



**Issue Date: 10 September 2008**

OALJ CASE NO.: 2007-RIS-00141

*In the Matter of:*

**U.S. DEPARTMENT OF LABOR,  
EMPLOYEE BENEFITS SECURITY ADMINISTRATION,**  
Complainant,

v.

**PLAN ADMINISTRATOR, PRECISION WIRE PRODUCTS, INC.,**  
Respondent.

**DECISION AND ORDER GRANTING EBSA'S MOTION FOR SUMMARY DECISION  
AND DENYING RESPONDENT'S COUNTER-MOTION FOR SUMMARY DECISION**

On August 21, 2008, Complainant Employee Benefits Security Administration ("EBSA") filed its motion for summary judgment ("MSD") seeking to affirm its assessment of an abated penalty of \$6,000.00 against Respondent Plan Administrator, Precision Wire Products, Inc. ("Plan Administrator," "Precision Wire," or "Respondent") for its failure to timely file a complete annual report for the 2004 plan year.

On August 29, 2008, Respondent submitted its opposition to the MSD and filed its counter-MSD against EBSA seeking a determination that no penalty should be assessed because The Plan Administrator's untimely filing of its 2004 plan report should be excused due to its service provider's illness in early 2007.

**I. STIPULATED UNDISPUTED FACTS**

The parties' filings include the following list of undisputed facts which I find are supported by the exhibits filed in support thereof.:

1. Precision Wire Products, Inc. ("Precision Wire") is the plan administrator of the Precision Wire Products, Inc. Employees 401(k) Profit Sharing Plan & Trust ("Plan").
2. Under ERISA, the plan administrator of an employee benefit plan is required to file an annual report with the federal government within 210 days after the end of the plan year. *See* ERISA § 104, 29 U.S.C. § 1024.

3. Plan 001, at the beginning of the 2004 plan year, had in excess of 100 participants and held assets in trust. (EBSA Ex. 1).
4. Under ERISA, a plan with more than 100 participants that holds assets in trust is required to have an annual audit performed on the plan and to attach the report of an independent qualified public accountant (“IQPA”) to the plan’s annual report. (EBSA Exs. 2, 3, 4, 5, and 10; 29 C.F.R. § 2520.104-20(b)).
5. Precision Wire filed a Form 5558 Application for Extension of Time to File Certain Employee Plan Returns, for an extension on its 2004 Form 5500, on or about July 11, 2005. (EBSA Ex. 1).
6. Precision Wire filed the 2004 Form 5500 annual report for Plan 001 on or about October 15, 2005, without attaching a Schedule H or an IQPA report, although item six indicated that the total number of participants in the plan at the beginning of the plan year was 175, item 9a indicated that the plan’s funding arrangements are both insurance and a trust, and item 9b indicated that the plan benefit arrangements are both insurance and a trust. Therefore, the Plan 001 was not exempt from the audit requirement. (EBSA Ex. 1).
7. EBSA issued two 30-day request letters to Precision Wire on or about December 14, 2005 and February 8, 2006, requesting submission of the missing 2004 Schedule H and IQPA report for Plan 001. (EBSA Ex. 2 and 3).
8. Precision Wire did not respond to either of the December 14, 2005 or February 8, 2006 request letters.
9. EBSA issued a Notice of Rejection (“NOR”) to Precision Wire on or about December 1, 2006, which reiterated the request for the 2004 Schedule H and IQPA report and advised Precision Wire that it had 45 days within which to comply without incurring a penalty. The NOR, inter alia, specifically contains the following notice:

**“WARNING: Read this Notice carefully. YOU must file a written response within 45 days of the date of this Notice to avoid potential civil penalties authorized by Title I of ERISA. The law does not allow for extensions of time to respond to this Notice, therefore no extensions will be granted by the Department.”** (EBSA Ex. 4).
10. Precision Wire did not file an amended 2004 Form 5500 within 45 days from the date of the NOR.
11. On January 29, 2007, EBSA issued a Notice of Intent to Assess a Penalty (“NOI”) requesting submission of a satisfactory 2004 annual report for the Plan. The NOI proposed an \$86,500 penalty against Precision Wire for failure to file a satisfactory 2004 annual report. (EBSA Ex. 5). The NOI further advised Precision Wire that it had 35 days within which to submit a statement of reasonable cause—which requires setting forth the facts alleged as reasonable cause in writing and under penalty of perjury—for the failure to file the 2004 annual

report or why the penalties, as calculated, should not be assessed. The NOI, inter alia, specifically contains the following:

