

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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April 14, 2022

BC QUARRIES, LLC,  
Contestant

v.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent

**CONTEST PROCEEDINGS**

Docket No. PENN 2020-0110-RM  
Citation No. 523939; 06/16/2020

Docket No. PENN 2020-0111-RM  
Citation No. 9523940; 06/16/2020

Docket No. PENN 2020-0112-RM  
Citation No. 9523941; 06/16/2020

Docket No. PENN 2020-0113-RM  
Citation No. 9523942; 06/16/2020

Docket No. PENN 2020-0114-RM  
Citation No. 9523943; 06/16/2020

Docket No. PENN 2020-0115-RM  
Citation No. 9523945; 06/16/2020

Docket No. PENN 2020-0116-RM  
Order No. 9523936; 06/16/2020

Docket No. PENN 2020-0118-RM  
Order No. 9523937; 06/16/2020

Docket No. PENN 2020-0119-RM  
Order No. 9523938; 06/16/2020

Docket No. PENN 2020-0120-RM  
Order No. 9523958; 06/30/2020

Docket No. PENN 2020-0141-RM  
Citation No. 9523971; 08/3/2020

Docket No. PENN 2020-0142-RM  
Order No. 9523972; 08/03/2020

BC QUARRIES, LLC,  
Contestant

v.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

BC QUARRIES, LLC,  
Respondent

CONTEST PROCEEDINGS (CONT.)

Docket No. PENN 2020-0143-RM  
Citation No. 9523973; 08/3/2020

Docket No. PENN 2020-0144-RM  
Order No. 9523974; 08/3/2020

Docket No. PENN 2020-0145-RM  
Order No. 9523975; 08/3/2020

Docket No. PENN 2020-0146-RM  
Order No. 9523970; 08/3/2020

Docket No. PENN 2020-0147-RM  
Order No. 9523976; 08/3/2020

Docket No. PENN 2020-0148-RM  
Order No. 9523977; 08/3/2020

Docket No. PENN 2020-0149-RM  
Order No. 9523978; 08/3/2020

Mine: Shirvan Quarry  
Mine ID: 36-09539

CIVIL PENALTY PROCEEDING

Docket No. PENN 2021-0007  
A.C. No. 36-09539-523083

Mine: Shirvan Quarry

## DECISION AND ORDER

Appearances: David L. Karp, operator, for BC Quarries

Ryan Atkinson and Matthew P. Epstein, Office of the Solicitor, U.S.  
Department of Labor, Philadelphia, PA for the Secretary

Before: Judge McCarthy

This proceeding is before the undersigned upon Notices of Contest and a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

This matter concerns a series of inspections of the Mine, Shirvan Quarry, from April to October of 2020 and the resulting citations and orders. These inspections led to a myriad of alleged violations, 8 citations and 11 orders at issue in this proceeding. BC Quarries also challenges the penalty assessment that resulted from three of the orders. Many of these alleged violations stem from a similar sequence that involves a citation for an alleged violation followed by the failure to abate that violation, a withdrawal order, and the failure to follow that withdrawal order.

A hearing was held via Zoom for Government on July 13-14, 2021. During the hearing, the parties offered witness testimony<sup>1</sup> and documentary evidence citation or order by citation or order.<sup>2</sup> The Secretary submitted a post-hearing brief on September 13, 2021.

Based on a careful review of the record, including the evidence submitted, the Secretary's post-hearing brief, and observation of the demeanor of witnesses,<sup>3</sup> the undersigned makes the following findings of fact and conclusions of the law.

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<sup>1</sup> MSHA inspector Timothy H. Lindsay testified for the Secretary. Mine Operator David Karp and his son, Brandon Karp, testified for BC Quarries.

<sup>2</sup> In this Decision, "July 13 Tr." refers to the hearing transcript for July 13, 2021, "July 14 Tr." refers to the July 14, 2021 transcript, "Sec'y Ex." refers to the Secretary's exhibits, and "Op. Ex." refers to BC Quarries' exhibits. Sec'y Exs. 1-30 and Op. Exs. 1-3 were received into evidence. July 14 Tr. at 75, 77.

<sup>3</sup> In evaluating testimony, the undersigned has taken into consideration the nature of the questioning and testimony given in response, the demeanor of the witnesses, their evasiveness or forthrightness, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for their testimony, their experience and credentials, and their consistency or lack of consistency vis-à-vis their own testimony and the testimony of other witnesses.

## I. STIPULATIONS

The parties submitted the following stipulations, which have been accepted into the record:

- a) At all relevant times, Respondent has been an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
- b) BC Quarries is a “mine” as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).
- c) Respondent’s operations at the mine at which the Citations in this case were issued are subject to the jurisdiction of the Mine Act.
- d) This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
- e) The individuals whose names appear in Block 22 of the Citation(s)/Order(s) in this case were acting in an official capacity and as authorized representatives of the Secretary of Labor when they issued the Citations/Orders.
- f) The Citation(s)/Order(s) were properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated.
- g) Respondent is an ongoing business.
- h) From June 16 to August 3, 2020, miners used the sea container identified in Order 9523975.
- i) From June 16 to August 3, 2020, miners used the 500-gallon tank identified in Order 9523972.
- j) From June 16 to August 3, 2020, miners used the 100-gallon tank identified in Order 9523974.
- k) On June 16, 2020, the John Deere excavator identified in Citation 9523939 did not have mirrors.
- l) As of June 16, 2020, the fire extinguisher identified in Citation 9523940 had not been inspected on a monthly basis.

Sec’y Prehearing Report at 3-4; July 13 Tr. at 13-26.

## II. PRELIMINARY MATTERS

As an initial matter, numerous citations and orders involved in this matter—both those that BC Quarries contested and those related to contested citations and orders—have already become final decisions of the Commission.

The Mine Act establishes a dual system for filing contests of citations and contests of proposed penalties. 30 U.S.C. § 815(d); 29 C.F.R. Part 2700, Subparts B, C; *Kemper Equip. Inc.*, 35 FMSHRC 376, 376 (Feb. 2013). However, “[t]he filing of a notice of contest of a citation . . . does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary . . . based on that citation.” 29 C.F.R § 2700.21(a). Consequently, a party that wants to contest a proposed penalty assessment must notify the Secretary of such contest “regardless of whether the person has previously contested the underlying citation.” *Id.* § 2700.26. Where an operator fails to contest a penalty assessment within 30 days, the Secretary’s penalty assessment becomes a final order of the Commission and not subject to review by any court or agency. 30 U.S.C. § 815(a). This is the case even where an operator has contested the underlying citation. *Apogee Coal Co., LLC*, 38 FMSHRC 32 (Jan. 2016); *Kemper*, 35 FMSHRC at 377. Furthermore, “a penalty under the Mine Act is predicated upon the existence of a violation.” *Old Ben Coal Co.*, 7 FMSHRC 205, 209 (Feb. 1985).

