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 28, 2008

JAMES BLEVINS, Owner and	:	CONTEST PROCEEDINGS
MAVERICK MINING CO., LLC,	:	
Contestants	:	Docket No. KENT 2006-232-R
	:	Order No. 7425414; 01/17/2006
	:	
v.	:	Docket No. KENT 2006-233-R
	:	Order No. 7425415; 01/17/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID: 15-18674
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-841
Petitioner	:	A.C. No. 15-18674-143259
	:	
v.	:	
	:	
MAVERICK MINING CO., LLC,	:	Mine: #1
Respondent	:	

ORDER

The parties are advised that Docket No. KENT 2008-841 is **CONSOLIDATED** for hearing and decision with Docket Nos. KENT 2006-232-R and KENT 2006-233-R.

On January 10, 2006, a fatal accident occurred at Maverick Mining Company's #1 Mine located in Pike County, Kentucky. MSHA investigated the accident and issued Order No. 7425414 and Order No. 7425415 on January 17, 2006. The Secretary issued the final Accident Report on March 3, 2006. Thereafter, the company requested a 10-day conference which was held on March 27, 2006. The company filed Notice of Contests on March 27, 2006, contesting Order No. 7425414 (KENT 2006-232-R) and Order No. 7425415 (KENT 2006-233-R). The Secretary filed her Answers on April 12, 2006. The contest cases were assigned to me on May 19, 2006, and I stayed them pending the assessment of the civil penalties for the violation of 30 C.F.R. § 75.220(a)(1) alleged in Order No. 74525414 and the violation of 30 C.F.R. § 75.362(a)(1) alleged in Order No. 7425415. The two alleged violations were assessed civil

penalties by MSHA on March 7, 2008. The company contested the penalties on March 25, 2008, and the Secretary filed her Petition for Assessment with the Commission on May 9, 2008 (KENT 2008-841). In the petition, the Secretary proposed civil penalties of $20,500 for each of the alleged violations.

The company now moves to dismiss the civil penalty proceeding contending the Secretary did not propose the civil penalty within a reasonable time as is required under Section 105(a) of the Mine Act.[1] The company notes approximately 24 months passed between the date of the Accident report and assessment.

As Administrative Law Judge Jerold Feldman explained in *Wabash Mine Holding Co.*, 27 FMSHRC 672, 685-686 (Oct. 2005):

> The statutory scheme authorizing the Secretary's imposition of a civil penalty is a major means by which operator compliance is achieved. The purpose of section 105(a) is to encourage operator compliance through timely penalty proposals rather than to create an escape mechanism through which an operator can avoid payment. The legislative history of section 105(a) explains, there may be circumstances, although rare, when prompt proposal of a civil penalty may not be possible, and the [Senate] Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, at 34, reprinted in Legis. Hist. at 622.

The company argues that the 24 month delay in assessing the penalty is not reasonable under section 105(a) and the penalties should be vacated. The company asserts that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005) allows the Commission the discretion to vacate penalties which have been unreasonably and unjustifiably delayed based on the individual circumstances of the case.[2] Company's Reply at 3; *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005).

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[1] Section 105(a) of the Mine Act provides:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, [s]he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator . . . of the civil penalty proposed. . . .

[2] In *Twentymile*, the Court reversed the Commission's holding a proposed penalty assessment was not issued within a reasonable time, and did not address the Secretary's position the Commission was legally barred from vacating an untimely filed penalty. The Court's conclusion the penalty assessment was not untimely was based on traditional reasonableness grounds.

I agree with the company's reading of the decision. Nor am I alone in my view. As the company notes, the Commission's Chairman has reached a similar conclusion. *See* 411 F.3d at 266. Therefore, I find the practical effect of the court's decision is to leave standing the Commission's traditional framework for resolving "timeliness" issues:

> [T]he requirement in section 105(a) that the Secretary propose a penalty assessment 'within a reasonable time' does not impose a jurisdictional limitations period. Rather, in cases of delay . . . [the Commission has] examined whether adequate cause existed for the . . . delay . . . . [and] whether the delay prejudiced the operator. *Twentymile Coal Co.*, 26 FMSHRC 666, 682 (August 2004) (citations omitted).

The Secretary attributes the delay to "misunderstanding of assessment procedures and inadvertence by the Secretary's counsel." Sec's. Response at 2. The company claims to have suffered prejudice by the delay as the mine closed shortly after the accident happened in January 2006. The company states it only knows the location of one of the witnesses who was underground when the accident occurred and that after 2 ½ years after the accident witnesses will have difficulty recalling the details of the events. Company's Reply at 4. However, the Secretary argues the company has not been prejudiced. She notes the company has been represented by counsel since the proceedings began.