**“WARNING: Read this Notice carefully. YOU must file a written response within 35-days of the date to preserve your administrative rights. The law does not allow for extensions of time to respond to this Notice, therefore no extensions will be granted by the Department.” (EBSA Ex. 5, p. 1).**

12. On or about March 5, 2007, Precision Wire submitted a Reasonable Cause Statement (“Reasonable Cause Statement #1”) in response to the NOI dated January 29, 2007. (EBSA Ex. 6). Precision Wire engaged Main Street Benefits, Inc. (“Main Street”) to provide third-party administration services to the plan. Ms. Valeri Stevens of Main Street, who submitted a power of attorney form, represented that there were mitigating circumstances regarding the incompleteness of the 2004 annual report and its noncompliance with ERISA’s provisions. Ms. Stevens alleged that the filing was incomplete due to the third-party administrator’s illness, the unavailability of updated participant loan balances, and the death of a plan administrative committee member. Ms. Stevens further alleged that she tried to comply with the filing requirements by filing as much information as was available to Precision Wire, which was why Schedule H was omitted. The Reasonable Cause Statement #1 omitted the required IQPA report and schedule H, item 3. *See* Ex 8 at 1.

13. On or about March 27, 2007, Precision Wire submitted a second Reasonable Cause Statement (“Reasonable Cause Statement #2”) in response to the NOI dated January 29, 2007. (Ex. 8) It summarized Reasonable Cause Statement #1 and included an enclosed amended 2004 Form 5500 with original signatures, Schedule H with all the completed items, and the required IQPA report. (Ex. 9)

14. Even though the amended 2004 return and Reasonable Cause Statement #2 were filed on or about March 27, 2007, OCA found reasonable cause to accept the filing of the amended return, and issued a Notice of Determination on Statement of Reasonable Cause (“NOD”) to Precision Wire, assessing an abated penalty in the amount of \$6,000. (EBSA Ex. 10).

#### I. FACTUAL FINDINGS

This matter arises under § 502(c)(2), 29 U.S.C. § 1132(c)(2), of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001, *et seq.*

EBSA, by way of its Division of Reporting Compliance (“DRC”) and its Office of Chief Accountant (“OCA”), assessed an abated \$6,000 penalty against Respondent, the plan administrator of the Precision Wire Products, Inc. Employees 401(k) Profit Sharing Plan & Trust (“Plan”), an employee retirement benefit plan, for reporting deficiencies in connection with the Plan’s 2004 plan year annual report. The specific deficiency was the failure to include the report of an independent qualified public accountant (“IQPA”) as required by ERISA § 103(a)(3)(A), 29 U.S.C. § 1023(a)(3)(A), and regulations issued there under.

The Plan's 2004 Form 5500 return, with a satisfactory IQPA report was due on or before July 31, 2005. Respondent obtained a valid extension in which to file the 2004 annual report on October 15, 2005; however, Respondent did not attach the required IQPA report.<sup>1</sup> On December 14, 2005 ("1st 30-day letter") and February 8, 2006 ("2nd 30-day letter"), Respondent received notices that the 2004 Form 5500 contained deficiencies, including a missing IQPA report. Respondent was given 30 days, respectively, to respond to the requests for clarification. (See Ex. 2 and 3). *Respondent did not respond to either of the 30-day letters with any reasonable excuse or by filing a compliant IQPA report or by attempting to cure any of the other cited deficiencies.*

