

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 23 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

DISMISSAL ORDER

Before: Judge Feldman

The captioned proceedings, brought by the Secretary pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 (the "Act" or "Mine Act"), 30 U.S.C. § 820(c), concern whether James C. Scott and Donnie B. Thomas "knowingly" violated section 50.10(d) of the Secretary's regulations, cited in Order No. 8178613, issued to Mill Branch Coal Corporation ("Mill Branch"). Section 50.10(d) requires an operator to contact the Mine Safety and Health Administration ("MSHA") within 15 minutes after a water inundation has occurred.<sup>1</sup> 30 C.F.R. § 50.10(d). On April 12, 2018, the Secretary issued notices of civil penalty to Scott and Thomas for their alleged violations of section 50.10(d), 36 months after the April 8, 2015, issuance of underlying Order No. 8178613 to Mill Branch.<sup>2</sup>

<sup>1</sup> The provisions of section 50.10(d) require an operator to notify MSHA within 15 minutes of the occurrence of an accident. The definition of an "accident" in the Secretary's regulations includes "[a]n unplanned inundation of a mine by a liquid or gas." 30 C.F.R. § 50.2(4).

<sup>2</sup> The Petition for Assessment of Civil Penalty with respect to Mill Branch's liability for Order No. 8178613 in Docket No. VA 2016-0106 was filed with the Commission on April 5, 2016. The degree of an operator's negligence is a factor in determining the appropriate civil penalty. 30 U.S.C. § 820(i). The negligence of Scott and Thomas, as corporate agents, is imputed to Mill Branch. *Sec'y of Labor v. Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (citation omitted). The proposed civil penalty apparently was based, in significant part, on the alleged imputed negligence attributable to Scott and Thomas. 30 U.S.C. § 820(i). Order No. 8178613 was disposed of in an unpublished Decision Approving Settlement issued on August 3, 2016.

The timeliness provisions of section 105(a) of the Act 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 . . . .

30 U.S.C. § 815(a). Although the above statutory provisions require timely notification to mine operators of proposed civil penalties, the Secretary does not dispute that the timeliness provisions of section 105(a) also apply to the issuance of proposed civil penalties in personal liability cases brought pursuant to section 110(c) of the Act.

On March 27, 2019, the Secretary was ordered to show cause why the captioned 110(c) proceedings should not be dismissed. Order to Show Cause, 41 FMSHRC \_\_\_, slip op. at 3-4. Specifically, the Secretary was ordered to address whether the notices of personal liability for civil penalties issued to Scott and Thomas, 36 months after the underlying violation of section 50.10(d) occurred, complied with the reasonable time provisions of section 105(a) of the Act. The Order to Show Cause is incorporated by reference.

The Order to Show Cause, consistent with Commission case law and MSHA's Program Policy Manual ("PPM") concerning 110(c) cases, noted that the issuance of underlying Order No. 8178613 upon completion of the MSHA inspection on April 8, 2015, is the starting point for determining whether the Secretary issued the subject notices of personal liability within a reasonable time. *See Sec'y of Labor v. Sedgman*, 28 FMSHRC 322, 340 (June 2006) (holding that, when a citation or order is issued at the conclusion of an MSHA inspection, the starting point for assessing timeliness is the issuance of the citation or order); *See also* PPM, Vol. I, at 42 (2012). In addressing timeliness issues, the Commission has opined that the Secretary is not free to arbitrarily ignore reasonable time constraints as that would "deny fair play to operators" by "exposing operators to stale claims." *Long Branch Energy v. Sec'y of Labor*, 34 FMSHRC 1984, 1989 (Aug. 2012) ("*Long Branch*") (citing *Sec'y of Labor v. Salt Lake Road Department*, 3 FMSHRC 1713 (July 1981)). Consequently, the Secretary was ordered to demonstrate adequate cause by providing a non-frivolous explanation for why the subject notices of liability were issued 36 months after the issuance of Order No. 8178613.

In response to the Order to Show Cause, the Secretary relies on Supreme Court cases that apply the general five year statute of limitations for initiating civil proceedings, contained in 28 U.S.C. § 2642, as the relevant period for applying timeliness provisions in statutes other than the Mine Act. Sec'y's Resp. to the Order to Show Cause at 3-4. As the inundation occurred on April 7, 2015, the Secretary argues the timeliness provisions of section 105(a) have not been

violated, as the five year statute of limitation will not run until April 7, 2020. *Id.* However, the Commission has rejected the Secretary's reliance on Supreme Court case law as a basis for abrogating the Secretary's obligation to provide adequate cause in order to demonstrate that he has acted in a timely manner.<sup>3</sup> *See Long Branch*, 34 FMSHRC at 1986-89.

