FEDERAL MINE SAFETY HEALTH AND REVIEW COMMISSION
Office of the Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2500

August 5, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-0025
Petitioner,	:	A.C. No. 46-09136-281297 A
	:	
v.	:	
	:	
SCOTT CARPENTER,	:	
Respondent.	:	Mine: Broad Run Mine

ORDER DENYING MOTION TO DISMISS

INTRODUCTION

This case is before me upon a petition for assessment of a civil penalty under Section 110(c) of the Federal Mine Safety and Health Act of 1977. The Respondent has moved to dismiss this matter, or in the alternative, dismiss all civil monetary penalties due to the Secretary's failure to issue a proposed assessment within a reasonable time. Resp. Br., 1. The Secretary opposes the Respondent's motion, asserting that the assessment was filed within a reasonable timeframe, the Commission lacks authority to dismiss the action due to delay alone, and that the Respondent has failed to demonstrate actual prejudice. Sec'y Br., 1. As the Respondent has failed to show that the Secretary failed to comply with a jurisdictional time limit, delayed its prosecution due to caprice or malice, or provide evidence of significant material prejudice, the Respondent's Motion to Dismiss is **DENIED**.

BACKGROUND

The Respondent, Scott Carpenter, worked as a section foreman at the Big River Mining, LLC Broad Run Mine located in Mason County, West Virginia from February 2010 to April 2010. Resp. Br, 1. On March 26, 2010 MSHA conducted an impact inspection of the Broad Run Mine, issuing a total of 16 citations and orders. *Id.* MSHA served Order No. 8023819 to Mr. Carpenter as the section foreman, alleging that ventilation controls were damaged on the section and stating that "the section foreman is aware of these listed conditions." Resp Br.: Ex. 2. Big River Mining abated Citation No. 8023819 that same day, four hours after the issuance of the violation. *Id.* The Broad Run Mine was idled in April of 2010 and Mr. Carpenter subsequently gained employment with another mining company. Resp. Br.: Ex. 3, 2; Resp. Mot. to Reopen: Ex. 2,1. Big River Mining did not contest Order No. 8023819, and the violation became a final Order of the Commission on June 11, 2010, which Big River paid in full. [1]

On August 2, 2010, Mr. Carpenter was interviewed by an MSHA Special Investigator in

[1] http://www.msha.gov/ MINE ID# 46-09136 Violation History.

regards to the March 26, 2010 inspection at the Broad Run mine. Resp. Br., 2. Mr. Carpenter was not represented by counsel during the interview. Resp. Br., 2. The Special Investigator prepared a statement based on this interview which Mr. Carpenter apparently declined to sign. Resp. Mot. to Reopen: Ex. 2, 7. The statement form did not specify the purposes of the interview. The prepared statement referenced the specific circumstances of Citation No. 8023819, but also described the Broad Run mine dispatcher providing advance notice of MSHA inspections and the failure of upper management to staff work crews with sufficient numbers of experienced miners. Resp. Mot. to Reopen: Ex. 2, 3-7. At the beginning of the statement form, Mr. Carpenter listed an address of 101 Dyer Road and indicated that he had begun working with Mammoth Coal at the Alloy Powellton Mine in May 2010. Resp. Mot. to Reopen: Ex. 2, 1.

On August 9, 2010 Mr. Carpenter moved from the address he had listed during the Special Investigation interview. Resp. Br.: Ex 1, 1. Mr. Carpenter subsequently obtained legal counsel through Nicholas Preservati of Preservati Law Offices, PLLC. Resp. Br., 2. On August 27, 2010, the District 3 Special Investigation unit forwarded the case to MSHA's Technical Compliance and Investigation Office "TCIO". Sec'y Response, 1-2. On Oct 11, 2010, Mr. Preservati advised the Special Investigator in writing that he represented Mr. Carpenter and requested that the Special Investigator direct all correspondence through counsel. Resp. Mot. to Reopen: Ex. 3, 1.

