ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	)	
Petitioner,	)	
v.	)	Docket Nos. VA 2018-0103 VA 2018-0104
JAMES C. SCOTT, employed by MILL BRANCH COAL CORP.,	)	
and	)	
DONNIE B. THOMAS, employed by MILL BRANCH COAL CORP.,	)	
Respondents.	)	

SECRETARY'S PETITION FOR DISCRETIONARY REVIEW

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INTRODUCTION

The Secretary of Labor petitions the Federal Mine Safety and Health Review Commission to review the decision a Commission administrative law judge issued on July 23, 2019, in the above-captioned case. In this case, MSHA proposed penalties against two agents of the operator approximately three years after they knowingly failed to report a massive water inundation at a mine. After seven months of settlement negotiations, the ALJ demanded information concerning the conduct of the Secretary's Mine Act § 110(c) investigation that would explain the three-year time period, citing Mine Act § 105(a), which requires the Secretary to propose a penalty "within a reasonable time after the termination of [an] investigation." When the Secretary objected on privilege and relevance grounds to disclosing details about the investigation, the ALJ, on his own motion, dismissed the proceedings. The decision is contrary to law and Commission rules and precedent, and substantial evidence does not support the decision. *See* 30 U.S.C. § 823(d)(2)(A)(ii); 29 C.F.R. § 2700.70(c).

ASSIGNMENTS OF ERROR

(1) The ALJ erred by dismissing a proceeding filed within the five-year statute of limitations provided by 28 U.S.C. § 2462.

(2) The ALJ erred by requiring irrelevant and privileged information concerning the Secretary's § 110(c) investigation as a condition of adjudicating the cases on the merits.

(3) The ALJ erred by interpreting § 105(a)'s "reasonable time" requirement to apply to the length of the Secretary's investigation.

(4) The ALJ erred by vacating a proceeding as a sanction for perceived untimeliness under § 105(a).

STATEMENT OF FACTS

A. The Inundation at North Fork # 6 and MSHA's Subsequent § 110(c) Investigation

On April 7, 2015, MSHA inspected North Fork # 6, an underground coal mine in Wise County, Virginia.[1] Upon arriving at the mine, Inspector Anthony Lucas asked Mine Superintendent James Curtis Scott how the sections looked; Scott replied that there was a "little water" in the 002 MMU. While inspecting equipment on the surface, Inspector Lucas observed miners exiting the mine soaking wet. He had originally planned to inspect the 001 MMU, but changed his inspection plans to go to the 002 MMU instead. Upon arrival in the 002 MMU, Inspector Lucas observed a substantial amount of water coming down on the section. The accumulations of water started in the No. 3 entry and got deeper through the last open crosscut. The No. 4 entry was approximately one foot from being roofed (inundated up to the roof with water) and the No. 5 entry appeared to be roofed. The inflow of water had knocked the power on the section and a number of other mine equipment was submerged. Owl Shift Mine Foreman Donnie Thomas told Inspector Lucas that there had been "one hell of a pillar fall."

Inspector Lucas immediately issued a Mine Act § 103(k) order to ensure the safety of the miners on the section. Subsequently, Inspector Lucas issued four Mine Act § 104(d)(1) citations and orders to the operator relating to the inundation. They alleged a violation of 30 C.F.R. § 75.1502 for failure to follow the approved emergency evacuation plan; a violation of 30 C.F.R. § 50.10(d) for failure to contact MSHA within 15 minutes of the inundation; a violation of 30 C.F.R. § 75.360(g) for failure to adequately record hazardous conditions relating to the inundation; and a violation of 30 C.F.R. § 75.380(d)(1) for failure to maintain the primary

[1] Record cites are not available because the ALJ dismissed these proceedings prior to hearing. The Secretary would have proffered evidence of these facts at the hearing.

escapeway, which had filled with water. The Secretary began an investigation to determine if the operator's agents "knowingly authorized, ordered, or carried out" a violation of a mandatory health or safety standard under Mine Act § 110(c). *See* 30 U.S.C. § 820(c).

As the investigation was ongoing, Mill Branch Coal Corporation filed for bankruptcy. On August 3, 2016, a Commission ALJ approved a settlement that resolved the operator's liability for these violations. The settlement did not modify the citation or orders in any way.

