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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

August 31, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOL MINING COMPANY LLC	Docket No. WEVA 2023-0141

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 27, 2023, the Commission granted interlocutory review pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, to consider *inter alia* whether the Judge assigned to this matter abused his discretion when he struck an argument and related caselaw citations from the Secretary's motion to approve settlement.

For the reasons which follow, we conclude that the Judge acted upon an improper understanding of his authority under the Mine Act and the Commission's Procedural Rules and, therefore, abused his discretion.

I. Factual and Procedural Background

This case concerns citations issued by an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") to Consol Mining Company pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a). The citations allege violations of mandatory safety standards. The settlement motion reflects Consol's agreement to pay civil penalties in exchange for the Secretary of Labor's agreement to modify several citations, including the removal of a significant and substantial ("S&S") designation in one citation. The "significant and substantial" terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguished as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

In the subject motion to approve settlement, the Secretary claimed that she has the unilateral authority to modify citations contested before the Commission, citing *American Aggregates of Michigan, Inc*., 42 FMSHRC 570 (Aug. 2020) and *Mechanicsville Concrete, Inc*., 18 FMSHRC 877 (June 1996). The Judge believed that the Secretary's legal argument directly conflicts with the language of section 110(k) of the Mine Act, 30 U.S.C. § 820(k), which allocates authority to the Commission to review proposed penalty settlements between the

Secretary and mine operators.[1] The Judge found that the Commission decisions cited by the Secretary in support of her alleged authority "cannot support the premise for which they have been cited." Order at 1 (May 11, 2023) (citations omitted). Accordingly, the Judge denied the motion without reviewing the settlement agreement and, as a sanction, ordered that the offending argument and citations be struck from the Secretary's motion. *Id.* at 2 n.2. Specifically, the Judge struck the following passage from the Secretary's motion:

> Taking into account the uncertainty of the outcome of these issues at trial, the Secretary has decided to exercise her discretion to modify the gravity to unlikely and not S&S as recognized in *Am. Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996)).

Id.[2]

On July 7, 2023, the Judge certified to the Commission for interlocutory review the question of his authority to strike material from the record, stating that the "question [is] impeding consideration of the motion to approve settlement." Order at 1 (July 7, 2023).

II. Disposition

We conclude that the Judge abused his discretion when he struck the Secretary's argument and citations to *American Aggregates* and *Mechanicsville Concrete* from the record. The Judge lacks authority to impose such sanctions.

In making an argument and filing a motion, a representative of the Secretary must certify pursuant to Commission Procedural Rule 6(b)(2), that it "is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law." 29 C.F.R. § 2700.6(b)(2). We find that neither the presentation of the argument nor the Secretary's citation to Commission caselaw violates the requirements of Procedural Rule 6.[3]

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[1] In pertinent part, 30 U.S.C. § 820(k) provides, "[n]o proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission."

[2] The Judge had previously ordered the Secretary to cease citing the aforementioned cases as authority to remove a S&S designation. Order at 1 (May 11, 2023) ("a conference and litigation representative who submitted a motion with such citations would be barred from practice before me.") (citation omitted).

[3] In coming to this conclusion, we rely on the Commission's prior grant of interlocutory review of the *identical issue* in multiple separate proceedings, which are currently pending on the Commission's docket. *See e.g., Knight Hawk Coal, LLC,* LAKE 2021-0160 (Apr. 2022); *Greenbrier Minerals, LLC*, 44 FMSHRC 706 (Dec. 2022) ("whether the Secretary has unreviewable discretion to remove an S&S designation from a contested citation without the

(continued…)

Further, by disallowing the Secretary from presenting certain arguments or citing particular cases, the Judge's order improperly prevented the Secretary from preserving issues on appeal. The Mine Act generally limits the Commission's jurisdiction to questions that were first reviewed by the Judge. *See* 30 U.S.C. § 823(d)(2). The Secretary must cite to cases and make arguments that she believes are meritorious, even if the Judge does not agree, if she desires to preserve them for consideration before the Commission or federal courts. *See Midwest Minerals, Inc.*, 12 FMSHRC 1375, 1378 (July 1990) (stating that matters not raised before the Judge and instead set forth for the first time on review "cannot be considered by the Commission.") (citations omitted). In short, if a Judge "strikes" an argument (and the cases that argument relies upon), the Secretary may find it impossible to receive review regarding that argument later.

We understand a Judge may become frustrated with the repetitive recitation of arguments and citations the Judge does not find relevant. Pending resolution of the underlying issue, however, the Secretary does not act in bad faith in continuing to present the argument or in citing Commission cases in an attempt to support her argument.

Even if a Judge believes that a party representative has failed to "conform to the standards of ethical conduct required of practitioners in the courts of the United States," the proper course of action is not to strike arguments or case citations but instead to refer the practitioner to the Commission in writing. 29 C.F.R. § 2700.80. Here, the Judge did not submit a written referral to the Commisison and, accordingly, we find it unnecessary to consider any disciplinary proceedings against the Secretary's representative in this instance.

We conclude that the Judge relied upon an improper understanding of his authority under the Mine Act and the Commission's Procedural Rules and abused his discretion. *See Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014) (stating that a Judge abuses his discretion when he issues a decision based upon an improper understanding of the law).

In so finding, we *do not* address the merits of the Secretary's own claim of authority. The Commission will address whether the Secretary has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval in one of the aforementioned pending cases in which the issue arises.

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[3] (…continued)
unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).") (footnote omitted); *Bluestone Oil Corp*., 44 FMSHRC 709 (Dec. 2022); *Rulon Harper Constr., Inc*., 44 FMSHRC 717 & n.1 (Dec. 2022).

In the interim, the Judge retains jurisdiction over this captioned proceeding. He should now consider whether the proposed settlement in the motion to approve settlement "is fair, reasonable, appropriate under the facts, and protects the public interest" as required by the Commission in *American Coal Co*., 38 FMSHRC 1972, 1976 (Aug. 2016).

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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August 18, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. THYSSENKRUPP INDUSTRIAL SOLUTIONS	Docket No. CENT 2022-0219 A.C. No. 41-00071-551832

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 18, 2022, the Commission received from Thyssenkrupp Industrial Solutions ("Thyssenkrupp") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Commission issued an order requesting further information from the operator, which Thyssenkrupp timely responded to on August 9, 2023.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 1, 2022, and became a final order of the Commission on May 2, 2022. Thyssenkrupp mailed its notice of contest on

May 23, 2022. Thyssenkrupp asserts that it delayed because it was waiting for the MSHA District Office to provide a copy of one of the citations that was missing from the assessment package. Thyssenkrupp eventually mailed the notice of contest rather than continuing to wait, but due to the delay, the filing was untimely. Thyssenkrupp eventually received a copy of the missing citation on June 30, 2022. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Thyssenkrupp's request and the Secretary's response, we find that Thyssenkrupp's approximately three-week delay in filing while waiting for paperwork was excusable. We note that the operator showed a good faith desire to contest the assessment by ultimately choosing to file its notice of contest rather than continuing to wait. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date o this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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August 21, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. VULCAN CONSTRUCTION MATERIALS, LLC	Docket No. SE 2023-0043 A.C. No. 31-01258-561300

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 29, 2022, the Commission received from Vulcan Construction Materials, LLC ("Vulcan Construction") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate the proposed assessment was delivered to the operator via U.S. Postal Service on August 29, 2022. On September 28, 2022, the proposed assessment was deemed a final order of the Commission because the operator had not filed a Notice of Contest within 30 days. On November 29, 2022, MSHA mailed a delinquency notice to the operator.

Vulcan Construction does not dispute that the assessment was mailed to the correct address. However, Vulcan Construction has no record of receiving the assessment. The operator asserts that the signature block on USPS' delivery confirmation simply noted "V Construction," therefore it cannot be certain who, if anyone, received the assessment. The exact method of delivery confirmation is unclear. The Secretary of Labor does not oppose the request to reopen.

We note that the motion to reopen was timely filed. The Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed on November 29, 2022, the same day the operator received the delinquency notification. Therefore, the motion was filed within a reasonable amount of time.

Having reviewed Vulcan Construction's request and the Secretary's response, we find that the operator has demonstrated good cause for its failure to timely respond and acted in good faith by timely filing its request to reopen. We also recognize that mail delivery was affected by the unprecedented strain of the COVID 19 pandemic during the relevant timeframe. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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August 21, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEST 2023-0051 A.C. No. 10-02177-557454
v.	Docket No. WEST 2023-0053 A.C. No. 10-02177-559239
KIEWIT MINING GROUP	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY: Jordan, Chair; Althen and Rajkovich, Commissioners

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 30, 2022, the Commission received from Kiewit Mining Group ("Kiewit") two motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEST 2023-0051 and WEST 2023-0053 because they involve similar factual and procedural issues. 29 C.F.R. § 2700.12.

Kiewit explains that all correspondence for the mine is automatically routed to the Post Office in Soda Springs, Idaho, where it is held for twice-weekly pickup by a mine employee. Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") and the U.S. Postal Service indicate the assessment in Docket No. WEST 2023-0051 was available for pickup at the Soda Springs Post Office on June 30, 2022, and the assessment in Docket No. WEST 2023-0053 was available for pickup on July 25, 2022. The assessments were returned to the Secretary as unclaimed approximately two weeks later. The assessments became final orders of the Commission on August 1, 2022, and August 24, 2022, respectively.[2]

Delinquency notices were sent to the operator on October 11 and November 4, 2022. On November 7, Kiewit reached out to MSHA for more information regarding the status of assessments. MSHA provided the operator with the USPS delivery date information and copies of the assessments on November 15, and Kiewit filed its motions to reopen on November 30.

Kiewit was unable to identify the specific cause of the failure to collect the assessment packages. However, the operator assures the Commission that its office procedures are normally reliable and that the Post Office is routinely checked twice a week. Kiewit notes that it has never before been untimely in filing a notice of contest. The Secretary does not oppose the operator's requests to reopen.

In light of Kiewit's history, we find that this mistake does not indicate an inadequate processing system, and is unlikely to recur. We also note that the operator followed up with MSHA and filed its motions to reopen within a reasonable amount of time.[3] We also recognize that mail delivery during the relevant period was affected by the unprecedented strain of the COVID 19 pandemic. Having reviewed Kiewit's requests and the Secretary's responses, we find that the operator's failure to timely file was the result of excusable mistake.

[2] The Commission has previously found motions to reopen to be moot where an operator never received the relevant assessment. *E.g.*, *Delhur Industries, Inc.*, 43 FMSHRC 396 (Aug. 2021). While the assessments at issue here technically never reached the operator's property, we find this case to be distinguishable. The assessments reached the operator's designated location for all mail delivery, akin to a P.O. Box or off-site office.

[3] The Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the operator was provided with the USPS records and copies of the citations on November 15, 2022, and the motions to reopen were filed on November 30, 2022.

In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Commissioner Baker, dissenting in part:

In this case, Kiewit failed to timely contest the proposed penalty at issue in Docket No. WEST 2023-0051, and then paid the amount owed. For the reasons set forth in my dissent in *Omya Inc.*, 45 FMSHRC __, 2023 WL 2559811 (Mar. 9, 2023), I do not believe it is accurate to characterize this action as a justifiable mistake or excusable neglect.