On January 3, 2011, the Secretary sent a written notice to the idled Broad Run Mine office address, stating that MSHA was proposing to assess civil penalties against Mr. Carpenter individually on the basis of a special investigation. Sec'y Supp. Response: Ex. 1; Resp. Br.: Ex. 3, 2. Mr. Carpenter no longer worked at the Broad Run mine at that date and asserts that he never received this preliminary notice. Resp. Br., 2; Resp. Response, 2. On February 7, 2011, MSHA held an in-house conference regarding this case, which Mr. Carpenter was not involved or notified of. Sec'y Supp. Response, 2. Eleven months later, on December 19, 2011, TCIO closed the investigation with a final decision to forward the case to the Assessment Office for the proposal of a civil penalty. Sec'y Response, 2.

On February 23, 2012 MSHA delivered a notice of proposed assessment to Mr. Carpenter's former address at 101 Dyer Road.[2] Resp. Mot. To Reopen: Ex. 6. Mr. Carpenter asserts that he never received the proposed assessment and as Mr. Carpenter did not file a notice of contest, the assessment became a final order of the Commission on March 26, 2012. Resp. Br., 2. On September 4, 2012, the Department of Treasury issued a statement to Mr. Carpenter's previous address at 101 Dyer Road, notifying him that he was delinquent on payment of the civil penalty. *Id.* Mr. Carpenter asserts that the delinquency notice was not forwarded to him until September 22, 2012. *Id.* On October 3, 2012, Mr. Carpenter filed a motion to reopen with the Commission pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure. Resp. Mot. to Reopen. Big River Mining dismantled the Broad Run Mine main office in early 2013, moving some shift inspection records to Beckley, WV while disposing of others. Resp. Br.: Ex. 3, 2.

The Commission granted the Respondent's Motion to Reopen on May 31, 2013 and directed the Secretary to file a petition for assessment with the Commission within 45 days. *Scott Carpenter*, 35 FMSHRC 1295, (May 2013). The Secretary complied with this order, filing a petition on July 11, 2012. Sec'y Br., 3. On August 22, 2013 the Respondent filed a

[2] The February 21 Notice of Assessment was delivered to 101 Dyer Road on February 23, 2012 and signed for by a J. Carpenter. Despite the shared last name, based on the Respondent's affidavit and forthright handling of this matter, the Court does not doubt Mr. Scott Carpenter's assertion that he did not receive the February 21 Notice of Assessment.

Motion to Dismiss, stating that the Secretary failed to file the original proposed assessment within a reasonable time after the issuance of the March 26, 2010 citation and that the delay had prejudiced his defense. Resp. Br., 1. The Secretary opposed the motion, stating that the assessment was filed within a reasonable timeframe, the Commission lacked authority to dismiss the action due to delay alone, and that the Respondent had failed to demonstrate actual prejudice. [3] Sec'y Br., 1. The Respondent filed a reply brief on September 3, 2013. Resp. Reply Br.

On June 9, 2014, the Chief Administrative Law Judge assigned this matter for this court's consideration. After reviewing the parties' motions, I issued an Order Requesting Additional Information on June 30, 2014. The parties complied with this request and a subsequent request issued to the Secretary for clarification. Sec'y Response; Resp. Response; Sec'y Supp. Response.

ANALYSIS

1. The Secretary did not notify the Respondent of the Proposed Assessment within a reasonable timeframe.

Section 110 (c) of the Mine Act imposes civil liability upon agents of the operator who knowingly authorize, order, or carry out violations of the Mine Act. 30 USC 820(c). Section 105(a) of the Mine Act states that the Secretary "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)." 30 USC 815(a). Commission ALJs have consistently held that the Section 105(a) "reasonable time" requirement applies to both 110(a) and 110(c) actions. *Steven Adkins*, 35 FMSHRC 1481, 1482 (May 2013)(ALJ Manning).

