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August 26, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. STEVE B. REES, employed by PRAIRIE STATE GENERATING COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2015-130 A.C. No. 11-03193-366707A Mine: Lively Grove Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MICHAEL WELCH , employed by PRAIRIE STATE GENERATING COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2015-144 A.C. No. 11-03193-366708A Mine: Lively Grove Mine

ORDER DENYING RESPONDENTS' MOTION TO DISMISS 110(c) DOCKETS

These cases are before me under section 110(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 820(c). Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. LAKE 2015-144 and LAKE 2015-130 to me on January 29, 2015, and March 9, 2015, respectively. On March 10, 2015, I consolidated these cases with Docket No. LAKE 2013-187, which contains the order the Mine Safety and Health Administration ("MSHA") issued to Prairie State Generating Company, LLC ("Prairie State"), that forms the basis of these proceedings. These consolidated cases are set for hearing on September 23–24, 2015.

I. FACTUAL AND PROCEDURAL BACKGROUND

MSHA issued Order No. 8440269 to Prairie State on June 26, 2012. MSHA subsequently initiated an investigation to assess Steven B. Rees ("Rees") and Michael Welch ("Welch") (together, "Respondents") for potential liability as agents of Prairie State under section 110(c) of the Mine Act. On November 7, 2014, MSHA issued its proposed penalties of $1,500.00 each to Rees and Welch, who contested the penalty assessments on November 19,

2014. On January 19, 2015, the Secretary of Labor ("Secretary") filed his Petition for the Assessment of Civil Penalty in Docket No. LAKE 2015-144, alleging that Welch knowingly authorized, ordered, or carried out Prairie State's violation of 30 C.F.R. § 75.360(a). Due to a clerical error, the Secretary filed his Petition for the Assessment of Civil Penalty in Docket No. LAKE 2015-130 on February 19, 2015, along with a Motion to Permit Late Filing, which I granted.

On July 24, 2015, Respondents filed a Motion to Dismiss and Memorandum of Law in support of the motion, requesting these dockets be dismissed due to the Secretary's delay in issuing the penalty assessments to Rees and Welch. The Secretary filed a response in opposition to the motion.

II. PRINCIPLES OF LAW

Section 105(a) of the Mine Act requires that the Secretary "shall, within a reasonable time after the termination of [an] inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited." 30 U.S.C. § 815(a). The Commission has held that the inquiry of what constitutes a reasonable time "turns on whether the delay is reasonable under the circumstances of each case, as the Commission examines whether adequate cause existed for the Secretary's delay in proposing a penalty and considers whether the delay prejudiced the operator." *Sedgman*, 28 FMSHRC 322, 338 (June 2006) (citing *Salt Lake Cnty. Rd. Dep't*, 3 FMSHRC 1714, 1716–17 (July 1981); *Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982); *Steele Branch Mining*, 18 FMSHRC 6, 13–14 (Jan. 1996); *Black Butte Coal Co.*, 25 FMSHRC 457, 459–61 (Aug. 2003)). The Secretary can satisfy the showing of adequate cause by providing a non-frivolous explanation for the delay. *Long Branch Energy*, 34 FMSHRC 1984, 1991 (Aug. 2012) (discussing the reasonable time requirement as embodied by Commission Procedural Rule 28(a), 29 C.F.R. § 2700.28(a)). Once the Secretary meets his burden, the operator must show some actual prejudice arising from the delay. *Id.* Allegations of mere potential prejudice or inherent prejudice are not sufficient. *Id.*

In determining the reasonableness of the time it takes the Secretary to propose a penalty, the "starting point" in the calculation is the completion of the Secretary's inspection or investigation. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261–62 (2005) ("*Twentymile*"); *Sedgman*, 28 FMSHRC at 340.

Although the "reasonable time" requirement does not explicitly extend to section 110(c), Commission Administrative Law Judges have applied the requirement to penalty cases against individuals under section 110(c) of the Mine Act. *See Scott Carpenter*, 36 FMSHRC 2311, 2313 (Aug. 2014) (ALJ); *Steve Adkins*, 35 FMSHRC 1481, 1482 (May 2013) (ALJ); *Christopher Brinson, Gerald Hastings, Ronald Colson*, 35 FMSHRC 1463, 1465 (May 2013) (ALJ); *Dyno Nobel East-Central Region*, 35 FMSHRC 265, 266 (Jan. 2013) (ALJ). Both the Secretary and Respondents apply the reasonable time requirement in section 105(a) of the Mine Act and cite to

the Commission's two-part analysis for determining whether a case should be dismissed for undue delay.[1] (*See* Resp'ts Mot. at 4–5, 10–17; Sec'y Resp. at 5–6, 10.)

III. ANALYSIS

Respondents argue that MSHA failed to file its section 110(c) penalty assessments within a reasonable time. (Resp'ts Memo. at 10–15.) Respondents further assert that MSHA cannot establish adequate cause for the delay in this matter because the delay between the initial inspection and the assessment was so long and the section 110(c) investigation was relatively simple. (*Id.* at 13–15.) Respondents especially note that the Secretary made no effort to begin the investigation for 500 days, a delay nearly as long as MSHA's internal guidance suggests that the entire 110(c) investigation and assessment process should take. (*Id.* at 7, 14.) In addition, Respondents assert that the delay has caused prejudice in the form of lost memories and missing witnesses. (*Id.* at 16–17.)