Therefore, I would deny Kiewit's motion to reopen with respect to Docket No. WEST 2023-0051.

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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August 21, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEVA 2023-0197 A.C. No. 46-09377-566429
v.	Docket No. WEVA 2023-0198 A.C. No. 46-09427-566430
ROCKWELL MINING, LLC	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 22, 2023, the Commission received from Rockwell Mining, LLC ("Rockwell") two motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEVA 2023-0197 and WEVA 2023-0198 because they involve similar factual and procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate the proposed assessments were delivered to the operator via U.S. Postal Service on November 16, 2022. On December 16, 2022, the proposed assessments were deemed final orders of the Commission because the operator had not filed Notices of Contest within 30 days. On January 31, 2023, MSHA mailed delinquency notices to the operator.

Rockwell asserts that it learned of the assessments on February 6, 2023, during an inquiry into its penalty balance. At that time, MSHA informed Rockwell that the assessments had been delivered on November 16, 2022 and that the signature block on the delivery confirmation read "C COVID." Rockwell claims no employee received the assessments on November 16, 2022. The exact method of delivery confirmation is unclear. The Secretary of Labor does not oppose the request to reopen.

We note that the motion to reopen was timely filed. The Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed on February 22, 2023, approximately two weeks after the conversation with MSHA and approximately three weeks after the delinquency notices were received. Therefore, the motion was filed within a reasonable amount of time.

Having reviewed Rockwell's requests and the Secretary's responses, we find that the operator has demonstrated good cause for its failure to timely respond and acted in good faith by timely filing its request to reopen.[2] We also note the use of "C COVID" in the signature block, and recognize that mail delivery was affected by the unprecedented strain of the COVID-19 pandemic during the relevant timeframe. In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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[2] In a June 29, 2023 Order in Docket No. WEVA 2022-0467 et al., Rockwell was put on notice that any future motions to reopen would be closely scrutinized for signs of an inadequate internal processing system. This motion was filed prior to that notice. Furthermore, the record does not indicate whether the mistake in this instance was with the U.S. Postal Service's delivery and confirmation process, Rockwell's receipt process, or simply a fluke. Nevertheless, we reiterate that any future requests to reopen which indicate a failure of Rockwell's internal processing system and fail to describe good faith measures to improve that system may be denied.

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August 30, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. SOUTHWEST ROCK PRODUCTS, INC.	Docket No. WEST 2021-0275 A.C. No. 02-03338-535671

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On January 11, 2023, the Commission received from Southwest Rock Products, Inc. ("SW Rock") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On January 31, 2022, the Chief Administrative Law Judge issued an Order to Show Cause in response to SW Rock's perceived failure to answer the Secretary of Labor's September 30, 2021, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on March 2, 2022, when it appeared that the operator had not filed an answer within 30 days.

SW Rock asserts that it did not receive documentation about the defaulted docket. The Secretary does not oppose the request to reopen but notes that the Order to Show Cause, which incorporates the order of default, was mailed to the address listed on the Legal Identification Report that SW Rock filed with the Department of Labor's Mine Safety and Health Administration ("MSHA"). She states that MSHA sent a delinquency notice to the operator on May 18, 2022, which was later forwarded to the U.S. Department of the Treasury for collection on July 12, 2022. The Secretary notes that SW Rock's address and contacts were not updated until November and December 2022. The Secretary further observes that the operator did not explain why it did not file a motion to reopen until several months after receiving MSHA's delinquency notice.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a Judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed SW Rock's request and the Secretary's response, we conclude that the operator has failed to provide sufficient information to determine whether good cause may exist to reopen the final order. We have held that a grant of relief under Rule 60(b) requires more than "general assertions or conclusory statements as to why an operator failed to timely contest." *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 608 (July 2008). However, SW Rock's motion to reopen provided only a cursory explanation for its failure to timely respond to the Chief Judge's Order to Show Cause, stating that they "are unsure as to why this docket defaulted and have received no documentation stating such." Moreover, SW Rock failed to provide any explanation regarding whether it maintained its correct legal address with MSHA – a problem that was clearly known to the company at the time the motion to reopen was filed.

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we also find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the operator only attempted to reopen the case nearly a year after the Order was issued, after having been sent a delinquency notification and notice that the assessment had been sent to Treasury for collection. No explanation is provided for this lengthy delay nor for having missed multiple attempts to warn the operator of its error.

Accordingly, we deny SW Rock's request to reopen with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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August 30, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. NORTHSIDE ROCK PRODUCTS LLC	Docket No. WEST 2022-0288 A.C. No. 35-03850-558508

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 20, 2023, the Commission received from Northside Rock Products LLC ("Northside") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On September 26, 2022, the Chief Administrative Law Judge issued an Order to Show Cause in response to Northside's perceived failure to answer the Secretary of Labor's July 27, 2022, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on October 26, 2022, when it appeared that the operator had not filed an answer within 30 days.

Northside asserts that "the paperwork had been put in the wrong file," that the operator had mistakenly believed that an answer had been filed, and that the mistake was not discovered until February 20, 2023. The Secretary opposes the request to reopen and argues that the operator does not explain exactly why the paperwork was placed in the wrong file or what procedures may have been implemented to prevent future defaults. The Secretary also notes that the Department of Labor's Mine Safety and Health Administration ("MSHA") sent Northside a delinquency notice on January 11, 2023.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a Judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Northside's request and the Secretary's response, we conclude that the operator has failed to provide sufficient information to determine whether good cause may exist to reopen the final order. Northside failed to provide a sufficiently detailed explanation for its failure to timely file an answer, including any measures it may have implemented to prevent future defaults, and the reasons why the misfiling was not discovered for more than a month after the delinquency notice had been sent. *See Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Accordingly, we deny Northside's request to reopen without prejudice. The words "without prejudice" mean that Northside may submit another request to reopen the assessment.[1]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

[1] In the event that Northside chooses to refile its request to reopen, it should state with specificity the facts and circumstances it believes would justify reopening the final order and should include any relevant documentation with the request.

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August 30, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CASCADE CONCRETE PRODUCTS COMPANY, INC.	Docket No. WEST 2023-0100 A.C. No. 45-02295-563293

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On January 12, 2023, the Commission received from Cascade Concrete Products Company, Inc. ("Cascade") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 19, 2022, and became a final order of the Commission on October 19, 2022. Cascade contends that it sent its

notice of contest of three citations to MSHA's penalty collections office in St. Louis along with the payment of the uncontested citations. The Secretary does not oppose the request to reopen but notes that notices of contest should be mailed to MSHA's Civil Penalty Compliance Office in Arlington, Virginia, while payments should be sent to MSHA's collection office in St. Louis. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Cascade's request and the Secretary's response, we find that the failure to properly file the notice of contest was the result of inadvertent administrative error. We urge the operator to take steps to ensure that such errors do not recur. Nevertheless, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
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August 31, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. R.E. PIERSON MATERIALS CORP.	Docket No. PENN 2022-0105 A.C. No. 36-00111-552721

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER TO SHOW CAUSE

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Act"). On July 19, 2022, the Commission received from R.E. Pierson Materials Corp. ("R.E. Pierson") a motion seeking to reopen the captioned case, which had become a final order of the Commission pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 13, 2022, and became a final order of the Commission on May 13, 2022. MSHA issued a delinquency notice to the operator on June 28, 2022.

R.E. Pierson's motion, filed by counsel, states that timely contest was not filed because the operator mistakenly failed to forward the assessment to counsel's office.[1] However, in a letter attached to the motion, the mine's operations manager states that the failure to timely file contest "was due to a clerical issue *in the cous[e]l's office.*" Ex. 1 (emphasis added).

The party seeking to reopen a final order bears the burden of showing that it is entitled to such relief through a detailed explanation of its failure to timely contest the penalty or answer the Secretary's petition. *See, e.g., Dynamic Energy, Inc*., 39 FMSHRC 1560, 1561 (Aug. 2017).

[1] Specifically, the motion to reopen states:

> The attached Letter from Mine Operations Manager . . . states . . . due to a clerical error in their office, the proposed assessment was not forwarded to outside counsel along with the citations in time to file the contest . . . .
>
> The citations were later forwarded to undersigned counsel for review, but the proposed assessments were not included in the email transmission due to clerical error.

Absent further explanation, there appears to be an inconsistency between the representations made by counsel in the motion and the representations made by the mine's operations manager in the attached letter. Namely, counsel asserts that the mine operator made a mistake, while the mine operator asserts that the mistake occurred in counsel's office.

In light of the identified discrepenacy, the parties are hereby **ORDERED TO SHOW CAUSE** within 30 days of the date of this order why this proceeding should not be dismissed. In responding to this order, R.E. Pierson and its counsel should provide a uniform and detailed explanation of the failure to timely contest the proposed penalty. If no response is filed, the final order will not be reopened.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 4, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0555 A.C. No. 46-08930-560351
APPALACHIAN RESOURCE WEST VIRGINIA, LLC, Respondent	Mine: Grapevine South Surface Mine

DECISION NOW APPROVING SECRETARY'S MOTION FOR SETTLEMENT

Before: Judge William Moran

This matter remains before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On March 1, 2023, the Court denied the Secretary's Motion for Approval of settlement for this docket. Thereafter, the Commission's recent decision in *Perry Cnty. Res., LLC*, KENT No. 2022-0024 (FMSHRC July 20, 2023), ("*Perry Cnty*") changed the landscape when a judge is faced with settlement motions for which the Secretary refuses to provide a section 104(b) order issued in connection with a section 104(a) citation. As described below, the Commission held that the Secretary, at least in circumstances presented there, need not supply the record of the 104(b) order to the Court.

Procedural Background

On March 1, 2023, the Court denied the Secretary's Motion for approval of settlement. The denial was based upon the Secretary's refusal to provide two section 104(b) orders as those orders, while the fact of their issuance was listed in Exhibit A for the docket, were missing from the record. The Court noted that the missing orders were part of the paper issued in connection with Citation Nos. 9567103, and 9567108 for that docket. Though the circumstances for this docket are not identical to *Perry Cnty,* the Court extrapolates that the Commission would not require the Secretary to provide the (b) orders in this case either. Therefore, the Court now approves the settlement.

The Commission's decision in *Perry Cnty. Res., LLC*, KENT No. 2022-0024, (FMSHRC July 20, 2023) ("*Perry Cnty*").

The Commission's decision in *Perry Cnty* held that this Court erred in requiring that the section 104(b) order, issued in connection with a section 104(a) citation in that docket, needed to be supplied to the Court in the settlement motion for that docket. At its core, the Commission based its decision on two factors: the Secretary's motion provided sufficient information to satisfy the *AmCoal*[1] standard; and the Court's concern that the record did not reveal if the Secretary met his obligation to notify the miners' representatives that the operator failed to abate a violation within the specified abatement period was irrelevant to that settlement motion proceeding.

