FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 8, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-552
Petitioner	:	A.C. No. 42-01280-03623
v.	:	
	:	White Oak Mine No. 2
WHITE OAK MINING AND	:	
CONSTRUCTION, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-63
Petitioner	:	A.C. No. 42-01280-03678 A
v.	:	
	:	Docket No. WEST 98-114
VAL J. LYNCH, & SHANE HANSEN,	:	A.C. No. 42-01280-03680-A
Employed by WHITE OAK MINING AND	:	
CONSTRUCTION, INC.,	:	White Oak Mine No. 2
Respondent	:	

ORDER DENYING MOTIONS TO DISMISS

These cases are before me pursuant to sections 105(a) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '' 815(a) and 820(c). Respondents Lynch and Hansen have moved to dismiss the cases against them on the grounds that there was an unreasonable delay between the time the underlying orders in these cases were issued to the operator and the time they were notified that the Secretary was assessing penalties against them under section 110(c). The Secretary opposes the motion. For the reasons set forth below, the motion is denied.

The following is the chronology of events in these cases:

1. March 27, 1995, Order No. 3415856 issued to White Oak.

2. March 30, 1995, Order Nos. 3415858 and 3415859 issued to White Oak.

3. March 31, 1995, Order No. 3415825 issued to White Oak.

4. June 13, 1995, a section 110(c) special investigation involving the facts in the above orders assigned to MSHA Special Investigator, Bruce Andrews.

5. June 15, 1995, Andrews receives case file.

6. August 24, 1995, Andrews begins working on investigation.

7. August 24, 1995 - July 11, 1996, Andrews conducts investigation, including interviewing 17 miners and inspectors.

a. Lynch interviewed September 19, 1995.

b. Hansen interviewed October 31, 1995.

8. March 21, 1996, initial case file received by MSHA Technical Compliance and Investigative Division (TCID) in Arlington, VA, headquarters. Respondents notified of right to request conferences on the allegations.

9. August 6, 1996, conferences held between MSHA and Respondents.

10. March 13, 1997, case file received by TCID, with additional investigative material obtained as the result of further investigation conducted, in part, because of information received at the conferences. TCID reviewed the file and then sent it with recommendations to the Office of the Solicitor for legal review.

11. August 14, 1997, TCID sent request to MSHA Office of Assessments for civil penalty assessments against individual agents.

12. November 24, 1997, proposed assessments mailed to Hansen and Lynch.

13. December 12, 1997, Lynch advises MSHA he wishes to contest the proposed assessment.

14. January 5, 1998, Hansen advises MSHA he wishes to contest the proposed assessment.

15. January 9, 1998, Petition for Assessment of Civil Penalty filed against Lynch.

16. January 19, 1998, Petition for Assessment of Civil Penalty filed against Hansen.

The Respondents base their motion on *Doyal Morgan et al*, 20 FMSHRC 38 (Chief Judge Merlin, January 1998). In that case, Judge Merlin held that: "Because the record indicates no difficulties in either investigation or evaluation and because no acceptable reason has been given to explain the delay, I find that adequate cause does not exist to justify the 22 months MSHA and the Office of the Solicitor took to complete action and issue the notices of proposed assessments." *Id.* at 42. Accordingly, he dismissed the 110(c) proceedings against the Respondents. However, this decision, while instructive, has no precedential value under the Commission's Rules, 29 C.F.R. § 2700.72, and is distinguishable from the instant cases on its facts. In these cases, the Secretary has explained the delay.

There are no Commission cases dealing with the Secretary's delay in notifying individuals of proposed penalties in 110(c) proceedings. However, in cases involving notification of the operator under section 105(a), the Commission has held that "in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator." *Steel Branch Mining*, 18 FMSHRC 6, 14 (January 1996).

It is apparent in examining the chronology set out above that, while the case is far from a model of efficiency, the Secretary was proceeding with due diligence. For instance, Bruce Andrews was the only special investigator in the Price, Utah, area when he was assigned the file on June 15, 1995, and he was working on several section 105(c), 30 U.S.C. § 815(c), investigations, which because of statutory time constraints take precedence over all other special investigations. Therefore, his delay, until August 24, 1995, in beginning the investigation is understandable. In addition, this case was not the only one he was working on during the period from August 1995 to March 1997. He also worked on two other 110(c) investigations and five 105(c) investigations throughout that period.

In fact, while it is not the function of the Commission to tell the Secretary how to conduct her investigations, or to second guess the investigation every step of the way, it is apparent that the only period of time in this case where the delay might be questionable was between the conferences and the submission of the final report to TCID. Even there, the delay was not so egregious as to require the harsh remedy of dismissal. This is particularly true when the admonition of the key Senate Committee that drafted the Act that "the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding" is kept in mind. S. Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978).

Viewing the period of a time between the first citation and the proposal of penalties as a whole, I conclude that the Secretary has adequately explained the delay involved. I agree with Chief Judge Merlin, when he stated in a similar case that:

> [I]t must be borne in mind that both the investigation and the various levels of internal review were necessary for a proper evaluation of agent liability and a knowing violation. The time used to evaluate the case could reasonably be viewed as affording some assurance that resources of both the individual and the government would not be wasted by the bringing of an unworthy case.

James Lee Hancock, 17 FMSHRC 1671, 1674 (Chief Judge Merlin, September 1995).

Having found that any delay in the cases has been adequately explained, the next issue is whether the Respondents have been prejudiced. The Respondents argue that Keith W. Smith Ais unable to testify due to injuries sustained in an automobile accident earlier this year.@ They also assert that they have been prejudiced Aby the loss of potential witnesses, [their] own fading memory, the fading memories of potential witnesses and loss or destruction of evidence.@ I find that the Respondents have not demonstrated prejudice in these cases.

Turning first to the specific allegation of the loss of testimony of Smith, I conclude that his loss has not been shown. No offer has been provided as to what he is expected to testify. No explanation has been given as to how his injuries would prevent him from testifying. Furthermore, nothing has been presented to show how long he may be precluded, if he is precluded, from testifying. This is particularly significant in view of the fact that no hearing has yet been scheduled. Finally, the Respondents have not shown that Smith=s testimony, whatever it is, is the only source of the evidence they wish to present.

The allegations that memories fade, witnesses become unavailable and evidence may be lost or destroyed do not demonstrate actual prejudice. The same allegations, which are inherently true, could be made in any case. They are not, however, a basis for dismissal unless they have actually happened and are determined to have a significant effect on the presentation of the case. The Respondents have not even alleged that any of these have occurred, let alone that they will result in an inability to defend the case.

In conclusion, I find that the Secretary, having adequately explained the delays in the case, notified the Respondents of the proposed civil penalties within a reasonable time and that the Respondents have not shown that they have incurred any actual prejudice as a result of the delays. Accordingly, the Motions to Dismiss are **DENIED**

T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Denise A. Dragoo, Esq., Lisa R. Petersen, Esq., Van Cott, Bagley, Cornwall & McCarthy, P.C., 50 South Main Street, Suite 1600, P.O. Box 45340, Salt Lake City, UT 84145-0340 (Certified Mail)

William K. Doran, Esq., Heenan Althen & Roles, 1110 Vermont Avenue, N.W., Suite 400, Washington, DC 20005-3593 (Certified Mail)

/fb