

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 20, 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. :
 : Blacksville No. 2
BGS CONSTRUCTION, INC., :
Respondent :

ORDER DENYING MOTIONS FOR RECONSIDERATION
AND
CERTIFICATION FOR INTERLOCUTORY REVIEW

This case is before me under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. On April 11, 2002, the Respondent filed a motion to dismiss the case because the civil penalty had not been proposed with “reasonable promptness.” The motion was denied on May 3, 2002. The Respondent has now filed a Motion for Reconsideration or, in the Alternative, Motion for Certification for Interlocutory Review. The Secretary opposes both motions. For the reasons set forth below, the motions are denied.

Motion for Reconsideration

The Respondent asserts that the ruling should be reconsidered because: (1) the Secretary unnecessarily specially assesses penalties; (2) the ruling did not consider *United Metro Materials*, 23 FMSHRC 1085 (September 2001) or Program Policy Letter 99-III-5 (August 16, 1999); and (3) the reasons given by the Secretary for the delay do not excuse its failure to assess a penalty within a reasonable time. None of these reasons is compelling.

Besides the bald assertion that the Secretary over-assesses cases as special assessments, the Respondent presents no evidence to support this claim. The Secretary has established guidelines for determining when a case should be specially assessed. 30 C.F.R. § 100.5. There is nothing to suggest that these guidelines are not being followed or a re being abused.

The policy letter and *United Metro* were considered in my ruling, they were just not discussed. Whether the letter is a guideline or a deadline makes no difference in this case. It does not provide any basis for relief to the Respondent. Similarly, the facts in *United Metro* appear to be different than the ones in this case. Furthermore, unreviewed decisions of judges, although they may be instructive, are not binding precedent. 29 C.F.R. § 2700.72.

Finally, the Respondent’s third assertion is only that, an assertion. It is not supported

by evidence, case law or even argument. The Respondent cites *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982), for the proposition that “insufficient clerical help” may not excuse delay. Here the Secretary has done more than claim insufficient clerical help. But even if she had not, I find it significant that the legislative history states that “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) (emphasis added).

Accordingly, the Motion for Reconsideration is **DENIED**.

Certification for Interlocutory Review

Commission Rule 76(a)(1), 29 C.F.R. § 2700.76(a)(1), provides, in pertinent part, that: “Review cannot be granted unless: (i) The Judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding” The Respondent’s motion states neither what the controlling question of law is nor how immediate review will materially advance the final disposition of the proceeding. Nonetheless, I find that the interlocutory ruling does not involve a controlling question of law.

The Commission decided the question of law at issue in this case in *Steel Branch Mining*, 18 FMSHRC 6, (January 1996). There it set out the facts to be considered in cases where it has been alleged that the Secretary did not notify the operator of the civil penalty within a reasonable time. *Id.* At 14. Those factors were applied in denying the Motion to Dismiss. Therefore, this matter does not involve a controlling question of law. *Buck Creek Coal, Inc.*, 17 FMSHRC 1677, 1679 (October 1995).

The Commission’s rule on interlocutory review requires that both criteria be present for a ruling to be certified. Accordingly, since a controlling question of law is not involved, the motion for certification is **DENIED**.

Hearing Date

Counsel for the Secretary is directed to initiate a telephone conference call with the Respondent’s counsel and the judge, for the purpose of setting a hearing date, not later than July 5, 2002.

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

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