With regard to the first factor, the Commission noted that in *AmCoal* it held "that parties may submit factual support consistent with the penalty criteria factors found in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), as well as facts supporting settlement that fall outside of the section 110(i) factors." *Perry Cnty at 5, citing AmCoal,* at 1982. Applying that standard, the Commission concluded that the Court "erred by denying the settlement on the basis that [the judge] was not provided the section 104(b) failure to abate order associated with Citation No. 9282162.[2] The operator agreed to accept Citation No. 9282162 as written and pay the proposed penalty in full. The Judge failed to identify relevant facts that would be provided by the order that had not already been made a part of the record." *Perry Cnty, Id.*

As to the second factor, the Commission, pertaining to whether "the Secretary met his obligation to notify the miners' representatives that the operator failed to abate a violation within the specified abatement period" determined that information was "irrelevant to the subject proceeding." *Id*. at 6. In that regard, it stated " Section 105(b)(1)(A) requires the Secretary to provide notice to an operator and to the miners' representative that the operator has failed to timely abate a violation and that a penalty will be proposed under section 110(b) of the Mine Act, 30 U.S.C.§ 820(b). Here, the Secretary provided factual information that she did not propose a penalty in connection with the section 104(b) order. Therefore, the provisions of section 105(b)(1)(A) do not apply to this proceeding." *Id.*

[1] *American Coal Co.*, 38 FMSHRC 1972, (Aug. 2016)

[2] The Commission did *not* reach "the question of whether a section 104(b) order issued for a failure to abate a contested citation may ever appropriately be sought by a Judge to further the Judge's *AmCoal I* analysis or whether it constitutes prohibited evidentiary documentation, we find the Judge's request was inappropriate in this case. The Judge failed to identify a rationale for requiring the order, considering that the operator accepted the contested citation as written and agreed to pay the proposed penalty in full." *Perry Cnty* at n.3. Accordingly, identification of a rationale, if deemed sufficient, would be considered by the Commission.

About 104(b) Orders[3]

The Mine Act speaks to (b) orders in *two* locations: section 104 and section 105. Those sections are independent of one another, but related. First, **under the topic of "Citations and Orders**," section 104(b) provides:

> Section 104(b) orders are issued when "upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> 30 U.S.C. § 814(b)

Second, **under the distinct topic of "Procedure for Enforcement**," section 105(b) provides:

> [i]f the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 820(b) of this title by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty. A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the representative of the mine employees.

[3] Withdrawal orders have been a safety tool as far back as 1952, with the House Report on the Prevention of Major Disasters in Coal Mines H.R. Rep. No. 82-2368 at Legis History at 62, 72. (1952). The Federal Coal Mine Health and Safety Act of 1969 followed suit. S. Rep. No. 91-411, at 90 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 216 (1975). So too, in a Senate Report regarding the 1977 Mine Act, it noted that "Inspectors are also authorized to issue similar closure or withdrawal orders where the violation previously "noted" has not been abated within the time prescribed for such abatement. S. Rep. No. 95-181, at 5 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 593 (1978). Thus, withdrawal orders have a life of their own; they are not inextricably tied to a penalty under section 105.

30 U.S.C. § 815 (b)(1)(A).

The Commission itself has recognized that section 104(b) orders are not joined at the hip to section 105(b) orders. In *Hopkins County Coal* 38 FMSHRC 1317, (June 2016), it upheld a section 104(b) order *without a single reference to* a section 105(b) order. The importance of a section 104(b) order in its own right was emphasized by the Commission, stating:

> The purpose of section 104(b) is to spur swift abatement of existing violations and compel operator compliance with the Act. A "no area affected" order provides an important *1336 deterrent to operators who fail to abate violations in a timely fashion. … The issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine Act. Moreover, penalizing an operator's refusal to comply with the Act in some instances, while allowing its refusal in others, falls short of fulfilling the Act's purpose. Thus, the Secretary's broad interpretation is consistent with the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an operator incurs repeated violations and refuses to comply.

Id. at 1335-1336.

So too, in *Hibbing Taconite,* 38 FMSHRC 393 (March 2016) the Commission spoke to the importance of section 104(b) orders with *no reference* to the other section invoking citations or orders per Section 104, namely Sections 105(a) and (b).

> While the inspector's concern with exacting immediate corrective action from the operator in order to keep miners safe is a laudable and important concern, the Mine Act sets forth a scheme in sections 104(a) and (b) by which to achieve that end. The inspector must take enforcement action consistent with those provisions. For instance, the inspector must set an abatement time based upon the amount of time necessary to fully abate a violation. Thereafter, if the operator does not fully abate within that time, the inspector must determine whether an extension in abatement time is warranted or whether **he should issue a section <u>104(b)</u> order**. In making that determination, the inspector may consider information such as whether the operator delayed beginning the abatement process and whether any delay was justified, giving priority to the safety of miners exposed to the unabated condition.

Id. at 399.

The federal courts of appeals have also discussed section 104(b) orders, independent of, and without any reference to, section 105(b) enforcement orders. *See, for* e.g., *Energy West Mining*, 111 F.3d 900, 901-903 (D.C. Cir. 1997).

Analysis

The underlying reasoning for this Court's denial of the settlement motion in *Perry Cnty*, while, in retrospect, insufficiently stated,[4] was that the Court, miners, and the public, should be privy to the circumstances which led the MSHA inspector to issue the (b) order. However, in light of the Commission's decision in that case, as applied to this case, *Appalachian Resource, WV, LLC,* Docket No. WEVA 2022-0555, extrapolating from the Commission's *Perry Cnty* decision, the Court reaches the conclusion that the Secretary need not supply the (b) order in this instance either. The Court does so, even though this case is potentially distinguishable[5] from *Perry Cnty*, because in this instance *there was a civil penalty discount in spite of the issuance of a (b) order*. In fact, as described below, the penalty discount was a hefty one, at more than a 50% discount in the penalty. The Commission has the availability to invoke *sua sponte* review when it wishes.

While concluding that the settlement motion now must be approved, some additional thoughts are in order, given that the Commission's decision in *Perry Cnty* left the door open to a potentially adequate rationale being presented by a court. (*See* n.3). The Court makes such an attempted rationale here.

In this matter, as in *Perry Cnty*, Section 104(b) orders were issued; in this instance for two of the citations in the docket. Those Orders did not occur in a vacuum. The inspector determined, pursuant to the Citations and Orders provisions in section 104 of the Act that, in connection with those section 104(a) citations he issued, that the time was up, so to speak. The Orders were issued because he determined that the violation had not been totally abated within the period of time as originally fixed therein or as subsequently extended, and that the period of time for the abatement should not be further extended. That is a fact.

Given that, it cannot be disputed that the 104(a) citations and the ensuing 104(b) orders in this matter were inextricably related. The 104(b) orders did come out of the blue. The orders arose *solely* in connection with the section 104(a) citations. Their creation and their viability did not depend upon taking any enforcement actions under section 105. The (b) orders *were therefore part of the official record for the two* 104(a) citations in this matter.

This Court, since disabused of the relevance of the (b) order in connection with the settlement motion, per the Commission's *Perry Cnty* decision, had thought that as an official document issued in connection with the 104(a) citation, it should be disclosed. The Court thought of the 104(b) order as the last chapter of the violation, akin to a book, without which inclusion the story would be missing the final chapter. The life of a 104(a) citation for which a 104(b) order is then issued cannot be told without that last chapter revealed and the Court believed, simply to complete that story, the Court, affected miners and the public should be able to finish

[4] As noted, in *Perry Cnty*, the Commission held that "*the Judge failed to identify* ***a rationale*** *for requiring the order*, considering that the operator accepted the contested citation as written and agreed to pay the proposed penalty in full." *Perry Cnty* at 5-6, n..3 (emphasis added).

[5] See note 3, above, as the proposed regularly assessed penalty *was not paid in full* here.

the book, so to speak, without filing a FOIA request.[6] The Commission's *Perry Cnty* decision determined that this Court was wrong about that.[7] They held that, as the penalty was paid in full for Citation No. 9282162, there was no basis for the Court to learn of the content or circumstances of the (b) order.

Resolution of the Settlement Motion in this matter

The (b) orders in this case were derived from Citation Nos. 9567103 and 9567108

On June 13, 2022, MSHA Inspector Melvin Keith Wolford issued a section 104(a) citation, **Citation No. 9567103.** 30 C.F.R. §77.1606(c) was cited. Titled "Loading and haulage equipment; inspection and maintenance," that standard provides in subsection (c) that "**Equipment defects affecting safety shall be corrected before the equipment is used**." The settlement notes that the violation has been admitted.

In the Condition or Practice section of his citation, the Inspector listed the following **eleven (11) defects** on the cited loader:

> **DEFECTS AFFECTING SAFETY ARE NOT BEING CORRECTED ON THE CAT 992G LOADER, CO. NO. 001, PRIOR TO PLACIING IT INTO SERVICE. WHEN CHECKED, THE FOLLOWING DEFECTS WERE OBSERVED.**
>
> 1. **THE TOP CENTER PIN PLATE HAS 2 OF 6 RETAINING BOLTS BROKE OUT.**
>
> 2. **THE CENTER SECTION IS OIL SOAKED FROM HYDRAULIC OIL LEAKS.**
>
> 3. **THE REAR AXLE AREA IS OIL SOAKED.**
>
> 4. **THE REAR BRAKE VALVE AND HOSES ARE OIL SOAKED.**

[6] An aside, reflecting the inherent importance of 104 (b) orders, it is noted that, per 15 U.S.C. 78m-2, there is a reporting requirement under the Securities Exchange Act that each coal or other mine must file the total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)), among other periodic reporting requirements such as the total number of S&S violations.

[7] The Court agrees that it was incorrect in tying any section 105(b) order to the issuance of a section 104(a) citation. As noted above, the two exist independently, with a section 104(b) order being part of the record associated with a section 104(a) citation and a section 105 (b) order being a separate enforcement decision. In *Perry Cnty*, and again in this matter, the Secretary has apparently decided not pursue enforcement actions under section 105(b).

5. **THE GLASS FOR THE EMERGENCY EXIT WINDOW LATCH NEEDS ADJUSTED. THE WINDOW DOES NOT PULL UP TIGHT TO THE WINDOW SEAL TO PREVENT UNFILTERED DUST FROM ENTERING THE CAB.**

6. **THE CATAGORY 2 AND 3 WARNING LIGHTS ARE STAYING ILLUMINATED AND MINERS ARE TAPING OVER THEM SO THEY CANT SEE THE LIGHTS FLASH.**

7. **THERE ARE SEVERAL TROUBLE CODES STAYING ON THE DISPLAY ALL THE TIME WHILE THE LOADER IS RUNNING THATS KEEPING THE LIGHTS ON.**

8. **THE LEFT FRONT WIPER WILL WORK INTERMITTENLY. IT WILL COME ON ONE TIME ITS CHECKED AND NOT WORK THE NEXT.**

9. **THE RIGHT SIDE STEERING JACK HAS EXCESSIVE SLACK/SLOP IN THE REAR PIN FIT_**

10. **THE BUCKET TILT CYLINDER HAS EXCESSIVE AMOUNTS OF OIL LEAKING OUT AROUND THE STEM SEAL.**

11. **THE HYDRAULIC OIL TANK HAS EXCESSIVE AMOUNT OF OIL LEAKING. THE BOTTOM OF THE TANK IS OIL SOAKED WITH DRIPS.**

FAILURE TO CORRECT THE CITED CONDITIONS EXPOSES TWO OPERATORS TO THE HAZARDS 10 HOURS EACH SHIFT 6 DAYS A WEEK.

THE LOADER WAS REMOVED FROM SERVICE.

