

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 16, 2018

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

v.

FRED THOMPSON, formerly employed  
by, FORTUNE REVENUE SILVER  
MINES, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2018-51-M  
A.C. No. 05-03528-450246 A

Revenue Mine

**ORDER DENYING MOTION TO DISMISS**

Before: Judge Manning

This case is before me under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820 (the “Mine Act”). The Secretary proposed civil penalties against Fred Thompson, the former mine manager of the Revenue Mine, and Thompson timely contested the penalties. The Secretary proposed a civil penalty of \$3,000 for the alleged violation set forth in section 104(d)(1) citation No. 8831660 and a civil penalty of \$3,400 for the alleged violation set forth in section 104(d)(1) order No. 8831661.<sup>1</sup> The citation and order were issued on July 12, 2015 and the Secretary proposed the penalties in this case on October 10, 2017.

The underlying citation and order were issued to Fortune Revenue Silver Mines, Inc., the operator of the Revenue Mine in July 2015. In August 2015 or shortly thereafter, as a result of Fortune Revenue’s default on obligations to its creditors, Ouray Silver Mines, Inc. (“OSM”), assumed operator status and contested the citation and order. By order dated March 14, 2018, I approved the motion to approve settlement filed by the Secretary in OSM Docket No. WEST 2016-43-M. In the settlement, OSM agreed to pay a reduced penalty for the citation and order. The Revenue Mine has not been operating (i.e. not producing ore) since OSM assumed ownership of the mine.

On or about February 21, Thompson filed a motion for summary decision in this case. I construe the motion as a motion to dismiss. In the motion, Thompson maintains that the Secretary’s delay in prosecuting this case has prejudiced his ability to defend himself.

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<sup>1</sup> The citation alleges a violation of section 57.8529. The citation states, in part, that the operator failed to ensure that the auxiliary ventilation fan in the Virginus South Decline was moving clean air into the active workings. The order alleges a violation of section 57.5002. It states, in part, that the operator failed to determine the adequacy of its ventilation control measures in the underground workings.

Specifically, since Fortune Minerals is no longer the owner or the operator of the mine and other managers/operators have become involved with the operation of the mine, essential documents that were in the possession of Fortune Minerals at the time of the writing of the citations such as written company policies, gas meter logs (both electronic and paper), mine maps, safety documentation, safety meeting sign in sheets, shift logs, shift instructions to the miners, meeting minutes and engineering calculation sheets are no longer available or have been otherwise irretrievably lost or disposed of making them unavailable for the preparation of an adequate defense. In addition to the physical documents that would be essential to the preparation of Respondent's defense, e-mails, e-mails with attachments or other electronically transmitted documents that are of equal importance have similarly been irretrievably lost, deleted or have become inaccessible. Also of equal importance to the preparation for trial is that of the interviews of potential witnesses.

The net of the Fortune default has resulted in all of the miners in the employ of Fortune Minerals being laid off and have scattered in pursuit of other employment opportunities. This scattering of potential witnesses combined with the lengthy delay created by MSHA's handling of the investigation following the lay-off has precluded Respondent from finding any such witness that has direct knowledge of with this matter. In an attempt to locate any such witness, the respondent has utilized methods such as social media and "Google" searches or telephone calls to numbers that the Respondent had following his departure from the employ of Fortune Minerals. These methods have proved fruitless in the location of potential witnesses thus impeding the Respondent from assembling an adequate defense.

Motion at 2. Thompson recognizes that the passage of time alone is not sufficient to warrant the dismissal of a case against the agent of a mine operator, but he argues that the combination of a lengthy delay and a showing of actual prejudice against the agent should result in a dismissal of the case.

