FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 14, 2020

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

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY THE COMMISSION:

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), and involve penalties the Secretary of Labor seeks to assess against James C. Scott and Donnie B. Thomas pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c).[1] For the reasons that follow, we vacate the order of the now-retired Judge dismissing the proceedings (41 FMSHRC 563 (July 2019) (ALJ)), and remand the cases to the Chief Administrative Law Judge for its reassignment and the resumption of proceedings.

[1] Section 110(c) of the Mine Act provides:

> Whenever 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, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) [that provide for operator civil and criminal penalties, respectively].

30 U.S.C. § 820(c).

I.

Factual and Procedural Background

On April 7, 2015, Scott and Thomas were employed by Mill Branch Coal Corporation at its North Fork #6 Mine as Superintendent and a shift foreman, respectively. The Secretary alleges that a dangerous inundation of water in a section of that mine that day was discovered by a Mine Safety and Health Administration ("MSHA") inspector. The next day, MSHA issued four citations and orders to Mill Branch in connection with the inundation, including Order No. 8178613, alleging that the inundation was not reported to MSHA within 15 minutes, as required by 30 C.F.R. § 50.10(d).[2] At the same time, MSHA began investigating the liability of the two miners for at least two of the violations.

Mill Branch later filed timely notices of contest with respect to the four orders and citations. Thereafter, on August 3, 2015, Mill Branch entered into bankruptcy proceedings.

In letters dated October 27, 2015, MSHA's Norton (VA) District Manager informed each of the two miners that MSHA was "proposing to assess an individual civil penalty against you as an agent of Mill Branch" for the violation cited in Order No. 8178613 as well as for violating 30 C.F.R. § 75.1502 (failure to follow the emergency evacuation and fire fighting plan), one of the four cited violations. MSHA went on to explain that "[t]his proposed penalty is based on information obtained during a special investigation conducted under the Mine Act . . . ."[3]

Despite the foregoing letters, MSHA, when it proposed penalties against Mill Branch in January 2016 in Docket Nos. VA 2016-105 & -106 for the four violations connected to the inundation, did not also propose to assess a penalty against either miner. Furthermore, in July 2016, prompted in large part by Mill Branch's pending bankruptcy proceeding, the Secretary and Mill Branch agreed to settle all four of the penalties, including the penalty for Order No. 8178613. Based upon the Secretary's motion for settlement, as well as his subsequent supplemental representations discussed below, a Commission Judge ordered Mill Branch to pay $33,071 for that violation, a reduction of 50 percent from the amount that the Secretary had proposed. *See* Decision Approving Settlement, Docket Nos. VA 2016-105, et al. (Aug. 3, 2016).

Twenty months later, on April 12, 2018, the Secretary proposed penalties against Scott and Thomas of $4,000 and $3,500, respectively. The Secretary alleged that the two miners, as agents of Mill Branch, knowingly authorized, ordered, or carried out the violation of section 50.10(d) set forth in Order No. 8178613. A different Judge was assigned to the miners' cases.

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[2] Section 50.10(d) requires operators to notify MSHA within 15 minutes of the occurrence of an "accident." An "accident" is defined to include "[a]n unplanned inundation of a mine by a liquid or gas." 30 C.F.R. § 50.2(h)(4).

[3] The Secretary did not enter copies of the letters into the record below; rather, they were appended by the Secretary to his reply brief to the Commission. In that same brief, the Secretary also disclosed that later in 2015, the miners had availed themselves of the opportunity MSHA offered in the letters to confer with the agency regarding their roles in the violations.

Upon eventually learning some of the background of the proceedings, the Judge issued a Show Cause Order. In that order, the Judge focused on the timing of the section 110(c) penalty proposals, in relation both to the much earlier settlement of the penalties against the operator and to the issuance of Order No. 8178613, three years previously. The Judge required the Secretary to supply information justifying such a course of conduct in the cases. 41 FMSHRC 227, 229-30 (Mar. 2019) (ALJ). The Secretary replied that the investigation ended on April 4, 2018, and penalties were proposed eight days later on April 12, 2018.

