

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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September 28, 2001

|                                |   |                               |
|--------------------------------|---|-------------------------------|
| <b>UNITED METRO MATERIALS,</b> | : | CONTEST PROCEEDINGS           |
| Contestant                     | : |                               |
|                                | : | Docket No. WEST 2000-35-RM    |
| v.                             | : | Citation No. 7923659; 9/21/99 |
|                                | : |                               |
| SECRETARY OF LABOR             | : | Docket No. WEST 2000-36-RM    |
| MINE SAFETY AND HEALTH         | : | Citation No. 4073211; 8/3/99  |
| ADMINISTRATION (MSHA),         | : |                               |
| Respondent                     | : | Plant 48                      |
|                                | : | Mine ID 02-02116              |
|                                | : |                               |
|                                | : |                               |
| SECRETARY OF LABOR,            | : | CIVIL PENALTY PROCEEDING      |
| MINE SAFETY AND HEALTH         | : |                               |
| ADMINISTRATION (MSHA),         | : | Docket No. WEST 2001-180-M    |
| Petitioner                     | : | A.C. No. 02-02116-05528       |
|                                | : |                               |
| v.                             | : |                               |
|                                | : | Plant 48                      |
| <b>UNITED METRO MATERIALS,</b> | : |                               |
| Respondent                     | : |                               |

**ORDER OF DISMISSAL**

Before: Judge Cetti

The above-captioned Contest Proceedings are consolidated with the corresponding Civil Penalty Proceeding Docket WEST 2001-180-M.

On March 20, 2001, Respondent, United Metro Materials (United Metro), filed a Motion to Dismiss the above-captioned section 110(a) civil penalty proceeding alleging an unreasonable delay by MSHA in proposing civil penalties for the two violations at issue in this case. In addition, United Metro states that it was unduly prejudiced by the delay between the issuance of the citations and the civil penalty proposal.

The material facts are not in dispute. On August 9, 1999, a laborer working at Plant 48 located in Final County, Arizona, operated by United Metro, was fatally injured when he was caught in a conveyor belt return roller while attempting to clean the roller with a hoe.

Two citations are at issue. Citation No. 7923659 charges a violation of 30 C.F.R. § 56.14107(a) and states that the return roller was one of two return rollers about six feet above the ground level which was not guarded. This citation was modified from a section 104(d)(1) citation to a section 104(a) citation by the Secretary on November 10, 1999. At the same time two other citations that are not presently involved in this case were vacated. The second citation at issue is Citation No. 7923660 which arises out of the same accident charging a failure to shutoff the conveyor prior to cleaning the rollers. The proposed penalty for this citation is \$35,000.00 and the proposed penalty for Citation No. 7923659 is \$40,000.00. Both citations were promptly abated by United Metro. All employees were instructed and specifically prohibited from manually cleaning conveyor components while conveyors were in motion.

The undisputed material facts are as follows:

1. On August 9, 1999, the Mine Safety and Health Administration (“MSHA”) initiated an investigation of a fatal accident at United Metro’s facility Plant 48 located in Final County, Arizona.

2. During the investigation, MSHA interviewed about eleven employees and requested fewer than a hundred pages of documents from United Metro.

3. On September 21, 1999, MSHA issued four citations to United Metro (Citation Nos. 7923659, 7923660, 7923661, 7923663). Two of the citations (Nos. 7923659 and 7923661) were issued under section 104(d)(1) of the Mine Act; the other two citations (Nos. 7923660 and 7923663) were issued under section 104(a).

4. On September 24, 1999, three days after issuance of the citations, MSHA issued its final investigation report.

5. On October 20, 1999, United Metro filed its Notice of Contest of all four citations. The Secretary of Labor (“Secretary”) filed her Answer on October 28, 1999. United Metro’s contests of the four citations were assigned to Administrative Law Judge August F. Cetti.

6. On November 10, 1999, following a Safety and Health Conference with MSHA’s District Manager pursuant to 30 C.F.R. § 100.6, MSHA vacated two of the citations (Nos. 7923661 and 7923663) and modified the remaining section 104(d)(1) citation (Citation No. 7923659) to a section 104(a) citations. The other section 104(a) citation (Citation No. 7923660) was not modified.