Standard 77.1606(c) was cited 68 times in two years at mine 4608930 (67 to the operator, 1 to a contractor).

Petition for civil penalty at 13 (emphasis added).

Citation No. 9567103 was assessed, under what the Secretary describes in Part 100, Criteria and Procedures for Proposed Assessment of Civil Penalties, as "Determination of penalty amount; **regular assessment.**" 30 C.F.R. §100.3 (emphasis added). The amount assessed was $626.00. Understandably, the 10% good faith reduction was not applied, as the Inspector issued a section 104(b) order upon determining that the violation was not totally abated within time allowed. The citation is to be paid in full. Motion at 2.

Two days later, on June 15, 2022, the same inspector issued section 104(a) **Citation No. 9567108**. In that instance, the same standard, equipment defects affecting safety, was cited as in Citation No. 9567103; 30 C.F.R. §77.1606(c). This time, not 11 (eleven) defects were identified, **but rather 19 (nineteen) defects were listed in the citation.** The motion proposed to reduce the regular assessment for that Citation by **54% (fifty-four percent), from $4,624.00 to $2,124.00.** In arriving at the *regular* assessment of $4,624.00, the 10% 'good faith' reduction was not applied in this instance either, an understandable decision given that, as with **Citation No. 9567103,** the issuing inspector also issued a section 104(b) order, upon determining that the violation was not totally abated within time allowed.

In the Condition or Practice section for this citation, the Inspector listed the following:

DEFECTS AFFECTING SAFETY ARE NOT BEING CORRECTED ON THE CAT 785D TRUCK, CO. NO. 111, PRIOR TO PLACING IT INTO SERVICE. WHEN CHECKED, THE FOLLOWING DEFECTS WERE OBSERVED.

1. **THE LEFT SIDE REAR INSIDE TIRE HAS LARGE PATCHES OF TREAD TORN OFF THE TIRE.**
   THE METAL CORDS ARE SEVERED AND STICKING OUT OF THE TIRE.

2. **THE HYDRAULIC OIL TANK IS OIL SOAKED FROM LEAKS ON THE TOP AND SIDE OF IT.**

3. **THE RIGHT FRONT WHEEL ASSEMBLY HAS A STUD AND NUT MISSING THAT HOLDS THE WHEEL ON.**

4. **THE CAB SIDE MUD FLAP UNDER THE DOOR IS MISSING ALLOWING MUD TO BE FLUNG ON THE WALKWAY AND MIRROR.**

5. **THE LEFT SIDE STEERING JACK IS LEAKING OIL OUT OF THE ROD END SEAL ON THE JACK.**

6. **THE RIGHT SIDE STEERING JACK IS LEAKING OIL OUT OF THE ROD END SEAL ON THE JACK.**

7. **THE LOWER FUEL TANK MOUNT IS DAMAGED. TWO OF THE MOUNTING BOLTS ARE MISSING THE MOUNTING NUTS AND THE BOLTS ARE PULLING OUT OF THE BRACKET.**

8. **THE RIGHT SIDE UPPER FRAME HORN THAT SUPPORTS THE UPPER DECK IS CRACKED 4 INCHES OR SO ON THE FRONT RIGHT CORNER ABOVE THE HOSES.**

9. **THE RIGHT FRONT BRAKE OIL COOLER HOSES ARE OIL SOAKED AND LEAKING OIL.**

10. **THE RIGHT FRONT BRAKE COOLER HOSE MANIFOLD IS LEAKING OIL.**

11. **THE BRAKE VAVLE, LOCATED INSIDE THE LEFT FRAME RAIL BELOW THE CAB IS OIL SOAKED AND LEAKING OIL TO THE GROUND.**

12. **THE BACK OF THE FUEL TANK IS LEAKING FUEL TO THE GROUND.**

13. **THE WIPER ARM LINKAGE IS WORN EXCESSIVE AND ALLOWING THE WIPER ARM AND BLADE TO GO OFF THE GLASS ACROSS THE RUBBER SEAL AND WILL DAMAGE THE WIPER IF LEFT UNCORRECTED. THE ARM NEEDS REPLACED OR ADJUSTED.**

14. **THE DOME LIGHT DOES NOT WORK INSIDE THE CAB.**

15. **THE PORCH LIGHT DOES NOT WORK TO PROVIDE ILLUMINATION AROUND THE DECK AREA.**

16. **THE DIGITAL GEAR INDICATOR THAT TELLS IF YOU ARE IN FORWARD, REVERSE, NUTERAL ETC. AND WHAT GEAR YOU ARE IN DOES NOT WORK.**

17. **THE CATAGORY 2 WARNING LIGHT IS TAPPED OVER WITH BLACK TAPE.**

18. **THE TRUCKS MONITOR SCREEN IS KEEPING SEVERAL CODES FLASHING THAT CAUSED THE CAT 2 LIGHT TO STAY ON ALL THE TIME AND MINERS TO TAPE THEM OVER.**

19. **THE ROCK PROTECTOR THAT STICKS OUT ABOVE THE CAB TO PROTECT MINERS FROM ROCKS FALLING OFF**

THE BED ONTO THE CAB IS NOT WELDED/ATTACHED GOOD AND STURDY. IT LOOKS TO BE TACKED INTO PLACE/MOCKED UP BUT WAS NEVER WELDED TO BE A PERMANENT FIXTURE.

THIS TRUCK IS USED ON STEEP GRADES, ELEVATED ROADWAYS, IN CONGESTED AREAS, AND AT TIMES NEAR

FOOT TRAFFIC. FAILURE TO CORRECT THE CITED CONDITIONS PRIOR TO PLACING IT INTO SERVICE EXPOSES THE DRIVERS TO SERIOUS HAZARDS. THE TRUCK WAS REMOVED FROM SERVICE UNTIL THE CITED CONDITIONS ARE CORRECTED.

Standard 77.1606(c) was cited 70 times in two years at mine 4608930 (69 to the operator, 1 to a contractor).

Petition for civil penalty at 17-18.

Presented as support for the **54% (fifty-four percent) reduction in the penalty,** the Motion, employing an economy of words, stated:

> Citation #9567108 will remain as issued with a reduction in penalty. The Respondent contends that the gravity of the citation was over-evaluated and should not have been issued as "reasonably likely" and "S&S". Respondent would argue at hearing that there were no operational issues with the steering or brakes. Additionally, the tire at issue is a 58 ply tire and only 2 plies were damaged. The Secretary recognizes that the ALJ may find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation, the Secretary has agreed to reduce the penalty for Citation #9567108 from $4,624 to $2,124, and the Respondent has agreed to pay the reduced penalty. If this citation had been issued at unlikely and non S&S, the penalty per 30 CFR part 100.3 would have been $934.00.
> Motion at 3-4

Accordingly, the Secretary took the incongruous position that he/she was standing by the inspector's evaluation in all respects but agreeing to reduce the penalty by more than half from the proposed regular assessment. To arrive at that conclusion, the Secretary posits that *the Court*, but with the Secretary completely abstaining as to its own view, may find merit in the Respondent's assertion that an injury is 'not reasonably likely' to occur.

On this record, the Court does not buy into that claim, not with operational issues identified on this 550,000 lb/155-ton payload mining truck[8] such as the gear indicator not

[8] https://www.cat.com/en_MX/products/new/equipment/off-highway-trucks/mining-trucks/18089285.html

indicating the gear position, the multiple leaking oil fluids from: the hydraulic oil tank, the left and right side steering jack, the brake oil cooler hoses, and the brake valve, not to mention the fuel tank leaking fuel. An indication that the mine was ignoring obvious problems, the category 2 warning light had been taped over.[9] And further, the Court does not buy into the claim that it may find merit that an accident was not reasonably likely to occur, when considered with the unchallenged facts in the citation that the truck was being used on steep grades, along elevated roadways, in congested areas and at times near foot traffic, all of which led the issuing inspector to conclude that failure to correct the cited conditions exposed the driver to serious hazards which were reasonably likely to occur.

Approval of the settlement motion; application of the Commission's decisions in *Perry Cnty and AmCoal*

The Court is not permitted to make reasonable inquiry about the contentions advanced in settlement motions. This is because, under the Commission's interpretation of section 110(k) of the Mine Act, Congress only intended that the three elements as laid out in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) need be considered under the Commission's standard for review of settlement submissions. The settlement motion does not require more information from the Secretary.

Per the Commission's decisions in *AmCoal* and *Rockwell Mining*, to approve a settlement motion there are three requirements. As set forth below, meeting the first two requirements are automatic and perfunctory.

(1) **The motion must state the penalty proposed by the Secretary**.

This requirement is met in every civil penalty petition, as the petition contains the proposed penalty. The amount is rarely, if ever, an issue, and if in issue, it is resolved before the penalty petition is filed.

(2) **The amount of the penalty agreed to in settlement**.

This requirement is also automatic; there could not be a settlement motion without the parties stating the penalty amount to which they have agreed.

[9] "Caterpillar warning lights, symbols and meanings are important for operating machinery safely. Caterpillars have a range of warning lights on their machines that indicate when something is wrong with the machine or its components, such as low oil pressure, overheating engine temperature and other problems." https://warninglightsoncar.com/caterpillar-warning-light/ As noted, the Court is not permitted in the context of settlement motions to ask questions about such matters.

(3) **"Facts," as the Commission has employed that term, in support of the penalty agreed to by the parties**.

In the context of settlement motions, "facts" have an atypical meaning.[10] In discussing what constitute "facts" for settlements, the Commission stated "there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. Facts supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively." *AmCoal* at 990. The only associated requirement with such *"facts"* is that *"there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion.*" *Id.* (emphasis added).

The Commission rejected the view that a respondent's assertions of fact need to "present legitimate questions of fact," and further that the Secretary need not comment yea or nay to the facts asserted by a respondent. Instead, the Commission announced that "[f]acts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing." Instead, the Commission allows that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them . . ." *Id.*

Accordingly, per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.[11] **The settlement terms are summarized in the following table:**

[10] In settlements, "facts" do not mean things that are known or proved to be true, nor does the term mean something that has actual existence or a piece of information presented as having objective reality. *Fact*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/fact (accessed Nov. 18, 2021). Accordingly, in settlements, a fact does not mean something that is true, nor is there a requirement that a statement of fact be verifiable.

[11] It should not come as a surprise that, under the Commission's *AmCoal* test for review of settlements, all such motions are approved. In the rare instances where a judge has denied a settlement motion, post-*AmCoal*, those decisions have met with reversals by the Commission. *Hopedale Mining*, 42 FMSHRC 589 (Aug. 2020), *American Aggregates*, 42 FMSHRC 570 (Aug. 2020) (Chairman Traynor and Commissioner Jordan, dissenting).

