April 2023

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 12, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CARMEUSE LIME AND STONE, INC.	Docket No. LAKE 2023-0074 A.C. No. 12-00426-566346

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 26, 2023, the Commission received from Carmeuse Lime and Stone, Inc. ("Carmeuse") 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 November 16, 2022, and became a final order of the Commission on December 16, 2022. Carmeuse asserts that it timely

filed Notices of Contest with the Commission for three of thirteen penalties at issue.[1] When MSHA issued the proposed assessment, Carmeuse's Senior Area Safety and Health Manager was on vacation. He did not receive a paper copy of the assessment (receiving an electronic version instead) and, upon his return, he mistakenly failed to file a timely contest. However, Carmeuse diligently monitored MSHA's website and quickly learned that the citations had become final orders. Carmeuse then promptly filed a motion to reopen prior to the issuance of a delinquency notice. 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.[2]

Having reviewed Carmeuse's request and the Secretary's response, we find that the operator clearly expressed its intent to contest the citations by initiating contest proceedings with the Commission and that Carmeuse's failure to timely file a contest with MSHA was due to inadvertence or mistake within the meaning of Rule 60(b)(1). *Asarco LLC*, 42 FMSHRC 308, 310 (Apr. 2020). Moreover, Carmeuse diligently monitored MSHA's website to assess the status of the penalties and took prompt action to file a motion to reopen after it discovered its mistake. 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

[1] The Contest Proceedings are docketed as LAKE 2023-005, LAKE 2023-0008, and LAKE 2023-0009.

[2] According to Carmeuse, its Senior Area Safety and Health Manager is responsible for reviewing and contesting all proposed penalties received at 12 of the operator's mines. Given the importance of this position in the contesting process, we urge Carmeuse to ensure backup procedures are in place for receiving proposed penalties when the manager is unavailable.

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
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April 12, 2023

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

v.

HANSON AGGREGATES
PENNSYLVANIA LLC

Docket No. PENN 2022-0116
A.C. No. 36-00091-552174

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

ORDER

BY: Jordan, Chair; Rajkovich and Baker, Commissioners

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 3, 2022, the Commission received from Hanson Aggregates Pennsylvania LLC ("Hanson") a document deemed to be 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 a proposed assessment was issued to the operator on March 29, 2022. The Secretary claims that Hanson did not timely contest the proposed penalties, and the penalties

became a final order of the Commission on May 9, 2022.[1] MSHA sent Hanson a delinquency notice on June 23, 2022. On August 3, 2022, the Commission received a notice of contest from Hanson, dated May 13, 2022, indicating Hanson's contest of six of the citations listed on the proposed penalty assessment. The Commission deemed the document received on August 3 to be a request to reopen.

Because Hanson's document does not explain the company's failure to contest the proposed assessment on a timely basis and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See Lehigh Sw. Cement Co.*, 31 FMSHRC 595 (June 2009); *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that Hanson may submit another request to reopen the assessment.[2]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

[1] The Secretary did not state when she believes the proposed assessment was received by Hanson.

[2] If Hanson submits another request to reopen, it must establish good cause for not contesting the citations within 30 days from the date it received the citation from MSHA, and provide information about whether it has paid the penalties for the citations it chose not to contest. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Hanson should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Hanson should also submit copies of supporting documents with its request to reopen.

(continued…)

Commissioner Althen, dissenting:

I respectfully dissent.

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

[2] (…continued)

Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion must be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c). Any motion to reopen filed by Hanson must comply with this timing requirement. In other words, if Hanson files a motion to reopen alleging mistake, inadvertence, or excusable neglect, the motion must be filed within a reasonable time and no later than one year after May 9, 2022.

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April 17, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BLUE MOUNTAIN ENERGY, INC.	Docket No. WEST 2021-0189 A.C. No. 05-03505-517587

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 April 22, 2021, the Commission received from Blue Mountain Energy, Inc. ("Blue Mountain") 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 July 13, 2020. On August 4, 2020, MSHA received a partial payment of the assessment. The remainder of the assessment became a final order of the Commission on August 12, 2020. On September 28, 2020, MSHA sent the operator a delinquency notice.

