FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001

March 3, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	**CIVIL PENALTY PROCEEDINGS**
	:	Docket No. CENT 2002-80-M
	:	A.C. No. 41-00009-05555
	:	
	:	Docket No. CENT 2002-124-M
	:	A.C. No. 41-00009-05556
	:	
	:	Docket No. CENT 2001-285-M
	:	A.C. No. 41-00009-05550
	:	
v.	:	Docket No. CENT 2001-286-M
	:	A.C. No. 41-00009-05551
	:	
	:	Docket No. CENT 2001-363-M
	:	A.C. No. 00009-05552
	:	
	:	Docket No. CENT 2001-364-M
CACTUS CANYON QUARRIES OF TEXAS, INCORPORATED, Respondent	:	A.C. No. 41-00009-05553
	:	
	:	Docket No. CENT 2001-379-M
	:	A.C. No. 41-00009-05554
	:	
	:	Mine: Fairland Plant and Quarries

ORDER ON MOTIONS TO DISMISS

These consolidated cases are before me on Petitions by the Secretary for the assessment of Civil Penalties for the alleged violation of mine safety regulations. The Respondent has in each case filed a Motion to Dismiss the Petition on various grounds all related to the lapse of time between the inspection, assessment of penalty and petition stages of the process. An opportunity for presentation of evidence was afforded both parties on June 25, 2002. Both parties declined to present witnesses at the hearing while the Secretary presented two affidavits. The hearing became an extended oral argument on the several variations on the theme of dismissal for delay raised by the respondent. These cases present for careful decision questions both of procedure and substance in this frequently encountered but often finessed area of practice.

Factual Background

Cactus Canyon Quarry operates a small facility in the Texas Hill Country. It has received regular visits from MSHA inspectors.[1] The quarry is located in the MSHA Region administered through the Dallas Regional Office. The first inspector visit of concern here occurred on August 14, 2000. The visit resulted in citations which form the basis for three of the seven cases before me. Subsequent visits occurred on March 29, 2001, and June 27, 2001. These visits resulted in citations which form the basis for the other four cases before me.

Based on the materials attached to the Petitions, as explained to a limited extent by representations of counsel, the inspections did not disclose potential violations with complex legal or factual implications. Only two potential violations were considered sufficiently important to require "special assessment" of the appropriate penalty. These potential violations included a failure to wear a safety harness and removal of a guardrail protecting dangerous machinery. As to the guardrail violation, Respondent has argued responsibility for the violation lies with a former employee who acted as a "saboteur."

The procedure followed after completion of the site inspections is described in affidavits by Mr. Michael Davis and Mr. Stephen Webber. Mr. Davis is now the Assistant District Manager for the Dallas, Texas District Office of the Mine Safety and Health Administration. He asserts he has knowledge of the methods and schedules for processing mine safety inspection reports as the reports are evaluated in the District Office for assessment of Civil Penalties. Mr. Webber is stationed in the national office of the Mine Safety and Health Administration with responsibility for processing of proposed assessments of Civil Penalties. Mr. Webber is one of the principal authors of a Program Policy Letter by the Department of Labor on the subject of Proposed Assessment of Civil Penalties. This Program Policy Letter purports to be the definitive interpretation of the Mine Safety and Health Act of 1977 issued by the Secretary as part of her responsibility for administration and enforcement of the Act. I note, however, that the time periods for processing penalty assessment recommendations are stated as goals rather than limitations, with liberal use of should rather than must as the modifier. It is undisputed that none of the assessments related to the citations issued in these cases was processed in the time periods which the Secretary established as processing time goals.

The affidavits by Mr. Webber and Mr. Davis describe an organization in some distress. Action on a report by an inspector requires documents to move through the organization with a computer record kept of each movement. But these movements cannot be completed in a timely manner if computer operators are not present in sufficient numbers. During the period the reports concerning Cactus Canyon Quarry were pending, severe shortages of computer operators were encountered. Other personnel shortages were also encountered. The affidavits do not

[1] This summary is based on written material now in the record as well as representations of counsel. It does not preclude modification of these conclusions in the event an oral hearing is necessary.

indicate that any effective management response to these shortages was implemented. It appears management simply decided to "grin and bear it." The citations issued to Cactus Canyon Quarries were not processed in any different manner or on any different schedule than any other citations processed during the same period. None of the alleged violations of mine safety regulations raised legal or factual issues of any great complexity or difficulty. Counsel for the Secretary essentially conceded at the hearing that delays in these cases were only the result of clerical shortages.

