

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

September 23, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-136
Petitioner	:	A.C. No. 01-01322-04258
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	:	Docket No. SE 2003-137
	:	A.C. No. 01-01322-04259
	:	
	:	Docket No. SE 2003-138
v.	:	A.C. No. 01-01322-04260
	:	
	:	Docket No. SE 2003-140
	:	A.C. No. 01-01322-04262
	:	
JIM WALTER RESOURCES, INC.,	:	Docket No. SE 2003-141
Respondent	:	A.C. No. 01-01322-04263
	:	
	:	Docket No. SE 2003-142
	:	A.C. No. 01-01322-04264
	:	
	:	Docket No. SE 2003-144
	:	A.C. No. 01-01322-04266
	:	
	:	Docket No. SE 2003-145
	:	A.C. No. 01-01322-04267
	:	
	:	Docket No. SE 2003-146
	:	A.C. No. 01-01322-04268
	:	
	:	No. 5 Mine

ORDER DENYING RESPONDENT’S MOTION TO DISMISS

These matters are before me based on Petitions for Assessment of Civil Penalties filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d) (1994) (the Act). Jim Walter Resources, Inc. (JWR) has filed a motion to dismiss 195 citations and orders that were issued during inspections conducted between April 19, 2002, and March 12, 2003. The Secretary filed oppositions to JWR’s motion and JWR filed a reply.

In support of its motion, JWR asserts the Secretary failed to provide notification of the proposed penalty assessments within a reasonable time as required by section 105(a) of the Act, 30 U.S.C. § 815(a). The Secretary issued a comprehensive proposed assessment for all 195 citations/orders on April 24, 2003. JWR received notification of the Secretary's proposed assessment on May 2, 2003.

Although Commission Rule 28(a), 29 C.F.R. § 2700.28(a), requires the Secretary to file petitions for assessment of civil penalty within 45 days of a mine operator's contest of the Secretary's proposed penalty assessments, the Commission's Rules and the Act do not provide a specific filing deadline for the Secretary's notification of proposed penalties. Section 105(a) of the Act only requires that the Secretary to notify the operator of the civil penalty to be assessed ". . . within a reasonable time after the termination of such inspection or investigation . . ." In cases where the Secretary's 105(a) notification of proposed penalties is delayed, the Commission has noted that it examines the same factors it considers in the closely related context of the Secretary's delay in filing her petitions for assessment of civil penalty with the Commission: namely, the reason for the delay and whether the delay prejudiced the operator. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996).

Thus, the threshold question is whether the Secretary's April 24, 2003, notification of her proposed penalties for all 195 citation and orders issued from April 19, 2002 to March 12, 2003, constitutes a delay as contemplated by section 105(a). As JWR noted in its September 15, 2003, Response to the Secretary's Supplemental Opposition, to JWR's knowledge, no operator has ever moved to dismiss large numbers of citations issued over a period of time where the Secretary elected to propose penalties simultaneously rather than in a piecemeal fashion. (*JWR's Resp.* at pp. 3-4). The Secretary argues that JWR has presented no legal justification or legal authority for the proposition that the Secretary must assess civil penalties seriatim. (*Sec'y's Opp.* at p.2). For the reasons discussed below, I conclude that JWR has failed to demonstrate that the Secretary's April 24, 2003, proposed penalties can be characterized as "delayed" given the extraordinary number of citations and orders and the chronology of events in these proceedings.

The Commission, citing legislative history, recently reiterated that there are circumstances, although rare, when a prompt proposal of a penalty may not be possible. *Black Butte Coal Company*, 25 FMSHRC 457, 459 (August 2003) citing *Steel Branch*, 18 FMSHRC at 13-14 (January 1966). Put another way, there are instances when prompt notification by the Secretary is not administratively feasible. In such instances, the Secretary's notification cannot be considered delayed.

In the instant case, although JWR does not delineate which of the 195 citations and orders it seeks dismissed as a result of the Secretary's April 24, 2003, comprehensive civil penalty notification, only the three oldest orders and 29 oldest citations issued during the period April 19, 2002, to July 31, 2002, present a colorable claim of delay. Moreover, at JWR's request, intervening safety and health conferences were conducted after the issuance of some of

these citations and orders that, of necessity, extended the notification period. Notwithstanding any delay caused by health and safety conferences, JWR received notification of the civil penalty proposals for this initial batch of orders and citations within approximately nine months. Notification of the penalty proposals for the remaining 163 citations was received in nine months or less. As noted by Judge Manning, civil penalties typically are proposed by the Secretary within three to nine months after a citation is issued. *CDK Contracting Company*, 25 FMSHRC 71, 74 (February 2003) (ALJ).

Whether the Secretary's notification period is reasonable, as contemplated by section 105(a), must be determined on a case-by-case basis. Although the Commission is responsible for determining whether the Secretary's notification occurred within a reasonable time, it would be inappropriate for the Commission to micro-manage the Secretary's Office of Assessments, in the absence of an abuse of discretion, in instances where that office decides that a comprehensive assessment notification is more efficient than a piecemeal assessment process. Thus, there is no basis for concluding that the Secretary's comprehensive notification, within nine months for the vast majority of the numerous citations and orders in issue in these proceedings, constituted a delay that must be justified by the Secretary. Significantly, even in instances of undue delay, not evident here, Congress has expressed its expectation that the failure to promptly propose a civil penalty ". . . shall [not] vitiate any proposed penalty proceeding." *Black Butte*, 25 FMSHRC at 459 (citing S. Rep. No. 95-181, at 34 (1977), reprinted in Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978)).

Having determined that there was no delay requiring an explanation by the Secretary, I need not address whether JWR has been prejudiced by the Secretary's comprehensive rather than piecemeal assessment approach. However, I note that JWR could have elected to contest the subject citations and orders within 30 days of issuance pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d). *CDK Contracting*, 25 FMSHRC at 76. While JWR could not have predicted the Secretary's processing period for notification of her proposed penalties during the 30 day contest period, at its option, JWR's pre-penalty contests could have been stayed pending consolidation of the civil penalty proceeding. Any stay could be lifted at JWR's request if it decided to proceed to hearing without waiting for the Secretary's penalty proposal.

ACCORDINGLY, Jim Walter Resources, Inc.'s Motion to Dismiss **IS DENIED**. **IT IS ORDERED** that the parties initiate a telephone conference with the undersigned within 14 days of the date of this Order to discuss a mutually satisfactory hearing date.

Jerold Feldman
Administrative Law Judge

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