Blue Mountain asserts that it intended to contest Citation No. 9030973 ever since the citation at issue was upheld during a safety and health conference on June 17, 2020. However, on July 16, 2020, Blue Mountain claims that it inadvertently mailed the contest to the Federal Mine Safety and Health Review Commission and to a Conference Litigation Representative rather than to the correct MSHA address. 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 Blue Mountain's request and the Secretary's response, we find there is sufficient evidence that mistakes were made, thus satisfying the Rule 60(b) criteria. We find that Blue Mountain acted in good faith, as demonstrated by its explanation for its failure to timely contest the assessment, its earlier efforts to engage in a conference, and the Secretary's non-opposition. In the interest of justice, we hereby reopen the penalty for Citation No. 9030973 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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 17, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. DRAGON PRODUCTS COMPANY, LLC	Docket No. YORK 2021-0060 A.C. No. 17-00022-533995

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 19, 2021, the Commission received from Dragon Products Company, LLC ("Dragon") a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Dragon claims it never received the proposed penalty assessment from the Department of Labor. The Secretary of Labor does not oppose the request to reopen and concedes that the assessment was not delivered to the operator but rather, was returned to MSHA.

Section 105(a) states that if an operator "fails to notify the Secretary that [the operator] intends to contest the . . . proposed assessment of penalty . . . the proposed assessment of penalty shall be deemed a final order of the Commission. 30 U.S.C. § 815(a). Here, because the operator never had an opportunity to timely contest the proposed assessment, we conclude that the proposed penalty assessment did not become a final order of the Commission. This obviates any need to invoke Rule 60(b) of the Federal Rules of Civil Procedure. Accordingly, the operator's motion to reopen is moot.

We deem the operator's motion a contest of the relevant penalties. 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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 17, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. YORK 2022-0016 A.C. No. 17-00022-539342
DRAGON PRODUCTS COMPANY, LLC	

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 December 22, 2021, the Commission received from Dragon Products Company, LLC ("Dragon") 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 August 11, 2021, and became a final order of the Commission on September 10, 2021. On September 22, 2021, MSHA received partial payment of the assessment. On November 23, 2021, a delinquency notification was mailed to the operator.

Dragon asserts that its contest of the assessment was timely mailed through certified mail, return receipt requested. However, MSHA did not have a record of receiving the contest of the assessment. Subsequently, Dragon tried to check with the postal service on the status of the contest but was informed that the tracking number for the package which contained its contest had expired. Dragon believes the postal service failed to properly deliver its contest. 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.

In addition, 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 December 22, 2021, within 30 days of the operator's receipt of the delinquency notification, mailed on November 23.

Having reviewed Dragon's request and the Secretary's response, we find that Dragon acted in good faith. We note that the Secretary does not dispute Dragon's assertion that the operator timely mailed its contest of the assessment. Dragon took precautions in sending the contest of the assessment by certified mail, return receipt requested, and tried to provide tracking information for its contest of the assessment. Dragon also timely filed its request to reopen.

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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ADMINISTRATIVE LAW JUDGE DECISIONS

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April 25, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0129 A.C. No. 36-07230-561904 Mine: Bailey Mine

DECISION APPROVING SETTLEMENT WITH SIGNIFICANT RESERVATIONS

Before: Judge William Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 104(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement. The Respondent has agreed to the proposed settlement. The originally assessed total amount for the citations at issue was **$9,036.00** and the proposed total settlement amount is **$1,897.00, reflecting a 79% (seventy-nine percent)** overall reduction, as reflected in the following table:

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9205312	$6,898	$1,393	Citation modified to moderate negligence; **80% reduction in penalty**
9204928	$1,069	$252	Citation modified to unlikely and non-S&S; **76% reduction in penalty**
9205356	$1,069	$252	Citation modified to unlikely and non-S&S; **76% reduction in penalty**
TOTAL REVISED PENALTY	**Original total: $9,036.00**	**Revised total: $1,897.00**	**79% overall reduction in penalty**

The Citations in issue

Citation No. 9205312

This citation invoked 30 U.S.C. §876(b), pertaining to "**Communication facilities; locations and emergency response plans**." The section addresses telephone service or equivalent two-

way communication facilities, which are to be approved by the Secretary or his authorized representative. Such communication facilities shall be provided between the surface and each landing of main shafts and slopes and between the surface and each working section of any coal mine that is more than one hundred feet from a portal. The cited subsection addresses the plan requirements.

