FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9956 / FAX: 202-434-9949

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RALPH W. DUSHANE, employed by CEMEX CONSTRUCTION MATERIALS OF FLORIDA, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2016-132-M A.C. No. 08-01287-402507A Mine: Brooksville South Cement Plant

ORDER DENYING DISMISSAL

Before: Judge Rae

This case is before me upon a petition for assessment of civil penalties filed by the Secretary of Labor against Ralph W. Dushane ("Respondent") in his capacity as an employee and agent of Cemex Construction Materials of Florida, LLC ("Cemex") under section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 820(c). Respondent has filed a motion to dismiss the petition due to the Secretary's delay in filing it.

Procedural Background

Following receipt of a hazard complaint in October 2012, the Mine Safety and Health Administration (MSHA) investigated Cemex's Brooksville South Cement Plant and issued two violations on November 5 and 7, 2012. Cemex and the Secretary resolved the two violations by reaching a settlement that was approved by a judge in December 2013. Meanwhile, on March 26, 2013, Respondent received a letter from MSHA informing him of MSHA's intent to assess penalties against him under section 110(c) of the Mine Act, which 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 civil penalties, fines, and imprisonment that may be imposed upon" the corporate operator. 30 U.S.C. § 820(c).

After a lengthy delay, the Secretary issued a proposed penalty assessment against Respondent on February 4, 2016. Respondent timely contested the proposed penalties. The Secretary filed a penalty petition with the Commission on April 14, 2016. Respondent subsequently filed his motion to dismiss.

Parties' Arguments

Respondent contends that the Secretary failed to provide notice of the proposed penalty "within a reasonable time after the termination of [the underlying] inspection or investigation," as required under section 105(a) of the Mine Act. 30 U.S.C. § 815(a). Respondent asserts that MSHA's internal guidelines set forth the Secretary's interpretation of what constitutes a "reasonable time" for assessment of a 110(c) penalty: 18 months from the date of issuance of the subject violation. *See* MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Vol. I, § 110, at 42 (2015) ("PPM"). In this case, approximately 38 months elapsed between the issuance of the subject violations in November 2012 and the assessment of the proposed penalties in February 2016. Respondent contends that the Secretary has failed to show adequate cause for this delay. Respondent further argues that he is prejudiced by the delay because there has been no formal discovery yet; the case against him is based primarily on the allegations of one other miner whom he has not yet had a chance to confront through cross-examination; and the lengthy delay will negatively impact his ability to obtain reliable evidence.[1]

In response, the Secretary first contends that the proposed assessment was issued within a reasonable time after termination of the underlying investigation because the investigation did not end until this matter was referred to the MSHA Office of Assessments on January 31, 2016. Thus, by the Secretary's count, it took just four days to issue the proposed assessment. This argument is predicated on the Secretary's view that the 110(c) investigation included not just the initial information-gathering phase at the MSHA district level during which witnesses were interviewed and documentary evidence was collected, culminating in the issuance of the March 26, 2013 letter notifying Respondent that MSHA was proposing to assess penalties against him, but also included the approximately 34 months during which MSHA's Technical Compliance and Investigation Office (TCIO) and the Office of the Solicitor (SOL) decided whether to refer the case to the Office of Assessments.

Alternatively, the Secretary contends that three years is a reasonable timeframe for the issuance of a 110(c) assessment given MSHA's workload and the logistics of coordinating among the various offices involved in the 110(c) assessment process. The Secretary asserts that the guidelines set forth in the PPM are not binding or determinative as to what constitutes a "reasonable time." Rather, the Secretary contends that his interpretation of "reasonable time" advanced in this litigation is entitled to *Chevron* deference. *See Chevron USA, Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). Finally, the Secretary argues that even if the time it took to assess a proposed penalty was unreasonable, Respondent has failed to show legally cognizable prejudice.

[1] Respondent also notes in passing that the penalty petition was filed 3 days beyond the deadline set forth in 29 C.F.R. § 2700.28(a), which provides that the Secretary must file a petition within 45 days of receiving a notice of contest. Respondent has submitted a USPS return receipt showing that an MSHA employee signed for the notice of contest on Friday, February 26, 2016. However, MSHA's internal date stamp on the copy of the notice that was submitted with the penalty petition indicates it was received on Monday, February 29. The Secretary contends that this was merely a clerical error. Because the 3-day delay was minimal and apparently was caused by a clerical error, I find that the delay does not justify dismissal of the petition.