The Judge was not satisfied with the substance of the Secretary's responses. The Judge rejected the Secretary's contention that the Commission can only review the appropriateness of the amount of time that lapsed between the *end* of the MSHA 36-month investigation of the miners and the agency's proposal of penalties against them. Because he found that the Secretary had failed to provide a justification for such a lengthy investigation and that the Secretary had failed to demonstrate that the notices of civil penalty were issued within a reasonable time as contemplated by the Mine Act, the Judge dismissed the proceedings. 41 FMSHRC at 565-66.

The Commission granted the Secretary's subsequent petition for discretionary review of the dismissal order.

II.

Disposition

This case involves an issue that flows from the dual enforcement scheme of the Mine Act. The Secretary is charged with, among other things, inspecting mines, investigating health and safety violations that are discovered, and proposing penalties for those violations. When an operator or miner contests an alleged violation or the penalty proposed for it, the Commission is then tasked with reviewing the proffered violation and proposed penalty, including assuring due process in adjudicating the matter and the ultimate assessment of any penalty.

A. Applicable Law

Section 105(a) of the Mine Act sets out the Secretary's obligations regarding the proposal of penalties, including the timeliness of their proposal, as well as the finality of a penalty not contested.[4] Section 105(d) then explains the role that the Commission is to play in the event of a

[4] Section 105(a) states in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, 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 110(a) for the violation cited. . . . . If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and

timely contest of any enforcement action by the Secretary, including the contest of a proposal of a penalty.[5]

One of the primary reasons the Mine Act was enacted was to greatly improve upon the civil penalty assessment, adjudication, and collection procedures of its main predecessor statute, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"). S. Rep. No. 95-181, at 43-45 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 631-33 (1978) ("*Legis. Hist.*"); *see generally Donovan v. Phelps Dodge Corp.*, 709 F.2d 86, 91 (D.C. Cir. 1983). There was no language addressing the timing or timeliness of the assessment process in section 109(a)(1) of the Coal Act, pursuant to which MSHA's immediate predecessor, the Mine Enforcement and Safety Administration of the Department of the Interior, proposed penalties against mine operators. Nor did the Coal Act demand timely action on the part of the predecessor to the Commission, the Board of Mine Operations Appeals, a creation of that same Department. Consequently, the Coal Act penalty procedures were "lengthy, and often repetitive," becoming ones which "encourage[d] delaying the ultimate payment of civil penalties." S. Rep. No. 95-181, at 44, *Legis. Hist.* at 632.

In drafting the Mine Act, the responsible Senate Subcommittee stated that "[t]o be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency. To achieve this objective S. 717 contains a number of significant departures from the present practice under the Coal Act." S. Rep.

> no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.

30 U.S.C. § 815(a) (emphasis added).

[5] Section 105(d) states:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, . . .or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination or any order issued under section 104, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . , and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. . . . .

30 U.S.C. § 815(d).

No. 95-181, at 43, *Legis. Hist.* at 631. Those departures, described as the "means by which the method of collecting penalties is streamlined," included that "civil penalties are to be assessed by the . . . Commission rather than by the Secretary as prevails under the Coal Act . . . . Where a penalty is contested, the normal proceedings for the hearing of cases by the Commission controls." S. Rep. No. 95-181, at 45-46, *Legis. Hist.* at 633-34. In creating the Commission, the Committee stated that it "strongly believes that it is imperative that the Commission strenuously avoid unnecessary delay in acting upon cases." S. Rep. No. 95-181, at 48, *Legis. Hist.* at 636.

At the same time, the legislative history notes that when circumstances cause prompt proposal of a penalty to not be possible, such event should not prevent imposition of a penalty. Thus the Senate Report states, "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, . . . the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, at 34, *Legis. Hist.* at 622. Congress desired expeditious action but also anticipated that speed is not achievable in all circumstances.