Section 104(a) of ERISA and DOL Regulations 29 CFR § 2520.104(a) require that the plan administrator file an annual report with the Secretary of Labor within 210 days after the close of the plan's fiscal year. The Plan's fiscal year ended on December 31, 2004, therefore, a satisfactory annual report for that fiscal year was due on or before July 31, 2005. An annual report which is rejected under section 104(a)(4) of ERISA for a failure to provide material information will be treated as a failure to file an annual report unless a revised report satisfactory to the Department is filed within 45 days of the date of the Notice of Rejection ("NOR"). See ERISA section 104(a)(5). On December 1, 2006, the Department of Labor issued the NOR in this case. Ex. 4. *The Plan Administrator did not respond at all within the 45-day NOR period. The NOR contained an explicit warning that no extensions would be granted.*

The NOR, inter alia, specifically contains the following notice:

**“WARNING: Read this Notice carefully. YOU must file a written response within 45 days of the date of this Notice to avoid potential civil penalties authorized by Title I of ERISA. The law does not allow for extensions of time to respond to this Notice, therefore no extensions will be granted by the Department.”** (EBSA Ex. 4).

On January 29, 2007, EBSA issued a Notice of Intent to Assess a Penalty ("NOI") requesting submission of a satisfactory 2004 annual report for the Plan. The NOI proposed an \$86,500 penalty against Precision Wire for failure to file a satisfactory 2004 annual report. (EBSA Ex. 5). The January 29, 2007 NOI further advised Precision Wire that it had 35 days within which to submit a statement of reasonable cause—which requires setting forth the facts alleged as reasonable cause in writing and under penalty of perjury—for the failure to file a satisfactory 2004 annual report or why the penalties, as calculated, should not be assessed. The NOI, inter alia, specifically contained the following:

**“WARNING: Read this Notice carefully. YOU must file a written response within 35 days of the date to preserve your administrative rights. The law does not allow for extensions of time to respond to this Notice, therefore no extensions will be granted by the Department.”** (EBSA Ex. 5).

On or about March 5, 2007, Precision Wire submitted its Reasonable Cause Statement ("3/5/07 RCS" or "RCS #1") in response to the NOI. Respondent retained a third-party service provider, Main Street Benefits, Inc. ("Main Street") to assist in providing administrative services to the Plan in the preparation of the Form 5500. An auditing firm was retained to prepare the

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<sup>1</sup> Penalties accrue from the original due date not the extended filing date.

2004 audit pursuant to information submitted by Main Street. Main Street's sole proprietor, Ms. Valeri Stevens, submitted the 3/5/07 RCS on Respondent's behalf. Ms. Stevens asserted that Mrs. Edith Ondrasik, the mother to the Company's President and a member of the Plan Administrative Committee, died in September 2005. Stevens asserts that Mrs. Ondrasik's death interfered with normal business operations at Precision Wire.

Next, Stevens represented that Wells Fargo Bank, the Plan's asset custodian, was required to provide an itemized report which included an accounting of the participants' loans. Stevens relied upon the loan balances to prepare the Schedule H and was unable to prepare the Schedule H or obtain the Accountant's Opinion without them. Ms. Stevens alleges that Wells Fargo did not supply a record of the participants' unpaid loan balances. Therefore, the participants' loan balances had to be updated; consequently, Ms. Stevens updated the loan balances on over 100 participant loans. The counter-MSD further provides that, finally, Stevens asserted that in mid-December 2006, she was diagnosed with "walking pneumonia," which caused her to miss a lot of work. On March 5, 2007, Stevens sent the auditor the participant loan information, and the information needed for the Financial Statements and Schedule H. *The 3/5/07 RCS did not attach an amended 2004 amended Form 5000, with the required accountant's report.*

Based on the undisputed facts of this case, EBSA could have next issued a Notice of Determination ("NOD") assessing an \$86,500 penalty after March 5, 2007 for the Plan Administrator's continued noncompliance. Based on representations made by Stevens in the 3/5/07 RCS, OCA's Reasonable Cause Committee granted Respondent until March 28, 2007 to provide an acceptable IQPA report and to correct other deficiencies *for abatement purposes*. (See Ex. 11). On March 28, 2007 Respondent filed a compliant annual report for plan year 2004. Thereafter, on April 2, 2007, EBSA issued an NOD, assessing an abated penalty in the amount of \$6,000.00. EBSA determined that while there was reasonable cause to waive \$80,500.00 in penalties, there was no reasonable cause to waive \$6,000 of the intended penalty because the Plan Administrator failed to timely file the IQPA report and failed to respond to the NOR. Additionally, OCA concluded that missing records does not constitute reasonable cause. Ex. 11.

