FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 8, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CEDAR CREEK QUARRIES, INC., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEST 94-637-M A. C. No. 35-03123-05514 Cedar Creek Quarry
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. ROBERT G. WIENERT, Employed by, CEDAR CREEK QUARRIES, INC., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-306-M A. C. No. 35-03123-05516 A Cedar Creek Quarry
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. DENNIS McCASLIN, Employed by, CEDAR CREEK QUARRIES, INC., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-307-M A. C. No. 35-03123-05517 A Cedar Creek Quarry

ORDER DENYING MOTIONS TO DISMISS
ORDER OF CONSOLIDATION
ORDER OF CONTINUANCE

Before: Judge Hodgdon

These cases are before me on petitions for civil penalty pursuant to Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '' 815(d) and 820(c). Respondents Robert G. Wienert and Dennis McCaslin have moved to dismiss the petitions against them. The Secretary opposes the motions. In addition, the Secretary has moved to consolidate these cases for hearing and to continue the August 8, 1995, hearing date. The Respondents oppose a continuance. For the reasons set forth below, the motions to dismiss are denied, the cases are consolidated for hearing and the hearing is continued.

Motions to Dismiss

The Secretary has filed petitions seeking civil penalties under Section 110(c) of the Act against Wienert, President of Cedar Creek Quarries, Inc., and McCaslin, a foreman employed by Cedar Creek Quarries, Inc., for knowingly authorizing, ordering or carrying out, as officers or agents of Cedar Creek Quarries, Inc. several violations of the Secretary's mandatory health and safety standards. The violations are all alleged to have occurred on December 7, 1993. The Respondents were officially notified that the Secretary was assessing such penalties on March 17, 1995. After Respondents stated that the wished to contest the penalties, the instant petitions were filed on
May 10, 1995. The Respondents argue that the approximately 15 month time period between the violations and notification of liability constitutes an unreasonable delay which requires that the petitions be dismissed.[1]

The Respondents assert that there are four reasons for dismissing the cases. The first is the "concept of *laches*" because the delay resulted in prejudice to the Respondents' ability to defend themselves. The Second is that Section 110(c) violates the equal protection and due process requirements of the Fifth Amendment by making officers, directors or agents of corporate operators liable for knowing violations of the Act or regulations, but not agents of noncorporate operators. Third, Respondents maintain that giving individuals "less notice and opportunity for administrative resolution" of violations than operators who are immediately given a citation or order also violates the equal protection and due process guarantees of the Fifth Amendment. Finally, Respondents contend that Section 56.12001 of the Regulations, 30 C.F.R. ' 56.12001, is so vague as to be fundamentally unfair. None of these arguments is persuasive.

The "Doctrine of *laches*" is an equitable concept which holds that "neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity." *Black's Law Dictionary* 875 (6th ed. 1990). Since this is not a court of equity, the Respondents advance that a similar concept should apply in this case. In their view, Judge Melick's decision in *Island Creek Coal Co.*, 15 FMSHRC 735 (April 1993), is precedent for such a theory.

This argument, however, fails for two reasons. First, "[a]n unreviewed decision of a Judge is not a precedent binding upon the Commission." Commission Rule 72, 29 C.F.R. ' 2700.72. Secondly, Judge Melick's decision was based solely on the failure of the Secretary to file a petition for assessment of penalty within 45 days of receipt of a timely contest of a proposed penalty assessment as required by Commission Rule 27(a), 29 C.F.R. ' 2700.27(a) [now Rule 28, 29 C.F.R. ' 2700.28]. Thus, he held that the Secretary had failed to file a timely request for an extension of time to file a petition, *Island Creek* at 737; that the

[1] The Respondents also allege a 31 month delay from the time the company was cited for the same type of violations on July 22, 1992. While the July 22, 1992, violations were mentioned in the orders given to the company on December 7, 1993, and may have some bearing on the Respondents' liability under Section 110(c) for the December 7 violations, the Secretary is not seeking civil penalties against the Respondents under Section 110(c) for the July 22 violations. Consequently, the only pertinent delay for consideration in connection with the motion to dismiss is the 15 month delay.

Secretary had failed to show "adequate cause" for the late filing, *id.* at 738; and that the Respondents had been actually prejudiced by this late filing, *id.* at 739.