The section 104(a) citation for this now-admitted violation stated:

> The Mine Operator failed to comply with their Approved Emergency Response Plan (Approved 9-11-2020), in that, there were no leaky feeder line (communication) or tracking tags installed in the 2-K Working Section (009-0 MMU) Alternate Escapeway (number 3 entry of 2-K) from the loading point inby 8 crosscut outby to the 5 South Mains Right (K) Track at the number 80 crosscut (2420 feet in length). Therefore **there was no redundant communication between the Primary or Alternate Escapeways** and **no communication or tracking at all in the alternate escapeway** or **at the Working Section refuge alternative/SCSR cache from the alternate escapeway**. After issuance of this citation, the Operator removed the persons from the working faces to outby the loading point until the condition can be corrected.
>
> The Following statements are from the Approved Mine Emergency Response Plan and have not been complied with:
>
> 1. Page 1, Communication, 2. Coverage Area, line b.,- The system will also generally provide continuous coverage along escapeways and a coverage zone approximately 200' feet inby and outby strategic areas of the mine. Strategic Areas are fixed work locations where miners are normally required to work, section SCSR caches, working section power centers and manned belt transfers.
>
> 2. Page 2., 6.,- Survivability, a. The post accident communication system will generally provide redundant signal pathways to the surface component. b.- Redundancy will be achieved by two or more systems installed in two or more entries, or one system with two or more pathways to the surface; provided that a failure in one system or pathway does not affect the other system or pathway. c.,- Redundancy means that the system can maintain communication with the surface when a single pathway is disrupted. Disruptions can include major events in an entry or component failure.
>
> 3. Page 3, Tracking System, 1. Performance, aiii.,- Locate Miners in escape-way at intervals not to exceed 2000 feet. iv.,- Locate miners within 200 feet of strategic areas. Strategic Areas are fixed work locations where miners are normally required to work, section mass SCSR caches, working section power centers and manned belt transfers. vii.,- Locate miners at the key junction in the escape-ways. viii.,- Locate miners within 200 feet of refuge alternatives. d.- The electronic tracking system will be installed in active daily traveled areas of the mine Primary and Secondary escapeways.

4. Page 5, 8. Maintenance, d. In the event of system or component failures, the miners will be notified of the problem. The affected miners will begin manual zone tracking and continue to advise the surface communication facility of their travel until the system is repaired. Repairs will start immediately if there is a loss in tracking capabilities. e.- The system will be examined weekly to verify that it is maintained in proper operating condition and the results of the examination will be entered in a record book.

5. Page 5, 9. Purchase and Installation,- b. If there is system failure the mine will revert to manual tracking system that was previously used.

Petition for Civil Penalty at 11-13.

The citation was terminated the following day, with the inspector noting:

Through a visual observation after traveling the 2K MMU 009-0 #3 entry (return) (Alternate Escapeway) in its entirety and having communication throughout and verifying through the tracking software on the Mine's surface of this inspectors locations, this citation is hereby terminated. The system is working in the previously mentioned entry/area. Secondly, the Mine Operator is carrying a record/ledger (weekly exam) to show the systems functioning properly.

Id. at 13.

The issuing inspector, who diligently recorded the aspects of the Approved Mine Emergency Response Plan provisions which were not complied with, listed the "Gravity" of the injury or illness as 'Unlikely,' but listed such injury or illness as "Fatal" if it were to occur. Marked as non-significant and substantial, nine miners would be affected. Given the multiple subjects of non-compliance, the inspector listed the negligence as "High." *Id.*

Analysis for Citation No. 9205312

The penalty, which was *regularly* assessed at $6,898.00, is now proposed to be settled at $1,393.00, representing **an 80% reduction**. This figure is apparently derived by designating the negligence from 'High' to "Moderate.' Motion at 3. The justification for this is short, the Motion relating that the "Respondent has represented to the Secretary that it had assigned miners to install the missing equipment that is the subject of the citation, but that the work was not timely completed because of supply problems." Undercutting this claim is that the inspector found *five* instances of non-compliance, yet all five violative conditions were somehow corrected the next day, the supply problems apparently having vanished rapidly. This is the sole basis presented in the motion for listing the negligence as moderate.

In support of the Secretary's contention, the Solicitor's attorney looks to *Vindex Energy Corporation*, 34 FMSHRC 223, 224 (Jan. 2012) (ALJ) ("*Vindex*"), asserting that "[i]t is 'appropriate to defer to the judgment of the parties' in arriving at a modified penalty based on the §100.3 tables." Motion at 3. The Solicitor's attorney is apparently unaware that an administrative law judge's decision is not precedential. Commission Procedural Rule 69(d)

provides that a Judge's decision does not constitute binding precedent. 29 C.F.R. § 2700.69(d). *Rain for Rent,* 40 FMSHRC 976, 980 (July 2018), *Tilden Mining,* 36 FMSHRC 1965 (Aug. 2014). The Secretary also errs in asserting that there is an evidentiary dispute regarding the appropriate level of negligence but offers nothing to support the notion that the negligence should be deemed "Moderate," other than the vague remark about the short-lived claim of 'supply problems.' Merely asserting 'supply problems' is apparently sufficient to carry the day.