In a case interpreting the relevant statutory language, *Secretary of Labor v. Twentymile Coal Co*, 411 F.3d 256 (D.C. Cir. 2005), involving a late-filed penalty proposal, the D.C. Circuit focused on a two-pronged inquiry: (1) was the delay in proposing the penalty a reasonable one; and (2) did the operator demonstrate prejudice from whatever delay in fact occurred? *Id*. at 262. More recently, in *Long Branch Energy*, 34 FMSHRC 1984, 1990 (Aug. 2012), we explained "that Commission enforcement of the filing time limits is a secondary consideration to the primary purpose of section 105(d), i.e., ensuring prompt enforcement of the Act's penalty scheme." *See also Salt Lake Cty. Road Dep't*, 3 FMSHRC 1714, 1716 (July 1981) ("considerations of procedural fairness to operators must be balanced against the severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute and, hence, the public interest itself."). In another case we also stated that "[w]hen reviewing a judge's pre-trial rulings," such as the one the Judge made here in dismissing the proceedings, "the appropriate standard of review to apply . . . is abuse of discretion, though any factual determinations he made in arriving at his conclusion are subject to substantial evidence review." *Black Butte Coal Co.*, 25 FMSHRC 457, 459-60 (Aug. 2003). "[T]he Commission cannot merely substitute its judgment for that of the . . . [J]udge . . . . The Commission is required, however, to determine whether the [J]udge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings." *Asarco, Inc.*, 12 FMSHRC 2548, 2555 (Dec. 1990).

B. The Judge's Dismissal for the Alleged Failure to Comply with Section 105(a)

The Secretary argues that the Judge made numerous legal errors in his order dismissing the two section 110(c) cases. He contends that his obligation to propose penalties "within a reasonable time" occurs only "after the termination of [an] inspection or investigation." PDR at 13 (citing 30 U.S.C. § 815(a)). He thus argues that the relevant time period in this case was eight days. The two miners respond that the Judge properly required that the Secretary demonstrate "adequate cause" for why it took three years for the penalties against them to be proposed, and that substantial evidence supports the Judge's conclusion that the Secretary failed to make such a showing. They allege that the delay of more than three years from the issuance of the citation to the operator to the issuance of the section 110(c) penalty proposals has prejudiced them.

The Judge based his dismissal of proceedings on our statement in *Long Branch* that "[i]n addressing timeliness issues, . . . the Secretary is not free to arbitrarily ignore reasonable time constraints that would 'deny fair play to operators' by 'exposing operators to stale claims.'" 41 FMSHRC at 564 (quoting *Long Branch*, 34 FMSHRC at 1989). The Judge applied the remainder of the Commission's *Long Branch* analysis to the facts at hand. Because in the Judge's view, the Secretary failed to provide a justification for not proposing the 110(c) penalties until three years after issuing Order No. 8178613, the Judge dismissed the proceedings. *Id*. at 564-65.[6] This case, however, does not hinge on application of Commission Procedural Rule 28, 29 C.F.R. § 2700.28. The Secretary complied with Rule 28(a). Therefore, Rule 28 was not applicable and does not provide a basis for dismissal.

The primary issue the Judge raised in his Show Cause Order is the timeliness of the Secretary's initial proposal of the section 110(c) penalties. We review his decision by looking first at the statute and then at due process.

The most obvious statutory provision is section 105(a). As seen, it states that "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104, 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 . . . ." 30 U.S.C. § 815(a) (emphasis added).[7]

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[6] *Long Branch* involved a specific procedural deficiency: a failure by the Secretary to file a penalty petition within 45 days of receiving a timely notice of contest. In *Long Branch*, the Commission expanded upon our earlier decision in *Salt Lake* and held that in such cases, a Judge, before permitting proceedings to go further, can require the Secretary to provide "adequate cause" for his failure to meet the 45-day time limit. 34 FMSHRC at 1989-91. The Commission was careful to point out in *Long Branch* that it was interpreting and applying its own regulation and thus had considerable legal leeway to craft the "adequate cause" standard. *Id*. at 1989.

