

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 11, 2003

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket Nos. WEST 2001-166-RM
	:	WEST 2002-223
BLACK BUTTE COAL COMPANY	:	

BEFORE: Duffy, Chairman; Beatty and Suboleski, Commissioners¹

ORDER AND DECISION

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). Black Butte Coal Company (“Black Butte” or “the operator”) filed a petition for interlocutory review (“PIR”) challenging an order issued by Administrative Law Judge Avram Weisberger denying its motion to certify for interlocutory review an earlier order by the judge. In his earlier order, Judge Weisberger denied Black Butte’s motion to dismiss the instant proceeding. *See* Unpublished Order Denying Motion to Dismiss and Consolidation Order at 4-6 (June 4, 2002) (ALJ) (“June 4th Order”). For the reasons set forth below, we grant Black Butte’s request for interlocutory review, but deny its request to dismiss this proceeding.

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been delegated to exercise the powers of the Commission. Commissioners Mary Lu Jordan and Michael G. Young assumed office after this case had been considered and decided. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioners Jordan and Young have elected not to participate in this matter.

I.

Factual and Procedural Background

On December 11, 2000, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the citation at issue in this contest proceeding as a result of an investigation following a fatal accident on July 29, 2000, at the Black Butte and Leucite Hills Mine in Sweetwater County, Wyoming. The citation alleged that the operator failed to maintain a haulage truck in a safe operating condition. *See* Citation No. 7625876 (dated Dec. 11, 2000) (attached to BB PIR as "Attach D"). A miner died from injuries sustained when he lost control of the truck due to a failure of the steering system, which caused the truck to travel uncontrollably through a berm. *Id.* The miner was not wearing a seat belt and was ejected through the windshield of the driver's cab. *Id.*

On January 10, 2001, the operator filed a notice of contest. On January 16, 2001, MSHA released its accident report, which was revised after a conference between the operator and MSHA in February 2001 based on 30 items which the operator disputed. The revised report was released two months later on April 24, 2001. On January 17, 2002, thirteen months after the underlying citation was issued, the Secretary issued a proposed penalty assessment.

Black Butte filed a motion to dismiss based on the Secretary's 13-month delay in proposing a penalty. On June 4, 2002, Judge Weisberger issued an order denying Black Butte's motion to dismiss. Black Butte subsequently filed with Judge Weisberger a motion to certify for interlocutory review his June 4th Order, which motion was denied on July 9, 2002. The judge also stayed the proceedings on the same date. On August 8, 2002, Black Butte filed a PIR requesting the Commission to review Judge Weisberger's June 4th Order. The Secretary of Labor filed an opposition to Black Butte's PIR, and Black Butte subsequently filed a reply to the Secretary's opposition.

II.

Disposition

Commission Procedural Rule 76(a)(2) provides that the Commission may, in its discretion, grant interlocutory review "upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2900.76(a)(2). Here, the issue presented by Black Butte involves a controlling question of law. Black Butte's motion to dismiss for the Secretary's failure to timely propose penalty assessments involves a dispositive question, analogous to whether a statute of limitations has been met, which could end the underlying proceedings well before a full hearing on the merits. *See, e.g., Chailland v. Brown & Root, Inc.*, 45 F.3d 947, 949 (5th Cir. 1995) (reviewing dismissal for failure to exhaust administrative remedies); *Chan v. City of New York*, 1 F.3d 96, 101 (2d Cir. 1993) (reviewing motion to dismiss

where complaint asserted claims under 42 U.S.C. § 1983).² Those requirements having been met, we exercise our discretion to grant the operator’s petition and consider it on the merits.

At issue is whether the judge erred in denying Black Butte’s motion to dismiss on the basis of the Secretary’s delay in issuing the proposed penalty assessment pursuant to section 105(a) of the Mine Act. Section 105(a) provides in pertinent part:

If, after an inspection or investigation, the Secretary issues a citation or order . . . , [s]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 . . . for the violation cited.

30 U.S.C. § 815(a).

In *Steel Branch Mining*, the Commission addressed this issue and concluded that the requirement of section 105(a) that the Secretary propose a penalty assessment within a reasonable time was not a jurisdictional limitations period barring a contest proceeding. 18 FMSHRC 6, 13-14 (Jan. 1996). The Commission looked to the legislative history of the Mine Act, which noted that “there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the [Senate] Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.” *Id.* (citing S. Rep. No. 95-181, at 34 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978)). The Commission then examined whether adequate cause existed for the Secretary’s 11-month delay in proposing a penalty, and whether the delay prejudiced the operator. 18 FMSHRC at 14. The Commission concluded that the Secretary’s case could go forward because adequate cause was established and no prejudice was shown. *Id.* See also *Rhone-Poulenc of Wyo. Co.*, 15 FMSHRC 2089, 2092-94 (Oct. 1993), *aff’d*, 57 F.3d 982 (10th Cir. 1995) (allowing a petition for assessment of penalty filed 11 days late); *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714 (July 1981) (same, 60 days late); *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982) (same, 15 days late).

