FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 3, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2002-41
Petitioner	:	A.C. No. 46-01968-03505 ZAG
v.	:	
	:	
BGS CONSTRUCTION, INC.,	:	Blacksville No. 2
Respondent,	:	

ORDER DENYING MOTION TO DISMISS
AND
PREHEARING ORDER

This case is before under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Respondent has moved to dismiss the case claiming that the Secretary did not notify it of the proposed civil penalty within a reasonable time as required by section 105(a) of the Act, 30 U.S.C. § 815(a). The Secretary opposes the motion. For the reasons set forth below, the motion is denied.

The two citations at issue in this case, alleging violations involving the death of a miner, were issued on September 15, 2000. The Mine Safety and Health Administration's (MSHA) investigation report was issued on November 9, 2000. The notice of the proposed assessment for the citations was mailed to the company on January 17, 2002. Thus, 14 months and eight days elapsed between the completion of the investigation and notification of the operator of the proposed penalty.

Section 105(a) provides that: "If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited . . . ." With regard to whether a civil penalty has been proposed within a "reasonable time," the Commission has furnished the following guidance:

> Section 105(a) does not establish a limitations period within which the Secretary must issue penalty proposals. *See Rhone-Poulenc of Wyoming Co.,* 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd* 57 F.3d 982 (10th Cir. 1995); *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714 (July 1981); and *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). In commenting on

> the Secretary's statutory responsibility to act "within a reasonable time," the key Senate Committee that drafted the bill enacted as the Mine Act observed 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. 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). Accordingly, 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).

The Secretary asserts that the reason for the delay in this case was that:

> [T]he Office of Assessments had a large case load and was understaffed during the relevant time period. During that period, four persons were responsible for processing over 2,500 citations and orders that were considered for special assessment. Two of those individuals were not in the office for extended periods of time.

(Sec. Resp. at 3.)

In *Steel Branch*, the Commission took official notice that the Secretary had an unusually high case load in 1992 and accepted that as an adequate reason for the delay, even though the "Secretary ha[d] not offered any explanation for his delay." *Id.* Consequently, keeping in mind Congress' expectation that failure to propose a penalty with promptness will not vitiate any proposed penalty proceeding, I find that the Secretary has provided an adequate explanation for the delay.

Turning next to the issue of prejudice to the operator, the company asserts that its "Safety Director, who was at the site and likely to testify on issues in the case, left the company in December 2001 and all BGS work at the Blacksville plant has ceased. Further, trial of this case would require witnesses to testify as to events almost two years old." (Resp. Mot. at 6.) These suppositions do not demonstrate actual prejudice. Although the Safety Director may have left the company, there is no indication that he would not be available for deposition or trial. In addition,

the fact that events are almost two years old is not an unusual occurrence in these cases and has the same effect on both sides. Furthermore, since the company has been aware of the factual allegations in this case since September 15, 2000, there is no reason that the Safety Director's testimony as well as the testimony of any other employees could not have been recorded to refresh recollections before trial.

Accordingly, an adequate explanation having been provided for the delay by the Secretary and the Respondent having failed to demonstrate actual prejudice, the Motion to Dismiss is **DENIED**.

Prehearing Order

In accordance with the provisions of section 105(d) of the Act, 30 U.S.C. § 815(d), the above proceeding will be called for hearing on the merits at a time and place to be designated in a subsequent notice. Prior to setting the case for hearing, the parties are directed to confer for the purpose of discussing settlement. If a settlement is reached, a motion for its approval shall be filed by the Secretary of Labor no later than **May 24, 2002**.

If settlement is not agreed upon, counsel for the Secretary shall initiate a telephone conference call with the Respondent's representative and the judge for the purpose of setting a hearing date. The conference call may be made at any time convenient to the parties, but not later than **May 31, 2002**.

Procedural motions filed in this case shall comply with Commission **Rule 10(c)**, 29 C.F.R. § 2700.10(c), which requires that "the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion."

Discovery requests made pursuant to Commission Rules 56, 57 and 58, 29 C.F.R. §§ 2700.56, 2700.57 and 2700.58, responses to discovery requests and depositions **should not be filed** with the judge.[1] However, copies of such requests or responses shall accompany any motion to compel or for other relief regarding discovery matters.

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

[1] Cover letters for discovery requests or responses may be filed with the judge if the party desires to have a record of the request or response in the official file.

Distribution: (Certified Mail)

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