Citation No. 9204928

This section 104(a) citation, invokes 30 C.F.R. § 75.1403, well known as the 'safeguard standard.' It is also a statutory provision which requires that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

For this now-admitted violation, on July 8, 2022 the inspector identified multiple violations of the provision, noting that "[t]he 2K section (MMU 009-0) #2 entry track from 0xc - 9.5xc has failed to be properly maintained as identified by the safeguards for the Bailey Mine in the aspect: **39 loose track bolts**, a **loose fish plate and a missing bolt** are allowed to exist on this track. Also, at the #8 crosscut **the rail is out of alignment** by 1/4 inch at the time of the exam.

Petition for Civil Penalty at 15 (emphasis added).

The citation noted that the safeguard standard had been cited **59 times in two years** at the mine. *Id.*

The citation was terminated four days later, on July 12, 2022, after the identified violations were corrected with the inspector stating that the "operator was able to tighten the loose bolts with approved means, and properly adjust the rail at #8 crosscut, however will need to burn a hole in the rail to install the missing bolt on the right side of the track at #8 crosscut. Because the mine is currently operating on shutdown and minimal people are working, additional time is granted to get specialized manpower to this location to cut the rail to install the bolt. *Id.* at 16.

Analysis for Citation No. 9204928

The Secretary's attorney cites an administrative law judge decision as precedent, misconstrues the Commission's decision in *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, (June 1996), and does not provide 'facts' to support the requirements for settlement, per the Commission's *AmCoal* decisions: 38 FMSHRC 1972, (Aug. 2016) ("*AmCoal I*"), *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*")

If the basis for the 80% penalty reduction regarding the previously discussed Citation, No. 9205312, is arguably justified, the same cannot be said for Citation No. 9204928. This is so because the offering by the Secretary does not even meet the Commission's requirements for settlement motions. The justification, *in its entirety*, provides only that:

> [t]he Secretary has elected to withdraw the S&S designation for this violation and resolve it as "unlikely." The proposed penalty reduction in this settlement is based on the point values in 30 C.F.R. §100.3 based on the Secretary's modification to the citation. The Secretary's use of the Part 100 regular assessment tables in settlement is a prima facie indication that the penalty reduction is fair, reasonable, and adequate under the facts, and protects the public interest.

Motion at 3-4.

The Secretary's attorney cites once again to the ALJ decision in *Vindex*, asserting that "[i]t is 'appropriate to defer to the judgment of the parties' in arriving at a modified penalty based on the §100.3 tables." *Id*. The inapplicability of ALJ decisions as precedent has been discussed above.

The Secretary then adds that she "possesses unreviewable discretion to withdraw an S&S designation," citing *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879 (June 1996) ("*Mechanicsville*") (finding "no material difference between the Secretary's discretion on the one hand to vacate a citation [pursuant to *RBK Construction, Inc*., 15 FMSHRC 2099, 2101 (Oct. 1993)] and his discretion on the other hand not to issue a citation in the first instance or not to designate a citation as S&S."[1] Motion at 4 ("*RBK*").

The Secretary continues to inappropriately cite *Mechanicsville* as authority. This Court and other judges have noted that *Mechanicsville* does not support the Secretary's claim that she possesses unreviewable discretion to withdraw an S&S designation. Yet, the Secretary continues to assert otherwise. It's time to be clear about the Commission's holding in *Mechanicsville.*

At the outset of its decision in *Mechanicsville*, the Commission very plainly set forth the issue before it, stating that it "raises the issues of *whether a judge on his own initiative* can designate a violation of a mandatory safety standard to be significant and substantial." 18 FMSHRC 877. The Commission's answer to the issue was equally plain, stating that it "agree[d] with the Secretary that the judge erred in determining *on his own initiative* that the violation was S&S." *Id.* at 879 (emphasis added). Thus, the decision was expressly limited to the Commission's holding *that the judge erred* "*by adding a new finding and conclusion*, i.e., that the violation posed a hazard to employees that was reasonably likely to result in a reasonably serious injury and was therefore S&S." *Id.* at 880 (emphasis added). The Commission's decision added nothing more to that holding.

