FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 13, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS
v.	
KEITH MILLER, employed by OAK GROVE RESOURCES,	Docket No. SE 2017-0092 A.C. No. 01-00851-428926 A
and	
CHASE GUIN, formerly employed by OAK GROVE RESOURCES,	Docket No. SE 2017-0093 A.C. No. 01-00851-428927 A
and	
WILLIAM EDWARDS, employed by OAK GROVE RESOURCES, Respondents.	Docket No. SE 2017-0094 A.C. No. 01-00851-428928 A
	Mine: Oak Grove Mine

ORDER DENYING SECRETARY'S MOTION FOR PROTECTIVE ORDER

Before: Judge Feldman

These matters concern 104(d)(1) Citation No. 8520686 and 104(d)(1) Order No. 8520687 issued on April 26, 2013, at the Oak Grove Mine for impermissible coal dust accumulations and inadequate preshift examinations in violation of the Secretary's mandatory safety standards in sections 75.400 and 75.360(a)(1), respectively.[1] 30 C.F.R. §§ 75.400, 75.360(a)(1). There were three operational shifts at the Oak Grove Mine at the time the citation and order were issued. On April 13, 2017, four years after the issuance of the aforementioned citation and order, the Secretary filed petitions for assessment of civil penalty pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c) ("Mine Act" or "Act"), seeking to impose personal liability against each of the captioned shift foremen for the violations cited in

[1] 104(d)(1) Citation No. 8520686 and 104(d)(1) Order No. 8520687, issued to Oak Grove Resources, were resolved by means of a Decision Approving Settlement issued on March 22, 2016. Docket Nos. SE 2014-147, SE 2014-231.

104(d)(1) Citation No. 8520686 and 104(d)(1) Order No. 8520687 issued on April 26, 2013.[2] The 110(c) investigation in these matters was reportedly completed on December 11, 2016, more than three and a half years after the issuance of the underlying citation and order.

The Respondents seek to depose an MSHA official familiar with its investigative procedures at its Technical Compliance and Investigation Office ("TCIO") to determine the reason for the approximate four year interval between the issuance of the underlying citations and the filing of the subject civil penalty petitions. The Secretary has filed a Motion for Protective Order seeking to prevent such discovery,[3] asserting that justification for the four year interval is irrelevant since the petitions were filed within the general five year statute of limitations for filing civil suits provided in 28 U.S.C. § 2462.[4] Sec'y Mot. at 4. The Secretary also contends that the amount of time taken to initiate and conduct the investigation is irrelevant, arguing instead that the Respondents were notified of the proposed civil penalties shortly after the December 11, 2016, culmination of the relevant investigation.[5] *Id.* at 4-5.

Alternatively, the Secretary asserts that the information sought by the Respondents is protected by the following privileges: (1) the deliberative process privilege, (2) the investigative process privilege, (3) the attorney-client privilege, (4) the work-product privilege, and (5) the qualified immunity for government officials privilege. Sec'y Mot. at 6-12. In seeking discovery, the Respondents represent that they "are not seeking to question the thought process that resulted

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[2] Section 110(c) of the Mine Act provides that "[w]henever 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" as the corporate operator. 30 U.S.C. § 820(c).

[3] The Secretary filed his Motion for Protective Order on June 20, 2017 ("Sec'y Mot."). The Respondents filed their Opposition on June 27, 2017 ("Resp't Opp."). Following Judge Andrews' recent July 20, 2017, Order in Docket No. PENN 2017-109, concerning a substantially similar discovery issue, the parties were invited to submit supplemental briefing to address any issues they deemed relevant that were the subject of Judge Andrews' Order. The Respondent filed a Letter in response on August 4, 2017 ("Resp't Supp. Br."). On August 10, 2017, the Secretary filed a supplemental brief ("Sec'y Supp. Br. A") which included copies of the Secretary's request for certification for interlocutory review of Judge Andrews' discovery Order ("Sec'y Supp. Br. B"), which was denied by Judge Andrews, and the Secretary's Petition for Interlocutory Review of Judge Andrews' Order by the Commission ("Sec'y Supp. Br. C").