Discussion

Determining whether a petition was filed in a "reasonable time" within the meaning of section 105(a) requires an analysis of the circumstances of each case, including "whether adequate cause existed for the Secretary's delay in proposing a penalty and …whether the delay prejudiced the [respondent]." *Sedgman*, 28 FMSHRC 322, 338 (June 2006). In *Long Branch Energy*, the Commission held that the Secretary can establish adequate cause merely by providing a non-frivolous explanation for his delay in filing. 34 FMSHRC 1984, 1991 (Aug. 2012). By contrast, in order to secure dismissal, the respondent must establish that the delay has resulted in actual prejudice – i.e., prejudice that is "real" or "substantial" (as opposed to "potential" or "inherent") and is "demonstrated by a specific showing." *Id.* at 1991-93. Although the respondent's burden is heavy and the Secretary's burden is light, the Commission has explained that "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." *Id.* at 1991. Consistent with this principle, Commission ALJs have overwhelmingly disfavored dismissal of 110(c) cases in the wake of *Long Branch* despite the Secretary's consistent substantial delays in completing 110(c) investigations and assessing penalties. *See, e.g.*, *Steve B. Rees*, 37 FMSHRC 1852 (Aug. 2015) (ALJ); *Scott Carpenter*, 36 FMSHRC 2311 (Aug. 2014) (ALJ); *Adam Whitt*, 35 FMSHRC 3487 (Nov. 2013) (ALJ); *Duffy, Inc.*, 35 FMSHRC 2291 (July 2013) (ALJ); *Christopher Brinson*, 35 FMSHRC 1463 (May 2013) (ALJ). *But see Steve Adkins*, 35 FMSHRC 1481 (May 2013) (ALJ) (disagreeing that *Long Branch* applies in 110(c) context, but still placing burden on respondent, as moving party, to show actual and meaningful prejudice unless petition was filed outside 5-year statute of limitations for federal civil suits).

The Secretary argues it took him a reasonable amount of time to file the petition because the special investigation had ended just four days beforehand. The idea that the length of the delay is calculated starting at the end of the special investigation is supported by precedent and by the language of section 105(a). *See, e.g.*, *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (stating that time to file petition begins at conclusion of accident investigation); *Steve B. Rees*, *supra* (extending this principle to a 110(c) investigation). I am less certain that it is reasonable for the Secretary to interpret "investigation" to include the period during which TCIO and SOL review the case before referring it to the Office of Assessments. The actual investigative work is already complete by then, yet the review period inexplicably lasted almost three years in this case, raising concerns about fairness to Respondent. *Cf. Dyno Nobel East-Central Region*, 35 FMSHRC 265, 267 n.2 (Jan. 2013) (ALJ) (noting that the Commission has not definitively resolved how to calculate the investigation period in 110(c) cases, but expressing concern that "because there is a potential for substantial delay in the initiation and conduct of a section 110(c) investigation, granting the Secretary carte blanche for that part of the process may well not comport with considerations of fair play and due process for individual respondents").

However, I need not decide whether to defer to the Secretary's interpretation of "investigation" because Respondent has not made a showing of actual prejudice. The violations at issue in this case were settled in 2013 and, as Respondent contends, the parties did not engage in discovery to preserve testimony. Four years have passed since the violations occurred. These two facts could very well prejudice Respondent's ability to find witnesses with any recollection

of the events. However, it is premature to make that determination now, as Respondent has not indicated whether there are any necessary witnesses who are physically unavailable or unable to recall the relevant events. Respondent has alleged only potential prejudice of the sort that inherently flows from delaying litigation.

I note that although the Commission has been extremely tolerant of the Secretary's habitual delays in filing 110(c) petitions, the Commission's most lenient decisions (such as *Long Branch*) came out several years ago when MSHA's case backlog was at historic levels. This has not been the case for more than a year. General references to MSHA's workload can no longer be accepted at face value as an excuse to spend in excess of three years processing a 110(c) case. Even if Respondent cannot show actual prejudice, I find such a lengthy delay raises questions about the reliability of any testimony that is presented, including the testimony of the investigator.

While Respondent is not entitled to dismissal at this time because he has not made a specific showing of actual prejudice, I will, however, entertain a renewed motion to dismiss before or at trial. In the event that Respondent, having had an opportunity to conduct full discovery, finds witnesses cannot be located or memories have indeed faded to the extent that he can demonstrate actual prejudice, dismissal may be warranted.

Priscilla M. Rae
Administrative Law Judge

Distribution:

Monica R. Moukalif, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street SW, Room 7T10, Atlanta, GA 30303

Christopher D. Pence, Esq., Hardy Pence PLLC, P.O. Box 2548, Charleston, WV 25329