That the Commission's decision in *Mechanicsville* did not go beyond the very words it employed in that decision was made additionally clear in *Spartan Mining*, 30 FMSHRC 699 (August 2008). There, Spartan tried to expand *Mechanicsville* but the Commission would have nothing of it, informing that it "*reject[ed]* Spartan's contention that the judge was bound by the Secretary's assessment of the degree of negligence of "moderate" contained in the citation. … Spartan unpersuasively relies on *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June

[1] *RBK* holds only that the Secretary has the authority to *vacate* the citations. 15 FMSHRC at 2101

1996) (finding that judge may not designate a violation as S&S on his own initiative), to assert that the judge's alteration of the citation was impermissible. *However, Mechanicsville is distinguishable because modifying a negligence determination, as the judge did here, is authorized by the Mine Act, whereas inserting an S&S designation is not.*" *Spartan* at *22 (emphasis added).

Accordingly, there is *no* basis for the Secretary's habitual citation to *Mechanicsville* as authority for the claim that she possesses unreviewable discretion to *withdraw* an S&S designation. It is one thing for the Secretary *to argue* that the Commission's holding in *Mechanicsville* should be *expanded* beyond that holding, but to assert that the decision affords the Secretary with unreviewable discretion to withdraw such a finding is beyond the pale. Here, the Secretary does not present its contention as an argument. Instead, the Secretary's attorney presents his position as the state of the law. It is not.

Attorneys have an obligation not to misstate case law. *Teamsters Local No. 579 v. B & M Transit, Inc.,* 882 F.2d 274, 280 (7th Cir.1989). Rule 11 of the Federal Rules of Civil Procedure requires attorneys to inquire about the … law before filing pleadings. … an attorney who submits a pleading must certify that: 'to the best of the [attorney's] knowledge, information, and belief formed after reasonable inquiry [the pleading] is … warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Dzwonkoski,* 2008 WL 2163916 (May 16, 2008) (S.D. Ala. 2008) citing *Howard v. Liberty Memorial Hosp*., 752 F.Supp. 1074, 1080 (S.D.Ga.1990).

Therefore, unless and until the Commission revises its holding in *Mechanicsville*, the Secretary, both her attorneys and her non-attorney representatives, (Conference and litigation representative, "CLRs,") should cease invoking that decision for propositions not supported by it.

REVISITING PRESENT COMMISSION LAW FOR SETTLEMENT MOTIONS AS APPLIED TO THIS MATTER.

Fundamentally, the Secretary's Motion in this matter does not meet the Commission's test for settlement approvals, as set forth in *American Coal Co.*, 38 FMSHRC 1972, (Aug. 2016) ("*AmCoal I*"), and *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*")

Once past the obvious preliminaries – that a motion for settlement must state the penalty amount originally proposed by the Secretary and the new amount the parties have agreed to pay, the Commission's decision in *AmCoal II* sets forth the present requirements deemed sufficient for its judges in carrying out their "front line oversight of the settlement process" in order "to fulfill their duty of determining if a settlement of a penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 985, 987.

The Commission repeatedly spoke of the need for 'factual support' for penalty reduction. *Id*. at 989, 990. Though the Commission advised that such 'facts' "are not limited to facts related to the section 110(i) penalty criteria or to the alleged violations," the Commission still required that facts be presented. *Id.* at 986. Accordingly, it has "required parties *to submit facts* supporting

a penalty amount agreed to in settlement." *Id.* at 987. It noted, "[i]n particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation "the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, *and facts* in support of the penalty agreed to by the parties." *Id.*

The Commission rejected the need for a respondent to present *legitimate* questions of fact which can only be resolved through the hearing process and also rejected that there is a need to show any *legitimate* factual disagreement. *Id*. at 991. As such, the Commission stated that "[f]acts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing. The Commission's Procedural Rules and standing precedent do not contain such a requirement. Rather, the Commission has recognized that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process." *Id.*

Despite the above, the Commission's *AmCoal II* decision still requires the submission of 'facts.' Such facts must be "mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 991. Here, no facts have been presented.

It is not an exaggeration to describe the basis for the Secretary's justification as essentially '*because we can*.' Though set forth above, it is worth repeating what the Secretary presented here, to wit:

> [t]he Secretary has elected to withdraw the S&S designation for this violation and resolve it as "unlikely." The proposed penalty reduction in this settlement is based on the point values in 30 C.F.R. §100.3 based on the Secretary's modification to the citation. The Secretary's use of the Part 100 regular assessment tables in settlement is a prima facie indication that the penalty reduction is fair, reasonable, and adequate under the facts, and protects the public interest.