Accordingly, this matter is now before this Office pursuant to Precision Wire's request.

## II. CONCLUSIONS OF LAW

### A. *Legislative History and Purpose of ERISA's Annual Reporting Requirements*

As pointed out by EBSA, ERISA, as amended, 29 U.S.C. §§ 1001, *et seq.*, is a comprehensive statute adopted by Congress after careful study of employee benefit plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981). Its provisions are remedial in nature and were developed to carry out the vitally important purpose of protecting those plans. *Brink v. DaLesio*, 667 F.2d 420, 427 (4th Cir. 1981). See *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 929 (3d Cir. 1985); *Eaves v. Penn*, 587 F.2d 453, 457 (10th Cir. 1978); ERISA § 2, 29 U.S.C. § 1001.

Among the means employed to accomplish this purpose are the extensive reporting and disclosure provisions, which expanded upon the requirements of the predecessor Welfare and Pension Plans Disclosure Act (“WPPDA”). ERISA’s legislative history indicates that Congress considered the expanded reporting requirements in ERISA § 103 crucial “so that the individual participant knows exactly where he stands with respect to the plan.” Moreover, Congress believed that the reporting and disclosure requirements of ERISA § 103 were critical to ensuring that:

fiduciaries are aware that the details of their dealings will be open to inspection and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

Report No. 93-127 To Accompany S.4, April 18, 1973, pp. 27-28 reprinted in 3 U.S. Cong. & Adm. News 1974, pp. 4863-64.

EBSA argues that the annual report is the principal source of information and data available to the Secretary of Labor on the over 1 million plans, covering an estimated 60 million participants and managing assets in excess of \$1.5 trillion, that the Secretary is mandated to regulate under ERISA. The annual report is also the primary means by which the operations of plans can be monitored by participants, beneficiaries, and the general public.

*B. ERISA’s Annual Reporting Requirements and the Secretary’s Implementing Regulations*

A plan administrator, pursuant to ERISA §§ 101 and 104, 29 U.S.C. §§ 1021 and 1024, must complete and file the annual report within 210 days of the end of the plan year. The form and contents of the annual report are set forth in ERISA § 103, 29 U.S.C. § 1023. Paragraph (a)(23) specifies the requirements for an annual audit of an employee benefit plan and the report or opinion thereon to be performed by an IQPA, including the form and content of the required report or opinion.

ERISA § 104(a)(4) and (5), 29 U.S.C. § 1024(a)(4) and (5), authorizes the Secretary to reject annual report filings that do not comply with the requirements set forth in ERISA. Section 104(a)(5) provides that if the Secretary rejects a filing under § 104(a)(4) and a revised filing satisfactory to the Secretary is not submitted within 45 days of the rejection, the Secretary is empowered to, among other things, retain an IQPA on behalf of a plan (at the plan’s expense) to perform the required audit and report, bring an action for appropriate legal or equitable relief, or take other action authorized by Title I of ERISA.

Subsequent to the passage of ERISA, Congress recognized that there was no separate penalty mechanism in the Act to enforce compliance with ERISA’s annual reporting requirement with respect to plan administrators, and the options available under § 104(a)(5) were either impractical or insufficient. Accordingly, Congress added § 502(c)(2), 29 U.S.C. § 1132(c)(2), by means of § 9342(c)(2) of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203 (“OBRA”), for reports due after December 31, 1987 to provide that:

The Secretary may assess a civil penalty against any plan administrator of up to \$1,100 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4)..

In order to implement this broad mandate, the statute provides the Secretary with extensive regulatory, investigative, and litigation authority. ERISA § 505, 29 U.S.C. § 1135, states that the Secretary "may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title." Pursuant to this authority and the authority granted in § 104(a)(5)(D), 29 U.S.C. § 1024(a)(5)(D), and in OBRA § 9342(d), the Secretary, following passage of § 502(c)(2) in 1987 and in compliance with 5 U.S.C. § 554 of the Administrative Procedures Act, promulgated regulation 29 C.F.R. § 2560.502c-2, which sets forth the administration and procedures governing the assessment of civil penalties under § 502(c)(2).

