# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 23, 2017

| | |
|---|---|
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 2016-44<br>A.C. No. 15-19217-390945 |
| v. | |
| ARMSTRONG COAL COMPANY INC.,<br>Respondent | Mine: Midway |

## ORDER CONTINUING STAY

Before: Judge Feldman

The captioned civil penalty proceeding is before me upon a petition 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 civil penalty of $8,893.00 for 104(d)(1) Citation No. 9042468, the single citation at issue, which alleges that Armstrong Coal Company Inc. ("Armstrong") violated the mandatory standard in 30 C.F.R. § 77.405(b). This mandatory standard prohibits the performance of work under raised equipment that has not been securely blocked into position. Citation No. 9042468 was issued on February 20, 2015, after the Mine Safety and Health Administration ("MSHA") determined that a hoisted dragline walking shoe bull gear was not secured during repairs.

In the interest of judicial economy and the Commission's limited resources, the captioned matters were stayed on March 9, 2016, 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 with the captioned civil penalty matter, or alternatively, whether he had declined to bring any relevant 110(c) actions.

In response to the September 14 order, on November 7, 2016, the Secretary reported that he had yet to decide whether to initiate a relevant section 110(c) proceeding. The Secretary's response was construed as a request to schedule the captioned civil penalty case for hearing without regard to whether a relevant 110(c) case would ultimately be filed.[1]

On January 30, 2017, Armstrong, citing judicial economy, sought continuation of the stay, arguing that "the same issues will be required to be tried multiple times" if a 110(c) action is brought subsequent to the scheduled hearing. *Mot. to Stay*, at 1 (Jan. 30, 2017).

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, 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, 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.

---

[1] This Order supersedes the November 14, 2016, Order Lifting Stay and Notice of Hearing.

*Id.* (emphasis added). Clearly, the Secretary cannot escape the adverse effects of laches if he unreasonably delays completion of an investigation for an exceptionally inordinate period of time.

Two years have now elapsed since the underlying citation was issued. I await the Secretary's determination as to whether an agent(s) of the corporate mine operator "knowingly authorized, ordered, or carried out" a violation of section 77.405(b) by permitting maintenance to be performed on raised equipment without it being properly secured. *See* 30 U.S.C. § 820(c). The Secretary has had ample time to arrive at this rather straightforward determination. Any significant further delay compromises the due process rights of potential 110(c) respondents given the potential unavailability and fading memories of witnesses.

The D.C. Circuit Court of Appeals addressed the consequences of the Secretary's delay in filing civil penalty petitions in *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005). The court determined 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 routinely confer rights on litigants that will limit the scope of the Secretary's authority. *Id.* at 261.

"Spur the Secretary to action." That is what I am seeking to accomplish. The Secretary's discretion in timely completing his investigation is not unfettered. The Commission long ago recognized that its "limited resources should [not] be squandered on separate proceedings involving common parties and to a great extent common facts and issues." *Energy Fuels Corp.*, 1 FMSRHC 299, 319 (May 1979) (dissenting opinion).[2] Consequently, during a February 16, 2017, conference call with the parties, I ordered that the Secretary must advise **on or before May 24, 2017** (27 months after the issuance of the underlying citation) whether he has *initiated* a relevant 110(c) proceeding, or that he has declined to do so. To ensure the efficient expenditure of the Commission's resources, during the telephone conference, I advised the parties that, should the Secretary fail to meet this deadline, I will reluctantly entertain a motion to dismiss the *captioned proceeding* against Armstrong for failure to prosecute.

In view of the above, **IT IS ORDERED** that Armstrong's motion to stay **IS GRANTED** and that the hearing in the captioned proceeding **IS CONTINUED** without date.

Jerold Feldman
Administrative Law Judge

---

[2] *Energy Fuels* concerned a mine operator's right to contest a violation prior to issuance of a petition for civil penalty. In such instance, the doctrine of *res judicata* would apply to a subsequent civil penalty proceeding, thus eliminating any duplication of efforts. Here, 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.

Distribution: (Regular and Certified Mail)

Schean Belton, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Marco M. Rajkovich, Esq., Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

/acp