BC Quarries contested the following citations but failed to contest the proposed penalty assessments or file a motion to reopen for those citations:

Citation No. 9523939 in Docket No. PENN 2020-0110,  
Citation No. 9523940 in Docket No. PENN 2020-0111,  
Citation No. 9523941 in Docket No. PENN 2020-0112,  
Citation No. 9523942 in Docket No. PENN 2020-0113,  
Citation No. 9523943 in Docket No. PENN 2020-0114,  
Citation No. 9523945 in Docket No. PENN 2020-0115,  
Citation No. 9523971 in Docket No. PENN 2020-0141, and  
Citation No. 9523973 in Docket No. PENN 2020-0143.

Sec’y Ex. 25 at 1-3; MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (searchable by mine name) (“*MDRS*”).<sup>4</sup> Because BC Quarries did not timely contest the proposed penalties or file a motion to reopen for these dockets, the penalty assessments have “become[] a final order of the Commission and not subject to review by any court or agency.” 30 U.S.C. § 815(a). Consequently, these contest dockets are **DISMISSED**.

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<sup>4</sup> The undersigned takes judicial notice of MDRS. Fed. R. Evid. 201(b) (“The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”).

### III. LEGAL PRINCIPLES, FACTUAL FINDINGS, AND ANALYSIS

The Secretary presents the remaining orders as falling into three categories: failure to abate a citation, working in the face of an order, and failure to correct a citation.

In three of the Orders—Order No. 9523936 in Docket No. PENN 2020-0166, Order No. 9523937 in Docket No. PENN 2020-0118, and Order No. 9523938 in Docket No. PENN 2020-0119—the Secretary alleges that BC Quarries violated section 104(b) when it failed to abate a violation in a previously issued citation. In four of the Orders—Order No. 9523970 in Docket No. PENN 2020-0146, Order No. 9523976 in Docket No. PENN 2020-0147, Order No. 9523977 in Docket No. PENN 2020-0148, and Order No. 9523939 in Docket No. PENN 2020-0110—the Secretary alleges that BC Quarries violated section 104(b) when it failed to correct a previous violation. The words “failure to correct” do not appear in section 104. However, it is a violation of section 104(b) to fail to abate a violation. As such, the undersigned will apply the same standard for a failure to abate a violation to the orders alleging that BC Quarries failed to correct a previous citation. To establish that a section 104(b) withdrawal order for a failure to abate is valid, the Secretary must prove “by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued.” *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (Apr. 1989).

The remaining four Orders—Order No. 9523958 in Docket No. PENN 2020-0120, Order No. 9523972 in Docket No. PENN 2020-0142, Order No. 9523974 in Docket No. PENN 2020-0144, and Order No. 9523975 in Docket No. PENN 2020-0144—allege a violation for working in the face of a withdrawal order. Although the language “working in the face” does not appear in the Mine Act, it is a violation of section 104(a) to violate “any . . . order . . . promulgated pursuant to this Act.” 30 U.S.C. § 814(a). As such, the Secretary must show, by a preponderance of the evidence, that BC Quarries violated a valid, non-abated withdrawal order. *Mid-Continent Resources*, 11 FMSHRC at 509.

Negligence is not defined in the Mine Act. The Commission has found that “[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC at 708 (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is “an aggravated lack of care that is more than ordinary negligence.” *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

#### A. General Background

BC Quarries operates the Shirvan Quarry, a surface mine in Susquehanna, Pennsylvania. *MDRS*. The mine produces dimension stone. *Id.*

This matter involves inspections conducted by MSHA over a series of months. In April 2020, Inspector Gary C. Merwine conducted the first set of relevant inspections. *See, e.g.*, Sec’y Ex. 8 at 7. On June 16 and 30 and July 9, 2020, Inspector Timothy H. Lindsay conducted the second set of inspections. *See, e.g.*, Sec’y Ex. 5 at 1; *Id.* at 7; Sec’y Ex. 15 at 7. On July 30, 2020, Inspector Lindsay again inspected the Mine. Due to events not relevant to the alleged violations, Inspector Lindsay left the Mine without issuing orders or citations for alleged violations found during the July 30 inspection. *See, e.g.*, Sec’y Ex. 5 at 7. On August 3, 2020, Inspector Lindsay issued the orders and citations for alleged violations found during the July 30 inspection. Finally, in October 2020, Inspector Merwine returned to the Mine and terminated several pending citations and orders. *See, e.g.*, Sec’y Ex. 12 at 11.

The facts specific to each remaining alleged violation will be discussed in separate sections below.

#### B. Order No. 9523936

In Order No. 9523936, part of Docket No. PENN 2020-0116, the Secretary alleges that BC Quarries violated section 104(b) when it failed to abate the preceding Citation, Citation No. 9522144. Sec’y Ex. 7 at 1. On April 2, 2020, Inspector Merwine issued Citation No. 9522144 for a John Deere 330LC excavator missing all its mirrors in violation of 30 C.F.R. § 56.14100(b).<sup>5</sup> *Id.* at 7. BC Quarries did not contest the proposed penalty or file a motion to reopen for Citation No. 9522144, which has become a final order of the Commission and the violation cannot be challenged. *MDRS*; 30 U.S.C. § 815(a); *Apogee Coal*, 38 FMSHRC at 32; *Kemper*, 35 FMSHRC at 377. Inspector Merwine gave two extensions for termination of Citation No. 9522144 and set a final extension for June 1, 2020. Sec’y Ex. 7 at 7-8.

On June 16, 2020, Inspector Lindsay observed that the John Deere 330LC excavator was still missing all its mirrors. July 13 Tr. at 203. A foreman told Inspector Lindsay that the

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<sup>5</sup> This regulation states that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.”

excavator had been operated for two weeks in the cited condition after the citation had been written. Sec’y Ex. 7 at 2.

In testimony, David Karp admitted that he had not fixed the mirrors. July 13 Tr. at 212. Mr. Karp also stated that the equipment had not been tagged out. *Id.* at 215-16. Mr. Karp did allege that the equipment was in a designated area for equipment that is out of service, but also admitted that there was no sign indicating that there was such an area. *Id.* at 216. Based on the lack of any indication that the area was posted or otherwise designated for equipment out of service, the undersigned concludes that this area was not a designated area posted for out-of-service equipment under 30 C.F.R. § 56.14100(c).<sup>6</sup> In short, BC Quarries took no effective steps to correct the missing mirrors “in a timely manner to prevent the creation of a hazard to persons.” 30 C.F.R. § 56.14100(b).