The Commission has not yet addressed the precise question of how the Section 105 (a) "reasonable time" requirement applies to Section 110(c) actions. *Adam Whitt et al*, 2013 WL 6792640, *3 (November 2013)(ALJ Andrews). However, the Commission has stated that the Section 105(a) "reasonable time" mandate,

> ...does not impose a jurisdictional limitations period, but rather 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. *Salt Lake County 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).

Sedgman et al, 28 FMSHRC 322, 338 (June 2006).

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[3] The Secretary argues that *Brock v. Pierce County*, 476 U.S. 253, 260 (May 1996), *Tazco, Inc.*, 3 FMSHRC 1895, 1896-97 (1981), and other appellate level cases preclude dismissal of proposed civil penalties based on delay alone. Sec'y Br., 4-9. The Commission has recently rejected similar arguments and maintained the "adequate cause" analytical framework set for in *Salt Lake*, 3 FMSHRC 1714 (July 1981) regarding prosecutorial delays. *Long Branch*, 34 FMSHRC 1984, 1989-90 (Aug. 2012). Similarly, the Commission has reiterated its authority, when appropriate, to vacate civil penalty assessments due to unjustifiable delays in notice of assessments. *Sedgman*. 28 FMSHRC 322, 338 (June 2006). Based on these Commission decisions, I will not addressed or relied upon the Secretary's arguments that the Commission is wholly prohibited from vacating a civil penalty due to delay.

For 110 (c) actions, the Secretary does maintain internal guidelines that call for MSHA to forward a final decision to the Office of Assessments within 7 months after the issuance of the underlying violation. MSHA Special Investigation Procedures, Handbook Number PH 05-1-4, 4-4 (Aug. 2005). Additionally, the MSHA Program Policy Manual states that Section 110 (c) penalty assessments will normally be issued within 18 months from the date of issuance of the subject citation or order. MSHA Program Policy Manual, Vol. I, p. 42 (Aug. 2007).[4] Indeed, ALJs have previously found that notice of assessments for 110 (c) actions served more than 18 months past the issuance of the citation failed to comply with the Section 105(a) "reasonable time" requirement and warranted dismissal. *Doyal Morgan et al*, 20 FMSHRC 38, 42 (January 1998) (ALJ Merlin); *Ernie Brock*, 4 FMSHRC 201, 202 (February 1982)(ALJ Koutras).

However, these internal guidelines do not impose a jurisdictional time limit upon the Secretary, and Notice of Assessments served outside the 18 month guideline are not *per se* unreasonably late. *Adam Whitt et al*, 2013 WL 6792640, *3. Section 110 (c) investigations that involve serious accidents or complicated technical issues may require investigation and review longer than 18 months and still comply with the Section 105(a) "reasonable time" requirement. *Doyal Morgan et al*, 20 FMSHRC 42 (holding that delay in instant case warranted dismissal but stating that complicated investigations may warrant lengthier review prior to notice of assessment). Additionally, even in simple cases where the official notice of assessment is served outside the 18 month guideline, a prompt preliminary notice of proposed civil penalties assessment provides the agent with adequate notice of pending civil penalties. *Stephen Reasor*, 34 FMSHRC 920, 923-24 (April 2012) (ALJ Moran).

The Secretary did not provide the agent with prompt preliminary notice of proposed penalties in this case. Although the Secretary did direct a preliminary notice to the idled Broad Run mine office on January 3, 2012, it did so after the Respondent had notified MSHA that he no longer worked there and requested all correspondence to be directed through counsel. Sec'y Supp. Response, 1-2; Resp. Mot. to Reopen: Ex. 2, 1: Ex. 3, 1. As such, it is unremarkable that Mr. Carpenter did not receive this notice. Resp. Response, 1-2.