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. WEVA 2022-0555			
9565193	**$3,546.00**	**$1,771.00**	**50 % Reduction in Penalty**
9565194	**$716.00**	**$716.00**	**Sustained as Issued**
9567103	**$626.00**	**$626.00**	**Sustained as Issued**
9567109	**$1,156.00**	**$1,156.00**	**Sustained as Issued**
9567108	**$4,624.00**	**$2,124.00**	**54% Reduction in Penalty**
9567119	**$774.00**	**$774.00**	**Sustained as Issued**
9567120	**$1,156.00**	**$1,156.00**	**Sustained as Issued**
9567122	**$840.00**	**$840.00**	**Sustained as Issued**
9567123	**$716.00**	**$716.00**	**Sustained as Issued**
9567126	**$1,593.00**	**$1,116.00**	**30% Reduction in Penalty**
9567130	**$3,546.00**	**$1,546.00**	**56% Reduction in Penalty**
TOTAL	**$19,293.00**	**$12,541.00**	**35% overall reduction in penalty**

Summary

Apart from any consideration of the Secretary's enforcement authority under Section 105 of the Mine Act, the Court takes note that the Commission has concluded that, at least in the context of settlement motions, the **104(b)** order paper issued as part of the official actions taken by a mine inspector upon determining that no further extensions should be granted for abatement of a section 104(a) citation, may not be viewed by the Court, miners or the public.[12]

That said, the Court must and does respect the Commission's decisions in *Perry Cnty* on the issue of disclosure of the 104(b) orders which were issued in this case. In addition, the Court adheres to Commission case law and approves the Secretary's Motion for settlement but **solely on the basis of the Commission's decisions in** *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. Per the Commission's decisions

[12] As noted, miners, the public and safety advocates may obtain the section 104(b) orders through a Freedom of Information Act request.

on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

It is **ORDERED** that the operator pay a penalty of **$12,541.00** within 30 days of this order.[13] Upon receipt of payment, this case is **DISMISSED**.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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[13] Penalties may be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. It is vital to include Docket and A.C. Numbers when remitting payments.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0070 A.C. No. 36-07416-552312 Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Ryan M. Kooi, Esq., & Doug Sciotto, CLR, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor

James McHugh, Esq., Hardy Pence, PLLC, Charleston, West Virginia, for the Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (The "Act" or "Mine Act"). A hearing was held via Zoom Government on May 2-3, 2023.[1] The parties subsequently submitted briefs. The within Decision has been reached after careful consideration of the evidence presented at hearing and arguments advanced by the parties.

At issue in this case is a single violation—Citation No. 9206769—issued under 30 C.F.R. §75.1725(a) for failure to maintain a continuous miner in safe operating condition. Specifically, the Citation states:

> The Company No. 25 continuous miner located on the H-2 Development Section (MMU 007-0) is not being maintained in safe operating condition. There are 2 damaged cutting bits on the right outer sump ring of the cutting head, approximately 2 feet from each other. One of the bits is missing the carbide tip, and the other is

[1] This docket originally included four citations. Prior to hearing, the parties settled Citation Nos. 9205021, 9204786, and 9205026. A Decision Approving Partial Settlement was issued on May 18, 2023.

> broken off at the lug. The continuous miner was out of service at the time due to a 103(k) order being issued for an ignition investigation. According to miners working on the section who witnessed the ignition, the ignition originated on the right-hand side of the cutting drum, was orange in color, and was approximately 2-2.5 feet in diameter. This is a contributory citation to a non-injury face ignition which occurred at 11:18 AM on 2/16/2022.

P-1 at 27.

LAW AND REGULATIONS

30 C.F.R. § 75.1725(a) provides, in pertinent part:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

CREDIBILITY ASSESSMENT

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

JOINT STIPULATIONS

The parties agreed to the following stipulations which were admitted as Joint Exhibit 1 ("J-1").

1. The Respondent was an "operator" as defined in 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. 802(d), at the mine at which the citations at issue in this proceeding were issued.
2. At all times relevant to these proceedings, Enlow Fork Mine (ID 36-07416) is a "mine" as defined in 3(h) of the Mine Act, 30 U.S.C. 802(h).
3. Operations of the Respondent at the Enlow Fork Mine at which the citations were issued are subject to the jurisdiction of the Mine Act.
4. 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.
5. Enlow Fork Mine is owned by the Respondent.

6. Payment of the total proposed penalty in this matter will not affect the Respondent's ability to continue in business.
7. MSHA Inspector Brandon Crutchman was acting in his official capacity and as an authorized representative of the Secretary of Labor when Citation No. 9206769 was issued and during the course of the accident investigation and inspection.
8. MSHA Inspector Walter Young was acting in his official capacity and as an authorized representative of the Secretary of Labor during the course of the accident investigation and inspection.
9. A true copy of Citation No. 9206769 was served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated therein, as required by the Act.
10. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 2022-0070 contains an authentic copy of Citation No. 9206769 at issue in this matter with all modifications or abatements, if any.
11. Petitioner's Exhibits are authentic copies of the documents they depict.

S. Br. at 4-6 (July 14, 2023).[2]

STATEMENT OF FACTS

Consol Pennsylvania Coal Company, LLC is the owner and operator of Enlow Fork Mine, an underground bituminous coal mine located in Southeastern Pennsylvania. J-1; P-14. In February of 2022, Enlow Fork Mine was liberating in excess of 11 million cubic feet of methane per 24-hour period. Tr. I at 57, 169. At that time, the mine used three portals: Oak Springs Slope, Sparta Portal, and Archer Portal. Tr. I at 27. Most active mining was conducted through the Archer Portal. Tr. I at 27.

I. The Ignition

At approximately 11:18 a.m. on February 16, 2022, a face ignition occurred on the H2 development section of Enlow Fork Mine. Tr. 1 at 82-83; P-1; P-2. At that time, MSHA Inspectors Brandon Crutchman and Walter "Bud" Young were conducting regular quarterly inspections in the Oak Springs side of the mine. Tr. I at 27, 161. At approximately 11:30 a.m., they met with Matt Roebuck—a company representative—at the Oak Springs hoist bottom to exit the mine. Tr. I at 27-28, 89, 161-62. It was at this time that Roebuck received a call on the mine radio reporting that an ignition had occurred and requesting that he report it to the MSHA inspectors to investigate. *Id*. Crutchman, Young, and Roebuck immediately exited the mine along with Inspector Rob Hutchinson, who had already issued a verbal 103(k) order to control and preserve the scene of the accident.[3] Tr. I at 28-29; P-2, P-9.

[2] Hereafter, the joint stipulations, transcript, the Secretary's exhibits, Respondent's exhibits, the Secretary's post-hearing brief, and Respondent's post-hearing brief are abbreviated as "Jt. Stip.," "Tr.," "Ex. P-#," "Ex. R-#," "S. Br.," and "R. Br.," respectively.

[3] Inspector Hutchinson has since retired and was unavailable to testify at hearing, as he resides outside of subpoena range under Fed. R. Civ. P. 45(c). Tr. I. at 29.

At the surface, Crutchman and Young learned the location of the ignition and that no injuries occurred. Tr. I at 32, 162. They gathered the pre-shift and on-shift examiners' reports, relevant pages of the mine's ventilation plan, and a map of the section. *Id.* The inspectors then proceeded underground, accompanied by company representatives—Scott Watson, John Heffelfinger, Gaven Verbosky, Don Blumetti, Brett Farrell, and Steve Barr—and two inspectors from the Pennsylvania Department of Environmental Protection—Harry Casteel and Ralph Scott. Tr. I at 32-33, 163. They arrived at the H2 development section via mantrip and met the section crew who had gathered at the section power center. Tr. I at 33, 91, 163. Crutchman and Young then conducted a group interview of eight miners who witnessed the ignition—Sam Stempell, return side bolter; Josh Polk, miner operator; Brad Simpson, shift foreman; Cody Gibson, intake side bolter; Justin Drew, continuous miner coordinator; Dave Eisenhower, foreman; Tristian Demidovich, return rib bolter; and Mike Kuzma, intake rib bolter. Tr. I at 34, 91, 163-65, 247; Tr. II at 332; P-2.

The miners reported witnessing an orange ball or glow in the face of the number three entry that measured between two and two-and-a-half feet in diameter and lasted approximately ten seconds before self-extinguishing. Tr. I at 34-35, 92, 164-65, 244-48, 258-59; Tr. II at 325; P-2; P-16. Prior to the ignition, the miners had cut the bottom of the coal face underneath the hard rock binder. Tr. I at 198-99, 244. After mining one foot into the middle cut, the ignition occurred. Tr. I at 37, 198-99, 252. When he saw the orange glow, Polk appropriately glanced at the methane monitor which read 0.1 percent, de-energized the continuous miner, and started spraying the area where the ignition occurred with a wash down hose. Tr. I at 111-112, 165, 244, 258-59; P-2.

II. The Investigation

Upon arrival at the site of the ignition, Young—escorted by Mine Superintendent Steve Barr—conducted an initial methane check at the number 3 entry that detected methane levels twelve inches from the roof, face, ribs, and floor between 0.3 and 1.7 percent. Tr. 58, 165-66; P-16. After Young adjusted the ventilation controls, the methane levels dropped below 1 percent. *Id*. Young also observed a methane feeder—a fracture in the coal near the rock binder that was emitting higher concentrations of methane between 2.7 and 3.4 percent. Tr. I at 58, 113-14, 167; P-16.

Crutchman began his investigation by conducting an imminent danger run of the other entries in the H2 development section. Tr. I at 58, 165-66. Following his return from the imminent danger run, he conducted methane tests that showed the adjustment of the ventilation controls had lowered the level of methane near the feeder to between one and two percent. Tr. I at 58-59, 64, 113; P-2. Crutchman determined the methane levels were safe and modified the 103(k) order to permit Consol to clean up the coal behind the continuous miner and back the machine out of the face area so that they could continue the investigation. Tr. I at 59, 64-65, 102.

After the continuous miner was removed, Crutchman and Young inspected the methane feeder and observed a mist of water coming from the rib and a low hiss that would have been inaudible while the continuous miner was in operation. Tr. I at 59-60, 69, 167-68. Crutchman conducted a test which confirmed that methane was emitting from the feeder at levels of one to

two percent. Tr. I at 59-60, 64.[4] The inspectors also checked the cutting bits on the head of the continuous miner and found two bad bits within approximately two feet of each other—one that had the carbide tip completely worn off and one that was broken off at the lug where it attached to the cutting head. Tr. I at 69, 172-73; P-1; P-2; P-16. The bits were located on the right side of the outer sump of the cutting head, in the area where the ignition occurred. Tr. I at 69, 254-55; P-1; P-2. Polk—the continuous miner operator—testified at hearing that the damaged bit looked worn and the broken bit looked like it had been broken by a sulfur ball. Tr. I at 246-47.

As a result of the investigation, Inspector Crutchman concluded that the direct cause of the ignition was damaged or missing cutting bits contacting intrusions in the face area—sulfur balls and laminated sandstone—which then created a spark and ignited the methane feeder. Tr. I at 82; P-2. Respondent replaced the two bits in order to abate the violation. Tr. I at 79, 179. The mine also submitted a ventilation plan addendum to MSHA, which included a requirement that Consol check the bits on the cutting head of the continuous miner every twenty feet when mining in the H1 to H5 districts. Tr. I at 81; P-8.[5] MSHA approved this plan. *Id*.

A. Conditions in the H2 Development Section

At the beginning of the shift, the crew examined the cutting bits, sprays, and parameters, and did not find any worn or broken bits. Tr. I at 37, 164, 240; P-2; P-16; R-3. The water pressure at the cutting head measured at 80 P.S.I. with a flow of 62 gallons per minute. Tr. I at 37, 129, 164; P-2; P-16; R-3. The crew used an 18-inch ventilation tube with a 16-inch slider that extended to approximately five feet from the face. Tr. I at 37; P-2; R-3. The crew had mined approximately 47 feet that shift and the continuous miner had not de-energized due to high methane. Tr. I at 37, 109, 164, 245, 252; P-2; P-16. Methane readings on a probe had increased to 0.3 percent during the shift. Tr. I at 37, 164; P-2; P-16.

