FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 27 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS
v.	Docket No. VA 2018-0103 A.C. No. 44-07087-462566 A
JAMES C. SCOTT, employed by MILL BRANCH COAL CORP.,	Docket No. VA 2018-0104 A.C. No. 44-07087-462567 A
and	
DONNIE B. THOMAS, employed by MILL BRANCH COAL CORP., Respondents.	Mine: D-6 North Fork

ORDER TO SHOW CAUSE

Before: Judge Feldman

As discussed herein, the threshold issue is whether the approximate 36-month interim period, between the April 8, 2015, issuance of underlying Order No. 8178613 to Mill Branch Coal Corporation[1] ("Mill Branch") and the April 12, 2018, personal liability notification by the Secretary's Office of Assessments to James Scott and Donnie Thomas ("Respondents")[2] satisfies

[1] Mill Branch's liability for Order No. 8178613 was disposed of in an unpublished Decision Approving Settlement issued on August 3, 2016.

[2] Section 110(c) of the Act provides, in pertinent part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, . . . shall be subject to the same [liability for] civil penalties . . . that may be imposed [on a mine operator] . . .under subsections (a) and (d) of this section.

30 U.S.C. § 820(c).

the timeliness provisions of section 105(a) of the of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(a). The timeliness provisions of section 105(a) provide, in pertinent part:

> If, 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 by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation . . . .

Id. (emphasis added).

Although the statutory notification provisions apply to contests of civil penalties by operators, Commission judges have repeatedly applied the timeliness provisions of section 105(a) to cases of personal liability brought pursuant to section 110(c) of the Act. *Sec'y of Labor v. Brinson, employed by Kentucky-Tennessee Clay Co.*, 35 FMSHRC 1463, 1465 (May 2013) (ALJ) (citing *Reasor*, 34 FMSHRC 943 (April 2012) (ALJ); *Wayne Jones*, 20 FMSHRC 1267 (Nov. 1998) (ALJ); *James Lee Hancock*, 17 FMSHRC 1671 (Sept. 1995) (ALJ)).

The seminal case addressing the application of the timeliness provisions of section 105(a) is *Sec'y of Labor v. Twentymile Coal Company*, 411 F.3d 256 (D.C. Cir. 2005) ("*Twentymile*"). In *Twentymile*, the Court deferred to the Secretary's interpretation that the operable period for assessing timeliness is the time period between the completion of the Secretary's investigation and the notification of penalty assessment. *Id.* at 262. In concluding that the termination of an investigation, rather than the date of issuance of a citation, is the operative event for determining timeliness as contemplated by section 105(a), the Court relied on the abatement provisions of section 105(b)(1)(B) of the Act that provide that an operator is required to "achieve rapid compliance *after notification of a violation.*" *Id.*; 30 U.S.C. § 815(b)(1)(B) (emphasis added). In this regard, the Court reasoned:

> [g]iven that Congress included *the* [abatement] *response to the investigation* among the relevant criteria [for assessing a penalty contained in 30 U.S.C. § 815(b)(1)(B)], we cannot deem it plausible that Congress contemplated that any determination of the reasonableness of the time could begin before the determination could be made, that is, before the mine had an opportunity to respond to the order.

Twentymile, 411 F.3d at 262 (emphasis added).

The Commission has subsequently considered the effect of the *Twentymile* Court's reliance on the statutory provisions of section 105(b)(1)(B) in interpreting the timeliness provisions of section 105(a). *See Sec'y of Labor v. Sedgman*, 28 FMSHRC 322, 339-41 (June 2006) ("*Sedgman*"). The Commission noted that section 105(b)(1)(B) "clearly refers not to investigation reports, but rather to citations and orders, as it is the citation or order that supplies

an operator with 'notification of a violation,'" and should therefore be the starting point for assessing timeliness. *Id.* at n. 20 (Commissioners Suboleski and Young) (quoting 30 U.S.C. § 815(b)(1)(B)).

Consistent with *Sedgman*, the Secretary's Program Policy Manual ("PPM") recognizes that the issuance of the underlying citation or order is the starting point for determining whether the assessment of civil penalties in section 110(c) cases are timely. Specifically, the PPM states:

> 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* [to the operator] *of the subject citation or order*. However, if the 18 month timeframe is exceeded, TCIO [the Compliance and Investigation Office] 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.

