**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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February 3, 2003

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| CDK CONTRACTING COMPANY,<br>Contestant | : | CONTEST PROCEEDINGS |
| | : | Docket No. WEST 2001-348-RM<br>C/O No. 7943017; 3/20/2001 |
| | : | Docket No. WEST 2001-350-RM<br>C/O No. 7943033; 4/05/2001 |
| v. | : | Docket No. WEST 2001-422-RM<br>Order No. 7935403; 4/23/01 |
| | : | Docket No. WEST 2001-423-RM<br>Order No. 7935404; 4/23/2001 |
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent | : | Docket No. WEST 2001-424-RM<br>Order No. 7935406; 4/23/2001 |
| | : | Docket No. WEST 2001-427-RM<br>Citation No. 7935409; 4/23/2001 |
| | : | Docket No. WEST 2001-428-RM<br>Citation No. 7942519; 4/23/2001 |
| | : | Docket No. WEST 2001-429-RM<br>Citation No. 7943037; 4/23/2001 |
| | : | Mine ID 05-00037 L35<br>Portland Plant/Quarry |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 2002-461-M<br>A.C. No. 05-00037-05506 L35 |
| v. | : | Portland Plant & Quarry |
| CDK CONTRACTING COMPANY,<br>Respondent | : | |

**ORDER DENYING CDK CONTRACTING COMPANY'S MOTION TO DISMISS**

CDK Contracting Company ("CDK") filed a motion to vacate the twelve citations and orders of withdrawal (the "citations") in these cases and to dismiss the civil penalty proceeding. These cases involve six section 104(a) citations, four section 104(d) orders, and two section 104(a)/107(a) citation/orders.[1] As grounds for the motion, CDK argues that the Secretary failed to propose penalties for the alleged violations within a reasonable time after the termination of the Secretary's investigation of a fatal accident at the Portland Plant and Quarry as required by section 105(a) of the Mine Act. The Secretary opposes the motion.

On February 24, 2001, a fatal accident occurred when a CDK employee fell from a scaffold ladder at the Portland Plant and Quarry. CDK was a construction contractor at that site. The Department of Labor's Mine Safety and Health Administration ("MSHA") commenced its investigation of the accident that day. On February 27, 2001, MSHA issued two of the section 104(a) citations. On or about March 22, 2001, MSHA issued a section 104(a) citation and a section 104(a)/107(a) citation/order. MSHA issued the remaining citations at issue in these cases in April 2001. CDK contested eight of the twelve citations in a timely manner. MSHA issued its final report on the investigation of the accident on July 9, 2001. The citations were terminated by MSHA on various dates between February 27 and July 13, 2001. On May 17, 2002, MSHA issued its proposed assessment of penalty under 29 C.F.R. § 2700.25. CDK timely filed its contest of the proposed penalties. MSHA proposed penalties for the citations between 13 and 15 months after they were issued and more than 10 months after it issued its final report on the accident.

## I. SUMMARY OF THE PARTIES' ARGUMENTS

CDK argues that these cases must be dismissed because the Secretary failed to notify CDK of the proposed penalties within a reasonable time after the citations were issued, as required by the Mine Act. The Secretary is required "within a reasonable time after the termination of such inspection or investigation [to] notify the operator . . . of the civil penalty to be assessed . . . ." 30 U.S.C. § 815(a). CDK argues that notification of the proposed penalty amount more than 13 months after the citations were issued is not within a reasonable time under the Mine Act. CDK maintains that the Secretary cannot establish that this delay was reasonable. Although these cases involve a fatal accident, the facts are not complex and were fully known by the time the citations were issued. In addition, CDK argues that several of the citations at issue in these cases were issued during a routine inspection rather than as a consequence of the fatal accident.

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[1] Citation No. 7943029 was vacated by MSHA on June 4, 2001, although it is still listed in the Secretary's petition for assessment of penalty in WEST 2002-461-M. Because this citation has been vacated, I have not discussed it in this order.

