

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

May 10, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 94-623-M
Petitioner	:	A.C. No. 45-03184-05528-A
v.	:	
	:	Docket No. WEST 94-624-M
EUGENE RUSSELL,	:	A.C. No. 45-03184-05529-A
ERVIN E. NICHOLS,	:	
JAMES M. DODD,	:	Docket No. WEST 94-625-M
REYNOLD E. CHANNER, and	:	A.C. No. 45-03184-05530-A
SCOTT FURMAN, employed by	:	
ECHO BAY MINERALS COMPANY,	:	Docket No. WEST 94-626-M
Respondents	:	A.C. No. 45-03184-05531-A
	:	
	:	Docket No. WEST 94-627-M
	:	A.C. No. 45-03184-05532-A
	:	
	:	Overlook Mine

**ORDER DENYING RESPONDENTS' MOTION TO CONDUCT  
DISCOVERY WITH REGARD TO THE TIMELINESS OF THE ISSUANCE  
OF THE CIVIL PENALTY NOTICES; ORDER DENYING RESPONDENTS'  
MOTION FOR CERTIFICATION OF INTERLOCUTORY REVIEW**

Respondents' have filed a motion requesting entry of an order allowing them to conduct discovery with regard to the reasons for the 24 to 27 month interval between the citation and order issued to their employer and their notification by MSHA that they were being assessed civil penalties pursuant to section 110(c) of the Act. In the alternative, Respondents have moved that I certify interlocutory review of my March 24, 1995, order denying Respondents' motion to dismiss/motion for summary decision on this issue. I deny both motions.

In my March 24, 1995, order I concluded that there is no basis for dismissing the instant penalties due to such a time lag without a showing by Respondents that they have been materially prejudiced by the delay in proposing the civil penalties. If a Respondent in a civil penalty proceeding establishes such prejudice, then the Commission will balance the prejudice to the Respondent and the reasons for the delay, and may, in some cases, vacate the penalty, Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981).

In these cases, Respondents have not even alleged facts which would establish material prejudice. In my March 24, 1995, order, however, I offered Respondents an opportunity to establish material prejudice at the hearing on the merits of these proposed penalties. If the Respondents succeed in doing so, I am prepared to weigh this prejudice against the reasons for the delay set forth in the affidavits submitted by the Secretary in response to Respondents' motion to dismiss.

I will not, however, allow Respondents, either in discovery or at hearing, to inquire further as to the reasons for the delay. For example, I believe it would be entirely inappropriate to allow Respondents to depose attorneys in the Office of the Solicitor as to why the civil penalties in these cases were issued 14-1/2 months after receipt of the MSHA reports and files.

If Respondents could establish that the Solicitor had these files longer than Mr. White of that office states in his affidavit, it would not materially influence the outcome of this case. If Respondents could establish that the Solicitor's attorneys could have worked longer hours or devoted more time to this matter, rather than others, it would be similarly immaterial. Further, I view Commission review of such internal procedures of the Secretary to be inappropriate as a general matter.

Commission Rule 56(b) limits the scope of discovery to relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence. Respondents have not made a showing that its requested discovery of Labor Department personnel with regard to the delay in assessing the instant penalties meets this standard.

In so concluding, I note Rule 403 of the Federal Rules of Evidence allows exclusion of relevant evidence if its probative value is substantially outweighed by considerations of confusion of the issues, delay, or waste of time. Without a showing as to what Respondents hope to learn in the requested discovery, I suspect that the evidence they seek may well fit the description of excludable evidence in Rule 403.

RESPONDENT'S HAVE NOT SATISFIED THE CRITERIA  
FOR INTERLOCUTORY REVIEW

Commission Rule 76 states that interlocutory review cannot be granted unless the judge has certified that his ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding.

In this case, granting of interlocutory review will likely delay final disposition of these proceedings. These matters should be disposed of on the merits at the hearing now scheduled to begin on July 11, 1995. Consideration of evidence of internal procedures of the Secretary will likely delay resolution of the merits, and is, to my mind, totally irrelevant--particularly in view of the facts that Respondents have not even made a facial showing of material prejudice.

For the reasons stated herein, Respondents' motion to conduct discovery with regard to the timeliness issue is **DENIED**. Similarly, Respondents' motion to certify my March 24, 1995, order for interlocutory review is **DENIED**.

Arthur J. Amchan  
Administrative Law Judge  
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