[4] 28 U.S.C. § 2462 states, in pertinent part: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

[5] Neither the Commission nor the Courts have identified a clear objective standard for determining when a 110(c) investigation terminates. The Secretary contends that the subject investigation terminated when TCIO forwarded the case to the Office of Assessments on December 11, 2016. Sec'y Mot. at 4-5.

in assessment of the penalty, but only the basis of the delay and whether [the] delay can be justified." Resp't Supp. Br. at 3.

Section 105(a) of the Mine Act provides, in essence, that the Secretary shall file a petition for assessment of civil penalty within a reasonable time after issuance of a citation or termination of a relevant inspection or investigation.[6] 30 U.S.C. § 815(a). Commission Rule 56(b) provides that "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. 2700.56(b).

In arguing that the length of a 110(c) investigation period is beyond review so long as a civil penalty notice is issued within a reasonable time after completion of the reported investigation period, the Secretary relies on the D.C. Circuit's decision in *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). Sec'y Mot. at 4. The Secretary's reliance on *Twentymile* is misplaced. It is true that *Twentymile* dealt with the reasonableness of the time period between the culmination of the Secretary's investigation and the issuance of the civil penalty petition, rather than whether the investigation was completed within a reasonable period of time. However, *Twentymile* concerned an elapsed period of approximately 17 months between the issuance of the subject 104(g)(1) withdrawal order and the related penalty petition, a far cry from the approximate 48 month interval in this matter. *Twentymile*, 411 F.3d at 258. Thus, *Twentymile* did not involve the magnitude of delay presented in this case.

Moreover, in *Twentymile*, the investigation was initiated and completed during the period between the issuance of a June 2000 withdrawal order and the issuance of an accident investigation report in January 2001, an interval of six months. *Id.* at 258. I question whether the Court in *Twentymile* would have reached the same conclusion if confronted with the facts of this case, where the investigation was initiated and completed between April 2013 and December 2016, an interval of 44 months. Consequently, the Court in *Twentymile* may not have deferred to the Secretary's interpretation of section 105(a) that consideration of the reasonable time period begins with the issuance of an investigation report if it were clear that the investigation was not initiated and conducted in a timely manner. In any event, the Court in *Twentymile* was not confronted with the Secretary's contention in this case that a reasonable time period for filing 110(c) petitions begins when TCIO forwards the case to the Office of Assessments.

I am cognizant of the Secretary's reliance on Supreme Court cases that have held that the Government is not jurisdictionally barred from bringing an untimely action unless Congress has expressly provided by statute or pertinent legislative history that such untimeliness precludes further Government enforcement action. Sec'y Supp. Br. C at 6-7 (citing *United States v. Montalvo-Murillo*, 495 U.S. 711, 721 (1990) (holding that a failure to conduct a timely

[6] Although section 105(a) addresses the timeframe for filing petitions for civil penalties filed against mine operators under section 104(a), a number of ALJ's have found it appropriate to apply the reasonable time language in section 105(a) to personal liability civil penalties proposed pursuant to section 110(c). *See, e.g., White*, 38 FMSHRC 1881 (July 2016) (ALJ); *Dushane*, 38 FMSHRC 1834 (July 2016) (ALJ); *Trujillo*, 35 FMSHRC 1485 (May 2013) (ALJ); *Dyno Nobel East-Central Region*, 35 FMSHRC 265 (Jan. 2013) (ALJ).

preliminary detention hearing did not necessitate a defendant's release on bail as a jurisdictional remedy); *Brock v. Pierce County*, 476 U.S. 253, 265-66 (1986) (holding that the Secretary retained jurisdiction to recover misused federal grants designated for employment and training programs despite exceeding the statutory time period provided for making an official determination)). Consistent with the Supreme Court cases relied on by the Secretary as well as *Twentymile*, it is apparent that untimeliness does not preclude the Government's jurisdictional authority.