As MSHA District 3 had forwarded the case to TCIO by August 27, 2010, it appears the substantive District 3 investigation of this case proceeded at a commendable pace ahead of MSHA's internal guidelines. Sec'y Response, 1, 2; MSHA Special Investigation Procedures, Handbook Number PH 05-1-4, 4-4. However, following a district level conference on February 7, 2011, over ten months passed without any apparent action before TCIO sent the case to the Office of Assessment on December 19, 2012. *Id.*

The Secretary then served the official notice of proposed assessment on February 23, 2014, nearly 23 months after the underlying citation was issued. Sec'y Br., 2. As Mr. Carpenter no longer resided at the address served, and the Secretary failed to contact counsel as requested, the subsequent default order and delinquency notice did not reach Mr. Carpenter until nearly 30 months after the underlying citation was issued. Resp. Br., 9. As such, the notice of assessment was served well in excess of the "normal" 18 month timeframe set forth in the Secretary's Program Policy Manual. MSHA Program Policy Manual, Vol. I, p. 42 (Aug. 2007). Commission record indicates that non-attainment of MSHA's Section 110 (c) investigation guidelines goals has not been rare in recent years. *Adam Whitt et al*, 2013 WL

[4] According to MSHA's website, this internal guidance is still in effect. See http://www.msha.gov/REGS/COMPLIAN/PPM/PMVOL1D.HTM

6792640 (Nov 2013) (ALJ Andrews); *Dino Trujillo*, 2013 WL 3152298 (May 2013); *Christopher Brinson et al*, 35 FMSHRC 1463 (May 2013) (ALJ Tureck); *Steve Adkins*, 35 FMSHRC 1481(May 2013) (ALJ Manning); *Stephen Reasor*, 34 FMSHRC 920 (April 2012) (ALJ Moran); *See Also* Department of Labor, OIG Report, *MSHA Can Improve Its Section 110 Special Investigations Process*,5-6 (finding that MSHA met its investigative timeframes in only 30 percent of the cases studied for Federal Years 2010-2012) ("OIG Section 110 Report"). [5]

Nevertheless, the Secretary argues that its internal guidelines are not relevant and that this court is required to calculate any findings of delay from the December 19, 2012 date on which TCIO forwarded the case to the Office of Assessments. Sec'y Br., 14; Sec'y Response, 3 (citing *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (holding that delay in notice of assessment for 110(a) action arising from a serious accident must be calculated from the issuance of the accident report rather than the issuance of the underlying order)("*Twentymile*")). I concur that *Twentymile* instructs the Commission to calculate delay from the conclusion of the 110(c) investigation and give some degree of deference to the Secretary's determination of the conclusion of the 110(c) investigation. *Adam Whitt et al*, 2013 WL 6792640, * 3.

However, the Secretary's contention that the 110 (c) "investigation" included the lengthy period of administrative inaction from February 7, 2011 to December 19, 2011 is unreasonable. In making this finding, I respectfully depart from several of my colleagues' findings that 110 (c) investigations are not concluded until MSHA forwards the case to the Office of Assessments. *Christopher Brinson et al*, 35 FMSHRC 1463, 1467 (May 2013) (ALJ Tureck) (citing *Twentymile* and finding that the Commission "must give deference" to the Secretary's determination of the end of the 110 (c) investigation.); *see also Adam Whitt et al*, 2013 WL 6792640, * 3.

In *Twentymile*, the court noted both the date that the accident report was issued and the later date that MSHA forwarded the matter to the Office of Assessments. *Twentymile*, 411 F.3d at 258. The court did defer to the Secretary's stance that the investigation concluded with the issuance of accident report, but in no way indicated MSHA's later decision to forward the case to the Office of Assessments was considered part of the accident investigation. *Id.* at 261. Thus, the August 27, 2010 District 3 report to TCIO stands as the closest analogy to the accident report relied upon by the *Twentymile* court as the termination of the investigation. *Id.* Additionally, the misaddressed January 3, 2011 preliminary notice indicated that MSHA considered the investigation complete at that point, as it stated MSHA intended to assess civil penalties against Mr. Carpenter on the basis of its special investigation. Sec'y Supp. Response: Ex.1,1. Granting the Secretary further deference, I find that the February 7, 2011 internal review could be considered part of the 110(c) investigation. However, past this point, the Secretary has not shown that any "investigative" or "review" efforts occurred between February 7, 2011 and December 19, 2011.