Thus, the questions before me are whether the Secretary established adequate cause for the delay and if so, whether the company established it has been fatally prejudiced. The contest proceedings at issue here were originally part of a group of four contests treated as a unit by the Commission. Two of the contested orders (Docket Nos. KENT 2006-230-R and KENT 2006-231-R) were issued to alleged mine operator, James Blevins, while the orders at issued in this proceeding (Order No. 7425414 and Order No. 7425415) were issued to the company. Subsequently, the Secretary moved to amend Order No. 7425414 and Order No. 7425415 to include James Blevins as an operator. I granted the motion on December 13, 2006, and I ordered the Secretary to modify the orders and serve them on Mr. Blevins. I also amended the caption in KENT 2006-232-R and KENT 2006-233-R to read: *James Blevins, Owner and Maverick Mining Co. v. Secretary of Labor, Mine Safety and Health Administration*. I further noted while counsel for Mr. Blevins and the company did not object to the motion, counsel continued to maintain that Mr. Blevins could not legally and factually be cited as an operator in the proceeding. Order (December 13, 2006).

In a letter dated January 4, 2007, counsel for the Secretary advised me the orders had been modified and served on Mr. Blevins and his counsel. Counsel for the Secretary asked that Docket Nos. KENT 2006-230-R and KENT 2006-231-R, contests filed solely by Mr. Blevins, be dismissed as moot. (The orders contested in KENT 2006-230-R and KENT 2006-231-R were based on the same allegations as the orders contested in Docket Nos. KENT 2006-232-R and KENT 2006-233-R.) I granted counsel's request on January 18, 2007 and dismissed KENT 2006-230-R and KENT 2006-231-R. Also, I stated "[T]he contests in KENT 2006-232-R and KENT 2006-233-R are deemed to have been filed by both James Blevins and Maverick Mining

Co., and James Blevins is recognized as a contestant [in Docket Nos. KENT 2006-232-R and KENT 2006-233-R.]" Severance and Dismissal (January 18, 2007).

Counsel for the Secretary states following the Secretary's amendment of the orders to show Maverick Mining Co., as an operator and James Blevins as a co-operator, counsel "assumed . . . [MSHA's] Office of Assessments would automatically begin the usual procedures leading to the assessment [of the violations alleged in] the two orders." Sec's Response, Exh. A1. Counsel states his assumption was mistaken and as a result he inadvertently failed to monitor the assessment procedures. *Id*. at 2.

Counsel for the Secretary is highly competent and conscientious. Certainly, counsel's belief the modifications would begin the procedures leading to assessments was a reasonable one. Citations and orders alleging violations of mandatory standards and modifications of the citations and orders are routinely sent to MSHA's assessment office by the inspectors who issue the enforcement actions or by personnel in the inspectors' offices without input from or intervention by the Secretary's counsel. Although this did not happen after the modification of Order No 7425414 and Order No. 7425414, it was reasonable for the Secretary's counsel to assume it would.

Moreover, I am not persuaded by the company's claim of prejudice. As counsel for the Secretary points out, the company has been represented by counsel from the earliest stages of MSHA's investigations and that representation has continued to the present time. Certainly, the company had the opportunity to interview those of its employees who had knowledge of the events in question and to take their sworn statements. Moreover, the company has not shown it has actually tried to find the potential witnesses and is unable to do so.[3]

Therefore, the company's Motion to Dismiss is **DENIED** and the cases will be heard as scheduled November 18, 2008, in Pikeville, Kentucky. A specific hearing site will be designated at a later date.

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[3] Since Mr. Blevins' arguments regarding the validity of the orders and the inspector's findings are identical to the company's and because Mr. Blevins is represented by the same counsel as the company, my reasoning regarding adequate cause and lack of prejudice applies to him as well as to the company.

Counsels are asked to note this order bears the correct caption for these cases. Within 15 days of the date of this order, counsel for the Secretary is ordered to file an explanation of the Secretary's position regarding Mr. Blevins and the civil penalty proceeding that is a part of these consolidated cases. While Mr. Blevins is a contestant in Docket No. KENT 2006-232-R and KENT 2006-233-R, the Secretary never has moved to amend the civil penalty petition to include Mr. Blevins as a Respondent. Any motion the Secretary files to this effect should clearly state the facts and reasons upon which Mr. Blevins alleged penalty liability or co-liability is based.

David F. Barbour
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, 300 Kanawha Blvd. East, P.O. Box 273, Charleston, WV 25321

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