Regulation 29 C.F.R. § 2560.502c-2 defines, among other things, the scope of application of § 502(c)(2); the manner in which the penalty amount to be assessed is determined; and the procedures for considering reasonable cause for failure to file or why the penalty as calculated should not be assessed, as well as appeals of decisions on reasonable cause. The first step generally is the issuance of a Notice of Rejection, setting forth the reporting deficiencies and providing the plan administrator with the 45-day grace period specified in ERISA § 104(a)(5) within which to submit a revised filing satisfactory to the Secretary in order to avoid assessment of a civil penalty.

If no satisfactory filing is received within the prescribed time frame, then the next step is the issuance of a Notice of Intent to Assess a Penalty ("NOI"), setting forth the reporting deficiencies and the intended penalty as calculated. The NOI also states that the Plan Administrator may file a Statement of Reasonable Cause explaining any mitigating circumstances and all alleged facts as to why the penalty, as calculated, should be reduced or not assessed. Under 29 C.F.R. § 2650.502c-2(e), the Secretary may waive or reduce the assessed penalty upon a showing that the plan administrator has complied with the reporting requirements of the Act or that there are mitigating circumstances regarding the degree of willfulness of non-compliance.

Paragraph (I) provides that failure to file such a statement within the 35 day period specified in paragraph (c) shall be deemed a waiver of the right to appear and contest—and an admission of—the facts alleged in the Notice of Intent, which Notice shall then become a final order of the Secretary within the meaning of 5 U.S.C. § 704. Paragraphs (g) and (h) provide for a Notice of Determination on a statement of reasonable cause and opportunity to seek an administrative law judge hearing within 30 days of service of a Notice of Determination—for those cases where there is a proper filing of a statement of reasonable cause in compliance with paragraph (e).

The penalty levels established by the Secretary include the following categories: (1) \$300 per day to a maximum of \$30,000 per year for failure to file an annual report, (2) missing or deficient accountant's report, \$150 per day to a maximum of \$50,000<sup>2</sup>; (3) missing or deficient

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<sup>2</sup> In this case, among other things, Respondent's 2004 plan year filings were deficient without the accountant's report or IQPA report from August 1, 2005 through March 26, 2007 or for approximately 611 days. Respondent's

financial reporting items, \$100 per day to a maximum of \$36,500; (4) missing or deficient other reporting items, \$10 per day to a maximum of \$3,650. These levels are intended to reflect the relative materiality of the reporting failures and, individually and in total, are far below the maximum penalty level, \$1,100 per day, that the Secretary is authorized to assess under § 502(c)(2). Penalties are assessed from the day after the date that a proper report is due (without regard to extensions) to the date on which an annual report satisfactory to the Secretary is filed. Amounts in each category are capped at the equivalent of a year's penalty period to compensate for delays that may occur during the process that are not within the control of the respondent, and penalty accruals are tolled pending the process. See 29 C.F.R. § 2560.502c-2(b). Within this context, the Secretary's ERISA reporting enforcement program commenced in 1990 beginning with annual reports due for the 1988 plan year.

### III. DISCUSSION

As the undisputed facts and exhibits demonstrate, the Secretary's abated penalty assessment was appropriate. Respondent had numerous opportunities to cure the IQPA deficiency before any penalty was assessed. Furthermore, despite the warnings for no extensions of time, EBSA granted Respondent until March 28, 2007 to produce a compliant report by filing the IQPA report with the amended return. Therefore, Respondent received an additional 23-day benefit of an abated penalty rather than the assessment of the entire penalty which could have been assessed on March 5, 2007.

As EBSA points out, there are no challenges to the service of the Notices issued by EBSA. Nor can Respondent show that EBSA did not observe its own procedures or that the Respondent was not afforded all procedural opportunities available under the statute and regulations to cure the filing deficiencies without incurring a penalty.