The mining of the coal seam in the H2 development section was complicated by the presence of a rock binder and sulfur balls. Tr. I at 39, 69, 98, 174. The rock binder—made of hard shale and thin layers of sandstone—measured approximately eight inches and was located 5.7 feet above the bottom of the coal seam. Tr. I at 39, 69, 98, 174; P-2. The miners told the inspectors that they occasionally witnessed sparking while cutting into it. Tr. I at 39, 98; P-2. The inspectors noted that there was evidence of hard rock binder in the ribs as well as the face, indicating that the miners had mined through the binder during the shift. Tr. I at 40-41, 174. Sulfur balls—round, hard rock formations—and a clay vein—an intrusion of clay within the coal seam that indicated a possible source of methane or adverse roof conditions—were also present

[4] The inspectors discovered that the methane monitor mounted on the continuous miner detected a lower level of methane than their monitors—2.2 percent compared to 2.5 percent—and issued a citation for failing to maintain the methane monitor in permissible and proper operating condition. Tr. I at 66; P-3. This citation was issued as non-contributory to the face ignition. Tr. I at 66-68, 184-85.

[5] Since Consol implemented this addendum, there have been no further ignitions in the H district. Tr. I at 81-82, 183. However, there have been additional ignitions in the G District, which does not require more frequent bit checks. Tr. I at 82.

in the face area. Tr. I at 41-2, 69, 174-75, 246; P-2; P-16. Shale, sandstone, and sulfur balls are harder materials than coal, and mining through them causes bits to wear down faster. Tr. I at 40, 107. This increases the potential for the bits to break and for sparking to occur. Tr. I at 40, 107, 246.

B. The Coal Bed Methane Well NV-89 Cut Through Plan

Prior to the ignition, the crew was approaching a coal bed methane well (CBM well NV-89), which was drilled laterally into the coal seam from the surface to reduce methane levels. Tr. I at 50, 57, 132, 178-79, 234; P-14. At the time of the ignition, the miners had advanced approximately 20 feet into the minimum working barrier around the suspected location of the well. Tr. I at 38, 50, 52-55; P-2; P-7. This would have been the first intersection of that well. Tr. I at 38. The first intersection of a coal bed methane well can be hazardous because there is no way of knowing if the previous well preparation was sufficient to prevent a methane inundation. Tr. I at 38, 47, 49, 134, 141, 178; P-7.

Mining through coal bed methane wells is a hazardous process that has the potential to cause methane to inundate mines, possibly leading to explosions or ignitions. Tr. I at 42. Respondent has a history of explosions—including one explosion causing injuries at the Enlow Fork mine—caused by the presence of methane at the coal face. Tr. I at 74-75, 183. Four of these ignitions occurred on the H Section. Tr. I at 183. As a result, 30 C.F.R. § 75.1700 prohibits mining through gas wells. Tr. I at 42. In this case, however, Respondent had submitted a Petition for Modification to permit mining through the coal bed methane well. *Id.* MSHA approved Consol's Petition for Modification, Docket No. M-2009-039-C, and Consol submitted a cut-through plan as an addendum to its approved ventilation plan incorporating approximately 40 additional procedures mandated by MSHA due to the hazardous nature of mining through gas wells. Tr. I at 45-46; P-7.

As soon as mining encroaches on the minimum working barrier, the mandatory procedures specified in the cut-through plan must be implemented. Tr. I. at 45, 234; P-7. These special procedures are designed to mitigate the risk of methane inundations and associated hazards. Tr. I at 49-50; P-7. Among other things, the mandatory procedures include more frequent methane tests, the application of rock dust to within 20 feet of the face rather than 40 feet, more frequent permissibility checks, daily calibration of the methane monitor on the continuous miner rather than once every 31 days, a prohibition from traveling or working in remote areas of the mine while crews are working within the minimum working barrier, the adjustment of the mining cycle to prevent methane from advancing into other active areas of the mine, and additional equipment to prevent and extinguish fires. Tr. I. at 46, 49, 54, 132-34, 176-77, 234-35; P-7. The procedures also require that the mine notify MSHA in the event that a methane inundation were to occur and normal section ventilation is unable to dilute the methane. Tr. I at 47-48; P-7. At the time the ignition occurred, the mine had implemented the procedures required by the cut through plan. Tr. I at 55. The miners had finished applying rock dust to the entry, ventilation was compliant, and the required firefighting equipment was present and operational. Tr. I at 39, 56, 108.

C. The Testimony of Michael Bohan—Consol's Senior Geologist

At hearing there was some controversy as to whether Respondent's witness, Michael Bohan, was appearing as an expert witness and, if so, whether Respondent had failed to give proper notice of such. Tr. II at 345-348.

Said issues have been rendered essentially moot in that this Court afforded Bohan's testimony little or no probative weight. Often argumentative and non-responsive to the Secretary's questioning, Bohan was evasive in answering whether the continuous miner's damaged bits posed any risk, including that of ignition.[6]

CONTENTIONS OF THE PARTIES

The Secretary contends that Respondent violated 30 C.F.R. 75.1725(a) when it failed to maintain a continuous miner in safe operating condition or remove it from service when one bit was damaged and one bit was missing from the cutting head of the machine. In addition to affirming the violation and penalty, the Secretary argues that for Citation No. 9206769, the gravity should be modified from "Reasonably Likely" to "Highly Likely," and from "Lost Workdays or Restricted Duty" to "Fatal."

The Respondent contends that this citation should be vacated or—at the very least—modified from "Reasonably Likely" to "Unlikely" gravity and to remove the S&S designation. Respondent argues that it is common for a shower of sparks to occur when the metal bits on a spinning continuous miner drum strike iron pyrite or sulfur balls, and that sparking is well-documented even when cutting bits are in perfect condition. Respondent's Post-hearing Brief at 3-4. Respondent also contends that the Secretary did not produce adequate evidence to support the "reasonably likely" gravity designation, and that the S&S designation is not warranted because the continuous miner operator immediately stopped the machine and called MSHA when the bits sparked, thereby negating the possibility of a hazard.

BURDEN OF PROOF AND STANDARD OF PROOF

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by the preponderance of the evidence. *Jim Walter Res. Inc.,* 28 FMSHRC 983, 992 (Dec. 2006). *RAG Cumberland Res. Corp.,* 22 FMSHRC 1066, 1070 (Sept. 2000). *Jim Walter Res., Inc.,* 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.,* 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG*

[6] This Court specifically rejects the Respondent's and Bohan's implications that the "glow" caused by the frictional contact of the continuous miner with a sulfur ball was comparable to the benign bioluminescence of a lightning bug.

Cumberland Res. Corp., 22 FMSHRC 1070 (Sept. 2000), (quoting *Concrete Pipe & Prods of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 8 U.S. 602, 622 (1993).

The United States Supreme Court has held that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California.* 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: "[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates." *Lilienthal's Tobacco v. United States,* 97 U.S. 237, 266 (1877).[7] While the Secretary must prove the elements of a citation by a preponderance of the evidence, this Court's factual determinations must be supported by substantial evidence.

ANALYSIS

Following the investigation of the ignition, Crutchman issued Citation No. 9206769 for a violation of 30 C.F.R. 75.1725(a). Crutchman determined the violation was reasonably likely to result in injuries causing lost workdays or restricted duty to five miners and designated it as S&S. Tr. I at 74-77; P-1. He explained that he evaluated the gravity as S&S and reasonably likely due to the violation of a mandatory safety standard; the existence of a discrete hazard; the fact that the mine liberates over 11 million cubic feet of methane per day; the presence of anomalies in the coal such as a hard shale binder with sandstone and sulfur balls that could cause sparking; the mine's history of approximately 14 ignitions, several of which were caused by bad bits; and the fact that the miners were anticipating mining through CBM well NV-89. Tr. I at 74, 149. He also noted that a prior ignition at the mine had burned a miner and damaged the section where the ignition occurred. Tr. I at 75. Crutchman testified that based on the facts uncovered during his investigation, he would have marked the citation as S&S and reasonably likely even absent the occurrence of an ignition. Tr. I at 79.

Crutchman further evaluated the gravity of the violation to include injuries resulting in lost workdays restricted duty based on the burns that could be expected or due to smoke inhalation by miners trying to extinguish the ignition. Tr. I at 76. He considered five miners to be affected by the hazards presented by the damaged and missing bits because there were five

[7] "What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly, the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case." 2 McCormick on Evid. § 339 (7th Ed.). Indeed, the notion of justice being an assessment by weighing has ancient roots, extending at least as far back as the *Iliad*'s Book XXII: "Then, at last, as they were nearing the fountains for the fourth time, the father of all balanced his golden scales and placed a doom in each of them, one for Achilles and the other for Hektor." Homer, The Iliad, Book XXII (Samuel Butler trans., [Publisher] [ed.]) (1898).

miners working in the immediate area—the continuous miner operator, the left-side roof bolter, the left-side rib bolter, the right-side roof bolter, and the right-side rib bolter. Tr. I at 76.

I. The Secretary carried his burden of proving a violation of 30 C.F.R. 75.1725(a).

The Secretary must prove the elements of an alleged violation by a preponderance of the evidence. *See Jim Walter Res., Inc*., 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp*., 22 FMSHRC 1066, 1070 (Sept. 2000). Mine operators are generally strictly liable for mandatory safety standard violations. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Nally & Hamilton Enters., Inc*., 33 FMSHRC 1759, 1764 (Aug. 2011).

Section 75.1725(a) provides, in pertinent part, "Mobile and stationary equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." 30 C.F.R. 75.1725(a). The question, then, is whether or not the equipment in this case was "unsafe." The Commission has established that the standard for a Section 75.1725(a) violation is whether "a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action." Otis Elevator Co. v. Sec'y of Lab., 921 F.2d 1285, 1291 (D.C. Cir. 1990) (citing Alabama By–Products Corp., 4 FMSHRC 2128, 2129 (1982)).

In 2013, MSHA issued public guidance stating that MSHA considers the operation of continuous mining machines with damaged or missing cutting bits unsafe because mining with damaged, worn, or missing cutting bits can result in sparks—the most common source of methane ignitions. Tr. I at 73; P-13. This guidance was validated on March 31, 2021, and is currently in effect through March 31, 2024. P-13. Specifically, this guidance states that "[c]utting coal or rock with continuous mining machines or longwall shearers that have damaged, worn, or missing cutting bits have ignited methane resulting in serious injuries and fatalities." Tr. I at 73; P-13.[8]

The Commission has affirmed a violation of this standard for missing components. In *Martinka Coal Co.*, a belt structure was missing rollers, causing the belt to rub against the structure. *Martinka Coal Co.*, 15 FMSHRC 2452, 2456 (Dec. 1993). The Commission affirmed the violation because of the presence of combustible accumulations and an ignition source. *Id.* In *So. Ohio Coal Co.*, the Commission found it sufficient that the inspector and operators testified that the condition--broken track pads--was unsafe. *So. Ohio Coal Co.*, 13 FMSHRC 912, 915-16, 916 n.2 (June 1991) (quoting *Ala. By-Prods. Corp.*, 4 FMSHRC at 2129) ("Substantial evidence supports the judge's finding that the two broken track pads presented an unsafe condition."). It concluded that "safe operating condition" means that a machine can be used safely by miners. *Id.* at 915.