Consequently, the Secretary has shown by a preponderance of the evidence that BC Quarries failed to abate the preceding Citation No. 9522144 in violation of section 104(b). Accordingly, Order No. 9523936 is **AFFIRMED**, and contest Docket No. PENN 2020-0116 is **DISMISSED**. The Secretary did not assess a penalty for this violation, and the undersigned declines to do so now.

C. Order No. 9523937

In Order No. 9523937, part of Docket No. PENN 2020-0118, the Secretary alleges that BC Quarries violated section 104(b) when it failed to abate the preceding Citation, Citation No. 9522143. Sec’y Ex. 8 at 1. On April 2, 2020, Inspector Merwine issued the preceding Citation after he observed that the same John Deere 330LC excavator discussed above, was missing a step to access the operator’s cab and the step for accessing the fuel cap was severely bent and missing a trackpad. Inspector Merwine issued the preceding Citation<sup>7</sup> for failing to provide a safe means of access in violation of 30 C.F.R. § 56.11001.<sup>8</sup> Sec’y Ex. 8 at 7. BC Quarries did not contest the proposed penalty for the preceding citation or file a motion to reopen, and the preceding citation has become a final order of the Commission and the violation cannot be challenged. *MDRS*; 30 U.S.C. § 815(a); *Apogee Coal*, 38 FMSHRC at 32; *Kemper*,

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<sup>6</sup> This regulation states that “[w]hen defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.”

<sup>7</sup> The original citation stated that it was for a violation of 30 C.F.R. § 56.10001. Inspector Lindsay explained that Inspector Merwine had entered the incorrect regulation and that § 56.11001 is the correct regulation for the violation described in the preceding citation. July 13 Tr. at 218.

<sup>8</sup> This regulation states that “[s]afe means of access shall be provided and maintained to all working places.”



35 FMSHRC at 377. Inspector Merwine gave two extensions for terminating the preceding citation, setting a final extension for June 1, 2020. Sec’y Ex. 8 at 8-9.

On June 16, 2020, Inspector Lindsay observed that a step to the cab of the John Deere 330LC excavator was still missing and that no repairs had been made. July 13 Tr. at 221. Inspector Lindsay testified that the John Deere 330LC excavator was not locked and tagged out. *Id.* As noted above, a foreman told Inspector Lindsay that the excavator had been operated for two weeks in the cited condition after the citation had been written. Sec’y Ex. 7 at 2.

Mr. Karp admitted that he had not repaired the excavator and had not properly tagged it out, but he again alleged that the excavator had been moved to an out-of-service area. July 13 Tr. at 223, 225. The undersigned again rejects this argument for the reasons set forth above because the area was not a designated area posted for out-of-service equipment under 30 C.F.R. § 56.14100(c). *See* Section B *supra*.

Consequently, the Secretary has shown by a preponderance of the evidence that BC Quarries failed to abate the preceding Citation No. 9522143 in violation of section 104(b). Order No. 9523937 is **AFFIRMED**, and contest Docket No. PENN 2020-0118 is **DISMISSED**. The Secretary did not assess a penalty for this violation, and the undersigned declines to do so now.

D. Order No. 9523938

In Order No. 9523938, part of Docket No. PENN 2020-0119, the Secretary alleges that BC Quarries violated section 104(b) when it failed to abate the preceding Citation, Citation No. 9522147. Sec’y Ex. 9 at 1. On April 2, 2020, Inspector Merwine issued the preceding Citation for a John Deere 790ELC excavator that did not have a functional travel alarm and horn in violation of 30 C.F.R. § 56.14132(a).<sup>9</sup> *Id.* at 6. BC Quarries did not contest the proposed penalty or file a motion to reopen for the preceding citation, and the preceding citation has become a final order of the Commission and the violation cannot be challenged. *MDRS*; 30 U.S.C. § 815(a); *Apogee Coal*, 38 FMSHRC at 32; *Kemper*, 35 FMSHRC at 377. Inspector Merwine gave two extensions for terminating the preceding citation, setting a final extension for June 1, 2020. Sec’y Ex. 9 at 7-8.

On June 16, 2020, Inspector Lindsay issued Order No. 9523938. He observed that the cited excavator was in use in the southeast corner of the pit. Lindsay’s documentation indicates the foreman told him that repairs had been made, but no repair or maintenance records were provided. *Id.* at 2. The foreman did not testify at hearing. Inspector Lindsay testified that when the operator’s representative Rodriguez tested the travel alarm by starting the excavator and moving it in forward and in reverse, the travel alarm and horn did not function. July 13 Tr. at 232-33, 235; *see also* Sec’y Ex. 9 at 1.

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<sup>9</sup> This regulation states that “[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.”

BC Quarries questioned Inspector Lindsay as to the use of a spotter in lieu of a backup alarm. July 13 Tr. at 250. Inspector Lindsay conceded on cross that BC Quarries did not need a travel alarm or horn if it used a spotter. *Id.* at 236. However, BC Quarries provided no testimony or evidence that it used a spotter on June 16, 2020. Further, Inspector Lindsay never received training records or any other indication that BC Quarries had a trained spotter, and BC Quarries did not produce any such records for this tribunal. *Id.* at 251, 254. Accordingly, the undersigned finds insufficient evidence to conclude that BC Quarries used a spotter in lieu of a backup alarm on June 16, 2020.

Mr. Karp testified that to activate the travel alarm, “[y]ou physically have to start the machine to operate it.” *Id.* at 237. However, Mr. Karp was not present for the June 16 inspection, and he provided no credible testimony to contradict Inspector Lindsay’s testimony that the excavator was physically moved during the June 16 inspection when the travel alarm did not work. *Id.* at 238.

Mr. Karp admitted that the horn did not work but testified that the fuse was blown. *Id.* at 237. He further testified that that whenever the excavator is run, it is inspected, and fuses are kept behind the seat, but that he

d[id]n’t know what it is, if some soda got down in there at some time and shorted something out—or some Gatorade. The dealer seems to think that every once in a while, it just blows the fuse . . . . [MSHA] keep coming on days we’re not operating any of these machines and writing a citation when none of them are being r[un].

*Id.* at 237-38. Mr. Karp reiterated that “we have problems with the horn on the 790 excavator. The dealer thinks some soda or Gatorade got down behind the seat into the fuse box.” *Id.* at 239. He further reiterated that pre-operational inspections are done on the horn, and, if it doesn’t work, the fuse is replaced. “If the MSHA guy comes and does an inspection, if we’re operating the machine and it doesn’t work, that’s our problem.” *Id.* “And as we start the machine on a daily inspect, if the fuse is blown, we put it in.” *Id.* at 240.