However, the Secretary's authority is not unfettered in that the exercise of authority must be reasonable and free of any abuse of discretion.[7] In this regard, the Court in *Twentymile* left open the possibility that there may be instances where it is appropriate to set aside the Secretary's untimely recommendation for penalty upon a showing of prejudice. *Twentymile*, 411 F.3d at 262. Similarly, the Commission has stated that the timeliness requirement in section 105(a) of the Act "does not impose a jurisdictional limitation[] . . ., but rather turns on whether the delay is reasonable under the circumstances of each case." *Sedgman*, 28 FMSHRC 322, 338 (June 2006). In fact, the Commission expressly noted that the Court in *Twentymile* did not overturn Commission precedent allowing for the reviewability of untimeliness. *Id.* at 339. Thus, I am not persuaded by the Secretary's contention that the requested discovery is irrelevant because the Secretary has unreviewable authority to file a petition for assessment of civil penalty at any time within the general five-year statute of limitation period for initiation of civil suits.[8]

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[7] The Secretary cites *Baer v. United States*, 722 F.3d 168, 174 (3d Cir. 2013) for the proposition that an agency's exercise of authority with respect to "the timing, manner, and scope" of its investigation is committed to agency discretion that is beyond review. Sec'y Supp. Br. C at 6. However, *Baer* is distinguishable from this case, as *Baer* dealt with the Government as a defendant rather than a petitioner bringing a civil action. In *Baer*, the Government was protected as a defendant by sovereign immunity for damages based on an alleged failure of the Security and Exchange Commission to thoroughly examine, investigate, and timely uncover the Madoff Ponzi scheme, which the plaintiffs alleged resulted in their financial loss. *Baer*, 722 F.3d at 168. In this case, the Secretary is the petitioner bringing a civil penalty action based on his investigation, the duration of which is subject to abuse of discretion review. *See id.* at 175 (noting that the conduct of an investigation "may amount to an abuse of discretion.").

[8] The consequences of the Secretary's assertion that the timeliness of the initiation of a 110(c) proceeding is not reviewable has been addressed by Judge Zielinski, wherein he stated:

> The legal standards applicable to determining whether a petition under section 110(c) has been timely filed, the adequacy of any required justification for delay, the requirements for a showing of prejudice, and the relative considerations involved in the balancing of the impact of dismissal on the Mine Act's substantive enforcement scheme against concerns of procedural regularity, fair play and prejudice, have not been decided by the Commission. . . . However, because there is a potential for substantial delay in the initiation and conduct of a section 110(c) investigation[], granting the Secretary carte blanch for that part of the process may well not comport with considerations of fair play and due process for individual respondents.

Dyno Nobel East-Central Region, 35 FMSHRC at 267 n.2.

I am similarly unpersuaded by the Secretary's assertion that the date of commencement and the duration of an investigation are immaterial. It is true that the Court in *Twentymile* considered the operative time period to be between the end of the Secretary's investigation and notification of the proposed penalty. However, the Court had no reason to consider whether the investigation was initiated and conducted in a timely manner, given its duration of no more than six months, as opposed to the 44 month elapsed time period involved in this proceeding. If the date of commencement of an investigation were irrelevant, it would permit the Secretary to unreasonably delay initiation of an investigation for many years as long as completion of the investigation and filing of the related petition for assessment of civil penalty occurred within the five year statute of limitations. In other words, if the statute of limitations period was dispositive, it would render the *Twentymile* Court's consideration of the reasonable time issue moot.

With respect to relevancy, the discovery sought by the Respondents is not frivolous, in that there is reasonable cause to believe that the information sought through discovery may lead to relevant evidence on the question of the timeliness issue. The reasonable cause to believe is based on the Secretary's policy manual which provides that, absent extenuating circumstances, 18 months is the operative "investigative timeframe" for filing civil penalty petitions in 110(c) cases, computed from the date of the subject citation or order, which in this case is April 26, 2013.[9] The Secretary's investigative timeframe is instructive even though it is not a binding norm.

I am cognizant of the Secretary's argument that the provisions of Commission Rule 56(c) may preclude the discovery sought because "[t]he deposition the respondents have noticed would be oppressive, placing undue burden and expense on the Secretary." Sec'y Mot. at 6. However, resolving discovery disputes is a balancing act between the interests of a party seeking discovery and the interests of an opposing party claiming undue hardship. In the final analysis, this requires consideration of whether the request for discovery is reasonable, and, whether the requested information is available from other sources. Obviously, only the Secretary is in possession of the information and documentation related to the length of his investigation. Consequently, the Secretary's claimed prejudice is overridden by the Respondent's right to seek the information sought in discovery.

