

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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November 18, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-631
Petitioner,	:	A.C. No. 46-09244-313287-A
	:	
v.	:	
	:	
ADAM WHITT, EMPLOYED BY INMAN	:	
ENERGY,	:	
Respondent.	:	Mine: Randolph Mine
	:	
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2013-632
MINE SAFETY AND HEALTH	:	A.C. No. 46-09244-313288-A
ADMINISTRATION (MSHA),	:	
Petitioner,	:	
	:	
v.	:	
	:	
EDWARD PAYNTER, EMPLOYED BY	:	
INMAN ENERGY,	:	
Respondent.	:	Mine: Randolph Mine

ORDER DENYING RESPONDENTS' MOTIONS TO DISMISS¹

Before: Judge Andrews

These cases are before me upon petitions for assessment of civil penalties under Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c). Respondents Adam Whitt and Edward Paynter have filed Motions to Dismiss these proceedings for failure to file the proposed assessments within a reasonable time after the issuance of the citation.² For the reasons that follow, the Motions to Dismiss are denied.

¹ Though these two dockets have not been consolidated, they are both resolved through this single Order because the legal issues addressed are identical.

² "Dismissal is proper under Fed.R.Civ.P. 12(b)(6) if the pleadings fail 'to state a claim upon which relief can be granted.'" *Orica USA, Inc.*, 32 FMSHRC 709, 710 (May 26, 2010) (ALJ).

I. Procedural Background

On April 1, 2010, Mine Safety and Health Administration (MSHA) inspectors inspected Inman Mine as part of an E03 impact inspection. The inspectors issued 16 citations and orders. All of the orders were terminated within five days, and were contested by Inman. The orders were settled pursuant to a global settlement of former Massey Energy Company controlled mines in WEVA 2011-1934, *et al.* This settlement included over 1,000 dockets. A determination on the merits of the orders was not reached nor was there any admission of any violations of the Act or regulations by the operator.

Some time thereafter, MSHA initiated 110(c) investigations into possible agent liability for Whitt and Paynter. On January 23, 2013, the Technical Compliance and Investigation Office requested an assessment of proposed civil penalties against both agents, which indicated that the investigation had concluded. On February 4, 2013, MSHA issued civil penalties to Whitt totaling \$18,300.00 for three violations. On the same date, MSHA issued civil penalties to Paynter totaling \$26,900.00 for seven violations.

Respondents Whitt and Paynter filed the instant Motions to Dismiss on July 26, 2013.

II. Contentions of the Parties

The Respondents argue that MSHA failed to assess penalties within a reasonable time, and as a result these cases should be dismissed due to the unreasonable delay and resulting prejudice. The Respondents argue that the appropriate time frame to consider is from the issuance of the underlying citation or order until the 110(c) penalty assessments. According to that time frame, 1,041 days elapsed.

The Respondents cite the MSHA Program Policy Manual and the MSHA Special Investigations Handbook to show that MSHA requires 110(c) investigations to conclude within either 18 months or 7 months (depending on which internal guideline one is referencing.) They assert that MSHA had no adequate cause for the untimely filing because the underlying citations and orders did not involve a complicated series of events. Furthermore, they argue that they suffered prejudice in the form of faded memories, the sale of Inman and closure of the mine, the resulting destruction of property and records, and the dispersal of potential witnesses. Furthermore, the Respondents argue that public policy favors dismissal because delays hinder the protective purposes of the Mine Act.

The Secretary argues that the Mine Act is clear that the relevant time frame this Court must consider is from the conclusion of the investigation to the issuance of the penalty. The Secretary argues that if this Court were to adopt the Respondents' proposed time frame, it should find that the assessment of penalties was within a reasonable time for several reasons. First, the Supreme Court has ruled in other statutory settings that without explicit statutory language or clear congressional intent, such "reasonable time" language is intended "to spur the Secretary to action, not to limit the scope of his authority." Sec. Reply to Mot. to Dismiss at 3,

quoting *Brock v. Pierce County*, 476 U.S. 253, 265 (1986). In this instance, the Secretary argues that the legislative history and text of the Mine Act shows that there should be no penalty for an untimely assessment. The Secretary maintains that if any time limit is to be imposed on MSHA, it should be the general statute of limitations for civil penalty actions of five years articulated in 28 U.S.C. § 2462.

The Secretary further argues that the phrase, “reasonable time,” is ambiguous, and as such is deserving of deference. He points to the increased MSHA caseload and the nature of the investigation to show adequate cause, and argues that in this instance the Respondents have shown no actual prejudice.

