FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

July 25, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-383-M A.C. No. 26-02661-404686 A
v.	Exodus Mine
BLAZE WHITE, employed by NEWMONT USA LIMITED, Respondent	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Before: Judge Manning

This case is before me under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c) ("Mine Act"). Blaze White ("White" or "Respondent") was a shift supervisor for Newmont USA Limited ("Newmont") when the citation and order at issue in this case were issued. White timely contested the proposed penalties filed by the Secretary of Labor and filed a motion to dismiss this proceeding due to the Secretary's delay in proposing penalties for the alleged violations. The Secretary opposes the motion. For the reasons set forth below, I deny White's motion at the present time.

The citation and order at issue in this case were issued following a fatal accident at the Exodus Mine. The chronology of events is as follows:

June 2, 2013 – A fatal accident occurred when a load-haul-dump vehicle fell about 40 feet into an open stope.

July 1, 2013 – MSHA issued a citation and order to Newmont under section 104(d)(1) of the Mine Act. Both state that the shift supervisor engaged in aggravated conduct.

August 2013 – MSHA interviewed miners and supervisors as part of its investigation of the accident.

September 19, 2013 – MSHA issued its final report on its investigation of the accident. MSHA's special investigations unit also began its investigation under section 110(c) of the Mine Act.

October 21, 2013 – MSHA's Western District Office forwarded the results of its special investigation to MSHA's Technical Compliance and Investigation Office (TCIO) for review.

June 18, 2014 – The Secretary served a petition for assessment of penalty on Newmont charging the operator with the two violations of MSHA's safety standards. Newmont filed its answer to the penalty petition on July 17, 2014.

November 16, 2015 – White voluntarily resigned from his position at the Exodus Mine and stopped working in the mining industry.

February 26, 2016 – TCIO referred the case to MSHA's Office of Assessments for a proposed penalty assessment.

March 3, 2016 – MSHA served its proposed penalty assessment in this case on White, which White contested on April 1, 2016.

May 17, 2016 – The Secretary served a petition for assessment of penalty on White charging him with violations under section 110(c). White filed his answer to the penalty petition and the motion to dismiss on June 16, 2016.

I. BRIEF SUMMARY OF ARGUMENT

Respondent maintains that the 783 day period of time between the accident and the date that the penalty was proposed against White is unreasonable, that no adequate cause justifies this delay, and that this delay has prejudiced White. In its response, the Secretary maintaines that the Mine Act does not authorize the Commission to dismiss a petition for assessment of penalties based on MSHA's alleged noncompliance with section 105(a) of the Mine Act. The Secretary also argues that the penalties were proposed within a reasonable time because he promptly proposed the penalties after the completion of the special investigation. Finally, the Secretary maintains that White was not prejudiced by the timing of the proposed civil penalties because he had ample opportunity to prepare his defenses.

In reply, Respondent takes issue with the Secretary's position that the "investigation" is not completed until TCIO forwards the case to the office of assessments. Respondent also maintains that the Secretary failed to establish that the penalties were proposed within a reasonable time. It also provides more argument to support its position that White has suffered actual prejudice as a result of the delay. The Secretary, in his surreply, disputes some of the facts set forth in Respondent's reply[1] and argues that Respondent has not demonstrated that any witnesses that White may want to call will be unavailable to testify.

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[1] The Secretary argues that White was sent a letter, dated September 13, 2013, from MSHA Western District Manager Wyatt Andrews which informed White that MSHA "is proposing to assess an individual penalty against you as an agent of Newmont . . . for knowingly violating" two safety standards as set forth in the subject citation and order. Sec'y Opposition, Ex. A. The letter did not disclose the amount of the proposed penalties but offered White the opportunity to request a conference on the proposed penalties. Respondent disputes that White received this letter. Resp. Reply 2.