The Secretary maintains that the proposed penalties were issued within a reasonable time given the circumstances of these cases. She also argues that she demonstrated just cause for any delay. The Secretary states that the special assessments group of MSHA's Office of Assessments was extremely busy during 2001-02. She states that this group has only four employees and two of these employees were unavailable during the relevant period of time. The Secretary points to the fact that during 2001, 2,153 "routine" special assessments were proposed, 217 "fatal/serious injury related" special assessments were proposed, and 204 "section 110(c)" special assessments were considered. In the first nine months of 2002, the numbers were 1,949, 183, and 158, respectively.

The Secretary contends that the relevant time period did not begin to run until MSHA completed its accident investigation. She maintains that the fatality that triggered the investigation was extremely serious and several citations were referred for special assessment. She states that careful consideration of the facts and consideration of the statutory criteria consumed considerable time. All but one of the citations was of a significant and substantial nature and they were all issued during MSHA's investigation of the fatal accident. The citations were in the Office of Assessments from August 6, 2001 until May 17, 2002. There was a backlog of cases in the office for special assessments during that time because one of the four assessors was on extended leave and the other was unavailable as a result of a training program. In addition, the Secretary states that the supervisor of the special assessments group was heavily involved in the development of MSHA's standardized information system, which will completely replicate the records into a web-based system.

The Secretary believes that the reasonableness of time should be analyzed by taking into consideration the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling relief. The Secretary contends that CDK suffered no actual prejudice because both parties used the time to conduct discovery and prepare for trial. The mere potential for prejudice is insufficient. Dismissal of civil penalty proceedings because of a delay that was not prejudicial would clearly run counter to the concern for safe and healthful working conditions that led to the creation of the civil penalty program. The Secretary points to the legislative history of the Mine Act in which the Senate Committee on Human Resources stated that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." (S. Rep. 95-181, at 34, *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)).

In response to the Secretary's opposition, CDK states that MSHA's failure to adequately staff its special assessments group does not constitute adequate cause for the delay. There was not an unusually high number of special assessments during 2001-02 and these cases are not particularly complex. The Commission accepted a lengthy delay in proposing a penalty when the caseload of the assessments office increased exponentially. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996). There has been no showing of such an increase here.

Finally, CDK argued that the Secretary's delay actually prejudiced its ability to defend itself in these cases. CDK states that it is no longer operational and that it is in the process of winding down its corporate affairs. It has only one employee at the present time. As a consequence, its potential witnesses are no longer employees of CDK. In addition, those former employees who have knowledge of the facts are no longer in the immediate geographical vicinity of the Portland Plant & Quarry. These key witnesses live in such far flung places as Virginia Beach, Virginia; San Pablo, Colorado; Ponca City, Oklahoma; Aztec, New Mexico; Eldorado, Arkansas; Goldendale, Washington; Wickenburg, Arizona; and San Juan, Puerto Rico. The hourly employee who worked with the deceased and who is the only individual with first-hand knowledge of the events leading up to the accident is believed to reside in Mexico. CDK states that the whereabouts of other witnesses is unknown. CDK believes that it will suffer actual prejudice if it is unable to secure the assistance of these individuals in the preparation of its defense and secure their presence at the hearing.

I permitted the Secretary to respond to CDK's reply because, for the first time, CDK presented argument that it suffered actual prejudice. The Secretary states that CDK's attempt to establish prejudice ignores or mischaracterizes several key factors in the cases. The Secretary states that CDK continued working at the Portland Plant & Quarry for many months after the citations were issued. All of the key witnesses were interviewed by MSHA and extensive discovery was taken, including the deposition of many potential witnesses. She states that witnesses frequently move away from the area of the mine. More importantly, CDK knew that it was working on a short-lived construction project in Colorado, yet it neither opposed the Secretary's motion to stay the pre-penalty contest proceedings nor filed a motion to lift the stay.