The undersigned discredits Mr. Karp’s testimony that the 790 excavator was not in operation and his implicit suggestion that any blown fuse would have been caught during the pre-operational inspection or might have occurred mid-shift on June 16. The Secretary has shown that the 790 excavator was in operation and the horn and back-up alarm did not work. BC Quarries proffered no documentation or testimony that a fuse had been replaced on or after April 2 and before Inspector Lindsay’s June 16, 2020 inspection. Given the extent of failure to abate violations on this record, the undersigned discredits BC Quarries’ apparent rebuttal defenses that it had timely abated the violation, but the violation recurred. Rather, the undersigned finds that the Secretary has shown by a preponderance of the evidence that BC Quarries failed to abate the preceding Citation No. 9522147 in violation of section 104(b). Order No. 9523938 is **AFFIRMED**, and contest Docket No. PENN 2020-0119 is **DISMISSED**. The Secretary did not assess a penalty for this violation, and the undersigned declines to do so now.

E. Order No. 9523958

In Order No. 9523958, part of Docket No. PENN 2020-0120, the Secretary alleges that BC Quarries violated section 104(b) when it was “working in the face” of the preceding Order, Order No. 9523938, part of Docket No. PENN 2020-0119. Sec’y Ex. 10 at 1. The preceding Order was a section 104(b) withdrawal Order that was issued on June 16, 2020, requiring that the Operator cease the use of the John Deere 790ELC excavator. Sec’y Ex. 9 at 1. The undersigned affirmed the preceding Order and dismissed the Operator’s contest of the preceding Order in Section D above.

Order No. 9523958 originally alleged a violation of section 104(a), but Inspector Lindsay testified that there was a clerical error, and the violation was modified to a violation of section 104(b). Sec’y Ex. 10 at 1-2; July 13 Tr. at 246. However, as explained above, a violation of a valid withdrawal order as alleged in Order No. 9523958 is a violation of section 104(a). 30 U.S.C. § 814(a) (stating that it is a violation to violate “any . . . order . . . promulgated pursuant to this Act”). Consequently, the undersigned **MODIFIES** Order No. 9523958 from a violation of section 104(b) to a violation of section 104(a).<sup>10</sup>

On June 30, 2020, Inspector Lindsay issued Order No. 9523958 after observing that the hour meter on the John Deere 790ELC excavator indicated that the excavator had been operated between June 18 and June 30, 2020. Sec’y Ex. 10 at 1; July 13 Tr. at 248-49. The Secretary also introduced photographs showing the difference in the hour meter on those two dates. Sec’y Ex. 10 at 4-5. These photos, along with Inspector Lindsay’s testimony, indicate that the excavator had been operated for 23.4 hours during that 12-day period. The preceding withdrawal Order was still in place. *Id.* at 1.

BC Quarries again raised the issue of a spotter (July 13 Tr. at 250), but for the same reasons set forth above, the undersigned does not find sufficient evidence to support the existence of a spotter. *See* Section D *supra*. BC Quarries did not offer evidence or testimony to rebut the evidence of the hour meter indicating that the excavator had been operated between June 18 and June 30, 2020.

The specific charge of Order No. 9523958 is that BC Quarries operated the John Deere 790ELC excavator while it was under withdrawal Order No. 9523938. The undersigned finds that the Secretary has shown by a preponderance of the evidence that the excavator was operated between June 18 and June 30, 2020, in violation of the withdrawal order and section 104(a). Order No. 9523958 is **AFFIRMED** as modified, and contest Docket No. PENN 2020-0120 is **DISMISSED**. The Secretary did not assess a penalty for this violation, and the undersigned declines to do so now.

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<sup>10</sup> In making this modification, the undersigned does not add new factual allegations outside of the original Order and finds that BC Quarries had notice of these allegations and is not unfairly prejudiced. *See Mettiki Coal Corp.*, 13 FMSHRC 760, 765 (May 1991).

F. Order No. 9523972

In Order No. 9523972, part of contest Docket No. PENN 2020-0142 and penalty Docket No. PENN 2021-0007, the Secretary alleges that BC Quarries violated section 104(a) when it continued to use a 100-gallon fuel tank and a 500-gallon fuel tank without proper labeling and after the issuance of a preceding withdrawal Order, Order No. 9523952. Sec’y Ex. 12 at 1. The Secretary issued the preceding withdrawal Order No. 9523952 on June 30, 2020, for failing to abate Citation No. 9523943. *Id.* at 10. The preceding Citation No. 9523943 found a violation of 30 C.F.R. § 47.41(a)<sup>11</sup> because the tanks “were not labeled with [their] contents.” Sec’y Ex. 5 at 1. BC Quarries did not contest or file a motion to reopen the preceding Order, and the undersigned dismissed the challenge to Citation No. 9523943. *See* Section II *supra*. As a result, the preceding Order and Citation are “admitted and unreviewable.” 30 U.S.C. § 815(a); *Apogee Coal*, 38 FMSHRC at 32; *Kemper*, 35 FMSHRC at 377. Inspector Merwine terminated the preceding Order on October 6, 2020. Sec’y Ex. 12 at 11.

On July 30, 2020, Inspector Lindsay saw that the same 100-gallon and 500-gallon fuel tanks did not have labels indicating the contents of the tanks and the hazards posed by those contents. July 13 Tr. at 289. These tanks contained diesel fuel, a fire hazard. *Id.* at 329. Inspector Lindsay also observed that the tanks were being used at that time. *Id.* at 291-92.

Mr. Karp acknowledged that the tanks had been moved and used between June 30 and August 3, 2020. *Id.* at 293-95.<sup>12</sup> Brandon Karp testified that he had written “no smoking” on the tanks on June 16 and “flammable” “combustible” by June 19, 2020. *Id.* at 306, 308. Although Brandon Karp initially testified that he “wrote diesel on the tanks or diesel storage,” he later admitted that the tanks did not have the word “diesel” on them or have other labelling that would indicate the contents of the tanks. *Id.* at 298-99, 315. Given the subsequent testimony and the lack of supporting photographic or other evidence, the undersigned discredits Brandon Karp’s

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<sup>11</sup> This regulation states that “[t]he operator must ensure that each container of a hazardous chemical has a label. If a container is tagged or marked with the appropriate information, it is labeled.” As relevant here, 30 C.F.R. § 47.42 states that a label must “[d]isplay appropriate hazard warnings” and “[u]se a chemical identity that permits cross-referencing between the list of hazardous chemicals, a chemical’s label, and its MSDS.” Additionally, § 47.11 defines “Identity” as “[a] chemical’s common name or chemical name” and “Label” as “[a]ny written, printed, or graphic material displayed on or affixed to a container to identify its contents and convey other relevant information.”

