FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D. C. 20006-3868

January 7, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. DOYAL MORGAN, EMPLOYED BY ASARCO INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. SE 97-251-M A. C. No. 40-00168-05574 A Young Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. WAYNE LARKINS, EMPLOYED BY ASARCO INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. SE 97-252-M A. C. No. 40-00168-05573 A Young Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. STEVEN RAMSEY, EMPLOYED BY ASARCO INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. SE 98-1-M A. C. No. 40-00168-05575 A Young Mine

ORDER OF DISMISSAL

Before: Judge Merlin

These cases are three petitions for the assessment of civil penalties filed by the Secretary of Labor against the respondents named above under section 110(c) of the Federal Mine Safety and Health Act of 1977, hereafter referred to as the "Act". Respondents have filed motions seeking to have the petitions dismissed on the grounds that the Secretary failed to act in a timely manner.

On October 30, 1995, a citation was issued to respondents' employer, Asarco Incorporated, under section 104 (d) of the Act, 30 U.S.C. § 814 (d), for an alleged violation of section 57.3200 of the Secretary's regulations. 30 C.F.R. § 57.3200. The citation was issued, as a result of an accident that occurred the previous day. The accident report of the Mine Safety and Health Administration, hereafter referred to as "MSHA", was completed and dated November 9, 1995. The citation was terminated on November 13, 1995.

The following events occurred with respect to the case against the operator: on April 15, 1996, a proposed penalty assessment was issued against the operator; on April 25, 1996, the operator requested a hearing; on June 3, 1996, the Regional Solicitor filed a penalty petition with the Commission; on June 10, 1996, the operator filed an answer; and by order dated June 21, the case was assigned to a Commission judge.

Thereafter, on July 5, 1996, the Regional Solicitor filed a motion to stay the case against the operator on the ground that an investigation was under way to determine whether individual penalties should be proposed under section 110(c). By response filed July 12, the operator opposed the stay. On August 1 the Regional Solicitor renewed the motion for stay stating, inter alia, that on July 30, the special 110(c) investigators advised that their investigation and report were complete, that the report had been forwarded to senior reviewing officials, and that a decision on whether to proceed would be made within 30 days. Once again, the operator opposed a stay, but on August 8, an order of stay was issued.

By letter dated January 6, 1997, the MSHA district manager advised the respondents that assessment of civil penalties against them individually was warranted and that they could request a conference. Respondents requested a conference which was held on February 4, 1997.

On February 10, 1997, the case involving the operator was reassigned to me and on that day I issued an order requiring the Regional Solicitor to advise on the status of the 110(c) investigation. On March 10, she responded that MSHA had completed its investigation, that an informal conference was held on February 4 with the parties and their representatives, and that MSHA had forwarded its recommendation on individual liability to the national office. According to the Regional Solicitor, consideration by the national office was expected to be completed by the end of March. Not having heard from the Regional Solicitor, my law clerk telephoned her on May 21 at which time she stated that she would check and send something out by the end of the week. However, no report was sent and on July 1 my law clerk again telephoned her. By letter dated July 8, the Regional Solicitor represented that the case was under active consideration and a decision would be made by the end of the month.

Finally, on September 2, 1997, proposed assessments were issued against the individual respondents under section 110(c). Between September 8 and September 17, respondents requested hearings before the Commission and their requests were given the Commission docket numbers captioned as above. Subsequently, on October 28, the Regional Solicitor filed penalty petitions and on November 3 she filed a motion to lift the stay in the case against the operator and consolidate it with these 110 (c) cases. On November 13, respondents filed a motion opposing consolidation and requesting that these cases be dismissed because of the delay in bringing them and because respondents had been prejudiced by the delay. The parties subsequently filed additional motions which are considered herein.

At the outset I consider the motion filed by the Arlington Solicitor to strike respondents' motion to dismiss these cases on the ground that their motion filed by fax was different from the motion filed the following day by express mail. The Arlington Solicitor's motion cannot be granted. The transmittal letter accompanying the mailed motion advised that the wrong version had been faxed on the preceding day and requested that the faxed copy be replaced with the mailed version.