## II. ANALYSIS OF THE ISSUES

The Commission has excused the late filing of proposed penalties based on claims of excessive work load, but it made clear that such claims will not receive blanket approval. *Steele Branch*, 18 FMSHRC at 14; *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714, 1717 (July 1981). The assessment in *Steele Branch* arose in 1991-92 when there was a dramatic increase in the number of penalty assessments. *See Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2094 (Oct. 1993). In the present cases, the delay was in large measure caused by the fact that two of the four MSHA employees assigned to the special assessments office were not available for a significant period of time. One employee was on extended leave for an unspecified reason, the other was in training, and the supervisor was heavily involved in developing a new information system. These excuses are not nearly as compelling as the excuse offered by the Secretary in *Steele Branch*.

The accident in these cases was serious and required an analysis of the facts by the Office of Assessments. Proposing penalties following a fatal accident requires a high degree of diligence on the part of assessment office employees and those MSHA officials who review the proposals. The office's staff was reduced and the supervisor's assistance was compromised by a major project. It is important to remember that a penalty is typically proposed within three to nine months after a citation is issued, so the delay in these cases is not as great as it may first

appear. In addition, the Secretary does not begin the assessment process until a citation is terminated and any investigation has been completed. Some of the citations in these cases were terminated in July 2001, when the investigation report was issued. They were all issued during MSHA's investigation of the accident. I find that the penalties involved in these cases were proposed within a reasonable time.

I also find that the Secretary established adequate cause for any delay. I agree with Judge Michael Zielinski's analysis of this issue in *Paiute Aggregates, Inc.,* 24 FMSHRC 950, 954 (Oct. 2002). In that case, Judge Zielinski concluded that the Secretary did not establish that the entire 14 month delay was due to factors beyond her control because she was unable to provide a week-by-week description of the events that occurred while the Office of Assessments was considering what penalties to propose. *Id*. Nevertheless, he held that it is clear that Congress intended that "delays in proposing penalties should not nullify penalty proceedings." *Id. Paiute Aggregates* arose under circumstances that are quite similar to the present cases. The showing necessary to establish adequate cause will vary depending upon the length and circumstances of the delay. *Paiute Aggregates, Inc.,* 24 FMSHRC 943, 946 (Oct. 2002) (Judge Zielinski). Thus, a case involving an egregious delay will require greater justification to meet the adequate cause test. *Id.* Here the rather short delay was caused by the Secretary's failure to adequately staff its special assessment office. While this excuse may not be sufficient to justify a lengthy delay, I believe that it satisfies the adequate cause test in this case, given the admonition of Congress cited above, because the penalties were proposed only a few months later than is typical for the Office of Assessments.

CDK argues that it was actually prejudiced by the delay because its witnesses moved away after its Colorado project was completed and the company is winding down its affairs. Although I agree with the Secretary that witnesses frequently move away before a hearing can be scheduled, the situation presented by this case is more serious because CDK's construction project has been completed and CDK no longer employs any of its witnesses. Although CDK may not have known at the time the citations were issued that the company would be going out of business, it knew that its construction project in Colorado would be ending and that many of its employee witnesses would be moving elsewhere.

Section 105 of the Mine Act gives mine operators the right to request a hearing on the merits before penalties are proposed. The Commission's Procedural Rule 20 sets forth an operator's right to contest citations. 29 C.F.R. § 2700.20. The Commission has long held that an operator can contest any citation or order before a penalty is proposed by the Secretary. *Energy Fuels Corp.*, 1 FMSHRC 299, 307-09 (May 1979). CDK protected its rights when it contested the citations in the contest proceedings set forth in the above caption. Although the Commission generally expects operators to wait until a penalty is proposed before requesting that the case be heard, it recognizes that situations will arise in which a hearing on the merits should be held before the Secretary proposes a penalty. If an operator files a pre-penalty notice of contest under Procedural Rule 20 and believes that it requires a hearing before the Secretary files her proposed penalty assessment under Procedural Rule 25, it can file a motion with the administrative law judge asking that the case be set for hearing. In a companion case to *Energy*

*Fuels*, the Commission provided some examples in which a pre-penalty hearing may be desirable.

> Although it is arguably unlikely that the operators [in these consolidated cases] will need a hearing before a penalty is proposed (the alleged violations having been abated and the citations containing no special findings), it might nevertheless be desirable for a hearing to be scheduled quickly if, for example, the allegedly violative conditions often recur, if continuing abatement efforts are expensive, or if another case is being heard on the same issue and early consolidation would be helpful.

