

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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July 25, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-123-M
Petitioner	:	A.C. No. 02-00150-05594
	:	
v.	:	Docket No. WEST 2001-237-M
	:	A.C. No. 02-00150-05595
ASARCO INCORPORATED,	:	
Respondent	:	Asarco Ray Complex

**ORDER DENYING ASARCO'S MOTION TO DISMISS**

Asarco Incorporated filed a motion to dismiss these cases “for lack of subject matter jurisdiction, or in the alternative, . . . for failure to state a claim upon which relief may be granted. . . .” It states that the cases involve two citation/orders issued pursuant to sections 104(a) and 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Mine Act”). Each 104(a) citation includes a 107(a) imminent danger order in the same document. Asarco bases its motion on the fact that “the Proposed Assessment of Penalty and the Petition for Assessment of Penalty for each citation/order only requests an assessment of penalty for the 107(a) component of each citation/order.” (A. Motion 1). Asarco argues that under the Mine Act, the Secretary does not have the authority to assess penalties for imminent danger orders issued under section 107(a). It concludes that the Commission is without jurisdiction to hear these cases. In the alternative, Asarco argues that the Secretary’s Petition for Assessment of Penalty fails to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). The Secretary opposes Asarco’s motion.

Asarco bases its motion on the forms sent to it by the Secretary. The Secretary’s proposed penalty assessment, served under 29 C.F.R. § 2700.25, consists of a computer printout listing the citations and orders included within each of her assessment control numbers. This form includes a number of columns including ones entitled “Citation or Order Number,” “Type of Action,” “Health or Safety Standard Violated: CFR Title 30,” and “Proposed Penalty.” In the case of WEST 2001-123-M, for example, the citation/order number is “7934757,” the type of action is “107A O,” the standard allegedly violated is “56.3131,” and the proposed penalty is \$486.00.” Accordingly, Asarco argues that the Secretary is improperly attempting to assess a penalty for a section 107(a) imminent danger order.

In addition, the Secretary’s petition for assessment of penalty, served under 29 C.F.R. § 2700.28, contains a similar computer printout labeled “Exhibit A” which includes the same

information as the proposed penalty assessment. Under the column “Type of Action” the Secretary inserted “107A O.” In WEST 2001-237-M, the proposed penalty was specially assessed by the Secretary under 30 C.F.R. § 100.5. In a document entitled “Narrative Findings for a Special Assessment” that was included with the petition for assessment of penalty, the Secretary included the following paragraph:

On August 15, 2000, MSHA issued a section 107(a) order 7934772 at Asarco Ray Complex Mine. Asarco, Incorporated, was cited for a violation of 30 CFR 56.1313.

This document does not state that a citation issued under section 104(a). Asarco states that “there is no section of the Mine Act which provides for the assessment of a penalty for a violation of section 107(a). . . .” (A. Motion 5). Asarco maintains that the Mine Act clearly provides that penalties may only be assessed for citations and orders issued under section 104. It contends that this requirement is “more than window dressing” and must be adhered to by the Secretary. (A. Motion 3).

The Secretary does not deny that penalties cannot be assessed under section 107(a) of the Mine Act. She argues that it is quite clear that she was assessing the penalties for the section 104(a) citation component of the citation/orders, despite the fact that the documents referred to by Asarco refer only to the section 107(a) imminent danger order. The Secretary attached a declaration of Stephen Webber, MSHA’s Director of the Office of Assessments, to explain the Secretary’s practice. Mr. Webber states that the Office of Assessments does not assess penalties for section 107(a) orders. He states that MSHA’s Metal/Nonmetal division frequently issues a combined section 104(a) citation and section 107(a) order in a single document. (Decl. ¶ 4). He further states:

In such cases it has been the longstanding practice of the Office of Assessments in Metal/Nonmetal cases to show [under] the “Type of Action” on page two of the Proposed Assessment form as “107(a) O.” No operator has previously expressed any confusion as the basis for assessment in such cases.

*Id.* Mr. Webber further explains that the designation “107(a) O” is used as an administrative convenience so that it is understood that a combined citation/order is involved. (Decl. ¶ 5). He states that MSHA follows this procedure is to “implement the policy of the Office of Assessments to not apply the 30% reduction for good faith in such cases.” (Decl. ¶ 6).

The Secretary also points out that the documents relied upon by Asarco refer to violations of 30 C.F.R. § 56.3131. She states that since section 107(a) imminent danger orders do not allege violations of the Secretary’s safety and health standards, it is clear that the violations arose out of the section 104(a) citations.

I find that Asarco's motion is not well taken for a number of reasons. It is black letter law under the Mine Act that the Secretary does not have the authority to assess penalties for section 107(a) orders. If the Secretary believes that the condition that created an imminent danger also violated one of her safety standards, she issues a citation under section 104(a) citation alleging the violation. Section 107(a) specifically provides that a section 104(a) citation may be issued in conjunction with such an order. The Secretary then proposes a civil penalty for the alleged violation of the safety standard. In these cases, the Secretary used the same document for both the section 104(a) citation and section 107(a) order. In each case the combined document clearly states in item 12 that the type of action is a 107(a) order and 104(a) citation. A civil penalty can only be proposed for the 104(a) citation portion of the document that alleges a violation of a safety standard. As noted by Asarco in its motion, the relationship between sections 104(a), 107(a), and the Secretary's authority to propose penalties was thoroughly analyzed by the Commission in *Eastern Associated Coal Corp.*, 13 FMSHRC 902 (June 1991).

Asarco and the law firm of Patton Boggs LLP have frequently appeared in cases before this Commission and they have a sophisticated level of knowledge of the Mine Act. They are well aware that the Secretary does not have the authority to propose civil penalties for alleged violations of 107(a). This concept is so well established that they should also know that the Secretary fully understands that she cannot propose penalties for imminent danger orders. In addition, Asarco and Patton Boggs should be aware that the section 104(a) portion of each citation/order alleges a violation of section 56.3131 not the 107(a) portion. In each document relied upon by Asarco in its motion, the Secretary alleges a violation of that safety standard. The allegation of a violation can only relate to the section 104(a) citation notwithstanding the references to section 107(a) in these documents. An individual with only a passing familiarity of the Mine Act and MSHA's assessment process would be able to understand that the penalties in these cases were proposed for the alleged violations of section 56.3131, which relate back to the section 104(a) citations by operation of law.

While it would perhaps be a little clearer if the computer generated forms listed both 107(a) and 104(b) under "Type of Action," Asarco and Patton Boggs should not have been confused by this omission. The explanation provided by Mr. Webber is reasonable. The Office of Assessments places the 107(a) order designation on the forms so that anyone reading them will know that the alleged violation arose out of circumstances that the Secretary believes created an imminent danger. The fact that a section 104(a) citation was also issued and forms the basis for the proposed penalty is implied. The motion filed by Patton Boggs on behalf of Asarco makes clear that they understand the interrelationship between sections 104(a), 107(a), and the Secretary's authority to propose civil penalties.

For the reasons set forth above, Asarco's motion to dismiss these cases is **DENIED**. The hearing in these cases will be held on August 14, 2001, in Tucson, Arizona, as previously scheduled.

Richard W. Manning  
Administrative Law Judge

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