There is no dispute between the parties that the Plan is an employee benefit plan covered by ERISA pursuant to 4(a), 29 U.S.C. § 1003(a). There is no dispute that Respondent was on notice that it would need to file a satisfactory amended 2004 annual return with an IQPA report, in order to avoid assessment of the entire \$86,500 penalty.

The legislative history and statutory provisions of ERISA make clear that the filing of an annual report is central to ERISA's monitoring and enforcement scheme. Respondent's failure to file a compliant report is a material reporting failure by any definition of the term "material."

Respondent simply argues that it should not be required to pay the \$6,000 abated penalty because the Plan Administrator encountered obstacles associated with illness, death, and difficulty in gathering information for the audit. Respondent mistakenly compares these obstacles of limited duration to an act of god like a hurricane to excuse the long periods of time where there was absolutely no attempt by the Plan Administrator to respond in good faith to EBSA's December 14, 2005 or February 8, 2006 request letters or the December 1, 2006 NOR. Instead, I find that Respondent acted with willful negligence in failing to comply with the filing requirements associated with its 2004 Plan year.

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penalty exposure here is at least \$50,000.00, the maximum amount for failing to file a timely accountant's report (611 days X \$150 per day = \$91,650.00).

Respondent's arguments do not demonstrate "reasonable cause" to further abate the assessed penalty. For the reasons that follow, I reject Respondent's arguments, uphold EBSA's abated penalty assessment, and order Respondent to pay the abated \$6,000 penalty.

A. *EBSA'S Determination to Assess a Penalty Should Be Upheld*

EBSA followed the statute as well as the procedures, guidelines and regulations for assessing the abated penalty in this matter. As stated in the Notice of Determination, the materially abated penalty was assessed because no reasonable cause was shown for the failing to file an acceptable report with the original filing or to timely correct the deficiency prior to the expiration of the 45-day NOR period. (See Ex. 11).

Before the NOR was issued, EBSA sent two requests for additional information and clarification, dated December 14, 2005 ("1st 30-day letter") and on February 8, 2006 ("2nd 30-day letter"), to the Plan Administrator (not Ms. Stevens) regarding the missing material information, i.e. the IQPA report. See Ex. 2 and 3. Respondent failed to respond within 30 days. If Respondent was experiencing problems complying with ERISA's filing requirements, it should have at least attempted to alert EBSA of its problems or designated a responsible individual to contact EBSA in response to the request letters. The Department of Labor then issued the NOR on December 1, 2006, to which Respondent also failed to respond within 45 days of the date of the NOR. Respondent's 2004 Form 5500, with an extension, was due on or about October 15, 2005. See ERISA § 104(a) (stating that annual reports are due within 210 days of the close of the reporting period). On March 28, 2007, nearly two years after the 2004 annual report was due, Respondent filed a compliant report for the 2004 plan year.

Respondent argues that it should not be required to pay the abated penalty because in September 2005, Mrs. Edith Ondrasik, Plan Administrative Committee member and the mother of Precision Wire's President died. This argument fails because Precision Wire should have prepared to file its 2004 Form 5500 prior to September 2005. Without an extension, the 2004 Form 5500 filing would have been due July 31, 2005. However, on July 11, 2005, before the original filing deadline, Precision Wire filed for extension, extending its filing deadline to October 15, 2005. Even considering that Mrs. Ondrasik's death caused sufficient disruption to file the IQPA report by October 15, 2005, Respondent's received sufficient notices of the possibility of imposed penalties such that a compliant report should have been filed in response to the two request notices in December 2005 and February 2006 and/or the NOR. If Respondent had properly monitored its service providers, then they would not have been subject to any assessed penalties. Additionally, Ms. Stevens fails to explain how Mrs. Ondrasik's death affected Main Street's ability to obtain participant loan balances and Schedule H information to forward to the auditors, especially when the information was maintained by Wells Fargo.

In mid-December 2006, Ms. Stevens became ill with "walking pneumonia." In the March 5, 2008 reasonable cause statement, Ms. Stevens claims that her illness prevented the Plan Administrator from responding to the NOR because certain information, needed by the Plan Administrator to respond, was in Ms. Stevens' possession. (See Ex. 6). Once again, Ms. Stevens' excuses for why Respondent failed to obtain a compliant IQPA report and provide Schedule H information fail to demonstrate sufficient reasonable cause for a total waiver of the penalty.