II. DISCUSSION

These same issues have been presented to Commission judges on many occasions. For example, I addressed these issues in my order in *Dino Trujillo*, 35 FMSHRC 1485 (May 2013). Rather than repeat what I set forth in that decision, I am incorporating my analysis of the legal issues in that order into this case by reference. In that case, the respondent calculated that the Secretary did not file the penalty petition until 1,057 days after the underlying order was issued to the mine operator. *Trujillo* at 1486. I determined that a delay of that length was not unreasonable per se and that the key question in section 110(c) cases is whether the respondent is able to show actual prejudice as a result of the delay. "Respondent's showing of prejudice must be 'real or substantial' and 'mere allegations of potential prejudice or inherent prejudice should be rejected.'" *Trujillo* at 1487 (quoting *Long Branch Energy*, 34 FMSHRC 1984, 1991-93 (Aug. 2012)). If a respondent is unable to show actual prejudice, it is "inappropriate" to dismiss a citation or order based on the Secretary's delay. *Twentymile Coal Co.*, 411 F.3d 256, 262 (D.C. Cir. 2005). This analysis is equally applicable here.

In the present case, Respondent states that certain witnesses no longer work for Newmont. Newmont has apparently tried to contact two witnesses without success. It states that "Newmont will continue attempting to contact the witnesses, but cannot be sure of success in receiving a statement or appearance at hearing of either." Resp. Reply 3. This case was assigned to me on June 20, 2016, and a hearing date has not been established. We are in the early stages of the proceeding. Respondent may be able to locate these potential witnesses before a trial date and they may be able to testify in some manner.

I agree with the analysis of these issues discussed by Commission Judge Pricilla Rae in her order denying a motion to dismiss in *Ralph W. Dushane*, 38 FMSHRC ____, Docket No. SE 2016-132-M (July 6, 2016). She denied the motion because the respondent "alleged only potential prejudice of the sort that inherently flows from delaying litigation." Slip op. 4. She stated, however, that she would "entertain a renewed motion to dismiss before or at trial" if the respondent determines that "witnesses cannot be located or memories have indeed faded to the extent that he can demonstrate actual prejudice[.]" Slip op. 4. I reach the same conclusion in this case.

I have considered the facts and argument presented by the parties in this case and I conclude that the motion should be denied. Although Respondent suggested that it may be prejudiced by the delay, actual prejudice has not yet been established. If Respondent is unable to locate key witnesses or if these witnesses are unable to testify or recall the events of June 2013, Respondent will be free to renew its motion to dismiss at that time.

Judge Rae included the following paragraph in her *Ralph W. Dushane* order. I wholeheartedly agree with her discussion and encourage the Secretary to take it to heart.

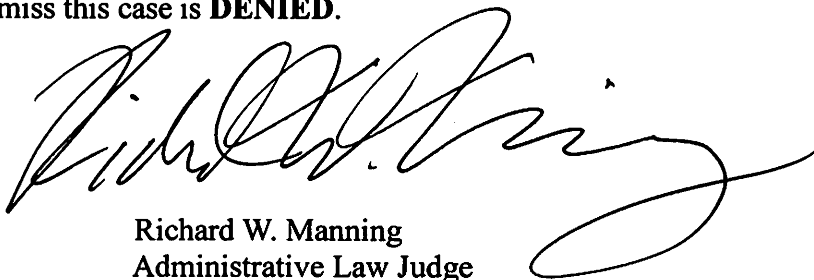
> I note that although the Commission has been extremely tolerant of the Secretary's habitual delays in filing 110(c) petitions, the Commission's most lenient decisions (such as *Long Branch*) came out several years ago when MSHA's case backlog was at historic levels. This has not been the case for more 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.

Slip op. 4. Given that by September 13, 2013, MSHA had determined that it would propose penalties against White, it is not clear why MSHA did not file its petition for assessment of civil penalty until May 17, 2016. The matter languished at TCIO between October 21, 2013 and February 26, 2016. This delay is incomprehensible to me and it does not serve the goal of advancing the safety and health of the nation's miners. TCIO's incompetence is wearing very thin.

III. ORDER

Respondent's motion to dismiss this case is **DENIED.**



Richard W. Manning
Administrative Law Judge

Distribution:

Tara E. Stearns, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103-6704

Laura E. Beverage, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202-1958

RWM