The Arlington Solicitor further complains that affidavits completed by respondents as well as their mailed motion contain the misrepresentation that in March 1996, the Regional Solicitor

told counsel that the 110(c) actions would be dropped.[1] Respondents' reply brief admitted that the statement was incorrect. I find that the misstatement is not a sufficient basis upon which to reject respondents' motion. However, respondents' counsel should realize that erroneous statements, particularly in sworn affidavits, reflect poorly upon his efforts as well as upon respondents themselves.

I have reviewed the allegations of respondents that the Regional Solicitor made material misrepresentations in her status reports. I reject these allegations and find that she furnished information to the best of her knowledge in accordance with what she had been told. Wherever the responsibility for the elapsed times in these cases may lie, it is not with the Regional Solicitor.

It is further noted that respondents' recitation of the chronology of these cases is flawed. In both its initial motion (p. 5) and its reply (p. 3) respondents through their counsel complain of the 14 months between completion of the special investigation and the proposed notices of assessments. As respondents well know and acknowledge elsewhere in their briefs, an informal conference was held at their request in February 1997, in the midst of this period. Whether the elapsed time was reasonable must be determined in light of relevant circumstances. But a presentation which omits relevant facts damages respondents by making it more difficult to accurately evaluate their claims.

In any event, respondents are entitled to have their claims evaluated on the basis of what actually happened and in accordance with applicable law. Section 110(a) provides that a citation be issued to an operator within a reasonable time. The legislative history speaks in terms of reasonable promptness for the issuance of such citations. S. Rep. No. 181, 95th Cong., 1st Sess. 30 (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 618 (1978). No such requirement specifically applies under section 110(c), but elemental fairness requires application of this condition to 110(c) cases. Relevant to the meaning of this requirement is the legislative history which specifically recognizes that there may be instances where issuance of a citation will be delayed because of the complexity of the issues raised, a protracted accident investigation or other legitimate reason. S. Rep. No. 181, supra at 30, Legislative History, supra at 618.

The tests by which delayed proposed penalty assessments under 110(c) are judged are the same as those for delayed penalty petitions and proposed penalty assessments under section 110(a). Steele Branch Mining, 18 FMSHRC 6, 14 (January 1996).[2] The Commission has permitted late filing of penalty petitions where the Secretary demonstrates adequate cause and where respondent fails to show prejudice from the delay. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981). The Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay. If the Secretary fails to demonstrate adequate cause, the case may be subject to dismissal. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (October 1993), aff'd, 57 F.3d 982 (10 Cir. 1995). I reject, as contrary to Commission precedent, the Arlington Solicitor's contention that respon-

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[1]Even if true, respondents' argument which amounts to a claim of estoppel would be without merit. Estoppel does not lie against the government. King Knob Coal Company, 3 FMSHRC 1417 (June 1981).

[2] This holding was set forth in the decision of the Commission. The Commission tied 2 to 2 on the merits.

dents must show both unreasonable delay and prejudice. Such an approach also would be contrary to sound public policy because the Secretary could prevail despite endless procrastination as long as targeted individuals could not sustain their burden of proving prejudice. [3]

As already set forth, the special investigation was completed and the report forwarded to senior officials on July 30, 1996, ten months after the citations were issued. Five months later, on January 6, 1997, the District Manager wrote respondents that penalties would be assessed against them. The requested conference was held on February 4, and on March 10 the Regional Solicitor informed me that additional investigation had been completed and recommendations were forwarded to the national office. Almost six months later, on September 2, proposed penalty assessments were issued. It took a total of 22 months after the citations were issued for MSHA to issue the notices of proposed assessments.

I have held that a prolonged or complicated investigation may justify a long delay. In James Lee Hancock, 17 FMSHRC 1671 (September 1995), I denied a motion to dismiss where the delay was seventeen months, but the Solicitor explained in detail what transpired during the investigative phase. In Hancock, the investigation was prolonged because two additional citations were issued during its course and the investigative file consisted of more than 400 pages. Although I found adequate cause for the time taken in that case, I cautioned that such delays were troubling. See also Wharf Resources USA Incorporated, 14 FMSHRC 1964 (November 1992). In the instant cases there has been no allegation that the investigation was prolonged or complicated.