[8] MSHA's internal policy is to issue a citation for two or more damaged or missing bits when they are within four feet of each other on the continuous miner head. Tr. I at 73, 121.

Whether missing or broken components are involved, there still must be a danger posed to miners by use of the cited machinery. The Commission recently affirmed two Section 75.1725(a) violations as S&S where cables were found to be in bad condition and posed a risk of snapping or dropping loads. *Consol Pa. Coal Co.*, 43 FMSHRC at 150-51, 153-54. There, a cable was found to not be connected as designed--merely wrapped around the reel. *Id.* at 150.

Here, it is undisputed that the machinery contained two missing or damaged bits. There is credible testimony and evidence that missing and damaged bits increase the chances of sparking when mining and—in the presence of methane—the chances of ignition. See Tr. I at 40, 73, 184; Tr. II at 323-24; P-13. Methane face ignitions are commonly understood to lead to explosions resulting in serious injury and death. In fact, Enlow Fork Mine itself has a history of 14 methane face ignitions since 2017, and the mine experienced at least one explosion caused by a methane face ignition that resulted in serious injuries to a miner. See Tr. I at 74-75, 183.

At this step, I need not address whether there is a confluence of factors making an injury reasonably likely. It is sufficient for purposes of the violation finding that a dangerous condition could be created by use of the cited machinery with these missing and damaged bits. A reasonably prudent miner familiar with the mining industry and the factual circumstances surrounding damaged and missing bits—the observed sparking, the slow-moving and difficult mining progress, the presence of the hard binder and sulfur balls, and the proximity to the CBM well—would recognize that operating a continuous miner with damaged or missing bits presents the hazard of methane ignitions. I find that Respondent failed to maintain the continuous miner in safe operating condition and failed to remove the continuous miner from service when in an unsafe condition. Therefore, I find that Respondent violated section 75.1725(a).

II. The violation of 30 C.F.R. § 75.1725(a) was significant and substantial in nature.

A violation is properly designated as S&S if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984) (citing Cement Div., Nat'l Gypsum Co., 3 FMSHRC 822, 825 (Apr. 1981)). The four elements required for an S&S finding are expressed as follows:

1. the underlying violation of a mandatory safety standard;
2. the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed;
3. the occurrence of the hazard would be reasonably likely to cause an injury; and
4. there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 (Aug. 2016)).

An S&S determination must be based on the assumed continuation of normal mining operations. See Consol Pa. Coal Co., 43 FMSHRC 145, 148 (Apr. 2021) (citing U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and

substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.").

For the following reasons, this Court finds that the Secretary has established that all four prongs of *Mathies/Newtown* have been met, and therefore Citation No. 9079562 was properly designated as S&S.

A. A violation of a mandatory safety standard occurred.

The facts and discussion *supra* establish a violation of 30 C.F.R. § 75.1725(a), which is a mandatory safety standard.

B. There was a reasonable likelihood of the occurrence of the hazard.

Mathies Step 2 is a two-step process: (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC at 1868. This finding must be based on "the particular facts surrounding the violation." *Northshore Mining Co.*, 38 FMSHRC 753, 757 (2016). The Secretary need not prove a reasonable likelihood that the violation itself will cause injury, but rather whether there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc.* 32 FMSHRC 1257, 1280-1281 (Oct. 2010).

Here, the standard requires that machinery be maintained in a condition that enables its safe use by miners. *See So. Ohio Coal Co.*, 13 FMSHRC at 915. The hazard the standard aims to prevent is one resulting from the dangerous operation of the cited machinery. The Secretary contends that "[b]y operating the continuous miner in an unsafe condition, Consol placed miners at risk of serious injury or death due to the high likelihood of an ignition, fire, or explosion." Therefore, the specific hazard here is one of ignition, fire, or explosion caused by sparks from damaged or missing bits striking iron pyrite or sulfur balls.

The remaining issue is whether a reasonable likelihood exists that the damaged or missing bits will spark and cause an ignition, fire, or explosion. The likelihood of hazard should be based upon the "particular facts surrounding the violation." *Newtown Energy, Inc.*, 38 FMSHRC at 2038. Operating the continuous miner on the H2 development section while there was one damaged bit and one missing bit on the cutting head posed a discrete safety hazard to miners because it was highly likely to lead to—and in fact did lead to—a face ignition. Damaged and worn bits increase the potential for sparking when mining, and in the presence of methane, sparking is highly likely to lead to an ignition, as it did here. Tr. I at 40, 73, 184; P-13.

As a matter of logic and common sense, I find that an event that *has* occurred *is* reasonably likely to occur. Methane face ignitions are, without a doubt, a discrete safety hazard to miners. The particular facts surrounding the violation created a reasonable likelihood of the occurrence of the hazard against which 30 C.F.R. § 75.1725(a) was directed. Mining through hard shale, sandstone, and sulfur balls further increases the potential for sparking. The presence

of the methane feeder and the machine's position within the minimum working barrier of a CBM well makes an ignition even more likely. In view of the foregoing, this Court finds that the Secretary presented sufficient evidence to meet the second step of *Mathies* and *Newtown*.

C. Based upon the particular facts surrounding the violation, the occurrence of the hazard—ignition, fire, or explosion caused by sparks from damaged or missing bits striking iron pyrite or sulfur balls—would be reasonably likely to result in an injury that would be reasonably likely to be serious, and indeed, fatal.

The third and fourth steps of the *Mathies* test require a showing of a reasonable likelihood that the hazard contributed to will result in an injury, and that the injury in question will be of a reasonably serious nature.[9] In evaluating the likelihood of injury, judges must assume the occurrence of the hazard. *See Newtown Energy, Inc.*, 38 FMSHRC at 2037. One only reaches Step 3 of the *Mathies* analysis after determining that the hazard is reasonably likely to occur. I thus assume the occurrence of the hazard—ignition, fire, or explosion caused by sparks from damaged or missing bits striking iron pyrite or sulfur balls.

Methane ignitions are reasonably likely to result in injuries of a reasonably serious nature, including burns, smoke inhalation, concussive forces, or even death. Methane ignitions have caused serious injuries to miners throughout mining history. Enlow Fork Mine has a history of at least one explosion caused by a methane ignition that resulted in burns to a miner. Tr. I at 75. Twenty-nine miners were killed by an explosion caused by a methane face ignition at the Upper Big Branch Mine in 2010. Tr. I at 85, 186-87. MSHA determined that the face ignition at Upper Big Branch that led to the explosion was caused by two damaged bits on the shearer cutting head. Tr. I at 86, 186.

An inspector's judgment is an important factor in determining whether there is "a reasonable likelihood that the hazard contributed to will result in an injury." *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (1998). Given the evidence presented and the reasonable inferences flowing from such, I find that the inspector reasonably concluded that the expected injury would affect five miners and that, as discussed *supra*, the resulting injury would reasonably cause injuries at least as serious as lost workdays or restricted duty. I therefore find that the hazard—ignition, fire, or explosion caused by sparks from damaged or missing bits striking iron pyrite or sulfur balls—would be reasonably likely to cause serious injury or death. Accordingly, the third and fourth step of *Mathies* and *Newtown* are met.

III. The low level of negligence designated by the inspector is supported by a totality of the circumstances.

According to 29 C.F.R. § 103.3(d), negligence is considered low when "the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." 30 C.F.R. § 100.3, Table X. In *Sec'y of Labor v. Brody Mining, LLC.,*

[9] The Commission expected that the third and fourth steps of the *Mathies* test would "often be combined in a single showing." *Knox Creek*, 811 F.3d at 163, citing *Mathies*, 6 FMSHRC at 3-4.

37 FMSHRC 1687, at 1701 (Aug. 2015), the Commission affirmed that, in making a negligence determination, Commission judges are not required to apply the definitions of Part 100, may evaluate negligence from the starting point of a traditional negligence analysis, are not limited to an evaluation of allegedly mitigating circumstances, and can consider "the totality of the circumstances holistically."

Inspector Crutchman testified that he found the operator to be negligent for the following reasons: (1) The miners that reported the incident were experiencing difficulties cutting through the binder; (2) the miners reported observing frequent sparking; and (3) the miners anticipated mining through a well and should have known to check for increased wear on the bits. Tr. I at 76. Based on this, Crutchman reasoned that the operator should have known that there was an increased chance for wear on the bits when mining was difficult and slow-going, which could have led to increased sparking and the potential for an ignition. Tr. I at 76-78, 116. I agree with his reasoning.

Inspector Crutchman evaluated negligence as "low" due to the following considerable mitigating circumstances: (1) the mine was in compliance with its ventilation plan and all applicable provisions of the cut-through plan for the well; (2) only one of the 67 water sprays was not working correctly; (3) the atomizer sprays were working correctly; and (4) the miners inspected the bits on the cutting head at the beginning of the shift and did not find any bits that were missing or damaged. Tr. I at 76-77, 108, 130-31, 185.

I agree with the Secretary that the mining conditions were difficult and warranted checking the bits more frequently. The bits were likely damaged when the continuous miner cut through the hard binder and sulfur balls, but the inspectors were unable to determine the exact time when the bits were worn or broken. Considering the totality of the circumstances, this Court finds low negligence to be appropriate for Respondent's failure to adhere to § 75.1725(a) requirements.

IV. The originally assessed penalty of $716.00 for the violation is appropriate.

Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). In assessing civil monetary penalties, an ALJ shall consider the six statutory penalty criteria:

> [T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and 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 *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997), the Commission held that all of the statutory criteria in § 110(i) should be considered in the court's *de novo* penalty assessment, but not necessarily assigned equal weight. In *Musser Engineering, Inc.,*

32 FMSHRC at 1289, the Commission held that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed.

The Secretary has proposed a penalty of $716.00 for the violation cited in Citation No. 9206769. I have considered and applied the six penalty criteria found in § 110(i) of the Act. Considering all the circumstances, the Secretary's original proposed penalty assessment appears appropriate.

The mine and its controlling entity are considered large in size under 30 C.F.R. § 100.3. The parties stipulated that payment of the proposed total penalty would not affect Respondent's ability to continue in business. Jt. Stip. 6. The history of assessed violations, admitted into evidence at Ex. P-1, showed 10 violations of this standard at this mine in the two years prior to issuance of this citation. *See also* Tr. I at 73-74.

I have addressed negligence and gravity in the discussion above. This Court notes that Respondent's argument for a reduced penalty rests upon a modification of the gravity finding from "Reasonably Likely" to "Unlikely," and the removal of the S&S designation. For reasons already discussed *supra*, this Court rejects such suggested modifications. Finally, while accepting that Respondent acted in good faith in abating the dangerous condition, this Court accords more weight to the gravity of the violation and the reasonable likelihood of serious or fatal injury posed by the hazard in determining an appropriate penalty.

Based on the foregoing, this Court finds that a penalty of $716.00 is appropriate.