III. Analysis

Section 105(a) of the Mine Act provides that MSHA should assess penalties within a “reasonable time,” stating:

If, after an inspection or investigation, the Secretary issues a citation or order under section 814 of this title, 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 under section 820(a) of this title for the violation cited...

30 U.S.C. § 815(a). Section 110(c), which is at issue in this case, has no such “reasonable time” requirement; however, § 105(a) time requirements are applied to § 110(c). *See e.g. Blevins*, 2008 WL 4190437 (Aug. 28, 2008) (ALJ).

Whereas the Respondents focused much of their attention on the phrase “reasonable time,” there is a predicate issue that may avoid the need to draw a line here on precisely how many months is unreasonable. Section 105(a) states that the time frame to be considered is from “after the termination of such inspection or investigation.” In § 110(c) cases, the reasonable time requirement comprehends the time between the termination of the investigation until the assessment of the penalty.

I fully concur with Judge Moran’s reasoning and conclusion in *Robert J. Silcox*, 34 FMSHRC 947 (Apr. 27, 2012) (ALJ). In that case, Judge Moran was faced with a similar issue and concluded that “there are distinct investigations for a section 104 matter and a 110(c) matter, the conclusion of any investigation associated with a section 110(c) matter is the only reasonable point in time to gauge the Secretary’s action.” *Id.* at 947.

Though the Commission has not yet addressed this precise issue, numerous decisions by other ALJs, as well as by the D.C. Circuit Court of Appeals, support this conclusion. *See e.g. Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256,261 (D.C. Cir. 2005); *Laurel Run Mining Co.*, 19 FMSHRC 437, 441 (Feb. 18, 1997) (ALJ) (“Rather, the operable time period in these cases is the ...period between completion of MSHA’s 110(c) investigation...and notification of the proposed penalties.”); *Trujillo*, 2013 WL 3152298 (May 13, 2013) (ALJ); *Christopher Brinson et al*, 2013 WL 3152293 at *3-4 (May 7, 2013) (ALJ) *Sedgman and David*

Gill, 28 FMSHRC 322 (June 2006). These decisions all note that it makes far more sense to begin counting at the conclusion of the § 110(c) investigation, rather than at the issuance of the underlying citation or order.

Respondents point to the Program Policy Manual and the Special Investigation Handbook as showing required guidelines for MSHA investigations. However, neither of these internal administration issues has the force and effect of regulation and thus they are not binding.³ The guidelines contemplate a time period before the proposed penalty assessment. Since I am of the opinion that the relevant time period is from the conclusion of the investigation to the proposed penalty, the question of application of the reasonable time requirement to delays from the date of a citation or order to the conclusion of an investigation will not be considered at this time.

Furthermore, deference must be granted to the Secretary's position in his brief that the time frame to be considered should begin only after the conclusion of the investigation. Courts have stated that although the Secretary's interpretation in a legal brief "is not a formalized statement of statutory interpretation of the sort that usual[ly] invokes *Chevron* deference," it should still receive deference. *Twentymile Coal*, 411 F.3d at 261 ("But because "in the statutory scheme of the Mine Act, the Secretary's litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a ... health and safety standard, [it] is therefore deserving of deference." *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir.2003) (quoting *RAG Cumberland Res. LP v. FMSHRC*, 272 F.3d 590, 596 n. 9 (D.C.Cir.2001) (quoting *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991))))). Certainly, in this case the "delay" of less than two weeks was reasonable.

While I am concerned about MSHA's protracted investigation in this matter, the Act does not appear to place the limits that Respondents argue in their briefs. Neither public policy nor the goals of the Act are achieved by dismissing these cases, because the ultimate purpose of the Act is "the health and safety of [the industry's] most precious resource—the miner." 30 U.S.C. § 801(a). Dismissing these cases, even in the context of MSHA's lengthy investigation, does not serve this purpose.

Having determined the appropriate time frame for consideration, I specifically find that:

- The thirteen days from the conclusion of the 110(c) investigation to the proposed penalty assessment did not violate the reasonable time requirement of Section 105(a) of the Mine Act; and,
- No actual prejudice to the Respondents has been established as resulting from

³ Indeed, in the section of the Special Investigations Procedures Handbook that Respondents cite, the timeframes contain the following caveat: "These timeframes are management goals and shall not be used for individual performance evaluations." Handbook No. PH05-1-4, 4-4 (Aug. 2005). If an individual at MSHA cannot be punished for missing one of the internal deadlines, it does not make sense to punish miners through strict enforcement of these deadlines.

this thirteen day period of time.

Therefore, Respondents' Motions to Dismiss are hereby **DENIED**.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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