<sup>12</sup> In relation to another citation, BC Quarries obliquely argued that it was not liable because the tanks belonged to a subcontractor and not BC Quarries. July 13 Tr. at 279-80. But even if the tanks belonged to a contractor, BC Quarries—as the operator of the mine—is liable for the actions of its contractors. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (Feb. 1997) (confirming that an operator is “strictly liable for all violations of the Act that occur on the mine site, whether committed by one of its employees or an employee of one of its contractors” (citing *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354 (Sept. 1991)).

initial testimony that he wrote “diesel” or “diesel storage” on the tanks and credits his subsequent admission that he did not do so.

BC Quarries submitted a photo that showed a manufacturer’s label on the 100-gallon tank. Op. Ex. 2. However, that label—a diamond with a red background, a picture of a flame, the word “combustible,” and the number three—only indicates that tank contained a flammable liquid and does not indicate what type of liquid was in the tank. *See* 49 CFR § 172.419 (defining the hazard label for flammable liquids). As such, the manufacturer’s label does not satisfy the requirements of § 47.41(a).

BC Quarries introduced no credible evidence that the tanks were labelled as containing diesel fuel at any time between June 30 and July 31, 2020. Based on that failure and the testimony provided by Inspector Lindsay, the undersigned finds that the tanks were not labelled to identify their contents.

Consequently, the undersigned finds that the Secretary has shown by a preponderance of the evidence that BC Quarries continued to use the 100- and 500-gallon fuel tanks without labels identifying their contents and did so despite the preceding withdrawal Order No. 9523952, thus violating section 104(a). Order No. 9523972 is **AFFIRMED**, and contest Docket No. PENN 2020-0142 is **DISMISSED**.

After the issuance of the withdrawal Order, BC Quarries did attempt to label the tanks to comply with MSHA regulations. Despite its failure to conform to these regulations, the actions of BC Quarries demonstrate that it was acting with only moderate negligence in this violation. Because the preceding withdrawal Order and Citation were still in effect on July 30, 2020, the violation described in Order No. 9523972 would not, itself, result in any additional likelihood of injury or illness. Therefore, the gravity of Order No. 9523972 is none. Through its repeated attempts to correct the violation, BC Quarries demonstrated some good faith.

The amount of a proper penalty will be discussed in Section IV.

G. Order No. 9523974

In Order No. 9523974, part of contest Docket No. PENN 2020-0144 and penalty Docket No. PENN 2021-0007, the Secretary alleges that after the issuance of a preceding section 104(b) withdrawal Order No. 9523954, BC Quarries violated section 104(a) when it continued to use the above-mentioned 100-gallon and 500-gallon fuel tanks without signs prohibiting smoking and open flames. Sec’y Ex. 14 at 1. The Secretary issued the preceding withdrawal Order No. 9523954 on June 30, 2020 for failing to abate Citation No. 9523946. *Id.* at 12. The preceding Citation No. 9523946 was for a violation of 30 C.F.R. § 56.4101.<sup>13</sup> BC Quarries did not contest the preceding Order or Citation. As a result, the preceding Order and Citation are “admitted and unreviewable.” 30 U.S.C. § 815(a); *Apogee Coal*, 38 FMSHRC at 32; *Kemper*,

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<sup>13</sup> This regulation states that “[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.”

35 FMSHRC at 377. Inspector Merwine terminated the preceding Citation on October 6, 2020. July 13 Tr. at 332.

On July 30, 2020, Inspector Lindsay observed a 100-gallon fuel tank and a 500-gallon fuel tank at the Mine. *Id.* at 329. These tanks contained diesel fuel, a fire hazard. *Id.* The 100-gallon fuel tank had the manufacturer's label, but neither fuel tank had any signs prohibiting smoking or open flames. *Id.* at 330-31. BC Quarries stipulated that miners used the 100-gallon and the 500-gallon fuel tanks from June 16 to August 3, 2020. Sec'y Prehearing Report at 3-4; July 13 Tr. at 13-26; *see also id.* at 347 (Brandon Karp testifying that the tanks were never taken out of service).

Brandon Karp also testified that the words "no smoking" were written on the tanks with a Sharpie pen, but he admitted that there was no sign prohibiting smoking and open flames. July 13 Tr. at 347. BC Quarries submitted a photo taken on August 10, 2022 showing the words "no smoking" and "combustible" written in Sharpie on the 500-gallon tank. Op. Ex. 3. However, based on the photo, the undersigned finds that the words in thin black Sharpie on the rust-colored 500-gallon tank are not "readily visible" as required by the regulation. 30 C.F.R. § 56.4101. No similar photo with words written in thin black Sharpie was proffered by BC Quarries for the 100-gallon tank. *See* Sec'y Ex. 14 at 5 and 6. The undersigned concludes that on July 30, 2020, the 100-gallon fuel tank and the 500-gallon fuel tank did not have readily visible signs prohibiting smoking and open flames.

The undersigned concludes that the Secretary has shown by a preponderance of the evidence that BC Quarries violated section 104(a) by continuing to use the 100- and 500-gallon fuel tanks without signs prohibiting smoking and open flames while the preceding withdrawal Order No. 9523954 was in effect. Accordingly, Order No. 9523974 is **AFFIRMED**, and contest Docket No. PENN 2020-0144 is **DISMISSED**.

After the issuance of the withdrawal Order, BC Quarries did attempt to label the tanks to comply with MSHA regulations. Despite its failure to conform to these regulations, the actions of BC Quarries demonstrate that it was acting with only moderate negligence in this violation. Because the preceding withdrawal Order and Citation were still in effect on July 30, 2020, the violation described in Order No. 9523974 would not, itself, result in any additional likelihood of injury or illness. Therefore, the gravity of Order No. 9523974 is none. Through its repeated attempts to correct the violation, BC Quarries demonstrated some good faith.

The amount of a proper penalty will be discussed in Section IV.

H. Order No. 9523975

In Order No. 9523975, part of contest Docket No. PENN 2020-0145 and penalty Docket No. PENN 2021-0007, the Secretary alleges that BC Quarries violated section 104(a) when it used a sea container housing oxygen acetylene tanks and gasoline cans without signs prohibiting smoking and open flames after the issuance of a preceding section 104(b) withdrawal Order, Order No. 9523955. Sec’y Ex. 15 at 1. The Secretary issued the preceding withdrawal Order No. 9523955 on June 30, 2020 for failing to abate Citation No. 9523948. *Id.* at 5. The preceding Citation No. 9523948 was for a violation of 30 C.F.R. § 56.4101.<sup>14</sup> BC Quarries did not contest the preceding Order or Citation. As a result, the preceding Order and Citation are “admitted and unreviewable.” 30 U.S.C. § 815(a); *Apogee Coal*, 38 FMSHRC at 32; *Kemper*, 35 FMSHRC at 377. The preceding Citation was terminated on October 6, 2020. July 13 Tr. at 352.

