**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
**601 NEW JERSEY AVENUE N. W., SUITE 9500**
**WASHINGTON, D.C. 20001**
**(202) 577-6809**

June 13, 2010

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | Docket No. WEVA 2009-1445 |
| Petitioner | : | A.C. No. 46-09086-184529 |
| v. | : | |
| | : | |
| BRODY MINING, LLC., | : | Brody Mine No. 1 |
| Respondent | : | |

**ORDER ON RESPONDENT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY RULING**

Before the Court is Respondent, Brody Mining, LLC's, Motion for Certification of Interlocutory Ruling. ("Motion")[1] Respondent maintains that interlocutory review of the Order Accepting Late Filing and Order Denying Motion to Dismiss, issued by Chief Administrative Law Judge Robert J. Lesnick on April 9, 2010, is appropriate on the grounds that a controlling question of law is involved *and* that immediate review will materially advance the final disposition of this civil penalty proceeding. For the reasons which follow, Respondent's Motion is DENIED.

Interlocutory review is addressed at 29 C.F.R. Section 2700.76 of the Procedural Rules ("Rules") for the Federal Mine Safety and Health Review Commission. ("Commission"). That Section notes that interlocutory review is not a matter of right, but rather one within the sound discretion of the Commission. There are different routes for a motion for interlocutory review to arrive before the Commission so that it may decide in its discretion whether such review is warranted. The presiding judge may certify on his own initiation that the twin criteria (i.e. controlling question of law and immediate review would materially advance final disposition)

[1]Respondent took two avenues, nearly simultaneously, to seek review of the same issue raised in its Motion for Interlocutory Ruling. It did so by filing a Petition for Discretionary Review of the same issue on May 12, 2010. Its Motion for Interlocutory Ruling was filed on May 11th but was not received by the Commission until May 17th. ( Petitions for Discretionary Review have an effective date of filing upon *receipt*, whereas filing of a motion for interlocutory review, among other subjects, is deemed effective upon mailing.) Therefore, the two efforts to obtain review were essentially taken at the same time.

exist or the judge may agree with a party's motion, asserting the appropriateness of such review. 29 C.F.R. Section 2700.76(a)(1)(i). Neither obtains here, as the Court is not acting on its own motion and does not subscribe to Respondent's contention that the criteria are met.[2]

Procedurally, Respondent had sought to have the civil penalty assessment dismissed on account of the Secretary's late filing, filing a motion seeking such relief on December 18, 2009. The Secretary opposed the motion, asserting that the high rate of contests and staffing shortage explained the delay in her filing.[3] The Chief Administrative Law Judge then issued his ruling, on April 9, 2010, denying the motion. Respondent cites the Chief Judge's observation in that Order that the preference is to resolve such cases on the merits rather than on procedural shortcomings and that the 45 day filing requirement was not intended to be a procedural straitjacket. Not mentioned by the Respondent, but noted by the Chief Judge, is "the unprecedented number of cases currently before the Commission, as well as the unprecedented number of penalty petitions pending before the Secretary . . ." Order at 2. In light of those facts, the Chief Judge described "strict adherence to the 45-day time line [as] unrealistic." *Id.*

Reduced to its essence, Respondent contends now that as the Secretary of Labor failed to file its petition for assessment of civil penalty within 45 days of receipt of its contest of those penalties, per Section 2700.28(a) of the Rules, and did not otherwise justify its failure to meet that filing time period, but instead did not file its petition until 135 days had elapsed beyond the due date, "Brody suffered prejudice because it was unable to resolve the citations at issue . . . so as to expose itself to a potential pattern of violation notice." Motion at 2.

Respondent elaborates on its contention that this matter should be dismissed, arguing that the Chief Judge failed to consider whether adequate cause for the 135 day delay was established and did not consider the "prejudice alleged by Brody [Mining]." *Id.* at 4.

Upon consideration, the Court concludes that there is no controlling question of law involved here. The notion that a 135 day delay can perforce prejudice Respondent is hollow. Similarly, the claim Respondent has exposed itself to a potential pattern of violation notice is speculative, at best. A host of cases have recognized both that Section 105(a) of the Mine Act "does not establish a limitations period within which the Secretary must issue penalty proposals." *Paiute Aggregates Inc.*, 24 FMSHRC 950, 951 (October 2002), citing (among other cases) *Steele Branch Mining*, 18 FMSHRC 6, (Jan. 1996) and Rhone-Poulenc *of Wyoming Co.*, 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd* 57 F.3d 982 (10th Cir. 1995). Further, it is noted that in

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[2]Unfortunately, the Secretary of Labor has not provided any response to Respondent's Motion. As a significant period of time had elapsed since the Motion was filed, and therefore, barring an extension, the time for filing of an opposition had elapsed, the Court decided to issue its ruling without the benefit of the Secretary's input.

[3]Indirectly, the Secretary demonstrated its staffing shortage as its opposition to Respondent's motion was itself out of time.

*Steele Branch* the Commission took "official notice" that the Secretary had an unusually high case load and determined that provided adequate reason for the delay. Certainly the high case load explanation, fully warranted in the past, is even more compelling today. Official notice of this fact is appropriate and the Court, as has Congress, takes such notice of the enormous caseload which exists today.

Finally, the Court notes that in the civil penalty proceeding which may ensue, the Respondent will not be precluded from contending that the delay worked to its prejudice in the defense to the 19 violations alleged, nor will it be precluded from establishing that some or all of the violations alleged to be "significant and substantial" were not in fact of that character.

Accordingly, for the foregoing reasons, Respondent's Motion for Certification of Interlocutory Ruling is DENIED.[4]

William B. Moran
Administrative Law Judge

[4]Per 29 C.F.R. Section 2700.76(a)(1)(ii), Respondent must file with the Commission a petition for interlocutory review within 30 days of the Court's denial of such motion for certification.