FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

August 30, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2004-129
Petitioner	:	A.C. No. 15-18068-19231
v.	:	
	:	
STERLING MATERIALS,	:	Sterling Materials
Respondent	:	

ORDER DENYING MOTION FOR SUMMARY DECISION

This case is before me under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. Respondent has filed a Motion for Summary Decision seeking dismissal of the case on the grounds that the Secretary failed to notify it of the proposed civil penalties within a reasonable time, as required by section 105(a) of the Act, 30 U.S.C. § 815(a). The Secretary has opposed the motion. For the reasons set forth below, the motion is denied.

The citations and order at issue in this case (two 104(a) citations and a 107(a) withdrawal order) were issued on April 9, 2003, and terminated on the same day. Respondent points out that the alleged violations were unremarkable in character, did not involve any injuries and, therefore, did not require an accident or special investigation by the Mine Safety and Health Administration ("MSHA"). Respondent was notified of MSHA's proposed penalty assessments on March 3, 2004, almost 11 months after the citations and order were issued. Respondent timely contested the citations and order on March 11, 2004. The Secretary filed her Petition for Assessment of Civil Penalty with the Commission on May 10, 2004, in excess of the 45 days permitted by Commission Rule 28(a), 29 C.F.R. § 2700.28(a). The Commission accepted the Petition, concluding that adequate cause had been shown for untimely filing. Respondent notes in the instant motion that it did not and does not object to the late filing of the proposed penalty assessment with the Commission.

Section 105(a) provides that "If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited . . . ." The Commission has provided guidance in determining whether a civil penalty has been proposed within a reasonable time:

> Section 105(a) does not establish a limitations period within which the Secretary must issue penalty proposals. *See*

> *Rhone-Poulec of Wyoming Co.,* 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd* 57 F.3d 982 (10th Cir. 1995); *Salt Lake County Rd. Dept*., 3 FMSHRC 1714 (July 1981); and *Medicine Bow Coal Co*., 4 FMSHRC 882 (May 1982). In commenting on the Secretary's statutory responsibility to act "within a reasonable time," the key Senate Committee that drafted the bill enacted as the Mine Act observed that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 181, 95th Cong.,1st Sess. 34 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978). Accordingly, in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator.

Steele Branch Mining, 18 FMSHRC 6, 14 (January 1996). Either circumstance, i.e., unreasonable delay or prejudice to the operator, may be a basis for dismissal. *Twentymile Coal Co.,* 26 FMSHRC 1, 17 (August 2004). The Commission has emphasized, however, that vacating a civil penalty on the basis of the Secretary's delay in notifying the operator is an extraordinary remedy. *Id*. at 20.

Resolution of the timeliness issue turns on whether the Secretary has established adequate cause for the delay so as to render it reasonable. *Id*. The Secretary contends that MSHA's notice to Respondent of its proposed assessments was not unreasonably delayed, and accounts for the processing time as follows:

> [T]he Office of Assessments implemented a new MSHA Standardized Information System (MSIS) in June, 2003. The new system was a completely new type of database, case management and financial tracking system. Because of the nature of the violations cited and the implementation of this system, MSHA assessed these violations ten months after the violations occurred . . . . Given the surrounding circumstances and the high case load of the Mine Safety and Health Administration, the penalty was issued within a reasonable time from the completion of the inspection.

Sec. Resp. at 2. Respondent does not dispute the accuracy of the Secretary's explanation for the

delay, but takes the position that MSHA could have made the assessments prior to the June 23, 2003, implementation of the Standardized Information System and further, that staff vacancies in the Office of Assessments should have been filled promptly so that MSHA could meet its statutory obligations. Resp. Mot. at 3-4.

Respondent offers no support for its opinions as to when MSHA could have assessed the penalties or filled the vacancies. Therefore, these mere assertions amount to conjecture and, therefore, are unpersuasive. Moreover, in light of Congressional intent to preserve proposed penalty proceedings where penalty proposals have not been made promptly, and the Commission's reluctance to vacate civil penalties where the reasonableness of notice is challenged, I find that the Secretary has provided an adequate explanation for the delay and that, under the circumstances, MSHA's penalty proposal occurred within a reasonable time.

Respondent also argues that it has been prejudiced by the delay by asserting that former employee, Dale Estis, has critical information concerning the facts underlying the citations and order, that Estis took notes memorializing those facts, that Estis left Respondent's employ on August 20, 2003, and that Estis' current whereabouts are unknown to Respondent and his notes no longer exist. Respondent reasons that, prior to Estis' departure, it would have de-briefed Estis, preserved his notes and stayed in touch with him, had it received prompt notice of what it considers very excessive proposed penalty assessments. Resp. Mot. at 5. Respondent stands in the same position as all other operators faced with the choice of paying proposed penalties or contesting them in legal proceedings: timely preservation of evidence and preparation of the defense is often critical to that election. To the extent that Respondent claims prejudice by Estis' departure from the company and unavailability of his notes, it bears the responsibility for its own failure to act. Notwithstanding Respondent's actions, the Secretary has researched pertinent public records and provided Estis' current residential address in Lexington, Kentucky. Sec. Resp. at 4. Therefore, without more, there is no reason to conclude that Estis is unavailable for deposition or trial.

Accordingly, adequate cause having been established for the delay by the Secretary in proposing civil penalties to Respondent, and Respondent having failed to demonstrate actual prejudice, the Motion for Summary Decision is **DENIED**.

Jacqueline R. Bulluck
Administrative Law Judge
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