On July 30, 2020, Inspector Lindsay observed a sea container that had oxygen acetylene tanks and gasoline tanks inside. *Id.* at 352. Inspector Lindsay did not observe any signs on the outside of the container indicating that smoking and open flames were prohibited. *Id.* Inspector Lindsay also observed the inside of the sea container and did not see the required signage. *Id.* at 355. Inspector Lindsay also testified that the doors of the container were open, and that he did not observe any signs on the interior sides of the doors either. *Id.* at 354-55. Inspector Lindsay also testified that the container presented a fire hazard because of its contents and the risk that a dropped match or lit cigarette would ignite the dry grass surrounding the container. *Id.* at 358-57, 362-63; Sec’y Ex. 15, at 8-9.

Mr. Karp testified that, on July 30, 2020, there were labels on the inside of the doors of the sea container. July 13 Tr. at 360. This testimony conflicts with Inspector Lindsay’s testimony that there were no labels on the inside of the doors of the container. *Id.* at 354-55. On this record, the undersigned credits Inspector Lindsay who had clear recall on cross examination of his observations and discussions concerning the open container and its contents on August 3, 2020. *Id.* at 354-60. However, whether there were signs on the insides of the doors is ultimately irrelevant. The standard requires that the required signage be “readily visible.” 30 C.F.R. § 56.4101. Even if there were signs on the interior sides of the doors, once those doors are closed, the signs are no longer visible to miners on the outside of the container filled with oxygen acetylene and gasoline tanks. If there were signs on the interior of the doors, they were not “readily visible” and would not, alone, satisfy the standard. July 13 Tr. at 359.

Consequently, the undersigned finds that the Secretary has shown by a preponderance of the evidence that BC Quarries continued to store materials that posed a fire or explosion hazard in the sea container without readily visible signs prohibiting smoking and open flames and did so despite the preceding withdrawal Order No. 9523955, thereby violating section 104(a). Order No. 9523975 is **AFFIRMED**, and contest Docket No. PENN 2020-0145 is **DISMISSED**.

BC Quarries had been repeatedly warned to label the sea container, which had oxygen acetylene and gasoline tanks inside, with signs prohibiting smoking and open flames. The failure

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<sup>14</sup> This regulation states that “[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.”

to do so and the continued use of the sea container despite the withdrawal Order constitutes high negligence. Because the preceding withdrawal Order and Citation were still in effect on July 30, the violation described in Order No. 9523975 would not, itself, result in any additional likelihood of injury or illness. Therefore, the gravity of Order No. 9523975 is none. Despite the preceding Order and Citation, BC Quarries did not correct the violation. This demonstrates a lack of good faith on the part of BC Quarries.

The amount of a proper penalty will be discussed in Section IV.

I. Order No. 9523970

In Order No. 9523970, part of contest Docket No. PENN 2020-0146, the Secretary alleges that BC Quarries violated section 104(b) when it failed to abate the preceding Citation, Citation No. 9523967. Sec’y Ex. 16 at 1. The Secretary issued the preceding Citation No. 9523967 on July 9, 2020 for a violation of 30 C.F.R. § 56.14207.<sup>15</sup> *Id.* at 7. BC Quarries did not contest the preceding Citation. As a result, the preceding Order and Citation are “admitted and unreviewable.” 30 U.S.C. § 815(a); *Apogee Coal*, 38 FMSHRC at 32; *Kemper*, 35 FMSHRC at 377. The preceding Citation was terminated on October 6, 2020. Sec’y Ex. 16 at 2.

During the July 9, 2020 inspection, Inspector Lindsay observed a Volvo A25C haul truck that was parked with no chocks. July 14 Tr. at 6. At that time, Inspector Lindsay used the level on his phone and determined that the truck was on a two-degree incline. *Id.* at 7. Inspector Lindsay also took a picture of the truck and the level indicating the two-degree incline. Sec’y Ex. 16 at 11. Based on this inspection, Inspector Lindsay issued the preceding Citation No. 9523967. *Id.* at 7.

During the July 30, 2020 inspection, Inspector Lindsay again observed the haul truck parked with no chocks. July 14 Tr. at 7. Although it was the same haul truck, it was in a different location during the July 30 inspection. *Id.* at 12. The Secretary submitted two photos of the haul truck taken during the July 30 inspection. Sec’y Ex. 16 at 5-6. Inspector Lindsay also testified that the haul truck was on an incline. July 14 Tr. at 7. However, Inspector Lindsay did not provide any measurements of the angle of the incline during the July 30 inspection. Additionally, Inspector Lindsay admitted that one of the photos (Sec’y Ex. 16 at 5) did not show an incline and that he could not tell how far the truck might roll in the second photo (Sec’y Ex. 16 at 6). *Id.* at 9, 11, 16.

Mr. Karp testified that the haul truck was on level ground during the July 30 inspection. *Id.* at 18.

As noted above, to prove a failure to abate a preceding violation, the Secretary must show that the violation that existed in the preceding citation existed at the time the Secretary issued the

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<sup>15</sup> This regulation states that “[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.”



order. *Mid-Continent Resources, Inc.*, 11 FMSHRC at 509. Here, the Secretary has failed to provide sufficient evidence to show that the haul truck was on an incline on the date he issued the Order. Of the two photos used as support for this Order, the first shows—and the Inspector admitted it shows—the truck on level ground. Sec’y Ex. 16 at 5; July 14 Tr. at 9, 16. The second photo is more ambiguous, but the undersigned finds that the second photo does not show, by a preponderance of the evidence, that the haul truck was on an incline during the July 30 inspection. Sec’y Ex. 16 at 6. Even assuming the second photo showed an incline, the Secretary did not provide any evidence as to the degree of any incline or demonstrate that it was more than *de minimis*.

Although the Secretary need only show that the violation described in the preceding Citation existed at the time of the issuance of the Order, the different locations of the haul truck present a changed circumstance. Because the haul truck had been moved sometime between the July 9 and 30 inspections, the Secretary cannot rely on Inspector Lindsay’s testimony that he determined that the truck was on a two-degree incline during the July 9, 2020 inspection. The Secretary must show that haul truck was on an incline in the new location on July 30, 2020. The Secretary has failed to do so.