On April 4, 2018, MSHA's § 110(c) investigation concluded that Scott and Thomas knowingly violated 30 C.F.R. § 50.10(d) by failing to report the April 7, 2015 inundation at North Fork #6. MSHA's investigations unit then referred the cases to MSHA's assessments unit to propose civil penalties against the agents. Eight days later, on April 12, 2018, MSHA issued a proposed assessment to each agent. On May 1, 2018, the Secretary received the agents' notices of contest, and on June 18, 2018, the Secretary filed petitions for assessment with the Commission.

B. Commission Proceedings

On August 10, 2018, the two dockets were assigned to Judge Feldman, who issued a prehearing order encouraging the parties to attempt to reach settlement and ordering that the parties submit a 45-day status report concerning their attempts to settle.

On September 24, 2018, the parties submitted a status report informing the judge that "the parties have made substantial progress towards settlement" and had engaged in informal discovery. They also stated that they "plan to continue discussions in the hopes that the matters can be resolved through settlement." On November 8, 2018, the parties submitted their pre-hearing statements that identified exhibits and witnesses, stipulated to relevant issues of fact or law that are not in substantial dispute, and identified issues to be litigated. They also provided a

memorandum of law and identified three separate mutually agreeable weeks for a potential hearing date.

On December 3, 2018, the judge consolidated the two dockets for a single hearing and ordered a hearing on the merits to be held on February 19, 2019. On January 24, 2019, Respondents moved for a continuance of the hearing. On January 31, 2019, the judge continued the hearing and scheduled a conference call for February 6, 2019, to discuss a date for a hearing of these matters. On February 6, 2019, the judge cancelled the conference call. On February 11, 2019, the judge requested that the parties confer and, again, provide a list of three mutually agreeable hearing dates, which the parties submitted on February 12, 2019.

On February 19, 2019, the judge's clerk emailed the Secretary's counsel and requested the dates that the Secretary had initiated the 110(c) investigations. The Secretary's counsel responded on February 21, 2019 that: "The underlying order was issued on April 8, 2015. The investigation began on that date and concluded on April 4, 2018." The parties continued to pursue settlement discussions during this time. Then, on March 27, 2019, Judge Feldman *sua sponte* issued an order to show cause why both cases should not be dismissed. *See* March 27, 2019 Order to Show Cause (Show Cause Order). Settlement discussions ceased.

The Show Cause Order identified the "threshold issue" as whether the approximately three-year period between citing the operator under Mine Act § 104(d)(1) for a violation of 30 C.F.R. § 50.10(d) and proposing the assessments against Scott and Thomas for a knowing violation of that standard "satisfies the timeliness provisions of section 105(a)." Show Cause Order at 1-2. The ALJ acknowledged that although § 105(a) applies only "to contests of civil penalties by operators," Commission ALJs have nevertheless "repeatedly applied the timeliness provisions of section 105(a) to cases of personal liability brought pursuant to section 110(c) of

the Act." Show Cause Order at 2.

Relying only on *Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2012), which involved the Secretary's failure to file petitions for penalty assessment within 45 days of receipt of contest as Commission Rule 28(a) requires, the order directed the Secretary to explain the reasons "for the 36-month delay" in proposing civil penalties, and to address three specific issues:

1. Why the Secretary had sufficient information concerning the facts surrounding the underlying violation to settle with the operator in August 2016, but needed an additional 20 months to issue proposed assessments against Scott and Thomas;
2. Why the investigation into "apparently non-complex questions of fact" (which, in the ALJ's view, included whether the Respondents were primarily responsible for notifying MSHA of the inundation within 15 minutes, the extent of the alleged delay, and whether there were any aggravating or mitigating circumstances) required approximately 36 months; and
3. Why, if the date of referral for proposed assessment exceeded the 18-month internal MSHA time goal indicated in its Program Policy Manual (PPM), there was a "delay."

Show Cause Order at 3-4.