ORDER

The Respondent, Consol Pennsylvania Coal Company, is **ORDERED** to pay the Secretary of Labor the sum of $716.00 within 30 days of this order.[10]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

[10] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

August 22, 2023

IMI AGGREGATES, LLC, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent,	CONTEST PROCEEDING Docket No. LAKE 2023-0249-RM Citation No. 9547190; 07/18/2023 Cambridge City Pit Mine ID 12-01034

ORDER DENYING MOTION FOR EXPEDITED CONSIDERATION

This docket is before me upon the Notice of Contest filed by IMI Aggregates, LLC ("Contestant" or "the operator") under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary timely filed her answer. Contestant has filed a Motion for Expedited Consideration, requesting an expedited hearing on this matter.

I. BACKGROUND

On July 18, 2023, MSHA Inspector Keith Duncan issued Citation No. 9547190 at the Cambridge City Pit mine under section 104(a) of the Mine Act alleging that "[t]he operator failed to provide nonconductive material at the E-stop button for the #1 conveyor," thus exposing miners to possible "fatal electrical shock injury" in violation of section 56.12020, 30 C.F.R. § 56.12020. (Mot., Ex. 1.) Inspector Duncan designated the citation as potentially fatal to one miner (though unlikely to significantly and substantially contribute to the cause and effect of a mine safety or health hazard) and as the result of low negligence on the part of the operator. (Mot., Ex. 1.) Contestant filed its notice of contest on August 7, 2023, denying any violation occurred and requesting the citation be vacated. (*See* Mot. at 2.)

The following day on August 8, 2023, Contestant filed its Motion for Expedited Consideration. On August 11, 2023, counsel for the Secretary filed the Response of Secretary of Labor in Opposition to Contestant's Motion to Expedite. Thereafter, Chief Judge Glynn Voisin assigned me this docket on August 17, 2023.

II. MOTION FOR EXPEDITED HEARING AND RESPONSE

In Contestant's Motion for Expedited Consideration, the operator requests an expedited hearing of its contest of Citation No. 9547190. (Mot. at 1.) Contestant asserts that in addition to the citation at issue in this case, MSHA "is threatening to write similar citations at its 21 other mines," and, therefore, the operator "is being asked to correct this alleged hazard at its 22 locations or risk receiving high gravity/negligence 104(d) citations/orders." (Mot. at 2.) Contestant includes a declaration from Safety Manager Brad Wales and claims "this unnecessary

abatement would entail roughly $40,000 in repairs, and each facility would be down 1 to 2 days if no issues arise with the repairs." (Mot. at 2; Mot., Ex. 2 at 2.) The operator's mines would supposedly need to be shut down for at least one day, resulting in approximately $1,540,000.00 in lost production while 300 miner employees would lose work. (Mot. at 2; Mot., Ex. 2 at 2.) The operator asserts that "[t]his alleged hazardous condition has existed for over 5 years and over 10 MSHA inspections." (Mot. at 2; Mot., Ex. 2 at 1.) Contestant also asserts that "Inspector Duncan stated that he agreed with [the operator's] position that there was no violation, but he had been told that he must write the citation." (Mot. at 2.) Contestant thus "seeks immediate review of this issue" through an expedited hearing and decision. (Mot. at 2.)

In response, the Secretary notes that the crux of Contestant's argument is theoretical—that MSHA may find similar conditions at other mines, that MSHA may issue violations of section 104(d), and that Contestant may have to do additional wiring to terminate any theoretical citations even though rewiring was unnecessary to abate the current citation. (Resp. at 2.) The Secretary points out that production was not stopped when the citation was issued or terminated, and that within five minutes of its issuance the operator abated the citation by placing a wooden pallet at the location with no further action to terminate the violation being ordered or taken. (Resp. at 2.) Thus, per the Secretary, "one of the traditional reasons for seeking an expedited hearing (i.e., to resolve a legal issue that has caused the cessation or curtailment of [mine] production) is not at issue in this matter." (Resp. at 2.) The Secretary emphasizes that Contestant is not being asked to correct this alleged hazard at its other mines to abate this citation, because "[n]o further abatement is required." (Resp. at 2–3.)

III. PRINCIPLES OF LAW

Commission Procedural Rule 52, 29 C.F.R. § 2700.52, sets forth the procedures for requesting and scheduling expedited proceedings, but it does not address the criteria under which such requests are to be evaluated. However, this rule contemplates circumstances exigent enough to permit scheduling a hearing on as little as five days of notice. 29 C.F.R. § 2700.52(b). Under Commission case law, Commission Judges are tasked with using "informed discretion" and considering all the facts when determining whether an expedited hearing is appropriate. *Wyo. Fuel Co.*, 14 FMSHRC 1282, 1287 (Aug. 1992). In *Wyoming Fuel*, the Commission held that the Mine Act does not mandate immediate hearings in all circumstances, nor does it require that a party's motion to expedite proceedings be granted on the terms sought. *Wyo. Fuel Co.*, 14 FMSHRC at 1287. Rather, a hearing by a Commission Judge must only be held "within a period of time reasonable under the circumstances of each case." *Id.*

Commission Judges have generally held that an expedited hearing is warranted upon a showing of "extraordinary or unique circumstances resulting in continuing harm or hardship." *Southwestern Portland Cement Co.*, 16 FMSHRC 2187, 2187 (Oct. 1994) (ALJ). Commission Judges have determined, however, that the mere threat of mine closure is not an extraordinary or unique circumstance warranting an expedited hearing. *See, e.g.*, *Wis. Indus. Sand Co.*, 36 FMSHRC 2789, 2789–90 (Oct. 2014) (ALJ) (denying motion for expedited hearing where only a section 104(a) citation, and no section 104(d) withdrawal order or section 104(b) order, was at issue); *Consolidation Coal Co.*, 16 FMSHRC 495, 495–96 (Feb. 1994) (ALJ) (noting contestant's request for an expedited hearing was speculative where no closure order was in

effect and the alleged citations and withdrawal order were promptly abated); *Energy West Mine Co.*, 15 FMSHRC 2223, 2223–24 (Oct. 1993) (ALJ) (denying expedited hearing because the operator contesting the section 104(d)(1) order was "not in a unique position," as every operator receiving such an order is under a continuing threat of closure and faces the possibility of a subsequent withdrawal order).

IV. ANALYSIS

First, Contestant's primary argument for its need to hold an expedited hearing is the parade of horribles, including financial hardship and work disruption, that will occur if its request is not granted. (Mot. at 2–3; Mot., Ex.2 at 2.) Contestant argues that an expedited hearing is appropriate because correcting similar violations at its other mines will be expensive and/or unnecessary. (Mot. at 4.) Indeed, Contestant asserts that MSHA "is threatening to write similar citations at its 21 other mines," and, therefore, Contestant "is being asked to correct this alleged hazard at its 22 locations . . . ." (Mot. at 2.)

Although Contestant worries about the *threat* of section 104(d) orders at its other mines, such worries are speculative when considering all the facts before me. Here, the evidence establishes that Contestant abated, and MSHA Inspector Duncan terminated, the citation within seven minutes after its issuance without shutting down the mine by placing a dry wooden pallet at the location for miners to stand on when operating the E-stop switch. (Mot., Ex. 1.) Indeed, these facts run counter to the assertions made by Brad Wales. In Wales's declaration nothing indicates Contestant is being compelled to fix the grounding issue under any section 104(d) citations or orders. (Mot., Ex.2 at 2.) And Contestant provides no evidence why its other mines would need to be shut down to perform the same work that only took seven minutes to abate. As the Secretary points out, nothing—other than the operator's unsubstantiated assertion that a shutdown would be required—suggests that Contestant would need to stop production for 1–2 days. (Resp. at 2.) As the Secretary correctly points out regarding Citation No. 9547190 which is the only alleged violation before me, "[n]o further abatement is required." (Resp. at 2–3.)

Here, the section 104(a) citation before me has already been abated and the mine continues production, so the mere possibility of a section 104(d) withdrawal order being issued to Contestant at the Cambridge Clay Pit mine or any of its other 21 mines is not an extraordinary or unique circumstance resulting in continuing harm or hardship. *See Wis. Indus. Sand Co.*, 36 FMSHRC at 2790; *Southwestern Portland Cement Co.*, 16 FMSHRC at 2187; *see also Mountain Cement Co.*, 23 FMSHRC 694, 694 (June 2001) (ALJ) (ruling that "[t]he possibility that an operator could be subject to future withdrawal orders under section 104(d) is neither extraordinary nor unique under the Mine Act."). Stripped down to its essence, this matter simply involves a run-of-the-mill section 104(a) citation, which does not warrant the extraordinary remedy of an expedited hearing.

Second, Contestant argues that an expedited hearing is proper because of a possibility that MSHA abused its discretion. Specifically, Contestant asserts that "Inspector Duncan stated that he agreed with our position that there was no violation, but he had been told that he must write the citation"; thus, Contestant believes the inspector abused his discretion. (Mot. at 2; Mot. Ex.2 at 2.) In support, Contestant cites to *Mountain Cement* arguing that "the court granted the

operator's request for an expedited hearing after finding, as it should in this case, that there was 'a very real possibility that the MSHA inspector abused his discretion or seriously misapplied the law . . . .' and that the operator would experience substantial economic hardship if required to comply with the citations." *Mountain Cement Co.*, 23 FMSHRC 694–95 (June 2001) (ALJ).

The alleged statement by Inspector Duncan, if true, is troubling but these circumstances are substantially different from the facts in *Mountain Cement*. In *Mountain Cement* the Commission Judge was concerned that MSHA abused its discretion because 20 violations were issued as section 104(d)(2) orders, yet most were subsequently modified to section 104(a) citations during a subsequent conference. *Mountain Cement Co.*, 23 FMSHRC at 695. Unlike the 20 withdrawal orders in *Mountain Cement*, I have before me a single section 104(a) citation. More importantly, despite MSHA Inspector Duncan's alleged statement, the operator does not contradict the underlying factual allegations that led to the issuance of Citation No. 9547190, as the Secretary points out. (Resp. at 3.) The operator's disagreement with MSHA citing it for an alleged electrical grounding violation does not rise to the level of extraordinary or unique circumstances resulting in continuing harm or hardship.

Lastly, Contestant argues this citation should be vacated both because the Secretary is estopped from citing this condition because she did not cite it in the prior five years, and because the condition did not violate the regulations. (Mot. at 2.) Contestant's estoppel argument is unpersuasive given recent Mine Act case law. *See Cactus Canyon Quarries, Inc. v. Fed. Mine Safety and Health Rev. Comm'n*, 64 F.4th 662, 666 (5th Cir. 2023). Likewise, Contestant's argument that it did not violate section 56.12020 is unpersuasive because, as the Secretary points out, Contestant fails to provide evidence to support this. (Resp. at 3.) In any event, neither of these arguments are relevant to the issue of an expedited hearing, as they do not rise to the level of unique or extraordinary circumstances.

For the above reasons and upon considering all the facts in exercising my informed discretion, I determine that Contestant alleges no extraordinary or unique circumstances resulting in continuing harm or hardship. Therefore, I conclude an expedited hearing is not warranted.

V. ORDER

In light of the foregoing, Contestant's Motion for Expedited Consideration is **DENIED**. The parties will alert my Law Clerk when both the penalty petition and answer have been filed, so I can consolidate this contest case with the penalty case for hearing and decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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