

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

August 14, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-451-M
Petitioner	:	A. C. No. 02-01691-05844
	:	
	:	Docket No. WEST 2004-76-M
	:	A. C. No. 02-01691-10445
v.	:	
	:	Docket No. WEST 2004-103-M
	:	A. C. No. 02-01691-12689
	:	
	:	Docket No. WEST 2004-196-M
QMAX COMPANY,	:	A. C. No. 02-01691-17038
Respondent	:	
	:	Portable Plant for Qmax Co.
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-61-M
Petitioner	:	A. C. No. 02-01691-27590A
	:	
v.	:	
	:	
JAMES L. FANN, Employed by	:	
QMAX COMPANY,	:	Portable Plant for Qmax Co.
Respondent	:	

**ORDER ADDRESSING SURVIVABILITY OF CLAIM  
AGAINST INDIVIDUAL AGENT OF OPERATOR**

Docket No. WEST 2005-61-M presents a claim for imposition of a civil penalty against James L. Fann under section 110(c) of the Act. 30 U.S.C. § 820(c). As noted in Respondents' post-hearing brief, James L. Fann died on May 28, 2006. By Order dated July 3, 2006, the Secretary was directed to submit a memorandum stating her position with respect to the viability of the section 110(c) claim in light of Mr. Fann's passing. The Secretary has taken the position that she will pursue the claim as it presently stands. While the Secretary has, at least tacitly, taken the position that the section 110(c) claim survived Mr. Fann's death, she did not cite any authority or present any legal argument on that issue.

In general, the survival of a federal cause of action is, in the absence of an expression of contrary intent, a question of federal common law. Actions that are remedial generally survive, and actions that are penal generally do not. *U.S. v. NEC Corp.*, 11 F.3d 136 (11th Cir. 1993); *Smith v. Dept. of Human Services, State of Okl.*, 876 F.2d 832, 834 (10th Cir. 1989); *International Cablevision, Inc., v. Sykes*, 172 F.R.D. 63 (W.D.N.Y. 1997); and see *Sinito v. U.S. Dept. of Justice*, 176 F.3d 512 (D.C.Cir. 1999).

There is nothing in the Mine Act addressing the survivability of claims arising thereunder, or suggesting that established rules regarding the abatement of actions upon the death of a party should not apply to claims under the Act. While the determination of whether a particular claim is “penal” or “remedial” for purposes of survivability can present difficult issues,<sup>1</sup> it appears that a claim under section 110(c) of the Act seeking imposition of a civil penalty against an individual corporate director, officer or agent is penal in nature. Accordingly, under federal common law, the action would abate upon the death of the individual charged.

While there does not appear to be any dispute as to Mr. Fann’s passing, his death has not been formally noted on the record. Nor has any potential successor entity, e.g., his estate, or a proper party representative been identified. Accordingly, Elaine P. Fann is directed to file a suggestion of death, including a copy of the death certificate, in the form referenced in Rule 25, Federal Rules of Civil Procedure.<sup>2</sup> Filing should be made within 20 days. If, within 14 days after the filing of the suggestion of death, the Secretary has not shown good cause why the claim should not be dismissed, the claim against James L. Fann under section 110(c) of the Act will be dismissed.

Michael E. Zielinski  
Administrative Law Judge

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<sup>1</sup> See *NEC, supra*; *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407, 414 (7th Cir. 1980) (overruled, in part, on other grounds, *Pridegon v. Gates Credit Union*, 883 F.2d 182, 193-94 (7th Cir. 1982)). In determining whether a particular claim is penal or remedial, courts typically consider three factors: (a) whether the purpose of the statutory claim was to redress individual wrongs or wrongs to the public; (b) whether the recovery goes to the individual or the public; and (c) whether the recovery is disproportionate to the harm suffered. *NEC*, 11 F.3d at 137; *Smith*, 876 F.2d at 835; *Sykes*, 172 F.R.D. at 67.

<sup>2</sup> The suggestion should include the caption of this case, a copy of the death certificate, and a certificate of service on the Secretary. The body of the suggestion should state:

Elaine P. Fann [or other appropriate person], as [executor, administrator, or other representative or successor] of James L. Fann, suggests upon the record the death of James L. Fann during the pendency of this action.

Distribution:

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