In the instant cases, there has been no violation of a statutory deadline. Judge Melick's discussion of prejudice suffered by the respondents as a result of the time lag between the violations and their notification that they were being assessed a penalty under Section 110(c) was to demonstrate that the respondents had been prejudiced as a result of the Secretary's untimely filing under the rule. It did not establish that a delay in bringing a Section 110(c) case is itself a ground for dismissing such petitions.

Furthermore, in these cases the Respondents have not shown that they have suffered actual prejudice. The alleged inability to locate the electricians who installed and dismantled the electrical equipment in question does not mean that there is no way to defend against the orders. As the Secretary has pointed out, there are other means of defense, such as finding equipment with the same specifications, using testimony from the equipment manufacturer or using wiring diagrams and drawings furnished by the manufacturer.

Next, Respondents have not been denied equal protection or due process under the Fifth Amendment. At least two federal circuits, as well as the Commission, have held that Section 110(c) is not a denial of equal protection. *U.S. v. Jones*, 735 F.2d 785 (4th Cir. 1984), *cert. denied*, 469 U.S. 918 (1984); *Richardson v. Sec. of Labor*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

Nor does the fact that the orders were immediately served on the mine operator but the Respondents were not notified of their liability until 15 months later violate due process or equal protection. Interestingly, the orders in this case were served on Mr. McCaslin, so he did have notice of the violations even if he did not know at the time that he might be considered personally liable. Similarly, Mr. Wienert, as president of the company, must have become aware of the orders shortly after their issue. In addition, on April 6, 1994, and shortly thereafter, both respondents were interviewed by the special investigator and should have been aware at that time of their potential liability.

Finally, the regulation is not void for vagueness. Section 56.12001, 30 C.F.R. ' 56.12001, provides that "[c]ircuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity." The fact that "correct type and capacity" is not defined does not mean that the regulation is vague since it is clear from the regulation that fuses and circuit breakers of the correct type and capacity are those which protect against excessive overload.

Furthermore, even if this were not apparent, the Commission has held that broadly worded regulations must be evaluated "in light of what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (November 1990)(citations omitted). Therefore, at the very least, this would be a matter of proof at the hearing.

Having considered the contentions of the parties as set forth in their briefs, the Respondents' motions to dismiss are DENIED. That being the case, Docket Nos. WEST 95-306-M and WEST 95-307-M are CONSOLIDATED for hearing with Docket No. WEST 94-637-M.

Motion for Continuance

Hearing in Docket No. WEST 94-637-M is presently scheduled for August 8, 1995, in Newport, Oregon. The Secretary has requested that the hearing be continued because his two main witnesses have medical problems which would prevent them from being present to testify on August 8. Citing the passage of time set out in the motions to dismiss, the Respondents oppose the continuance.

While I am sensitive to the Respondents' concerns, the delays in these cases have not been inordinate, or as indicated above, of a nature to justify the extreme remedy of dismissal. In addition, the request for continuance by the Secretary is due to circumstances beyond his and his witnesses control. Nor is the request for a three month continuance excessive in view of the fact that one of the witnesses has just had open heart surgery. Therefore, I will grant the continuance.

Accordingly, the motion for continuance is GRANTED. The hearing in the above-captioned cases is CONTINUED until November 14, 1995, at 9:00 AM, in Newport, Oregon. A specific hearing site will be designated in a subsequent order.

In preparation for the hearing, the parties are directed to complete the following on or before November 3, 1995: (1) attempt to stipulate as to all relevant matters that are not in substantial dispute; (2) exchange written statements of the issues as they see them; (3) exchange lists of exhibits and, at the request of a party, produce exhibits for inspection and copying; (4) stipulate as to those exhibits which may be admitted in evidence without objection, and as to others indicate whether the exhibit is accepted as authentic; and (5) except for the Secretary's miner witnesses, exchange witness lists with a summary of the testimony expected from each witness (counsel for the Secretary shall furnish the names and expected testimony of miner witnesses on November 10).

The parties are further ORDERED to file with the judge, so that it is received on or before November 10, 1995, a preliminary statement setting forth: (1) the parties' statement of the issues; (b) lists of exhibits and witnesses with a summary of the expected testimony for each witness; and (c) any stipulations.

The parties should mark their exhibits, in the order that they expect to offer them,

before the hearing. The Secretary's exhibits should be marked "Govt. Ex. 1" *et seq.* and the respondents' exhibits should be marked "Resp. Ex. A" *et seq.* If both parties wish to offer the same exhibit, it may be marked as a joint exhibit. Exhibits consisting of more than one page should have the pages numbered.

T. Todd Hodgdon
Administrative Law Judge
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