

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

March 28, 2017

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

M-CLASS MINING, INC.,
Respondent

M-CLASS MINING, INC.,
Contestant

v.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2015-686
A.C. No. 11-03189-390047

Docket No. LAKE 2016-55
A.C. No. 11-03189-394304

Mine: MC #1

CONTEST PROCEEDINGS

Docket No. LAKE 2015-186-R
Order No. 9033167; 12/05/2014

Docket No. LAKE 2015-185-R
Order No. 9033166; 12/05/2014

Mine: MC #1

ORDER

Before: Judge Feldman

The captioned consolidated civil penalty and contest proceedings are before me upon petitions for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C. § 815(d). The Secretary of Labor seeks to impose a total civil penalty of \$133,000.00 for 104(d)(2) Order Nos. 9033166 and 9033167, which allege M-Class Mining, Inc.’s (“M-Class”) failure to timely withdraw miners from a working section after the malfunction of a ventilation fan, in violation of 30 C.F.R. § 75.313(a)(3) and 30 C.F.R. § 75.313(c)(1), respectively. These orders were issued by the Mine Safety and Health Administration (“MSHA”) on December 5, 2014.

On April 27, 2016, Docket Nos. LAKE 2015-686 and LAKE 2015-185-R were stayed based on the parties’ representation that the Secretary had initiated an investigation to determine whether to initiate a personal liability case pursuant to the provisions of section 110(c) of the Mine Act. The stay was to be lifted upon completion of the Secretary’s investigation.

Given the Secretary's failure to complete his section 110(c) investigation during the six months following the issuance of the stay, on September 14, 2016, an order was issued requiring the Secretary to advise, on or before November 10, 2016, whether he had initiated a 110(c) proceeding for consolidation, or alternatively, whether he had declined to bring any relevant 110(c) actions. Thereafter, the Secretary moved to consolidate the captioned civil penalty matters in Docket Nos. LAKE 2015-686 and LAKE 2016-55 with the relevant contest matters in Docket Nos. LAKE 2015-185-R and LAKE 2015-186-R. The captioned matters were consolidated pursuant to the Secretary's request on December 12, 2016, at which time the Secretary was granted an extension, until January 25, 2017, to comply with the September 14 order.

As the Secretary failed to comply with the January 25, 2017, deadline, on February 8, 2017, the Secretary was Ordered to Show Cause why the captioned matters should not be dismissed for a failure to prosecute. On February 9, 2017, the Secretary responded, asserting that he had failed to comply with the January 25 deadline "because the Secretary had neither 'initiated a relevant 110(c) proceeding' nor had the Secretary 'declined to bring any relevant 110(c) actions.'" The Secretary further requested that the stay remain in effect pending the ongoing 110(c) investigations.

The reasonable time period for filing a section 110(c) action has been previously addressed in a Commission proceeding:

Section 105(a) of the Act provides that "[i]f, 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 ... of the civil penalty proposed to be assessed ... for the violation cited" Section 110(c) is silent regarding when an individual respondent must be notified of a proposed penalty assessment. However, since penalty assessments against individuals brought under § 110(c) arise from the same inspections as penalty assessments against operators, it would logically follow that the reasonable time requirement [referred to in] § 105(a) should apply to penalty assessments brought under § 110(c).

Brinson, et al., employed by Kentucky-Tennessee Clay Co., 35 FMSHRC 1463, 1465 (May 2013) (ALJ Tureck) (citations omitted). Thus, it has been held that the provisions of section 105(a), and its apparent applicability to section 110(c) cases, require the Secretary to file a petition for assessment of civil penalty within a "reasonable time" *after termination of an investigation*. However, the Secretary has identified 18 months as the operative reasonable time period for filing civil penalty petitions in 110(c) cases, computed from the date of the subject citation or order, which in this case is December 5, 2014, rather than the date of the completion of the 110(c) investigation. See I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, § 110(c) (2012).

Specifically, MSHA's Program Policy Manual provides:

Investigative timeframes have been established to help ensure the timely assessment of civil penalties against corporate directors, officers, and agents. Normally, such assessments will be issued *within 18 months from the date of issuance of the subject citation or order*. However, if the 18 month timeframe is exceeded, [the Compliance and Investigation office ("TCIO")] will review the case and decide whether to refer it to the Office of Special Assessments for penalty proposal. In such cases, the referral memorandum to the Office of Special Assessments will be signed by the Administrator.

Id. (emphasis added).

I recognize that the Secretary's obligation to initiate a 110(c) proceeding within a reasonable period of time is not jurisdictional. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (holding that the "reasonable time" provision for filing petitions for civil penalty in the Mine Act is intended to "spur the Secretary to action," rather than to confer rights on litigants that will limit the scope of the Secretary's authority). However, the Secretary's discretion to initiate 110(c) proceedings in a timely manner is not unfettered. Here, approximately 27 months have passed since the issuance of the subject violations during which time witnesses may have become unavailable and memories may have faded. However, I will reluctantly provide the Secretary with an additional reasonable period of time to complete his investigation.

ORDER

In view of the above, **IT IS ORDERED** that the Secretary must *initiate, on or before August 31, 2017* (32 months after the issuance of the underlying citation), a relevant 110(c) proceeding, or advise the undersigned that he has declined to do so. In furtherance of the efficient utilization of the Commission's resources,¹ should the Secretary fail to meet this deadline, I will entertain a motion to dismiss the *captioned proceedings* against M-Class Mining, Inc., for failure to prosecute.



Jerold Feldman
Administrative Law Judge

¹ The consolidation of any relevant 110(c) proceeding with the captioned civil penalty proceedings is an essential means of avoiding wasteful and duplicative adjudication. For the principle of collateral estoppel would not preclude a 110(c) litigant's right to a *de novo* 110(c) hearing despite a prior adjudication of the civil penalty proceeding brought against the mine operator.

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