

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 6, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 97-10-M
Petitioner	:	A. C. No. 33-00134-05557 A
v.	:	
	:	Redland Ohio - Woodville Mine
ROBERT J. COX Employed by REDLAND	:	
QUARRIES U.S., INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 97-11-M
Petitioner	:	A. C. No. 33-00134-05558 A
v.	:	
	:	Redland Ohio - Woodville Mine
DALE BUSDEKER, Employed by	:	
REDLAND QUARRIES U.S., INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 97-12-M
Petitioner	:	A. C. No. 33-00134-05559 A
v.	:	
	:	Redland Ohio - Woodville Mine
GILBERT A. SANCHEZ, Employed by	:	
REDLAND QUARRIES U.S., INC.,	:	
Respondent	:	

ORDER GRANTING MOTIONS TO DISMISS

Before: Judge Fauver

These are civil penalty cases against corporate employees alleged to be agents under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, et seq. The charges stem from a citation issued against the corporation on December 13, 1994. The cases against Respondents were filed on November 27, 1996.

Respondents have moved to dismiss on the ground that the charges are untimely.

Neither the Act nor the Secretary's regulations impose a time limit for bringing penalty actions under section 110(c). However, section 105(d) of the Act provides that hearings before the Commission shall be conducted under section 5 of the Administrative Procedure Act, which provides in part:

Persons entitled to notice of an agency hearing shall be timely informed of --

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted.

This section has been applied to require a timely petition for civil penalties in section 110(c) cases. *Manuel Palacios*. (Docket No. DENV 76-29) (Office of Hearings and Appeals, U.S. Department of the Interior; Order of Judge Sweitzer, June 16, 1977); *Wayne R. Steen*, 16 FMSHRC 2293, 2300, fn 2 (Judge Fauver, 1994), reversed on other grounds, 18 FMSHRC 1552 (1996). See also: *Robert V. Swindall*, 13 FMSHRC 310, 313-14 (Judge Broderick; 1991) (suggesting that an 18 month delay with prejudice to the party, e.g., disbursement of witnesses and faded memories, would warrant dismissal); *Ernie Brock*, 4 FMSHRC 201 (Judge Koutras, 1982) (dismissing a section 110(c) case where 26 months elapsed); *Curtis Crick*, 15 FMSHRC 7335, 737 (Judge Melick, 1993) (A[B]ecause [section 110(c)] cases directly impact individual rights, the concepts of fair play and due process must be even more carefully protected. @)

Section 110(c) cases, with their focus on enforcement against individuals, are analogous to criminal cases where fairness and due process are of heightened importance. The rationale for requiring diligent notification of charges in criminal cases was succinctly stated by Judge Skelly Wright in *Nichens v. United States*:

Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags.

323 F.2d 808, 813 (D.C. Cir. 1973), cert. denied, 379 U.S. 905 (1974).

Respondents' motions to dismiss demonstrate untimeliness in the charges with prejudice to Respondents. The citation against the corporation was issued in December 1994. In February 1995, the Secretary conducted a special investigation. No individuals were charged. On October 10, 1996, the Secretary notified Respondents that they would be charged with violations. Petitions were filed before the Commission on November 27, 1996. On December 5, 1996, a key witness died (William Diels, a maintenance employee who actually worked on the brakes that are the subject of the alleged violations). Important documents are missing, a number of witnesses

have left the company, and it is reasonable to presume that memories have faded over this long period, with prejudice to Respondents' defenses.

I find that the delay of nearly 2 years warrants dismissal.

Accordingly, the motions to dismiss are **GRANTED** and these proceedings are **DISMISSED**.

William Fauver
Administrative Law Judge

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