Motion at 3-4.

None of this amounts to mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, *appropriate under the facts*, and protects the public interest.

Citation No. 9205356

This citation also invokes 30 C.F.R. § 75.1403. Issued on July 20, 2022, the inspector's Condition or Practice section of the citation states:

> The Mine Operator failed to maintain an unobstructed travelway of at least 24 inches in width on walk side of the 11-L Conveyor Belt between the outby end of the storage unit andthe bottom step of the 6 south Mains Left Track overcast stairs for a distance of 30 feet in length. Old pieces of conveyor belt were humped up in the air, there were 2 small rolls of conveyor belt, splicing nail buckets, splices, a conveyor belt cutter and splicing template filling most of the required walkway in

> the cited area. The walkways in this area was wet, muddy and very slippery without having to traverse this extraneous materials. The Operator immediately started to clear the extraneous materials after the issuance of this citation. **Standard 75.1403 was cited 61 times** in two years at mine 3607230 (60 to the operator, 1 to a contractor).

Petition for Civil Penalty at 18 (emphasis added).

The citation was terminated on July 21, 2022, with the inspectors remarking that "[a]ll of the extraneous materials have been cleaned out of the cited travelway/walkway. There is now at least 24 inches of clear, unobstructed travelway, therefore this citation is terminated. *Id.* at 19.

Analysis for Citation No. 9205356

As the Secretary's attorney seeks the same modifications to this citation as he did for Citation No. 9204928 and offers the same justification, the Court's previous analysis applies.

Summary:

As discussed above, the Secretary has cited to inapplicable precedent, by relying upon an administrative law judge decision, inappropriately cited to *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, (June 1996), for a proposition that case does not support, and failed to meet the Commission's standards for an acceptable motion to approve settlement, per its decisions in *AmCoal I* and *AmCoal II*.

That said, because the Commission has, to the best of this Court's understanding, a 100% approval rate for settlement motions, it has decided to approve the settlement in this instance because the Commission examines all settlement determinations made by its judges, and has the authority, per 29 C.F.R. §2700.71, to review a judge's decision on its own motion.[2]

The Court has considered the Secretary's Motion and approves it 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 administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. As noted, under those decisions, reasonable inquiry by the Court is not permitted.

---

[2] 29 C.F.R. § 2700.71, titled, "Review by the Commission on its own motion," provides "[a]t any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed only upon the ground that the decision may be contrary to law or Commission policy or that a novel question of policy has been presented. The Commission shall state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review.

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.

WHEREFORE, the motion for approval of settlement is GRANTED. Citation No. 9205312 is modified to moderate negligence, Citation No. 9204928 is modified to unlikely and non-S&S, Citation No. 9205356 is modified to unlikely and non-S&S.

It is ORDERED that the Respondent pay the agreed-upon civil penalty of $1,897.00 within 30 days of this order.[3] Upon receipt of payment, this case is DISMISSED.

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

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[3] 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

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004
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April 27, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. GREENBRIER MINERALS, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0036 A.C. No. 46-02140-563930 Mine: Saunders Preparation Plant

DECISION APPROVING SETTLEMENT

Before: Judge William Moran

This case is 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. The CLR has filed a motion to approve settlement. The originally assessed amount was $1,189.00 and the proposed settlement is for $878.00.

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9567361	$626.00	$626.00	
9567358	$563.00	$252.00	Modify to low negligence; **55% (fifty-five percent)** reduction in penalty
TOTAL	**$1,189.00**	**$878.00**	

This Motion to Approve Settlement involves two violations of 30 C.F.R. § 77.1605(a); both were regularly assessed, with one paid in full, and the other with a 55% reduction. The standard pertains to loading and haulage equipment, and its requirements can aptly be described as 'clear as glass,' because it requires that "[c]ab windows shall be of safety glass or equivalent, *in good condition* and shall be kept clean." (emphasis added).

Citation No. 9567358; the citation with the 55% reduction in the penalty.

Here, the issuing MSHA inspector, Curtiss Vance III, diligently noted:

"[t]he following window*s* on the Dl0R Caterpillar Dozer Co. No. 472 were not in good condition:

1. The left side door window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
2. The right side door window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
3. The front window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
4. The rear window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
5. The side windows were not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.

This dozer was being operated on the Coal Stockpile Area pushing to a underground feeder. Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

Petition for Civil Penalty at 6

The Secretary requests Citation No. 9567358 be modified to Low negligence. The Respondent would argue that the window glass in the Caterpillar Dozer Co. **No. 472** had been replaced in the past. The *window* glass had not been reported to be damaged on the pre-operational checks. The mine management was not aware of the condition at the time of the inspection. Motion at 3 (emphasis added).

