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

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| CDK CONTRACTING COMPANY,<br>Contestant | : | CONTEST PROCEEDING |
| | : | Docket No. WEST 2001-426-RM |
| v. | : | Citation No. 7935408; 4/23/2001 |
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent | : | 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 2003-5-M<br>A.C. No. 05-00037-05511 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 Citation No. 7935408 in these cases and to dismiss the civil penalty proceeding. As grounds for the motion, CDK argues that the Secretary failed to propose a penalty for the alleged violation 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 April 23, 2001, MSHA issued the citation at issue in these cases. CDK contested the citation on May 23, 2001. MSHA issued its final report on the investigation of the accident on July 9, 2001. On August 16, 2002, MSHA issued its proposed assessment of penalty under 29 C.F.R. § 2700.25. CDK timely filed its contest of the proposed penalty. MSHA proposed the penalty for the citation almost 16 months after it was issued and almost 13 months after MSHA 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 penalty within a reasonable time after the termination of the accident investigation, 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 16 months after the citation was 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 citation was issued. CDK maintains that there was not an unusually high number of special assessments during 2001-02. 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.

The Secretary maintains that the proposed penalty was 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 many citations were referred for special assessment. She states that careful consideration of the facts and consideration of the statutory criteria consumed considerable time. The citation was in the Office of Assessments from August 2001 until August 16, 2002. There was a backlog of cases in the office of special assessments during that time because one of the four assessors was on extended leave and the other was unavailable because 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 a civil penalty proceeding 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)).

## 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 citation at issue originally alleged that Holnam, Inc., the production operator, failed to immediately notify MSHA's Rocky Mountain District that a fatal accident occurred at the Portland Plant and Quarry. The citation was modified on May 4, 2001, to charge CDK with the violation rather than Holnam, Inc. The proposed penalty is $100. Thus, the penalty was proposed about 15 months after the citation was issued to CDK.

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. I find that the penalty 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 somewhat 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.

I also take into consideration the fact that this citation was part of a group of citations that were specially assessed following the accident investigation. The explanation provided by the Secretary does not support a 15 month period to proposed a $100 penalty for a violation of section 50.10. If this citation were considered alone, I would dismiss the civil penalty case. On this date, I issued orders denying CDK's motions to dismiss in two other groups of cases that arose after the same accident. (WEST 2001-420-RM, etc., with WEST 2002-464-M; and WEST 2001-348-RM, etc., with WEST 2002-461-M). These other cases involve ten citations and orders that were specially assessed. When taken with these other cases, the Secretary has provided sufficient justification for the length of time she took to propose a penalty for Citation No. 7935408.

In the other CDK cases referenced above, CDK argued that it was actually prejudiced by the delay because its witnesses moved away after its Colorado project was completed and the company was in the process of winding down its affairs. It is not entirely clear from its motion whether CDK is making the same argument in these cases. My ruling on the prejudice issue would be the same here and I incorporate by reference my analysis on that issue from my order in WEST 2002-420-RM, etc.

## III. ORDER

I find that although the Secretary took a longer period of time to propose a penalty for Citation No. 7935408 than normally would be the case, the penalty was proposed within a reasonable time. In the alternative, I find that the Secretary demonstrated adequate cause for the delay taking into consideration the other ten citations that were specially assessed following the accident investigation. I also find that, by not requesting a pre-penalty hearing, CDK waived its right to claim actual prejudice because it knew that it would be shutting down its operations and terminating its employee witnesses. Consequently, CDK Contracting Company's motion to dismiss is **DENIED**.

Richard W. Manning
Administrative Law Judge

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