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[9] The relevant provision of MSHA's Program Policy Manual provides:

> 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 of the subject citation or order. However, if the 18 month timeframe is exceeded, TCIO 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.

I MSHA, U.S. Dep't of Labor, Program Policy Manual § 110 (c), at 42 (1996).

Alternatively, the Secretary asserts that even if the discovery information is relevant evidence or likely to lead to relevant evidence, the information sought is protected by the deliberative process privilege, the investigative process privilege, and the attorney-client privilege. Sec'y Mot. at 6-12. These three privileges are not applicable in that the information sought by the Respondents is chronological rather than substantive. Obviously, tracking information is not germane to the disposition of such issues as the fact of the violation, gravity, and negligence. As previously noted, the Respondents are not seeking to "question the thought process that resulted in assessment of the penalty, but only the basis of the delay and whether delay can be justified." Resp't Supp. Br. at 3. Thus, MSHA's normal 110(c) processing timeframes, as well as the relevant tracking information and documentation pertaining to the subject 110(c) investigations, are appropriate avenues of discovery.

The Secretary also asserts the qualified immunity privilege for Government officials. While I am sensitive to the Secretary's assertion, I do not believe that the appropriate TCIO official that will ultimately be deposed will be an official of such high ranking to justify the invocation of the privilege.

Finally, the Secretary asserts the work product privilege. Tracking information is not protected by the work product privilege, for such information is compiled during the course of normal administrative operations, and is not created in contemplation of litigation. In this regard, I stress that any documents made available through discovery should be limited to those that are routinely used to track case progress rather than any documents specifically prepared in anticipation of litigation.

ORDER

In view of the above, **IT IS ORDERED** that the Secretary's Motion for Protective Order **IS DENIED.**

IT IS FURTHER ORDERED that discovery, consistent with the parameters discussed in this order, shall proceed at a time that is mutually agreeable to the parties at the Secretary's office in Arlington, Virginia. Discovery shall be limited to the following information and/or documentation as requested by the Respondents:

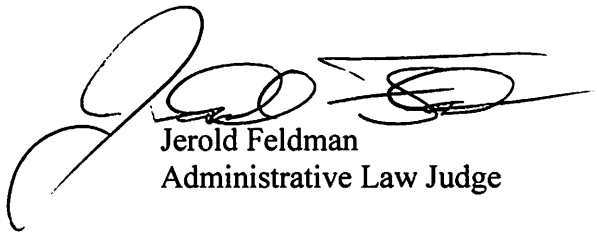
1. Facts surrounding the normal review process within TCIO when a section 110(c) case is forwarded to it and the average time frames for such process.

2. The staffing and workload of TCIO during the relevant period between April 26, 2013, and December 11, 2016, as they pertain to such things as cases brought under section 110, 105(c) cases, and FOIA requests.

3. The dates of referral from TCIO to the Solicitor's office for review, as well as any return dates to TCIO, including a pertinent chronological printout from TCIO's tracking system pertaining to the period between April 26, 2013, and December 11, 2017. Any tracking system documents that contain opinions of reviewers or solicitors shall be redacted.

4. Any information that explains the length of time to complete the relevant 110(c) investigations that is not subject to the deliberative process privilege, such as, but not limited to, workload and personnel information.

I stress that any questions or requests for documentation concerning the thought processes that served as a basis for the Secretary's initiation of these 110(c) proceedings, or for the amount of the proposed civil penalties, is beyond the scope of permissible discovery set forth in this Order. I also note that it is neither my intention nor desire to micromanage the Secretary's enforcement program. However, the approximate four year interval between the issuance of the underlying citations and the filing of the subject petitions for assessment of civil penalty gives rise to a legitimate discovery request.[10]



Jerold Feldman
Administrative Law Judge

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[10] On September 7, 2017, counsel for Respondents filed a Motion for Summary Decision on the merits in the captioned matters. Despite the motion, counsel indicated a desire to go forward with discovery on the timeliness issue. Counsel also indicated that he may file a motion to dismiss on the basis of untimeliness after completion of discovery on the timeliness question. The motion for summary decision and any motion to dismiss for untimeliness, as well as any oppositions thereto, will be considered after completion of the discovery that is the subject of this Order.