Citation No 956736; the citation paid in full.

This citation, which was issued by the same inspector and cited the same standard, 30 C.F.R. § 77.1605(a), differed in that it involved a different piece of equipment, but it was another D10R Caterpillar Dozer, **No. 031**. Otherwise, the violation is virtually indistinguishable from Citation No. 9567358, described above.

The condition or practice section of the citation informed:

The following windows on the DlOR Caterpillar Dozer Co. No. 031 were not in good condition:

1. The left side door window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
2. The right side door window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
3. The front window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
4. The rear window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.

This dozer is operated on the Coal Stockpile Area, pushing to a underground feeder. Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean.

Petition for civil penalty at 8.

Analysis

To put it directly, the justification in this motion does not add up. As noted, these two, now-admitted, violations are virtually indistinguishable. *The two citations were issued by the same inspector, on the same day, and within an hour of each other. Both pieces of equipment were the same: D10R Caterpillar Dozers, and they were being operated in the same area – the Coal Stockpile Area – and doing the same task – pushing material to an underground feeder.*

Citation No. 9567361, the one paid as regularly assessed, differs from Citation No. 9567358, the one with a 55% penalty reduction, only in that No. 9567361 was assessed at $63.00 more. To be clear, the inspector evaluated both violations the same – listing the likelihood of injury as 'reasonably likely,' resulting in lost workdays or restricted duty, with both denoted as 'significant and substantial,' and the negligence as moderate. In fact, of the two, Citation No. 9567361, is less egregious as it listed *four* distinct window locations on the equipment that were not in good condition, whereas Citation No. 9567358 listed *five* distinct window locations that were not in good condition. The difference for No. 9567361 is that the operator failed in compliance after the citation was issued to the point that a (b) order had to be issued for failing to demonstrate 'good faith' in achieving rapid compliance.

The Secretary makes matters worse with her position that she need not disclose the (b) order itself for the Commission to view, hiding the salient information from the Commission, all miners, and the public. One would have anticipated that the Secretary, whose obligation is to protect the safety and health of miners, not mine operators, would be at forefront on this issue, *insisting on disclosure of the (b) order*, not blocking it from view. That strident approach, blocking affected persons and entities from seeing the entire record, is inimical to the Secretary's role. The Court would have rejected the Secretary's motion for this deficiency alone but for the fact that its non-disclosure stance for (b) orders is before the Commission presently in another docket.

As noted, compounding this unjustified basis for the more than 50% penalty reduction in Citation No. 9567358 is that the affected dozer had "not good condition" issues with *five* distinct areas: the left side door window, the right side door window, the front window, the rear window and the side windows. And, make no mistake about it, this dozer is a large machine, weighing 144,190 lbs, with a length of more than 25 feet and a height at 13.5 feet.[1] These dimensions underscore the safety importance of all windows being maintained in good condition.

Except for the significant fact that the five identified safety deficiencies are not funny, the excuses offered in the motion for the large penalty reduction would be laughable. This is so because asserting that the glass had been replaced in the past counts for nothing in any penalty

[1] https://www.ritchiespecs.com/model/caterpillar-d10r-crawler-tractor

analysis. Further, the claim that the window glass had not been reported to be damaged on the pre-operational checks and that excuses mine management, shows only that a citation for failure to conduct genuine pre-op checks may have been in order. Inspectors should consider such citations when confronted with such claims. With *every* window deficient, a claim of operator ignorance cannot be deemed credible. Additionally, the idea that such excuses constitute "*considerable* mitigating circumstances," the Part 100 requirement for "low negligence,"[2] would mean that nearly all violations could qualify under such a review standard.

It is this Court's view that unsupported reductions in proposed regular assessments such as this run counter to the Mine Act's purposes. Congress expressed that penalties are to be of sufficient magnitude, i.e. "cost," to make compliance with the safety and health standards preferable to non-compliance. Results such as these, with the citation identifying more deficiencies, involving the same bulldozer model, doing the same work at the same time, and in the same location, but costing far less, gives the appearance of an unwarranted discount in the penalty, as opposed to valid justifications for penalty reductions.

Despite the many concerns expressed, the Court is presently precluded from making reasonable inquiry when presented with settlement motions. 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.

Accordingly, the Court has considered the Secretary's Motion and approves it *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.