[7] The Secretary correctly points out that section 105(a) goes on to refer only to penalties proposed pursuant to section 110(a), which governs penalties imposed upon operators, not individual miners. Given our holding here, we need not resolve the Secretary's contention that, by implication, the terms of section 105(a) do not govern penalties that the Secretary proposes to assess against individual miners pursuant to section 110(c). We note, however, that both the Secretary and the Commission have continually found it necessary to look to other provisions of the Mine Act — such as sections 105(a) and section 105(d) set forth above, along with section 110 — to give effect to the summary provisions of section 110(c).

The Secretary also argues that, notwithstanding its "reasonable time" language, section 105(a) cannot be read to be a statute of limitations, so that by default 28 U.S.C. § 2462 applies to *all* Mine Act civil penalty proceedings. That provision states in pertinent part that "[e]xcept 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 . . . ." *See, e.g., 3M Co. v. Browner*, 17 F.3d 1453, 1455 (D.C. Cir. 1994) (holding 28 U.S.C. § 2462 to apply because civil penalty at issue there "contains no provision limiting the time within which the [federal

Regardless of the length of time the Secretary may have taken to investigate the section 110(c) charges here,[8] deference has been accorded the Secretary's interpretation of section 105(a) that the time period subject to the reasonableness requirement in that provision *begins* only upon the *completion* of the investigation necessary to support the penalty proposal. *See Twentymile*, 411 F.3d at 261. Consequently, the Secretary explained that his investigations into the liability of the two individual miners under section 110(c) for the section 50.10(d) violation did not conclude until April 4, 2018. S. Resp. to Order to Show Cause at 1.

Thus, for present purposes, the period subject to the "reasonable time" requirement of section 105(a) began on April 4, 2018 with the conclusion of the section 110(c) investigations and ended with MSHA's proposal of penalties on April 12, 2018 — a period of eight days. PDR at 13-14. There is no question that, for purposes of section 105(a), the eight-day period of time qualifies as "reasonable" for purposes of proposing a penalty. *See Long Branch*, 34 FMHSHRC at 1991 n.11 ("Commission presumes that the Secretary's agents generally act in good faith . . . ."). Consequently, the Judge's order dismissing these proceedings cannot be affirmed at this juncture on the basis of section 105(a).[9]

Turning to the due process issue, the Commission has recognized that the "[t]he fundamental requirement of procedural due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner' *appropriate to the nature of the case*."

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agency] must initiate the administrative action."). Because of our holding here, we leave the resolution of this argument to a future case.

[8] Mine Act investigations are governed by section 103 of the Act, 30 U.S.C. § 813, which contains no timeliness provision. *Cf.* 52 U.S.C. § 30107(a)(9) (providing that the Federal Election Commission is "to conduct investigations . . . expeditiously"). Furthermore, an investigation into a miner's individual liability under section 110(c) for a violation is, in particular, not perfunctory and thus may take time beyond that that is necessary to investigate the operator for the violation. *See Sedgman*, 28 FMHSRC 322, 341 (June 2006) (Commissioners Suboleski and Young) (characterizing as reasonable under section 105(a) the less than 11 months of time between citation issuance and penalty proposal to the operator, given the section 110(c) investigation that was also conducted).

[9] Chairman Rajkovich and Commissioner Althen note, separately, the following observations. The only record of the conduct of the investigation after December 2015 presently before us is the Secretary's statement that MSHA issued the assessment eight days after the Technical Compliance and Investigation Office sent a letter requesting proposal of assessments. Thus, the current record precludes our determination of a number of issues. Those include: whether section 105(a) applies to section 110(c) assessments; whether an investigation terminates in MSHA's absolute discretion; whether any person of interest, or the Commission, may inquire as to when an investigation was concluded for purposes of section 105(a); and, whether (or how) *Long Branch* may affect our evaluation of prejudice versus "reasonable time" in the conduct of investigations pursuant to section 110(c). The fact that we have not addressed those issues, here, has no bearing on their consideration by the Judge on remand or by the Commission in future cases.