The Secretary maintains that the penalty petition in this case was filed within a reasonable time. The penalty assessment was filed about two years and three months after the subject citation and order were issued. The Secretary argues that "Congress did not intend to authorize the Commission to vacate penalties for failure to propose a penalty within a *reasonable time* as determined by the Commission." Sec'y Opposition at 4 (emphasis in original). The Mine Act does not "prescribe any consequence if the Secretary fails to propose a penalty 'within a reasonable time.'" *Id* at 5. Because the assessment of a penalty for a violation of the

Secretary's health and safety standards is mandatory, the Commission is "not authorized to refuse to assess" a penalty for a violation. *Id.*

The Secretary further argues that his delay in assessing a penalty was not unreasonable in this case. In July 2015, MSHA started its investigation into a possible agent violation against Thompson. Respondent and other witnesses were interviewed by MSHA in September 2015 and Thompson submitted a written response to questions posed by MSHA in October 2015. In December 2015, MSHA notified Thompson that it intended to bring a civil penalty case against him under section 110(c) of the Mine Act. Thompson requested a conference, which was granted, and he submitted a second written position statement to MSHA in January 2016. In October 2017, MSHA's Office of Assessments issued a Proposed Assessment against Thompson proposing a civil penalty of \$6,400.

"Dismissal of cases . . . is strongly disfavored and, 'regardless of how important procedural regularity may be, it is subservient to the substantive purpose of the Mine Act in protecting miners' health and safety.'" Sec'y Opposition at 6 quoting *Long Branch Energy*, 34 FMSHRC 1984, 1991 (Aug 2012). Commission judges have denied motions to dismiss where the section 110(c) assessments were issued for even longer time periods than is present in this case.

The Secretary also argues that Thompson has not demonstrated that it has been prejudiced by the delay. He maintains Thompson "only speculates as to the possibility of prejudice." Sec'y Opposition at 7. The Secretary argues that Thompson has not specified why the information he believes to be lost is necessary for his defense with respect to the specific allegations contained in the citation and order. In addition, the Secretary believes that MSHA may have much of the information he needs. At the Secretary's request, the safety manager for OSM searched for and located documents from 2015 that directly relate to the citation and order at issue. Finally, Thompson has not identified the witnesses he is unable to locate and how the failure to find them is prejudicial to his defense. This case is in the preliminary stages and it would be premature to grant a motion to dismiss.

I permitted Thompson to reply to the Secretary's opposition. He presented several facts that he believes demonstrate that he has been prejudiced by the Secretary's delay in bringing this case. Specifically he points out that: (1) all miners that were working at the mine were laid off some time ago and he has been unable to locate them; (2) two miners that worked in the area of the mine cited by MSHA have passed away; and (3) because Fortune Revenue is no longer the owner or operator of the mine, essential documents have been destroyed making them unavailable for the preparation of an adequate defense. Although the Secretary asserts that MSHA may be in possession of critical documents, the Secretary has not produced them to Respondent and has not even represented that MSHA actually has the documents in question.

### ANALYSIS

I find that I must deny Thompson's motion at the present time but, as this case progresses, the issue whether the Secretary's delay in prosecuting this case has prejudiced

Thompson's ability to defend himself may need to be revisited. As the Secretary states, this proceeding is in a preliminary stage.

Some of the Secretary's arguments can be dismissed quite easily. The Secretary, citing a case under the jurisdiction of the Securities and Exchange Commission, asserts that he has five years to prosecute cases under the Mine Act. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1219 (2013) (citing 28 U.S.C. § 2462). I reject this argument without further discussion, in part because the Commission has developed its own jurisprudence in analyzing the timeliness of the Secretary's actions under the Mine Act.

I also reject the Secretary's argument that the Commission does not have the authority to dismiss a penalty case upon a motion of the respondent because the Mine Act requires that a penalty be assessed for every violation of the Secretary's health and safety standards. The Secretary asserts that had Congress intended the Commission to have the authority to dismiss cases that are not prosecuted within a reasonable time "it would have clearly indicated such result." Sec'y Opposition at 5. I believe that it is clear that Congress did not contemplate that the Secretary would take years or even a half a decade to assess penalties under the Mine Act. The legislative history of the Mine Act is instructive on this issue. It stresses the need to adjudicate and collect penalties as quickly as possible. "To be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency." S. Rep. No. 95-181, at 43 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 631 (1978). "[A] long delay in assessment and collection of civil penalties does not encourage operator compliance with the Act and its standards." *Id.* at 632. Thus, Congress did not include a specific provision authorizing the Commission to dismiss a case if the Secretary unreasonably delays filing a penalty petition because it made clear that encouraging compliance with safety standards requires that the penalty be assessed promptly.