On April 12, 2019, the Secretary responded to the ALJ's order. *See* Sec'y's Statement in Response to the Order to Show Cause (Sec'y's Statement). The Secretary stated that the petitions for assessment were timely filed under 28 U.S.C. § 2462, which provides for a five-year statute of limitations. Sec'y's Statement at 3-4. The Secretary explained that Mine Act § 105(a) requires that the Secretary notify the operator or agent of a proposed assessment within a reasonable time after the termination of the investigation (here, only eight days), and that the Commission does not have the authority to dismiss a proceeding as a sanction for a perceived

failure to propose an assessment in a timely fashion. Sec'y's Statement at 4-5. The Secretary further argued that agent liability investigations require more fact-finding than those needed simply to cite an operator, that details of the investigation are protected by the deliberative-process, investigative, attorney-client, and work product privileges, that the PPM is not binding on either the Secretary or the Commission, and that the agents failed to show any prejudice. Sec'y's Statement at 6-9.

Even though the Show Cause Order was directed only at the Secretary, the ALJ permitted the agents to file a response to the Secretary's submission. On April 25, 2019, the agents filed a response, in which, for the first time, they alleged prejudice. *See* Response in Opposition to Secretary's Statement in Response to Order to Show Cause and Request for Dismissal. On April 30, 2019, the Secretary replied, arguing that their assertions of prejudice did not warrant dismissal. *See* Secretary's Reply to Respondents' Statement.

THE ALJ'S DISMISSAL ORDER

On July 23, 2019, the ALJ dismissed the proceedings, rejecting each of the Secretary's arguments. *See* July 23, 2019 Dismissal Order (Dismissal Order).[2] The ALJ declined to apply the five-year statute of limitations, citing *Long Branch*, 34 FMSHRC at 1986-89. Dismissal Order at 3. He held that the length of a § 110(c) investigation is subject to Commission review and rejected the Secretary's argument that the relevant time period in determining whether a penalty proposal is timely is the period between the close of the investigation and the proposal of penalties. Dismissal Order at 3. The ALJ did not explain why he believed he was entitled to privileged information, stating only that "[t]he implications of . . . granting the Secretary carte blanch[e] . . . may well not comport with considerations of fair play and due process." Dismissal

[2] The Dismissal Order incorporated the Show Cause Order by reference. Dismissal Order at 2.

Order at 3 (*quoting Dyno Nobel East-Central Region*, 35 FMSHRC 265, 267 n.2 (Jan. 2013) (ALJ)). In addition, he expressly declined to address whether the three-year period prejudiced the Respondents. Dismissal Order at 4.

ARGUMENT

The Commission reviews an ALJ's legal conclusions de novo. *Contractors Sand & Gravel, Inc.*, 20 FMSHRC 960, 966-67 (Sept. 1998). The ALJ erred by disregarding the applicable five-year statute of limitations, demanding irrelevant and privileged information, misconstruing Mine Act § 105(a), and, to the extent he believed § 105(a) to be ambiguous, by not deferring to the Secretary's reasonable interpretation.

A. The ALJ erred by dismissing a proceeding filed within the five-year statute of limitations provided by 28 U.S.C. § 2462.

Statutes of limitations "se[t] a fixed date when exposure to the specified Government enforcement efforts en[d]." *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1641 (2017) (*quoting Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013)). They are intended to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 568 U.S. at 448 (*quoting Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–349 (1944)). In short, they provide "security and stability to human affairs." *Gabelli*, 568 U.S. at 448 (*quoting Wood v. Carpenter,* 101 U.S. 135, 139 (1879)).

Where Congress does not "otherwise provide[]" a limitations period, 28 U.S.C. § 2462 states that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" must be "commenced within five years from the date when the claim first accrued . . ." 28 U.S.C. § 2462. Because this statute of limitations is not specific to a particular Act of Congress, it "governs many penalty provisions throughout the U.S. Code."