When reviewing a judge’s pre-trial rulings, the Commission set forth its standard of review as follows:

[T]he Commission cannot merely substitute its judgment for that of the administrative law judge The Commission is required, however, to determine whether the judge correctly interpreted the

² Under the federal law, a controlling question of law includes issues that will resolve the action entirely, such as the applicability of a statute of limitations. See 19 James Wm. Moore et al., *Moore’s Federal Practice* § 203.31[2] at 203-87 through 203-90 (3d ed. 2002).

law or abused his discretion and whether substantial evidence supports his factual findings.

Asarco, Inc., 12 FMSHRC 2548, 2555 (Dec. 1990) (reviewing a judge's discovery rulings) (citations omitted). Applying an abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial. *See Medusa Cement Co.*, 20 FMSHRC 144, 147 (Feb. 1998) (applying the abuse of discretion standard when reviewing a judge's pre-trial order); *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (Apr. 1995) (same). Accordingly, the appropriate standard to apply on interlocutory review of the judge's ruling is abuse of discretion, though any factual determinations he made in arriving at his conclusion are subject to substantial evidence review.³

In denying the operator's motion to dismiss, the judge considered the factors the Commission set forth in *Steel Branch*. *See* June 4th Order at 4-5. The judge reviewed the parties' written submissions, considered the Secretary's reasons for the delayed penalty proposal, and concluded that she had provided adequate explanation. *Id.* According to the Secretary's counsel's written submission to the judge, the thirteen month delay was due in part to the need to conduct a fatality investigation and write an accident report, which was released over a month after the citation was issued. *Id.*; S. Br. at 9. She explained that as a consequence of the operator's submission of 30 items of concern on the initial accident report, she was required to issue a revised report resulting in an additional three-month delay. *See* June 4th Order at 4-5; S. Br. at 9-10. The counsel for the Secretary also pointed to an extremely high case load and less than normal staffing levels due to training and leave absences. *See* June 4th Order at 4-5. The judge noted that the operator did not refute these allegations. *Id.*

Although Black Butte appears to challenge the judge's conclusion that the Secretary provided adequate cause on substantial evidence grounds, it fails to identify any evidence in the record contradicting the Secretary's allegations. The operator merely challenges the judge's conclusion by asserting that the Secretary's reasons as to the cause of the delay were "unsworn and unattributed statements" made by her counsel. *See* BB PIR at 1-2, 7-8. The judge, however, reviewed the record, considered all the evidence, and accepted the representations made by the Secretary's counsel. Moreover, Black Butte does not point to any evidence in the record undermining the Secretary's representations. We conclude that it was well within the judge's discretion to accept the Secretary's representations, and thus reject the operator's assertions on this point.

³ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The judge also considered whether Black Butte suffered any prejudice as a result of the Secretary's delay. The judge concluded that the operator had not asserted any specific prejudice and thus, had not shown that it was prejudiced by the delay. *See* June 4th Order at 5-6. We conclude that the judge did not abuse his discretion in denying the operator's motion to dismiss, and that his decision is amply supported by substantial evidence.

Moreover, we note that this is a fatality case. Under the circumstances, any delay that may have resulted during the investigation and as a result of revising the accident report in accordance with the operator's changes is understandable. The operator knew about the investigation and citation, and clearly was able to gather evidence in support of its position. To absolve Black Butte of liability due to a late issuance would undermine the purpose of the Mine Act, especially here where the operator has not demonstrated any prejudice from the delay.

III.

Conclusion

Accordingly, we lift the stay on this proceeding, deny Black Butte's request to dismiss, and affirm the judge's order. This proceeding shall proceed for disposition on the merits.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Stanley C. Suboleski, Commissioner

Distribution

James A. Lastowka, Esq.
McDermott, Will & Emery
600 Thirteenth St., N.W.
Washington, D.C. 20005

Jack Powasnik, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

Kristi Floyd, Esq.
Office of the Solicitor
U.S. Department of Labor
P. O. Box 46550
Denver, CO 80201-6550

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021