Thus, for purposes of determining whether the Secretary delayed the Notice of Assessment for this case, I find that MSHA's investigation into this matter concluded on February 7, 2011, the last date on which the Secretary claimed substantive review occurred. Additionally, the Secretary's failure to address the notice of assessment to counsel as requested prevented the Respondent from receiving the Notice of Assessment until September 22, 2012. Thus, I find that the Notice of Assessment was delayed by 19 months. [6] A 19 month delay does

[5] Report No. 05-13-008-06-001 http://www.oig.dol.gov/public/reports/oa/2013/05-13-008-06-001.pdf.

[6] Even using the February 21, 2012 issuance of the Notice of Assessment as the end measuring point, I would have found a delay of over 12 months and required the Secretary to provide adequate cause for the delay.

not comport with the Section 105(a)" reasonable time" requirement without an inquiry into possible justifications for the delay. *Webster County Coal*, 34 FMSHRC 1946, 1950-51 (Aug. 2012) (holding that 18 month petition filing delay constituted an "error" that required the Secretary to produce evidence of adequate cause).

2. The record presents non-frivolous reasons that explain the Secretary's delay.

Having found that the Secretary delayed the notice of assessment, this court is required to determine if there is "adequate cause" to explain the delay. *Sedgman et al*, 28 FMSHRC 338. After reviewing this case, it appears that the primary reason that it took nearly two and a half years for the preliminary and official notice of assessment to reach Mr. Carpenter is that the Secretary failed to heed Mr. Carpenter's written request on October 11, 2010 to direct all correspondence through counsel. Resp. Br, 2; Resp. Mot to Re-open: Ex. 3, 1. The Secretary has not explained why two months after receiving Mr. Carpenter's letter, and four months after being notified that Mr. Carpenter no longer worked at the Broad Run mine, it directed the preliminary notice of proposed assessment to the idled Broad Run mine office. Resp. Mot. to Re-open: Ex. 2,1 - Ex. 3, 1. Similarly, the Secretary has not explained why it directed the notice of assessment to Mr. Carpenter's former personal address over 18 months after receiving Mr. Carpenter's request to direct all correspondence through counsel.

However, as the Secretary directed the preliminary notice of assessment to the mine office at which the underlying alleged violation occurred, it appears that the Secretary was likely following standard procedure rather than acting out of any malice. Sec'y Supp. Response, Ex. 1. Likewise, it does not appear that MSHA, in directing the official notice of assessment to the personal address Mr. Carpenter initially provided to the Special Investigator, was acting out of mere caprice or bad faith. Resp. Mot. to Reopen: Ex. 3,1. Additionally, as the official notice of assessment was signed for and accepted at that address, the Secretary had reason to believe that Mr. Carpenter had received the final notice of assessment in February of 2012. Resp. Mot. To Reopen: Ex. 6. As such, non-frivolous reasons explain the Secretary's failure to direct the preliminary and final notice of assessment to Mr. Carpenter's counsel as requested. In making such a finding, I follow the Commission's acceptance of similar administrative mishaps. *Webster County Coal*, 34 FMSHRC 1950-51 (excusing 18 month delay in filing numerous penalty petitions caused by a clerical error); *Salt Lake*, 3 FMSHRC 1717 (stating that "the Secretary is engaged in voluminous national litigation and mistakes can happen").

As discussed above, the secondary cause of the delay was the ten plus month gap between the last apparent substantive review of this matter and the final decision by TCIO to forward the case to the Office of Assessments. Sec'y Response, 2. The Commission has found similar delays in the prosecution of a case excusable when explained by an increase in MSHA's caseload at the national level. *Rhone Poulenc of Wyoming Co.*, 15 FMSHRC 2089 (Oct. 1993) aff'd 57 F. 3d 982 (10th Cir. 1995); *Long Branch Energy*, 34 FMSHRC 1984, 1993-94 (August 2012). TCIO was responsible for this matter during a timeframe of increased enforcement actions under the MINER Act. Sec'y Resp., 2.; *Long Branch Energy*, 34 FMSHRC 1993-94.