As noted, Mr. Karp testified contrary to Inspector Lindsay that the haul truck was on level ground during the July 30 inspection. July 14 Tr. at 18. Although Inspector Lindsay testified that the haul truck was on an incline, he did not provide any measurements of the angle of the incline during the July 30 inspection and he admitted that one of the photos did not show an incline and he could not tell how far the truck might roll in the second photo. In these circumstances, the undersigned discounts Lindsay’s testimony and credits Karp’s testimony that the haul truck was on level ground during the July 30 inspection consistent with Sec’y Ex. 16 at 5.

Consequently, the Secretary has failed to show by a preponderance of the evidence that BC Quarries failed to abate Citation No. 9523967, and the undersigned **VACATES** Order No. 9523970.

J. Order No. 9523976

In Order No. 9523976, part of contest Docket No. PENN 2020-0147, the Secretary alleges that BC Quarries violated section 104(b) when it failed to abate the preceding Citation, Citation No. 9523968. Sec’y Ex. 17 at 1. The Secretary issued the preceding Citation No. 9523968 on July 9, 2020 for a violation of 30 C.F.R. § 56.11001.<sup>16</sup> *Id.* at 8. BC Quarries did not contest the preceding Citation. *MDRS*. As a result, the preceding Order and Citation are “admitted and unreviewable.” 30 U.S.C. § 815(a); *Apogee Coal*, 38 FMSHRC at 32; *Kemper*, 35 FMSHRC at 377. The preceding Citation was terminated on October 6, 2020. Sec’y Ex. 17 at 2.

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<sup>16</sup> This regulation states that “[s]afe means of access shall be provided and maintained to all working places.”

On July 9, 2020, Inspector Lindsay observed a Volvo A25C haul truck with damaged steps. July 14 Tr. at 25, Sec’y Ex. 17 at 8. Specifically, Inspector Lindsay observed that the bottom step of the engine access step was missing and that the next step was damaged, making it uneven. *Id.* at 27. Based on the damaged steps, the Secretary issued the preceding Citation No. 9523968 for a failure to provide safe access for the haul truck. Sec’y Ex. 17 at 8.

On July 30, 2020, Inspector Lindsay inspected the haul truck again and found that the steps were still damaged. July 14 Tr. at 28. Inspector Lindsay also took photos of the damaged steps. *Id.*; Sec’y Ex. 17 at 5.

Although Mr. Karp argued that he had personal reasons for not repairing the steps, he admitted that an inspector had told him how to fix the damaged steps, but he had not done so. July 14 Tr. at 35-37, 38.

The Secretary has demonstrated by a preponderance of the evidence that BC Quarries did not abate the preceding Citation No. 9523968 in violation of section 104(b). Order No. 9523976 is **AFFIRMED**, and contest Docket No. PENN 2020-0147 is **DISMISSED**. The Secretary did not assess a penalty for this violation, and the undersigned declines to do so now.

K. Order No. 9523977

In Order No. 9523977, part of contest Docket No. PENN 2020-0148, the Secretary alleges that BC Quarries violated section 104(b) when it failed to abate the preceding citation, Citation No. 9523957. Sec’y Ex. 18 at 1. The Secretary issued the preceding Citation No. 9523957 on June 30, 2020 for a violation of 30 C.F.R. § 56.14100(d).<sup>17</sup> *Id.* at 5. BC Quarries did not contest the preceding Citation. *MDRS*. As a result, the preceding Citation is “admitted and unreviewable.” 30 U.S.C. § 815(a); *Apogee Coal*, 38 FMSHRC at 32; *Kemper*, 35 FMSHRC at 377. The preceding Citation was terminated on October 8, 2020. July 14 Tr. at 41; Sec’y Ex. 18 at 2.

On June 30, 2020, Inspector Lindsay requested pre-shift examination and workplace examination paperwork. July 14 Tr. at 39-40. At that time, BC Quarries did not produce any paperwork, despite the multiple pieces of defective equipment at the Mine. *Id.* at 39. Inspector Lindsay then issued the preceding Citation No. 9523957 for violating § 56.14100(d). Sec’y Ex. 18 at 5. The original Citation referenced several pieces of defective equipment that should have been documented under § 56.14100(d). *Id.*

On July 30, 2020, Inspector Lindsay returned to the mine and again requested pre-shift and workplace exam paperwork. July 14 Tr. at 40. BC Quarries did not provide the requested

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<sup>17</sup> This regulation states that “[d]efects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.”

paperwork. Based on BC Quarries' continued failure to produce the paperwork, Inspector Lindsay issued Order No. 9523977.

At the hearing, Mr. Karp argued that, because no equipment needed repairs during pre-shift examinations, there was no need for such equipment to be listed in pre-shift and workplace-exam paperwork. July 14 Tr. at 49. Inspector Lindsay admitted that, under § 56.14100(d), a mine operator does not need to provide paperwork where there are no defects. *Id.* at 50. The evidence throughout this hearing demonstrates, however, that there were known defects that BC Quarries never documented, and that BC Quarries failed to abate. For example, Orders No. 9523937 and 9523938 involve defects that had been originally cited as violations on April 2, 2020, were part of Citation No. 9523957—the preceding Citation—and had not been abated until October 2020. BC Quarries did not produce these records until the preceding Citation was abated on October 8, 2020. *Id.* at 41. As such, the evidence demonstrates that there were at least several months when BC Quarries was aware of the defects but did not record them as required by § 56.14100. This evidence further indicates that BC Quarries was in violation of this regulation when Order 9523977 was issued.

Consequently, the Secretary has demonstrated by a preponderance of the evidence that BC Quarries did not abate the preceding Citation No. 9523957, thereby violating section 104(b). Order No. 9523977 is **AFFIRMED**, and contest Docket No. PENN 2020-0148 is **DISMISSED**. The Secretary did not assess a penalty for this violation, and the undersigned declines to do so now.

L. Order No. 9523978

In Order No. 9523978, part of contest Docket No. PENN 2020-0149, the Secretary alleges that BC Quarries violated section 104(b) when it failed to abate the preceding citation, Citation No. 9523961. Sec'y Ex. 19 at 1. The Secretary issued the preceding Citation No. 9523961 on June 30, 2020 for a violation of 30 C.F.R. § 56.4430(a).<sup>18</sup> *Id.* at 19. BC Quarries did not contest the preceding Citation. *MDRS*. As a result, the preceding Citation is “admitted and unreviewable.” 30 U.S.C. § 815(a); *Apogee Coal*, 38 FMSHRC at 32; *Kemper*, 35 FMSHRC at 377. The preceding Citation was terminated on October 6, 2020. Sec'y Ex. 19 at 2.