Alternatively, the Secretary avers that the reasonableness of the length of MSHA investigations is an enforcement prerogative that is not subject to Commission review. Sec'y's Resp. to the Order to Show Cause at 7-8. Thus, the Secretary contends that the period for determining reasonableness is the eight-day period that transpired between the referral of the investigation report to MSHA's Office of Assessments and the issuance of the subject notices of personal liability without regard to the 36-month investigation period that preceded it. Sec'y's Resp. to the Order to Show Cause at 4. The implications of this assertion, given the Secretary's disinclination to provide any explanation for the lengthy 36-month investigation, have been addressed by Judge Zielinski:

[B]ecause there is a potential for substantial delay in the initiation and conduct of section 110(c) investigations, 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. One judge has noted that in cases against individual respondents "concepts of fair play and due process must be even more carefully protected."

*Sec'y of Labor v. Dyno Nobel East-Central Region*, 35 FMSHRC 265, 267 n. 2 (Jan. 2013) (ALJ) (quoting *Curtis Crick*, 15 FMSHRC 735, 737 (Apr. 1993) (ALJ)). Rather, the Commission has stated that determining whether the timeliness provisions of section 105(a) are satisfied turns on "whether the delay is reasonable under the circumstances of each case." *Sec'y of Labor v. Sedgman*, 28 FMSHRC 322, 338 (June 2006).

The Secretary does not have the liberty to substitute his self-serving interpretation of the timeliness provisions of section 105(a) by relying on a five-year statute of limitation, or, by alternatively relying on a de minimis eight-day interim period in striking disregard of the preceding lengthy 36-month investigation. It is well settled that the Commission, and not the Secretary, has the delegated authority to "interpret the Mine Act and adopt a specific test or standards for adjudicating [procedural and substantive] charges arising thereunder." *Sec'y of Labor v. Berwind Natural Res. Corp., et al.*, 21 FMSHRC 1284, 1317 (Dec. 1999) (citations omitted); *see Long Branch* 34 FMSHRC at 1988; *see also* n. 3, *supra*.

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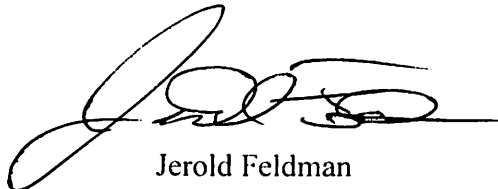
<sup>3</sup> The Commission's *Long Branch* decision referred to section 105(a) as the "basic framework" for requiring the Secretary to act in a timely manner. *Long Branch*, 34 FMSHRC at 1987. *Long Branch* concerned the Secretary's failure to file a petition for assessment of civil penalty within 45 days of receipt of a contest of a proposed civil penalty assessment as required by Commission Rule 28(a). *Id.* Rule 28(a) interprets the statutory provisions of section 105(d) that require the Secretary to "immediately advise the Commission" after a timely notice of a contest is received. 29 C.F.R. § 2700.28(a); 30 U.S.C. § 815(d).

In the final analysis, in responding to the Order to Show Cause, the Secretary could have availed himself of two options. Namely, responding to the Order to Show Cause by demonstrating that there was a “non-frivolous explanation” for the 36-month delay. *Long Branch*, 34 FMSHRC at 1991. Alternatively, the Secretary could have sought the Commission’s interlocutory review, pursuant to Rule 76, with respect to the significance of the date of issuance of a citation or order in determining the applicable interval for addressing timeliness under section 105(a). 29 C.F.R § 2700.76.

The Secretary has chosen neither option. Consequently, the captioned 110(c) proceedings must be dismissed as the Secretary has failed to provide any meaningful justification for the 36-month delay in the issuance of the notices of personal liability that serve as the basis for the captioned proceedings. As such, I need not address whether the Secretary’s delay has prejudiced the Respondents as a consequence of the closure of the D-6 North Fork mine and the resultant potential hardship with respect to obtaining mine records and locating relevant witnesses.

**ORDER**

In view of the above, **IT IS ORDERED** the captioned 110(c) proceedings **ARE DISMISSED** with prejudice as the Secretary has failed to demonstrate that the subject notices of personal liability were issued within a reasonable time as contemplated by section 105(a) of the Act.



Jerold Feldman  
Administrative Law Judge

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