Respondent and Ms. Stevens were aware of Precision Wire's noncompliance and its obligation to file an amended 2004 Form 5500, with a compliant audit for an entire year before Ms. Stevens became ill. On December 14, 2005, fewer than two months after the deficient 2004 Form 5500 had been filed, EBSA sent Precision Wire its 1st 30-day letter. (Ex. 2). Neither Respondent nor Ms. Stevens submitted a written response or filed the required unqualified audit. Again, on February 8, 2006, EBSA issued Precision Wire a 2nd 30-day letter. (Ex. 3). No response was submitted by Precision Wire or Ms. Stevens. When the NOR (Ex. 4) was issued on December 1, 2006, providing an additional 45 days to come into compliance, Ms. Stevens was diagnosed with walking pneumonia. At this point, Respondent had over 105 days to come into compliance before a penalty was issued; but it failed.

Finally, Ms. Stevens alleges that a corrected report was not timely filed because the records needed to complete the 2004 Form 5500 were not made available from Wells Fargo Bank, the bank trustee. Neither of the Reasonable Cause Statements discloses when Ms. Stevens and/or Respondent requested the participant loan records. Nor does either Statement provide information on why Respondent continued to retain an asset custodian that had not provided participant loan balances since 1997. Pursuant to Ms. Stevens' allegation, during her illness, she had to manually reconstruct unpaid participant loan records going back to 1997 (3/5/07 RCS Ex. 6, p. 2) because the bank trustee would not provide the needed information. I find that Ms. Stevens and Respondent had ample time to obtain participant loan information before the audit report was initially due. The fact that Respondent failed to obtain this material information before the DOL notices were issued demonstrates its willful negligence and failure to properly administer the Plan.

It is disingenuous for Respondent to argue that EBSA erred in assessing an abated penalty especially when EBSA considered the circumstances and made an exception in assessing the final penalty. Even when reviewing all the circumstances in favor of Respondent, the Plan Administration and Ms. Stevens have failed to demonstrate sufficient reasonable cause for a complete penalty waiver. All parties knew or should have known of ERISA's reporting and disclosure provisions, as well as all statutory deadlines for a compliant filing. No reasonable cause is found for ignoring pertinent ERISA's provisions or almost all of the DOL's Notices. The Department followed the statute as well as the procedures, guidelines and regulations for assessing the penalty in this matter. As stated in the Notice of Determination, the \$6,000 penalty was assessed because no reasonable cause was shown for failing to attach a Schedule H and IQPA Accountant's Opinion to the 2004 annual report. It is undisputed that Respondent did not come into reporting compliance until March 28, 2007, even though the report was due at the time of the October 2005 filing of the 2004 Form 5500.

Prior to issuing the Notice of Determination, EBSA sent sufficient notices providing opportunities to comply with the annual reporting requirements and avoid the full penalty. Additionally, in consideration of the Respondent's reasonable cause statements, EBSA exercised its discretion to find reasonable cause to accept the filing of a compliant IQPA report 23 days after the NOI response was due. Respondent received the benefit of this extension and therefore was assessed an abated penalty rather than the assessment of a full penalty of \$86,500. Respondent's failure to file a timely, compliant annual report does not demonstrate either good faith or diligence in the performance of its responsibilities as plan administrator.

For the reasons set forth above:

**IT IS ORDERED** that EBSA's motion for summary decision is **GRANTED** and Respondent's motion for summary decision is **DENIED**.

**IT IS FURTHER ORDERED** that EBSA's determination that Respondent be assessed \$6,000.00 in penalties is **AFFIRMED** and Respondent shall immediately pay the assessed \$6,000.00 abated penalty.

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GERALD M. ETCHINGHAM  
Administrative Law Judge

*San Francisco, California*

**NOTICE OF APPEAL RIGHTS:** Pursuant to 29 CFR § 2570.69, a notice of appeal must be filed with the Secretary of Labor within 20 days of the date of issuance of this Decision and Order or the decision of this court will become the final agency action within the meaning of 5 U.S.C. § 704.