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<sup>18</sup> As relevant here, this regulation states that “[s]torage tanks for flammable or combustible liquids shall be -

- (1) Capable of withstanding working pressures and stresses and compatible with the type of liquid stored;
- (2) Maintained in a manner that prevents leakage;
- (3) Isolated or separated from ignition sources to prevent fire or explosion; and
- (4) Vented or otherwise constructed to prevent development of pressure or vacuum as a result of filling, emptying, or atmospheric temperature changes. Vents for storage of Class I, II, or IIIA liquids shall be isolated or separated from ignition sources. These pressure relief requirements do not apply to tanks used for storage of Class IIIB liquids that are larger than 12,000 gallons in capacity.”

During the July 9, 2020 inspection, Inspector Lindsay saw five-gallon fuel cans containing gasoline that were not “maintained in a manner to prevent leakage.” July 14 Tr. at 51. Specifically, the cans “had a plastic bag with trash inside draped over the fill port and the cap [was] placed on it to prevent leakage.” *Id.* at 51. Inspector Lindsay issued the preceding Citation to that effect. Sec’y Ex. 19 at 9.

During the July 30, 2020 inspection, Inspector Lindsay saw five-gallon fuel cans that “didn’t have any ventilation” and had caps “screwed on tight.” July 14 Tr. at 52. The Secretary proffered a photo of the cans taken during this inspection. Sec’y Ex. 19 at 4. The photo does not show any bag filled with trash. *Id.* Inspector Lindsay also admitted that there was no plastic bag during this inspection and that BC Quarries had “made an adjustment.” July 14 Tr. at 56. Mr. Karp also testified that the cans had been changed between the two inspections. *Id.* at 57.

Order 9523978 is for a violation of 104(b) for a failure to abate the preceding Citation No. 9523961. The Secretary needs to prove that the violation described in the preceding Citation existed at the time the Order was issued. Sec’y Br. at 32 (citing *Mid-Continent Resources, Inc.*, 11 FMSHRC at 509). However, the Secretary has failed to prove that here. The original citation described the violation as a fuel can “not maintained in a manner that prevents leaks” and “had a plastic bag with trash inside draped over the fill port then the cap placed on it.” Sec’y Ex. 19 at 4. In contrast, Inspector Lindsay, on July 30, 2020, issued the Order for a fuel can that “didn’t have any ventilation” and “the cap was screwed on tight.” July 14 Tr. at 52. Inspector Lindsay also admitted—and the photo clearly demonstrates—that there was no plastic bag with trash in it during the July 30 inspection. *Id.* at 56; *see also*, Sec’y Ex. 19 at 4.

The violation described in the preceding Citation did not exist on July 30, 2020. Not only was there no “plastic bag with trash inside draped over the fill port” with a cap on it, but the description of the violation was also different during the July 30 inspection. Inspector Lindsay testified that the July 30 inspection showed fuel cans that lacked ventilation, but the preceding Citation was for failure to prevent leakages. *Compare id.* at 52 (describing the fuel can that “didn’t have any ventilation”) *with* Sec’y Ex. 19 at 4 (“The five gallon fuel can . . . was not maintained in a manner that prevents leakage”). While § 56.4430(a) concerns both leakage and ventilation, the preceding Citation described a violation for a condition—that is, leakage—that was not present at the time of the subsequent Order.

The Secretary has failed to demonstrate that the violation described in Citation No. 9523961 existed at the time he issued Order No. 9523978, and the undersigned **VACATES** Order No. 9523978.

#### **IV. Penalty Assessment**

It is well established that Commission Administrative Law Judges assess civil penalties *de novo* for violations of the Act. Section 110(i) of the Act delegates to the Commission the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). When an operator contests the proposed penalty, the Secretary petitions the Commission to assess the proposed penalty. 29 C.F.R. § 2700.28. The Act requires, that “in assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once factual findings on the statutory penalty criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising this discretion to determine the amount of a penalty, the Commission has recognized that a judge is not bound by the penalty proposed by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

When determining a proper assessment for the violations, the undersigned considered the following facts: 1) BC Quarries' history of violations of the relevant standards in the 15 months prior to the accident (Sec'y Ex. 25); 2) BC Quarries' size as an operator, who logged 3,000 hours worked at the mine in 2020 (*MDRS*); and 3) the fact that the penalties will not have an effect on BC Quarries' ability to continue in business (July 13 Tr. at 26).

In addition, the undersigned considered the high level of negligence and zero gravity of Order No. 9523975, as well as the failure in good faith to timely correct the violations. For Orders No. 9523972 and 9523974, the undersigned considered the moderate levels of negligence, the zero gravity, and BC Quarries' good faith.

Based upon the undersigned's consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, the undersigned assesses penalties of \$125.00 each for Orders No. 9523972 and 9523974 and a penalty of \$137.00 for Order No. 9523975. This amount is the result of an independent determination of the penalty amount based on the statutory criteria that responds to the seriousness of the violations and will deter future violations. *American Coal Co. v. FMSHRC*, 933 F.3d 723, 728 (D.C. Cir. 2019).

## V. CONCLUSION

For the foregoing reasons, it is **ORDERED** that Docket No. PENN 2020-0110 contesting Citation No. 9523939, Docket No. PENN 2020-0111 contesting Citation No. 9523940, Docket No. PENN 2020-0112 contesting Citation No. 9523941, Docket No. PENN 2020-0113 contesting Citation No. 9523942, Docket No. PENN 2020-0114 contesting Citation No. 9523943, Docket No. PENN 2020-0115 contesting Citation No. 9523945, Docket No. PENN 2020-0141 contesting Citation No. 9523971, and Docket No. PENN 2020-0143 contesting Citation No. 9523973 be **DISMISSED**.

It is **ORDERED** that Orders No. 9523936, 9523937, 9523938, 9523975, 9523976, and 9523977 be **AFFIRMED**, and contest Dockets No. PENN 2020-0116, 0118, 0119, 0145, 0147, and 0148 be **DISMISSED**.

It is **ORDERED** that Order No. 9523958 be **MODIFIED** from a violation of section 104(b) to a violation of section 104(a); that Orders No. 9523972 and 9523974 be **MODIFIED** from high negligence to moderate negligence; that Orders No. 9523958, 9523972, and 9523974 be **AFFIRMED** as modified; and that contest Dockets No. PENN 2020-0120, 0142, and 0144 be **DISMISSED**.

It is **ORDERED** that Orders No. 9523970 and 9523978 be **VACATED**.

It is further **ORDERED** that the Operator pay a total penalty of \$387.00 within thirty days of this order.<sup>19</sup>

*Thomas P. McCarthy*

Thomas P. McCarthy  
Administrative Law Judge

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<sup>19</sup> Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508> or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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