7. On November 19, 1999, Judge Cetti dismissed the two proceedings involving the citations vacated by the Secretary (Docket Nos. WEST 2000-37-RM and WEST 2000-38-RM),

and consolidated and stayed the remaining two proceedings (Docket Nos. WEST 2000-35-RM and WEST 2000-36-RM) pending the filing of the corresponding penalty case.

8. On December 19, 2000, MSHA issued its Proposed Assessment of Penalties for the two remaining section 104(a) citations. The Proposed Assessment was issued over 16 months after MSHA began its investigation and about 14 months after its citations and final investigation report were issued.

9. On January 11, 2001, United Metro filed its Notice of Contest of the Proposed Assessments.

### **Discussion**

Looking first to the Mine Act for guidance in this matter, section 105(a)<sup>1</sup> of the Act requires the Secretary to notify the operator of the civil penalty proposed within a reasonable time after the termination of the inspection or investigation that resulted in the issuance of the citation. In this case, the citations were issued on September 21, 1999, and three days later, September 24<sup>th</sup>, MSHA issued the final investigation report. On December 19, 2000 MSHA notified the operator of the civil penalty proposed. [Undisputed material facts No. 4, 5, and 8].

Black's Law Dictionary, 5<sup>th</sup> Ed., defines "reasonable" as follows:

Reasonable. Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking, or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.

I find the first line of the above definition particularly fair, proper, just, and suitable under the circumstances to be most appropriate definitions for "reasonable" as used in section 105(a) of the Act. I further find that under the undisputed facts of this case, the 15 months delay exceeded a proper or a suitable length of time for notifying the operator of the civil penalty proposed. I, therefore, find the 15-month period prior to notification of the operator of the proposed penalty is not within a reasonable time within the meaning of section 105(a) of the Act

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<sup>1</sup> Sec. 105. (a) 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 and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

and as applied to the undisputed material facts and the vague reasons given by the Secretary in her opposition to the Motion to Dismiss.

Although the accident was tragic, it is apparent from the record that this was a straightforward uncomplicated case requiring the assessment of penalties for only two citations; one alleging unguarded equipment, and the other alleging that the same equipment was not shutdown before cleaning.

The last sentence of section 110(i), 30 U.S.C. § 820(i), states: “In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact” concerning the section 110(i) penalty factors.

The Solicitor’s explanation for the delay is general and vague. The specific circumstances which caused the delay are not addressed.

As pointed out by United Metro there is no allegation that the investigation was prolonged or complicated. There is no allegation of a sudden rise in the number of special penalty cases nor any complications with respect to the investigation. The case involves the assessment of penalties for only two straightforward citations: one alleging unguarded equipment and the other alleging that the same equipment was not shut down before cleaning.

MSHA relies on its Program Policy Manual interpretation of the term “reasonable time” as a period of time that is less than 18 months and does not state the specific causes for the delay in this case. Citing *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 1663 (2000).<sup>2</sup> United Metro contends that as a matter of law, MSHA’s 18 months’ “interpretation” in its Program Manual is not entitled to deference because it was not made through formal adjudication or notice and comment rulemaking.

MSHA’s current guidance document Program Policy Letter No. P99-III-5 (August 16, 1999) further states that, “absent unusual circumstances,” even cases involving “a serious accident, fatality, or other special circumstance should be assessed within 180 days [i.e., six

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<sup>2</sup> The Supreme Court stated (120 S. Ct. At 1663):

Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law-do not warrant *Chevron*-style deference.

months] of the accident . . .” In this case MSHA exceeded its six-month guideline by nine months.

In *Rhone-Poulenc*, 15 FMSHRC 2089, 2093, Oct. 1993 the Commission reaffirmed its ruling in *Salt Lake* and *Medicine Bow* that “the Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay” and stated “if the Secretary fails to demonstrate adequate cause, the case may be subject to dismissal.”

I find that the Secretary in this case failed to demonstrate adequate cause for the substantial delay in notifying the operator the proposed penalty.

In view of the foregoing and the principals, arguments, and authorities cited in United Metro’s Motion to Dismiss and its Reply to Secretary’s Opposition to Dismiss, I enter the following Order of Dismissal.

### **ORDER**

The above-captioned Civil Penalty Proceeding and the corresponding Contest Proceedings are **DISMISSED**.

August F. Cetti  
Administrative Law Judge

Distribution:

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