Gabelli v. S.E.C., 568 U.S. at 445 (applying 28 U.S.C. § 2462 to enforcement actions brought by the Securities and Exchange Commission under the Investment Advisors Act). As such, this statute of limitations has been applied to government enforcement actions under a number of federal statutes in federal district court. *See, e.g., U.S. v. Luminant Generation Co., L.L.C.*, 905 F.3d 874, 880-81 (5th Cir. 2018) (Clean Air Act); *U.S. v. Godbout-Bandal*, 232 F.3d 637, 639 (8th Cir. 2000) (Change in Bank Control Act). It applies with equal force to civil penalty proceedings before ALJs. *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

The Mine Act does not "otherwise provide" a limitations period for filing civil penalty enforcement actions. *See generally* 30 U.S.C. § 801 *et seq*. Accordingly, the five-year statute of limitations from 28 U.S.C. § 2462 applies to this action. This statute of limitation "must receive a strict construction in favor of the Government." *Badaracco v. Comm'r*, 464 U.S. 386, 398 (1984) (interpreting a statute of limitations that allowed the IRS to assess tax "at any time" when there is a "false or fraudulent return with the intent to evade tax" to permit a 1977 enforcement action concerning underpayment of tax between 1965 and 1969).

The knowing conduct in this case involves the failure on April 7, 2015 to report to MSHA an inundation of water. Assuming that the Secretary's claims for civil penalties first accrued on that date (at the earliest), the Secretary filed the petitions in these cases well within the statute of limitations, which will not close until April 7, 2020. By dismissing on timeliness grounds claims filed three years after accrual, the ALJ disregarded the controlling five-year statute of limitations and effectively established a three-year statute of limitations.

MSHA's internal timeliness goals also do not supersede or affect in any way the five-year statute of limitations. The Commission has repeatedly held that "the Enforcement Guidelines and the PPM are not binding on the Secretary or the Commission." *D.H. Blattner & Sons, Inc.*,

18 FMSHRC 1580, 1586-87 (Sept. 1996) (*citing King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981)); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (reversing Commission decision that improperly regarded the Secretary's enforcement policy as binding). As a management tool, to encourage prompt investigations when possible, the Program Policy Manual establishes internal MSHA goals for completing § 110(c) investigations. Many factors impact whether MSHA is able to achieve its goals in a particular investigation, including staffing levels, whether there exist other priority matters, the facts of the case, and the level of cooperation from the mine, its agents, and its miners. MSHA strives to complete investigations as expeditiously as possible, but the PPM is not a self-imposed jurisdictional limit on its ability to propose penalties within the five-year statutory period.

B. The ALJ erred by requiring irrelevant and privileged information concerning the Secretary's § 110(c) investigation as a condition of adjudicating the cases on the merits.

The ability to impose personal liability under Mine Act §§ 110(c) and 110(d) is among the most significant enforcement actions available to MSHA to ensure compliance with the Mine Act and related standards. *See* 30 U.S.C. § 820(c) (agents may be "subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d)."); *Id.* § 820(d) (conviction can result in punishment by "a fine of not more than $250,000, or by imprisonment for not more than one year, or by both . . ."). Because of these serious consequences, MSHA conducts thorough investigations before assessing proposed penalties or pursuing criminal enforcement under these provisions. In general, a § 110(c) investigation is much more involved than an average inspection; it requires gathering facts and evidence via documents, multiple witness interviews, and research and analysis. A § 110(c) investigation also involves extensive analyses and communications within and among the relevant MSHA District Office, MSHA's investigations unit, the Office of the Solicitor, and sometimes the Department

of Justice (DOJ), that typical citations and orders do not. It is imperative that MSHA conduct agent investigations extremely carefully, with attorney oversight and consultation, to avoid a miscarriage of justice against accused individuals. Sufficient research and deliberation is needed to ensure that MSHA is not bringing agent cases that are not thoroughly investigated and researched and that are not on firm legal footing. And MSHA's investigations must be extremely thorough before referring any matter to DOJ for potential criminal prosecution. Further, after a DOJ referral, in coordination with DOJ, MSHA may wait to pursue civil liability against an agent pending the outcome of the criminal inquiry and the evidence gathered in connection with that inquiry. Criminal investigations, including those that involve a grand jury, may take years to conclude.

The ALJ's Order to Show Cause demanded the Secretary divulge information concerning the content of its investigation that led to the penalty petitions. This information is both irrelevant and privileged.