Additionally, I take judicial notice that TCIO was responsible for overseeing the investigation into the April 5, 2010 Upper Big Branch explosion which occurred only two weeks after the underlying citation at issue. OIG Section 110 Report, 3 (stating that "...during FYs 2010 through 2012, MSHA enforcement personnel were involved in the investigation of the Upper Big Branch mine explosion and the concurrent internal review."); *see Union Oil*, 11

FMSHRC 289, 300 n. 8 (March 1989) (holding that judicial notice can be taken of extra record information that is commonly known and can safely be assumed to be true). Thus, I find that MSHA's increased caseload and investigative duties during the relevant time period provide non-frivolous justifications for the ten month delay between the conclusion of MSHA's investigation and the decision to forward the case to the Office of Assessment.

Therefore, I find that non-frivolous reasons excuse the Secretary's delay in notifying Mr. Carpenter of the proposed assessment.

3. The Respondent did not suffer material prejudice from the Secretary's delay.

Although non-frivolous reasons explain the Secretary's delay in serving the Respondent with a Notice of Assessment, this court must still determine if that delay nevertheless materially prejudiced the Respondent's defense. *Long Branch Energy*, 34 FMSHRC 1991.

The Respondent received actual notice of the proposed assessment and resulting default order on September 22, 2012. Resp. Br., 2. At this point, the Broad Run main office still maintained pre-shift inspection records at the mine site. Resp. Br.: Ex. 3, 2. After receiving the default order, the Respondent acted correctly in moving to reopen the matter with the Commission, but apparently failed to investigate the records available at the mine at that time. Thus, the Secretary's mistake in addressing the notice of assessment did not prevent the Respondent from inspecting the Broad Run mine records before they were moved and/ or discarded in early 2013. *Id.* Additionally, Big River Mining idled the Broad Run mine almost immediately after the March 2010 inspection and laid off the majority of the workforce, including Mr. Carpenter, in April of 2010. Resp. Br.: Ex. 3, 2. As this layoff predated even the misaddressed January 3, 2011 preliminary notice by over six months, any difficulty involved in locating potential witnesses no longer working for Big River cannot be attributed to the Secretary's address errors or delayed Notice of Assessment.

Furthermore, although the Broad Run Mine main office was disassembled in early 2013, it appears that a substantial amount of records were retained and moved to Beckley, West Virginia. Resp. Br.: Ex. 3, 2. As Respondent has not yet made thorough discovery efforts regarding remaining pre-shift inspections, the Respondent may well locate records pertaining to the March 26, 2010 inspection. The Respondent states that he no longer remembers the names of many of the miners on his section at the time of the inspection. Resp. Br.: Ex. 1, 2. However, the Respondent did identify Jonathon Hooper as a crew member on the section during the March 26 inspection. *Id.* As this matter concerns straightforward allegations of ventilation control deficiencies, it appears that Mr. Carpenter would be able to present a sufficient defense based upon his own and Mr. Hooper's testimony. For all these reasons, I conclude that the Respondent has not shown that the Secretary's delay materially prejudiced his defense. *Long Branch Energy*, 34 FMSHRC 1992-93 (stating that dismissal due to prejudice is only appropriate when the operator has shown specific evidence of "substantial" prejudice).

Thus, although the Secretary failed to successfully notify the Respondent of the proposed assessment within a reasonable time frame, that delay is explained by non-frivolous reasons, and the Respondent has not produced persuasive evidence of material prejudice.

ORDER

For the reasons detailed above, the Respondent's Motion to Dismiss these proceedings and assessed civil penalties is **DENIED.** Due to the longstanding history of this case, the parties are hereby **ORDERED** to conduct discovery efforts into this matter on an expedited basis. The parties shall provide a detailed update to the Court regarding status of discovery efforts and prospects of settlement no later than Friday, September 12, 2014.

David P. Simonton
Administrative Law Judge

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