Capitol Cement Corp., 21 FMSHRC 883, 893 (Aug. 1999) (emphasis added) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). We note that the circumstances the miners' cases present are undoubtedly unusual.[10] Cases against operators and related cases against individual miners "are often consolidated for reasons of judicial efficiency . . . ." S. Resp. to Show Cause Order at 6. Moreover, the Commission has recognized that there are common elements to operator and individual miner liability cases, such as gravity. *See Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997); *see also Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012) (Judge's "finding that the [operator's] violation was not unwarrantable sufficiently explains why in her view no penalties against the individuals should be assessed . . . ."). Should the miners have suffered actual prejudice attributable to the unusual procedural path this case has traveled to date, it is possible they have been denied due process. We remand this case back to the judge, where the miners will have the opportunity to provide argument and evidence that they have been denied due process.

We do not find a statute bars the filing in this case, and in the absence of such a finding, the length of time, standing alone, does not bar the assessments. To establish a due process violation, the miners would have to submit on remand evidence of actual prejudice, not just allegations of potential or inherent prejudice.[11] *See Long Branch*, 34 FMSHRC at 1991-93; *see also Twentymile*, 411 F.3d at 262; *Valley Camp Coal Co.*, 1 FMSHRC 791, 792 (July 1979) (reversing Judge's decision dismissing penalty contest for failure to timely answer penalty petition because there was no showing that the Secretary had been prejudiced by the delay). The Secretary would then have the opportunity to submit rebuttal evidence to the assigned Judge.

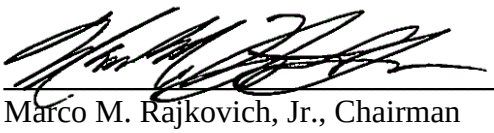
[10] Chairman Rajkovich and Commissioner Althen note, separately, the undoubtedly unusual aspect of these cases with the following observations. On October 27, 2015, notification was given to the miners of the intention to propose penalties against them. The violation under investigation was for failing to notify MSHA within 15 minutes of the occurrence of an accident. This would not appear to be a complex matter for investigation; yet the investigation was not reported as completed until more than two years later, on April 4, 2018. In proposing the settlement in the operator's case, the Secretary proffered that the resolution would "conserve scarce resources" such as "inspectors spending time preparing for and appearing at trial." E-mail from Office of Solicitor attorneys to Judge's clerk (July 27, 2016). In the Preliminary Statements in these cases, however, the Secretary identified as potential witnesses the two inspectors who had issued the citations and orders against Mill Branch in the operator's case. Further, there is no evidence that the Judge in the proceeding against the operator was informed that Scott and Thomas were the subjects of an investigation.

[11] To date, the miners' prejudice arguments have been made solely through argument of counsel, with no supporting evidence, such as affidavits.

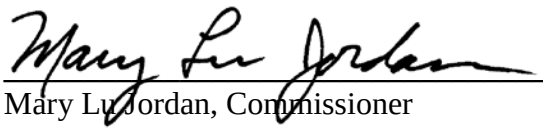
III.

Conclusion

For the foregoing reasons we vacate the Judge's order dismissing the proceedings and remand these cases to the Chief Administrative Law Judge for reassignment.



Marco M. Rajkovich, Jr., Chairman



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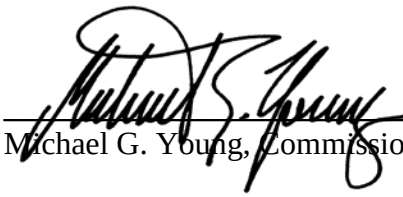
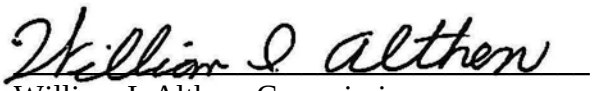
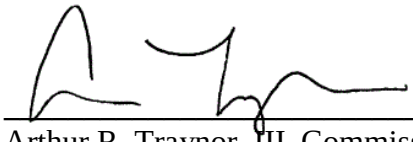


Michael G. Young, Commissioner



William I. Althen, Commissioner



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