MSHA, U.S. Dep't of Labor, PPM, Vol. I, at 42 (2012) (emphasis added).

In addressing the timeliness issue, it is noteworthy that the Commission has opined, "the Secretary is not free to ignore . . . time constraints . . . for any mere caprice, as that would . . . deny fair play to [respondents]" by exposing respondents to stale claims. *Sec'y of Labor v. Long Branch Energy*, 34 FMSHRC 1984, 1989 (Aug. 2012) ("*Long Branch*") (citing *Sec'y of Labor v. Salt Lake Cnty. Road Dep't*, 3 FMSHRC 1714, 1716 (July 1981)). However, the Commission noted that it "must balance concerns for procedural irregularity against the severe impact of dismissal on the Mine Act's penalty scheme." *Long Branch*, 34 FMSHRC at 1991. In this regard, the Commission stated:

> In order to achieve this balance, we clarify that "adequate cause" may be found to exist where the Secretary provides a non-frivolous explanation for the delay. The Secretary's excuse may not be facially implausible, and should be supported by evidence sufficient to establish that the delay did not result from "mere caprice" or through willful delay, intentional misconduct, or bad faith.

Id. (footnote omitted).

ORDER

Consistent with the above, the Secretary **IS ORDERED TO SHOW CAUSE** why the captioned 110(c) proceedings should not be dismissed because the April 12, 2018, issuance of the subject notifications of personal liability for proposed civil penalties, approximately 36 months after issuance of underlying Order No. 8178613, failed to comply with the reasonable

time provisions of section 105(a). Consistent with *Long Branch*, the Secretary should demonstrate "adequate cause" by providing a "non-frivolous explanation" for the 36-month delay. Specifically, the Secretary should address the following:

1. Underlying Order No. 8178613, issued on April 8, 2015, for an alleged violation of the accident notification provisions in section 50.10(d) which require an operator to immediately contact MSHA within 15 minutes after the operator knows, or should know, that a water inundation has occurred.[3] 30 C.F.R. § 50.10. Settlement of Mill Branch's liability for Order No. 8178613 was approved on August 3, 2016. *See* n. 1, *supra*. If the Secretary had sufficient information concerning the facts surrounding the cited violation to determine that settlement was appropriate in August 2016, the Secretary should provide a justification for why it took an additional 20 months to issue the subject notices of proposed penalties notifying the Respondents of their alleged personal liability under section 110(c).

2. The Respondents' personal liability for the proposed civil penalties is based on their alleged "knowing" violation of the accident reporting requirements contained in section 50.10(d). The propriety of personal liability requires determining: whether the Respondents were primarily responsible for notifying MSHA of the inundation within 15 minutes; the extent of the alleged delay; and whether there were any aggravating or mitigating circumstances. The Secretary should provide justification for why the investigation into these apparently non-complex questions of fact required approximately 36 months to complete.

3. The Secretary should provide the date of referral to the Office of Special Assessments for the personal liability penalty proposals in issue. If the date of referral is beyond the 18-month investigative time frame contained in the Secretary's PPM, the Secretary should explain the reason for the delay.

The Secretary may provide any additional information he deems relevant. **IT IS FURTHER ORDERED** that the Secretary shall provide responses to the above-requested information within 21 days of the date of this Order. The Respondents' may provide a response to the Secretary's submission within 14 days thereafter. Any procedural questions should be directed to my Law Clerk, Noah Meyer, at nmeyer@fmshrc.gov.

Jerold Feldman
Administrative Law Judge

[3] An "accident" is defined to include "[a]n unplanned inundation of a mine by a liquid or gas." 30 C.F.R. § 50.2(4).

Distribution (by certified mail):

Andrew R. Tardiff, Esq., U.S. Department of Labor, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22202 tardiff.andrew.r@dol.gov

Eric T. Frye, 1051 Main Street, Milton, WV 25541 eric.frye@blackjewel.us

Donnie B. Thomas, P.O. Box 1, Lejunior, KY 40849

James C. Scott, 3706 Turkey Creek, Inez, KY 41224

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