On the reverse side of the delay coin, Cactus Canyon Quarries has conceded that the delay in these cases has not worked any special hardship on its ability to respond to the claims, with the unsupported assertion that with respect to one claim it was deprived of the ability to raise an affirmative defense of intervening action by an alleged "saboteur" in the person of a disgruntled supervisory employee. The Commission has established relatively clear authority that a mine operator is held to a "strict liability" standard in assuring compliance with safety regulations and the intervening actions of a "saboteur" would not be sufficient to prevent liability. *Secretary of Labor v. Ideal Cement Company,* 13 FMSHRC 1346 (Sept., 1991). The only relevance a claim of actions by a "saboteur" would be to the level of negligence involved in the violation. In any event, testimony by the alleged "saboteur" would not be essential to evaluate the consequences of this argument for mitigation of the claim amount.

Policy Analysis

My policy analysis of the issue of when a hearing on the merits can be preterminated begins by identifying three critical vectors; (1) the interest of the public in assuring a safe work place through administrative oversight, (2) the interest of the mine operator in fair and economical administration of a safety program; and (3) the interest of the government agency in economical and effective administration of a safety program. The direction the resulting vector points tells me whether a hearing is appropriate.

Resolution of these vectors begins by postulating a legislative intent in the Mine Act that every allegation of a safety defect identified by responsible officials should result in an opportunity for a hearing to resolve whether a defect was present and the appropriate sanction for that defect. An opportunity for a hearing serves to protect both the worker at risk from unsafe conditions as well as the operator responsible for providing those conditions. The safety system created by Congress assumes an opportunity for open contest of facts and policies. Only by open dialogue on these important questions can workplace safety be improved or maintained.

This "presumption" that every allegation of a safety problem is entitled to a hearing must be moderated by the need to establish a limit on hearings to protect the mine operator from unfairness or harassment in responding to safety inspections. The general trend of decided cases is to dismiss complaints where there is some reason to believe the delay in filing had the natural effect (intended or not) in putting the Respondent at an unfair disadvantage in making a defense. Where there is reason to believe the government intentionally manipulated the case schedule to deprive the Respondent of a legitimate defense, dismissal is even easier.

Finally, there are multitudes of cases which stand for the proposition that government agencies as entities cannot be prejudiced by the inadvertent acts of individual employees. There is no allegation by the Operator that any of the delays encountered in these cases was intentional or otherwise designed to put the Operator at a disadvantage. See, *Secretary of Labor v. Pierce County*, 476 U.S. 253 (1986) and cases cited there.

The vector for the public interest points clearly in support of providing a hearing in this and in most cases.

The Operator has an interest in prompt and fair adjudication of any claim against it. If heard and decided promptly (1) the evidence for any defense is fresher, (2) the uncertainty inherent in any claim clouds the financial status of the operator, and (3) the pending claim is a distraction from management focus. The Operator has an interest in resolution of unclear issues of law or policy even at the expense of some delay. There do not appear to be legal or policy issues of great significance raised in these cases.

The vector for Operator interest points away from a hearing in the face of any substantial delay in obtaining a hearing.

The interests of the Secretary fall into the areas of efficient management of resources and pursuit of program objectives. Efficient management of resources implies some flexibility in when and where to employ people and money, but with a need to maintain accountability. Pursuit of program objectives implies an intention to bring every case to a hearing on its merits and every hearing sooner rather than later.

The vector of the Secretary's interest appears to point strongly toward a hearing.

There remains one final interest to be considered, the interest of the Commission in enforcement of its procedural regulations. Commission Rule 28(a), 29 C.F.R. § 2700.28(a), provides that a petition for assessment of a civil penalty shall be filed within 45 days of receipt of a timely contest of a proposed penalty assessment. This time is subject to extension for good cause under Commission Rule 9, 29 C.F.R. § 2700.9. It seems fair to conclude that the longer the delay in filing the more compelling the reasons must be to justify extending the 45-day period.

Legal Conclusions

Respondent makes two essential contentions; (1) the time between issuance of citations and assessment of a penalty was too long, and (2) the time between Respondent's objection to the assessments and filing of Petitions was too long.