Delay has also been allowed where there have been special circumstances such as a government shutdown. Roger Christensen, 18 FMSHRC 1693 (September 1996). No such circumstances are present here. A high number of 110 (c) investigations and a rise in the number of 110(c) contests are factors to be considered in allowing late filed penalty petitions. See Hancock, supra, at 1674. This consideration also does not obtain here since Commission records show that the number of 110 (c) cases filed with the Commission dropped from 196 in FY 1995 to 56 in FY 1996 to 70 in FY 1997.

The Arlington Solicitor advances a number of arguments in his sur-reply brief which must be addressed. He states that the Secretary was handicapped because respondents refused to furnish written or oral evidence to MSHA investigators. According to the Solicitor, the refusal complicated review. This argument is rejected. Respondents are under no obligation to give evidence, particularly since criminal investigation and prosecution are possible. The Arlington Solicitor next argues that MSHA would have completed action on January 6, if respondents had not requested the informal conference which was held on February 4. In his view, to penalize MSHA for the additional time taken after the conference, would have a chilling effect on the agency in carrying out its functions and result in meaningless conferences. This argument is also rejected. It places responsibility for the time taken by MSHA upon respondents because they requested a conference. The chilling effect would be upon individuals who would be forced to

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[3]Respondents claim prejudice because an eyewitness to the accident who has retired for psychological reasons is not available to testify. In addition, they state that a second witness who has retired because of age is unavailable due to age. The Regional Solicitor's argument that the testimony of these individuals can be had in written form is unpersuasive, because cross examination as well as examination from the bench would not be possible. Even if prejudice were a consideration, respondents would be entitled to offer further support for their allegations on this issue and a determination about going forward on the merits could not be made until that was done.

choose either not to have a conference or have one and be held responsible for elapsed times over which they have no control. The suggestion that the conferences would become meaningless if MSHA were held accountable for the time it took to reach a decision is disapproved as demonstrating a lack of confidence in MSHA's abilities. Finally, the Arlington Solicitor's unsupported reference to July 30, 1997, as the date MSHA ultimately decided to proceed, is unfounded. Even assuming some internal decision was made on that date, it has no significance for respondents who did not learn of MSHA's position until the notices of proposed assessments dated September 2, 1997. Use of July 30 is a rather artless attempt to shorten the time MSHA used to decide whether or not to proceed.

The Arlington Solicitor does not allege any complications with respect to the investigation and offers no specific information with respect to what transpired during the 22 months it took to issue the notices of proposed assessments. He merely states the evidence was very seriously considered at the local and national levels of MSHA and by the Solicitor's office. But beyond those generalities there is nothing to explain what took 22 months. The Solicitor attempts to justify various time frames within the 22 months. However, the task here is not to evaluate the time it took to complete each phase from investigation to review to decision. A determination must be made based on the total time. Because the record indicates no difficulties in either investigation or evaluation and because no acceptable reason has been given to explain the delay, I find that adequate cause does not exist to justify the 22 months MSHA and the Office of the Solicitor took to complete action and issue the notices of proposed assessments. This is not to say that 22 months would be too long in every case. The determination of timeliness must be made on a case by case basis.

These cases are similar to Raymond P. Ernst, 18 FMSHRC 1674 (September 1996) where late filed penalty petitions were dismissed. In that case I held as follows:

> The reasons offered by the Solicitor in these cases to justify the late filings fall short of what is required for a showing of adequate cause. The Solicitor makes the briefest of responses which contains only general statements about events which allegedly caused the untimeliness. The specific circumstances are not addressed. The Solicitor refers to many hours of review, but the actual times spent and the chronology of those times are undisclosed. He mentions many meetings between interested parties, but does not say who the parties were or when the meetings took place. Finally, the Solicitor fails to sufficiently answer respondents' allegations because he does not distinguish between the delay in filing the penalty petition and the delay in the investigation phase. Because the Solicitor's explanation is general and vague, it could apply to any 110(c) case where timeliness becomes an issue.

Id. at 1676. The holding in Ernst applies to these cases.

In light of the foregoing, it is **ORDERED** that respondents' motion to dismiss is **GRANTED**.

It is further **ORDERED** that these cases are **DISMISSED**.

Paul Merlin
Chief Administrative Law Judge

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