Under the Mine Act's statutory scheme, the Secretary and the Commission have complementary, but distinct, roles. The Secretary, acting through MSHA, "inspects mines, issues citations for safety violations, and proposes civil penalties." *Long Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1162 (D.C. Cir. 2013). The Commission, on the other hand, exercises "the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006). In this way, the Secretary "plays the roles of police and prosecutor, and the Commission plays the role of judge." *Lone Mountain*, 709 F.3d at 1162. When the Secretary proposes civil penalties against agents and the agents contest, the ALJ's role is limited to determining whether the agents "knowingly authorized, ordered, or carried out [a] violation"

and, if so, the appropriate civil penalty. 30 U.S.C. § 820(c), (i). The Secretary bears the burden of proof in establishing the violation; the evidence submitted at trial, and not the manner in which the Secretary conducted his investigation, is the relevant inquiry.

In addition, the information requested is privileged under the investigative privilege (official information privilege), the deliberative process privilege, the attorney-client privilege and the work-product privilege. The Commission has long recognized "that the Secretary's investigative files are protected by a qualified official information privilege" and not subject to disclosure. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112 (July 1995) (finding the ALJ erred by making a negative inference from the Secretary's refusal to produce an MSHA investigatory report). This privilege "prevents the unwarranted disclosure of documents from law enforcement investigatory files as well as testimony about that information." *Sec'y of Labor o/b/o Donald L. Gregory*, 15 FMSHRC 2228, 2237 (Nov. 1993).

The Commission also has long recognized the importance of the deliberate process privilege as a "common sense-common law privilege" that promotes the "frank and honest" exchange of views within the agency. *See In re: Contests of Respirable Dust Sample Alteration Citations (Dust Cases)*, 14 FMSHRC 987, 990-91 (June 1992) (quoting *Nixon v. Sirica*, 487 F.2d 700, 763-64 (D.C. Cir. 1973) (Wilkey, J., dissenting)). Under the test explained by the Commission, the privilege protects communications that are "pre-decisional" and "deliberative." *Dust Cases*, 14 FMSHRC 987, 994 (June 1992) (quoting *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)). Investigatory information such as that the ALJ demanded is "pre-decisional" because it is compiled before the Secretary decides whether or not to propose criminal or civil liability and is "deliberative" because it informs the decision.

Additionally, because the Office of the Solicitor is involved in each § 110(c)

investigation, responding to the ALJ's demands would require the disclosure of attorney-client communications and work product. The attorney-client privilege is an "absolute privilege" and disclosure can never be compelled. *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1009 (June 1992).[3] Likewise, responding to the ALJ's demands would require the Secretary to disclose his work product, which protects "documents and tangible things" that are "prepared in anticipation of litigation or for trial" and "by or for another party or by or for that party's representative." *Asarco, Inc.*, 12 FMSHRC 2548, 2557-58 (Dec. 1990) (*quoting* Fed. R. Civ. P. 26(b)(3)). See *Asarco*, 12 FMSHRC at 2559 (holding an MSHA special investigator's notes are protected work product because a "major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) or (d) of the Mine Act").

For all of the same reasons, the Secretary also does not, nor should it ever, discuss or reveal the existence of pending criminal referrals to the Department of Justice, which an information demand of this type in any given agent case may require.

C. The ALJ erred by interpreting § 105(a)'s "reasonable time" requirement to apply to the length of the Secretary's investigation.

By its plain terms, § 105(a) does not appear to apply to agent assessments.[4] Section 105(a) refers only to operator penalties proposed under § 110(a), not to penalty petitions under § 110(c). *See* 30 U.S.C. § 815(a). This makes sense, because when MSHA cites operators or

[3] Other privileges and privacy laws also may be implicated, such as the Privacy Act of 1974, as amended.

[4] Section 105(a) states: "If, after an inspection or investigation, the Secretary issues a citation or order under section 814 of this title, he 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 820(a) of this title for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. . . ." 30 U.S.C § 815(a).

issues them orders in routine cases, the time between the determination that a violation has occurred and the time MSHA proposes penalties potentially could be substantial (for example, in the case of special assessments). But, either way, the plain language of § 105(a) also is clear that the Secretary's obligation to propose penalties "within a reasonable time" occurs only "after the termination of [an] inspection or investigation." 30 U.S.C. § 815(a). MSHA must have the relevant facts in order to determine whether a violation exists in the first place. Thus, to the extent § 105(a) applies to agent assessments, the relevant period is the period between the conclusion of the § 110(c) investigation and the proposed agent assessment, not the period between the conclusion of the mine inspection or the citation to the operator and the proposed agent assessment.