In this instance, the Secretary provided a reasonable explanation for its actions between July 12, 2015, the date the citation and order were issued, and January 2016, when Thompson submitted additional information. The Secretary did not provide an explanation for the time between January 2016 and October 11, 2017, the date MSHA issued the proposed penalty assessment. I expect that that during much of that time the case was being reviewed by MSHA's Technical Compliance and Investigation Office (TCIO), which is the black hole of MSHA. TCIO typically takes an extraordinarily long time to review the recommendations of the applicable MSHA district office in cases brought under section 110(c) of the Mine Act.

Nevertheless, I find that adequate cause existed for the delay. The 110(c) investigation was commenced less than one month after the citation and order were issued and a proposed penalty was assessed a little over two years after that. That is relatively quick for MSHA. It appears that as soon as the investigation was completed, the penalty was promptly proposed.

I also find that Thompson has not demonstrated that he was prejudiced by the delay in this matter. I have previously explained that "Respondent's showing of prejudice must be 'real or substantial' and 'mere allegations of potential prejudice or inherent prejudice should be rejected.'" *Dino Trujillo*, 35 FMSHRC 1485, 1487 (May 2013) (ALJ) (quoting *Long Branch*

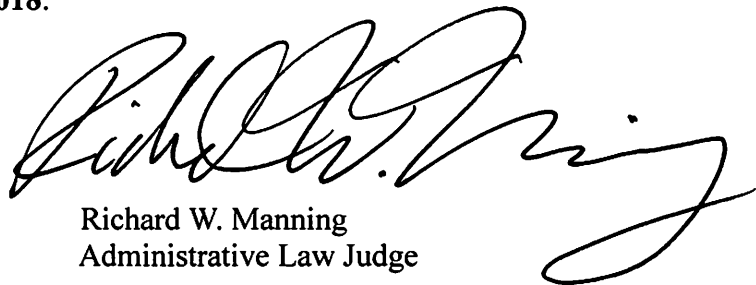
*Energy*, 34 FMSHRC 1984, 1991-93 (Aug. 2012). As noted by the Secretary, discovery has not begun and neither party has yet exchanged any records. I agree with the Secretary that, given the preliminary stage of this case and the fact that discovery has not yet commenced, Respondent has alleged only potential prejudice and has not demonstrated actual prejudice. Discovery will facilitate the exchange of information which may allow Thompson to secure records needed for his defense and the location of individuals he has not yet been able to find. Dismissal is an extreme remedy and is disfavored without a strong showing of actual prejudice.

I recognize that Thompson is in a difficult position given that Fortune Revenue is no longer the mine operator, critical documents may no longer be readily available to him, and key witnesses may have passed away or may not be found. I am denying the motion to dismiss at the present time because it is not entirely clear whether Thompson will be able to overcome these obstacles during the discovery phase of the case. In his opposition to Thompson's motion, the Secretary stated that, as part of its investigation, MSHA gathered documents that are relevant to this case including "manager meeting minutes, emails, shift reports, and 5-point cards submitted by miners." Sec'y Opposition at 7. In addition, counsel stated that, at the Secretary's request, OSM located documents "from 2015 that include such items as air sample records, pre-shift reports, daily safety meeting reports, mobile equipment inspection records, policies and procedures, 'SLAM' workplace inspection reports, etc." *Id.* at 8. The Secretary represents that these records "may very well exist in the files of MSHA and/or OSM." *Id.*

Given that Thompson is not represented by counsel, I hereby **ORDER** the Secretary to search for the documents described above and all other documents related to this case and to provide them to Mr. Thompson by no later than **April 26, 2018**. The Secretary shall provide a privilege log for any documents or parts of documents he is withholding due to an asserted privilege. If the Secretary believes that OSM is in possession of relevant documents not in the possession of MSHA, he shall so state in his response to this order. Finally, if the Secretary has information regarding the location of former Revenue Mine miners, he shall provide that information to Thompson as well.

**ORDER**

For the reasons set forth above, Respondent's motion to dismiss this case is **DENIED** but Respondent is free to renew the motion after discovery has been completed. The Secretary is **ORDERED** to provide the documents and information described in the above paragraph to Mr. Thompson by no later than **April 26, 2018**.

  
Richard W. Manning  
Administrative Law Judge

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