1. Time before Assessment

Two key elements must be considered in connection with this period of delay; the

statutory language in the Mine Safety Act, 30 U.S.C. § 815(a), and the published interpretation of that language by the Secretary. The statute requires that notification of a penalty assessment shall follow issuance of a citation "within a reasonable time." The meaning of "within a reasonable time" has been litigated many times. The Fifth Circuit decision in Seven Elves v. Eskenazi, 635 F.2d 396 (C.A. 5, 1981) is particularly enlightening. The Court was confronted with a motion to vacate a default judgment entered under confusing circumstances. The judgment was for a substantial amount. The judgment debtor filed a motion to vacate within 2 weeks of learning of the entry of judgment and less than a year after the judgment was entered. Noting that the precise extent of a "reasonable time" is a matter to be determined on the particular facts of each case, the Court stated that the term should be "liberally construed in favor of trial on the full merits of the case." (*Supra*, at 403) See, *Secretary of Labor v. AMAX Coal Company,* 3 FMSHRC 1975 (Aug. 1981) which involved a period of 361 days between issuance of a citation and notification of assessment of a penalty.

These cases are consistent with the remand order by the Commission in CENT No. 2002-379-M that directed the Administrative Law Judge to determine whether the Respondent had suffered prejudice from the entire period of delay rather than the period between notice of assessment and filing of the Petition. The Commission was looking for prejudice to the Respondent as the key factor in determining whether the delay was a "reasonable time". Only in the face of significant prejudice would the Commission deal with the often complex questions of explanation of the time it takes for a government agency to act.

This principle would be very easy to apply in this case if it were not for the fact that the Secretary has also attempted to define a "reasonable time" for purposes of processing penalty assessments. The view of the Secretary on this topic should be entitled to deference, particularly because it is a subject virtually under her total control, i.e. the flow of paper through the agency. The Secretary quite laudably expressed a narrow view of what is a "reasonable time" for the agency to move a citation to a decision on assessment. The issue for me must be whether the failure to satisfy the time requirements stated by the Secretary is fatal to prosecution of these cases in the absence of a showing of prejudice to Respondent by the passage of time.

I consider this a difficult and delicate issue. While some effect must be given to the views of the Secretary on this fundamental concept of "reasonable time" to pursue penalty claims, I believe the bulk of the decided cases indicate that adopting the Respondent's position on this issue would be totally inconsistent with the intent and purpose of the Mine Safety Act. In the absence of demonstrated prejudice to a Respondent from delay in assessing a penalty or filing a Petition, the only effect of delay in proceeding longer than endorsed by the Secretary is to impeach the credibility of the witnesses called by the Secretary to argue the urgency and importance of the alleged safety violations.

I must conclude that the time taken in these cases by the Secretary to notify the Respondent of the penalty assessment was not so long and prejudicial as to preclude the Secretary from proceeding to a hearing on these claims.

2. Time before Petition

The Commission has held in several cases that the 45-day period for filing a petition of assessment of a penalty is not a statute of limitations. See, *Rhone-Poulene of Wyo. Co.,* 15 FMSHRC 2089 (Oct. 1993) aff'd 57 F.3d 982 (10th Cir. 1995). The test as to the limit of time at this point in the process is essentially the same as the test for a "reasonable time" at the earlier stage of the process, i.e. prejudice to the Respondent balanced by adequate explanation for the time taken beyond that afforded by the Commission's Rule. For small delays accepted adequate explanations include press of other work, inadequate clerical assistance and personal hardships. For longer delays the reasons need to be more unique and special to the particular case, e.g., distraction from investigation of a major mine accident or loss of staff to national emergency. My conclusion assumes good faith on the part of government agency management to reallocate people to cover the pending work load as quickly as possible.

I must conclude that none of the delays in filing Petitions in these cases was so long and so beyond the explanations given by counsel for the Secretary as to preclude the Secretary from obtaining a hearing on the merits of these claims.

ORDER

For the reasons given above, the several motions to dismiss filed by the Respondent in the above captioned matters are denied. Counsel are directed to confer within the next 30 days on any discovery matters they believe need to be complete prior to a hearing. Counsel for the Secretary will initiate a prehearing conference by telephone call within 10 days of completion of discovery. The purpose of the prehearing conference will be to schedule a time and place for a hearing.

Irwin Schroeder
Administrative Law Judge

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