Although the plain language of § 105(a) is clear, to the extent any ambiguity exists the Secretary interprets § 105(a) of the Mine Act as providing that the termination of the investigation occurs when the investigation has concluded, and not the date that the underlying citation against the operator was issued or the date the events being investigated occurred. The Secretary's interpretation of the statute is entitled to deference unless it is unreasonable. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984); *The American Coal Co. v. FMSHRC*, 796 F.3d 18, 23 (D.C. Cir. 2015) (*citing Martin v. OSHRC*, 499 U.S. 144, 156-57 (1991)). And the D.C. Circuit Court of Appeals has ruled that this particular interpretation deserves deference. *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d at 261 (Secretary issued proposed penalty to the operator within a reasonable time although done approximately 11 months after the issuance of MSHA's accident investigation report and approximately 17 months after the issuance of the § 104(g) (training) order being assessed). An investigation of potential liability under § 110(c) terminates when MSHA concludes the

investigation, not when MSHA cites the operator, and not when MSHA settles or otherwise resolves citations or orders against the operator. In this case, on April 4, 2018, the investigations unit referred the cases for penalty assessments. On April 12, 2018, MSHA proposed those penalties. This eight-day period is reasonable.

An interpretation of § 105(a) that includes the period of investigation in the "reasonable time" period may negatively impact the Secretary's decision-making on enforcement actions by imposing arbitrary limits on the acceptable length of his investigations. This interpretation also is inconsistent with other provisions of the Mine Act; where Congress meant to prioritize the speed of the Secretary's investigation, it was explicit. *See* 30 U.S.C. § 815(c)(2) (discrimination investigation "shall commence within 15 days of the Secretary's receipt of the complaint . . .").[5] As discussed, MSHA should not be rushed in analyzing an agent's conduct; to place the emphasis on the speed of the Secretary's review would risk incomplete investigations that may result in a miscarriage of justice.

The ALJ's reliance on *Long Branch Energy*, 36 FMSHRC 1984 (Aug. 2012) for his interpretation is misplaced. *Long Branch* concerned Commission Rule 28(a)'s requirement that the Secretary file a petition for assessment of penalty within 45 days of receipt of a timely contest of proposed penalty assessment. *See* 29 C.F.R. § 2700.28(a). Commission Rule 28(a) does not restrict the length of the Secretary's investigation.

D. The ALJ erred by vacating a proceeding as a sanction for perceived untimeliness under Mine Act § 105(a).

Finally, the Mine Act provides no authority for the Commission or its ALJs to vacate citations if the Commission believes the Secretary failed to propose a penalty "within a

[5] But even with respect to that provision, Congress "emphasized . . . that these time-frames are not intended to be jurisdictional." *See* Sen. Rep. 95-181 at 36 (1977).

reasonable time." In *Brock v. Pierce County*, 476 U.S. 253 (1986), the Supreme Court held that, despite language in the Comprehensive Employment and Training Act requiring that Secretary of Labor shall investigate misuse of grant funds and "shall" determine "the truth of the allegation or belief involved, not later than 120 days after receiving the complaint," the Secretary did not lose the power to recover funds beyond that 120-day period. In *Brock*, the Supreme Court concluded that there was "simply no indication in the statute or its legislative history that Congress intended to remove the Secretary's enforcement powers if he fails to issue a final determination on a complaint or audit within 120 days." *Brock*, 476 U.S. at 266. Instead, the 120-day provision was "clearly intended to spur the Secretary to action, not to limit the scope of his authority." *Id.*, 476 U.S. at 265.

Since *Brock*, the Supreme Court has clarified that a court determining whether a statutory deadline is jurisdictional must examine "the language, the context, and the purposes of the statute." *Dolan v. U.S.*, 560 U.S. 605, 611 (2010). The Court cautioned that where a statute "does not specify a consequence for noncompliance with its timing provisions, federal courts will not in the ordinary course impose their own coercive sanction." *Id.* (internal quotations omitted). The Court also cautioned that the use of the word "shall" has not always led the Court to interpret statutes to bar officials from taking action to which a missed statutory deadline refers. *Id.* (*citing Brock*, 476 U.S. at 262).