The Secretary first asserts that it assessed the penalties within a reasonable time, having completed the investigation into Respondents' personal liability on August 12, 2014, and issued the penalties on November 7, 2014.[2] (Sec'y Resp. at 2–3, 8–10.) Additionally, the Secretary asserts that the significant increase in MSHA's caseload and the additional layers of review necessary when individual agents' interests are at stake slowed the investigation and assessment process. (*Id.* at 9.) Finally, the Secretary claims that Respondents have failed to show a legally cognizable prejudice. (*Id.* at 9–12.)

The Secretary's paperwork for these investigations, submitted by Respondents, shows the completed case file was forwarded to MSHA's Technical Compliance and Investigation Office ("TCIO") on June 2, 2014. (Resp'ts Memo. at 21–22.) No further activity appears in the Secretary's paperwork. (*Id.*) The Secretary avers the investigation was completed two months later, on August 12, 2014. (Sec'y Resp. at 3.) The Secretary's penalty assessments in this matter followed in November 2014. Commission precedent indicates that a delay in the filing of penalty assessments by either three months or five months is not unreasonable. *See Sedgman*, 28 FMSHRC at 341 (finding an 11-month delay under section 105(a) to be reasonable).

Nevertheless, I look to both the Secretary's justification for the slow assessment and the Respondents' claims of prejudice. The Secretary's simple explanation of a case backlog does little to illuminate the five-month gap between the investigation's completion and the assessment, let alone the 28-month period from the initial inspection. Nevertheless, the Commission has found delays in the prosecution of cases excusable when explained by sharp

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[1] Although the Secretary nominally suggests the Commission alter its approach to such cases, Petitioner's argument embraces the Commission's requirement that actual prejudice be present before a case can be dismissed for delay. (*See* Sec'y Resp. at 10–13.)

[2] The Secretary insists that the Commission lacks the authority to dismiss an assessed penalty where an assessment was not filed in a reasonable time. (Sec'y Resp. at 2–8.) Contrary to the Secretary's assertion, it is a basic principle of administrative law that a substantive agency proceeding may be overturned upon a showing of prejudice. *Salt Lake Cnty. Rd. Dep't*, 3 FMSHRC 1714, 1716 (July 1981). The Commission has considered and rejected the Secretary's contention. *See Sedgman*, 28 FMSHRC at 338.

increases in MSHA's national caseload. *See Long Branch*, 34 FMSHRC at 1993–95; *Rhone Poulenc of Wyo. Co.*, 15 FMSHRC 2089, 1993–94 (Oct. 1993). However, the Commission has recognized that the Secretary's workload rose substantially due to recent increased enforcement efforts and a higher rate at which operators contest the resulting citations. *See Long Branch*, 34 FMSHRC at 1993–95. Accordingly, the Secretary's explanation for the delay is not frivolous. Therefore, I determine the Secretary has established adequate cause for the delay.

Given my finding of adequate cause, I turn to Respondents' allegations of prejudice. First, Respondents assert that during the Secretary's 28-month investigation, an important witness to the June 26, 2012, inspection left the mine and "will need to be found to provide his recollection of the facts." (Resp'ts Memo. at 16.) Although the disappearance of a key witness could prejudice a party, Respondents have not claimed that their witness cannot be found. Rather, Respondents assert that they potentially may have difficulty contacting their witness. Respondents merely allege potential prejudice, not actual prejudice.

Next, Respondents claim they are prejudiced because Rees is no longer able to recall the events of June 2, 2014, when the underlying order issued. (Resp'ts Memo. at 16.) In support, Respondents point to MSHA's interview of Rees from January 2014, in which Rees stated that he could not remember any details from the June 2014 inspection. (*Id.* at 16, 23–24.) Respondents' argument fails to allege facts distinguishing this case. With the passage of time, memories fade and details blur. This degradation of evidence is inherent to any aging case, and is precisely why Congress enacted a five-year statute of limitations for federal civil lawsuits. *See Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1221 (2013). Barring evidence showing that Rees's memory loss resulted from something other than the usual passage of time, Respondents assert only an inherent prejudice.[3]

Given the Secretary's non-frivolous explanation and Respondents' failure to show that they were actually and meaningfully prejudiced by the Secretary's delay, I determine that the Secretary's petitions for penalty should not be dismissed at this stage of the proceedings. I note, however, that it is the Secretary's burden to prove his charges "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom.*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). A gap of more than three years between an initial inspection and the eventual hearing regarding the inspection raises significant questions about the reliability of any testimonial evidence presented at that hearing.

Respondent's Motion to Dismiss these proceedings is hereby **DENIED**. These consolidated cases will be called for hearing on September 23–24, 2015, in St. Louis, Missouri.

Alan G. Paez
Administrative Law Judge

[3] I also note that Rees's lost recollection is somewhat self-serving. It was fully within Rees's power to memorialize the events of June 2, 2012, by taking notes of the day.

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