

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
**1730 K STREET, N.W., Room 6003**  
**WASHINGTON, D. C. 20006-3867**  
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June 17, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-124-M
Petitioner	:	A. C. No. 41-00009-05556
v.	:	
	:	Mine: Fairland Plant & Quarries
CACTUS CANYON QUARRIES OF	:	
TEXAS INCORPORATED,	:	
Respondent	:	

**ORDER OF PARTIAL DISMISSAL**  
**ORDER OF ASSIGNMENT**

**Before:       Judge Barbour**

**PROCEDURAL POSTURE**

On March 29, 2001 and September 20, 2001, the Mine Safety and Health Administration (“MSHA”) issued Citation Nos. 6207831 and 6209922, respectively, against the Respondent, Cactus Canyon Quarries (“Cactus Canyon”). Citation No. 6207831 was issued because it is alleged that a foreman was standing on top of the head pulley at the number 4 conveyor belt without any fall protection. Citation No. 6209922 was issued because it is alleged that the back-up alarm on the Komatsu Track Hole was inoperable. Although the citations were issued in March and September of 2001, the proposed penalties were not assessed until February 12, 2002, approximately 13 months after the issuance of Citation No. 6207831 and 5 months after the issuance of Citation No. 6209922.

Cactus Canyon, subsequently, timely filed its notice of contest.<sup>1</sup> The Secretary of Labor (“Secretary”) then filed her penalty petition on April 15, 2002.<sup>2</sup> Cactus Canyon filed a motion to

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<sup>1/</sup> Commission Rule 26 provides: “[a] person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty.” 29 C.F.R. § 2700.26. The record does not indicate the date Cactus Canyon received the proposed penalty assessment, but a representative of Cactus Canyon dated Exhibit A of the proposal, February 28, 2002. Cactus Canyon then returned the form indicating it wished to contest the citation, and MSHA received the form on March 6, 2002.

<sup>2/</sup> Cactus Canyon states that it does not know why Citation No. 6209922 was included with the penalty petition because it was not contested. However, the Notice of Contest clearly indicates that Cactus Canyon sought

dismiss, on April 26, 2002, which was followed by the Secretary's Entry of Appearance and Substitution of Counsel on May 3, 2001, and her Motion For an Extension of Time to Respond to Respondent's Motion to Dismiss on May 24, 2001.

For the reasons articulated below, I deny the Secretary's motion for extension of time, I grant in part Cactus Canyon's motion to dismiss and I assign the case for further proceedings.

### **MOTION FOR EXTENSION OF TIME**

In her motion for an extension of time, the Secretary asserts that she filed a similar motion for extension for time in Docket No. CENT 2002-80-M - another case involving Cactus Canyon - on May 13, 2002, and she intended to do the same in the instant case. Sec. Mot. For Ex. of Time to Respond to Resp. Mot. to Dis. at 1. However, Counsel forgot to do so. *Id.* She further states that Administrative Law Judge Irwin Schroeder has set a hearing on Cactus Canyon's motion to dismiss in Docket Nos. CENT 2002-80-M, CENT 2002-285-M, CENT 2002-286-M, and CENT 2002-379-M.<sup>3</sup> *Id.* She seeks additional time to respond until July 15, 2002, to avoid any duplicative work.

The Commission's rules govern when responsive pleadings must be filed. A party may file a statement in opposition to a motion within 10 days after service of the motion. 29 C.F.R. § 2700.10(d). When the motion is served by mail, an additional 5 days are added to the time allotted for filing an opposition. 29 C.F.R. § 2700.8. If a party seeks an extension of time to file a document, the request must be filed no later than 3 days before the expiration of time allowed for the filing or serving of the document. 29 C.F.R. § 2700.9(a). Finally, a motion for an extension of time is effective upon receipt. 29 C.F.R. § 2700.5(d).

Cactus Canyon filed its motion to dismiss on April 26, 2002. Therefore, the Secretary had until May 13, 2002, to file her response. The Commission did not receive her motion for an extension of time to respond until May 24, 2002. While the Secretary's counsel did not undertake this case until May 3, Counsel had 10 days to file a motion for an extension of time before the time for rebuttal expired. The days lapsed without the Secretary taking any action. Counsel's excuse as having forgotten to file the motion is unacceptable.

Accordingly, the Secretary's motion is **DENIED**.

### **MOTION TO DISMISS**

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to contest both citations in this case.

<sup>3</sup>/ The Secretary is wrong regarding Docket Nos. CENT 2002-80-M and CENT 2002-379-M. They are not assigned to Judge Schroeder. Therefore, he does not have jurisdiction to hear arguments on motions to dismiss those cases.

Section 105(a) of the Mine Act (“the Act”) requires the Secretary to notify an operator of a proposed civil penalty “within a reasonable time after the termination of such inspection or investigation.” 30 U.S.C. § 815(a). Although the Act gives no guidance regarding the duration of “a reasonable time,” MSHA has provided some direction in its Program Policy Manual, defining “reasonable time” as “normally . . . within 18 months of the issuance of a citation or order.” The manual further provides, however, that “[c]itations and orders not associated with a serious accident, fatality, or other special circumstance that are recommended for a special assessment should be assessed within 75 days of the issuance date.” *Program Policy Manual*, Part 100, at 6(f) (2002).

Cactus Canyon moves for dismissal of Citation No. 6207831 because the Secretary failed to assess a penalty for the citation within 75 days. Resp. Mot. to Dis. at 1. In support of its argument, Cactus Canyon cites a decision in which Administrative Law Judge August Cetti ruled a 15-month delay unreasonable where the case was “uncomplicated.” *United Metro Materials*, 23 FMSHRC 1085, 1088 (Sept. 2001)(ALJ). Judge Cetti concluded that the Secretary had failed to demonstrate adequate cause for the delay because her explanation was general and vague, and she failed to expound upon the specific circumstances which caused the delay. *Id.*

The Commission has held that if a penalty proposal is delayed, the judge must consider (1) the reason for the delay, and (2) whether the operator is prejudiced by the delay, the identical test used when scrutinizing the Secretary’s delay in filing the penalty petition. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996). The Secretary bares the burden of showing the reason for the delay. I am unable to evaluate the Secretary’s position because she has failed to set forth any reason for her delay in assessing the penalty for Citation No. 6297831. Accordingly, in the interest of justice, I must grant Cactus Canyon’s motion to dismiss with respect to that citation.<sup>4</sup>

#### **ORDER OF ASSIGNMENT**

The Secretary’s petition and her allegations remain extant with respect to Citation No. 6209922, and I assign this case to Administrative Law Judge Irwin Schroeder for trial and decision. Judge Schroeder will rule on any pending motions. All future communications regarding this case should be addressed to Judge Schroeder at the following address:

Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
Two Skyline Place, Suite 1000  
5203 Leesburg Pike  
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<sup>4/</sup> It is unnecessary to evaluate whether Cactus Canyon was prejudiced by the delay as the first part of the test has not been satisfied.

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David F. Barbour  
Chief Administrative Law Judge

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