Similarly, the language, context, and purpose of § 105(a) also do not indicate that Congress intended that non-compliance with that section would bar enforcement of the Act. First, unlike the statutes at issue in *Brock* and *Dolan*, Mine Act § 105(a) does not impose a hard deadline for the Secretary to propose assessment, but requires merely that such time be "reasonable." By contrast, in other parts of the Mine Act, Congress chose to set clear deadlines

for action -- and consequences for letting those deadlines pass. *See, e.g.* 30 U.S.C. § 815(b)(1)(A) (operator has 30 days to contest proposed penalty assessment and failure to contest within those 30 days converts the proposed assessment into a final order "not subject to review by any court or agency").[6] Other statutes also direct agencies to act "within a reasonable time" but have not been interpreted to require adverse enforcement consequences for noncompliance. For instance, the Administrative Procedure Act at 5 U.S.C. § 555(b) requires an agency to "within a reasonable time . . . conclude a matter presented to it." In *Consolidated Freightways v. N.L.R.B.*, 892 F.2d 1052 (D.C. Cir. 1989), the D.C. Circuit, while noting that it did not condone the six-year period between remand and issuance of an order, upheld enforcement of the National Labor Relations Board's order because "even a 'deplorable' delay does not justify interference . . ." *Id.* (*quoting N.L.R.B. v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969)).

Mine Act enforcement should not be compromised simply because of noncompliance with § 105(a). The Mine Act was enacted because of the "need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c). An important component of improving working conditions in the mining industry is the imposition of a penalty when mandatory health or safety standards are violated, especially for the most serious violations, which agent cases typically involve. *See generally* 30 U.S.C. § 820. The Commission has often noted the importance of the deterrent effect of penalties. *See Unique Electric*, 20 FMSHRC 1119, 1123

[6] Notably, the Commission has interpreted this provision to not limit its own authority to reopen final orders. *See Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993).

(Oct. 1998) (describing the specific and general deterrent effect of Mine Act penalties). Interpreting § 105(a) to bar enforcement simply because the Secretary failed to propose penalties "within a reasonable time" ultimately harms miners who work in the nation's mines and benefit from that deterrence -- a group that "bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit." *Dolan*, 560 U.S. at 613-14.

The legislative history also makes clear that Congress did not intend that enforcement suffer because of non-compliance with § 105(a). The report of the Senate Committee that drafted the provision that became § 105(a) stated that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and *the Committee does not expect that the failure to propose a penalty promptly shall vitiate any proposed penalty proceeding.*" Sen. Rep. 95-181, at 34 (1977) (emphasis added).

The ALJ's concerns about "fair play and due process," *see* Dismissal Order at 3, may be understandable, but they are addressed by the five-year statute of limitations, not Mine Act § 105(a). Agents are entitled to know the exact timeframe within which they may be sanctioned. The end of the five-year limitations period -- not at the end of "a reasonable time" -- is the time when the agents no longer face "exposure to the specified Government enforcement efforts." *Kokesh*, 137 S. Ct. at 1641 (2017).

Moreover, even if the Commission does have authority to sanction the Secretary where a penalty was not proposed in a timely fashion, it certainly should not do so without a showing of prejudice due to the delay. In *Twentymile*, the court noted that "it would be particularly inappropriate to set aside the Secretary's recommendation for penalty in this case given that Twentymile, after repeated opportunity, has yet to show any prejudice to itself from whatever delay in fact occurred." 411 F.3d at 262. Here, the ALJ expressly declined to make a finding of

prejudice. Dismissal Order at 4.

Further, even where sanctions are appropriate, a court "abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions." *Oliva v. Sullivan*, 958 F.2d 272, 274 (9th Cir. 1992) (quotation omitted) (discussing failure to prosecute once the case has been docketed). The Commission has itself recognized that dismissal is a "drastic remedy." *Long Branch*, 34 FMSHRC at 1993. The ALJ here considered only dismissal.

CONCLUSION

For the reasons above, the Secretary urges the Commission to grant the Secretary's petition for discretionary review, reverse the ALJ's dismissal of these cases, and remand the cases with instructions that the ALJ promptly set these matters for hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2019, a copy of the foregoing Petition for Discretionary Review was served by electronic mail on:

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