*Helvetia Coal Co*., 1 FMSHRC 321, 322 (May 1979). While the closing of a mine or the winding down of an operator's business is not listed as an example, it is clearly the type of case in which a pre-penalty hearing is desirable.

CDK did not object to the Secretary's motion to stay the eight pre-penalty contest cases. CDK knew that its Colorado project was coming to an end and, at some point, also knew that CDK itself would be winding down its operations. Yet, CDK neither advised me of that fact nor asked that the stay be lifted so that a hearing could be scheduled.[2] The parties engaged in extensive discovery during the period of the stay and depositions were taken of many of CDK's potential witnesses. CDK could have requested that a hearing be scheduled before its witnesses were terminated from employment or upon the completion of discovery. All relevant issues in these eight citations could have been litigated at such a hearing, including whether the alleged violations occurred and, if so, whether they were significant and substantial and the result of CDK's unwarrantable failure to comply with the safety standards. Negligence and gravity issues could have also been adjudicated. All elements of a citation that are subject to eyewitness testimony can be litigated before a penalty is proposed. At the very least, CDK could have made sure that the testimony of its key witnesses was preserved in deposition testimony.

I find that any prejudice suffered by CDK as a result of the Secretary's delay in proposing penalties for the eight citations that it contested could have been prevented if CDK had requested a pre-penalty hearing on the merits of the citations. By forgoing its right to request a pre-penalty hearing when it knew that it would be closing its operations, CDK surrendered its right to claim that it was prejudiced by the Secretary's delay in proposing penalties in these cases.

CDK did not contest four of the citations at issue under Procedural Rule 20. I agree with CDK that the Mine Act does not "impose on operators the burden to routinely seek an expedited hearing prior to assessment of penalties in order to have a fair opportunity to prepare and present

[2] Counsel for CDK advised me of the status of CDK's operations in October 2002, five months after the Secretary proposed penalties in these cases.

its defense." (CDK Reply at 13). An operator should ordinarily be able to contest citations and penalties in the penalty proceeding without being concerned that it will take so long for the Secretary to initiate the penalty case that its defense will be compromised. Nevertheless, a construction contractor understands that its involvement at a mine will come to an end and that its employees will move on to other jobs. A contractor who is issued citations following a fatal accident would be well advised to directly contest the citations if it knows that its work at a mine will be ending within a year or two. Such citations are likely to be specially assessed by MSHA, an investigation will be conducted which may include a section 110(c) investigation, and penalties will not be proposed as quickly as they normally are by MSHA. Such proceedings sometimes take years to be resolved, even in the best of circumstances. Key witnesses for even a stable production operator are often no longer working at the mine by the time a case is heard if a fatal accident is involved.

In this instance, there is no doubt that CDK will be inconvenienced by the fact that it is no longer operating in Colorado and is winding down its business. Its costs will be higher and some of the witnesses it would like to call may not be available. CDK did not state when its work at the Portland Plant and Quarry came to an end or when it decided to cease all operations. CDK may have faced some of these same obstacles if the penalties had been proposed several months earlier. With respect to the citations that were not contested under Procedural Rule 20, taking into consideration the length and circumstances of the delay, I find that CDK did not establish that it was significantly prejudiced by the fact that the Secretary proposed the penalties a few months later than they would have been if the citations were not issued during a fatality investigation.

## III. ORDER

I find that although the Secretary took several months longer to propose penalties for the citations than normal, the penalties were proposed within a reasonable time. In the alternative, I find that the Secretary demonstrated adequate cause for the delay. I also find that, by not requesting a pre-penalty hearing, CDK waived its right to claim prejudice with respect to the contested citations because it knew that it would be shutting down its operations and terminating its employee witnesses. Finally, I conclude, for the reasons stated above, that CDK was not seriously prejudiced with respect to the citations that it did not contest under Procedural Rule 20. Consequently, CDK Contracting Company's motion to dismiss is **DENIED**.

Richard W. Manning
Administrative Law Judge

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