WHEREFORE, the motion for approval of settlement is **GRANTED**. Citation No. 9567358 is modified to low negligence, with the penalty reduced to $252.00 for that violation. It is further **ORDERED** that the operator pay the penalty of **$878.00** within 30 days of this order.[3] Upon receipt of payment, this case is **DISMISSED**.

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

[2] 30 C.F.R. §100.3, and Table X.

[3] 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. Please include Docket and A.C. Numbers. It is vital to include Docket and A.C. Numbers when remitting payments.

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April 6, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of Ronald D. Collins Complainant v. NEXT ENDEAVOR VENTURES, LLC Respondent	TEMPORARY REINSTATEMENT Docket No. VA 2023-0023 Mine: NEV # 1 Mine ID: 44-07394

ORDER GRANTING APPLICATION FOR TEMPORARY REINSTATEMENT

Appearances: Sharon H. McKenna, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, Tony Oppegard, Esq., Lexington, KY, for the Complainant, Billy R. Shelton, Esq., Lexington, KY for the Respondent

Before: Judge William B. Moran

This case is before the Court upon application for temporary reinstatement filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act"), and 29 C.F.R. § 2700.45 et seq. On March 1, 2023, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement for Ronald D. Collins, Complainant, to his former position as Superintendent/Foreman for Next Endeavor Ventures, LLC at Mine NEV #1, a surface mine.

The case was assigned to the Court on March 3, 2023. Due to schedule conflicts with the parties and the Court, the parties agreed that the hearing could be set beyond the ten calendar days provided for by Commission Rule 45. A virtual hearing, via Zoom for Government videoconference, was held on March 31, 2023. The parties also agreed that, should the Court find that the application was not frivolously brought, the date for reinstatement would be effective retroactively to March 22, 2023. For the reasons set forth below, the Court grants the application for temporary reinstatement and retains jurisdiction until final disposition of the complaint on the merits.

Applicable Law

As noted by Judge Margaret Miller,

> Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any protected right under the Act. The purpose of this protection is to encourage miners 'to play an active part in the enforcement of the Act,' in recognition of the fact that 'if miners are to be encouraged to be active in matters of safety and health they must be protected against … discrimination which

> they might suffer as a result of their participation.' S. Rep. No. 95-181, 95th Cong. 1st Sess. 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

Grimes Rock, 43 FMSHRC 287, 289, May 2021 (ALJ Margaret Miller) ("*Grimes* ALJ dec.")

> A miner that lodges a complaint of discrimination under section 105(c) is entitled to 'immediate reinstatement … pending final order on the complaint' as long as the complaint was 'not frivolously brought.' 30 U.S.C. § 815(c)(2). The Commission has stated that the scope of a temporary reinstatement proceeding is therefore 'narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought.' *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc*., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). This standard reflects a Congressional intent that 'employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding.' *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990).

Grimes ALJ*, Id.*

> In a temporary reinstatement hearing, a judge is tasked with evaluating the evidence of the Secretary's case and determining whether the miner's complaint appears to have merit. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Secretary must prove only a nonfrivolous issue of discrimination and need not make a full showing of its prima facie case of discrimination. *Id*. at 1088. Nevertheless, it may be 'useful to review the elements of a discrimination claim' when gauging whether a claim is nonfrivolous. *Id*. Those elements include (1) that the complainant was engaged in a protected activity and (2) that the adverse action complained of was motivated in part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803 (Apr. 1981). The Secretary may establish the motivational nexus between the protected activity and the adverse action with indirect or circumstantial evidence such as (i) the employer's knowledge of the protected activity, (ii) hostility or animus towards the protected activity, (iii) coincidence in time between the protected activity and the adverse action, and (iv) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (Nov. 1981).
>
> While it is true that a judge may consider these factors, a temporary reinstatement case remains 'conceptually different' than the underlying case of discrimination. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d at 744. The Mine Act envisions an 'expedited basis' for a temporary reinstatement proceeding that does not permit full discovery or complete resolution of conflicting testimony. 30 U.S.C. § 815(c)(2); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1879 (Aug. 2012). In fact, Commission case law indicates that resolving credibility issues or conflicts in testimony is beyond the scope of a temporary reinstatement

> hearing. *Williamson*, 31 FMSHRC at 1089. Similarly, a judge is not permitted to weigh the operator's evidence against the Secretary's evidence when determining whether to grant temporary reinstatement. *Id*. at 1091.

Grimes Rock, 43 FMSHRC 287, 289-290, May 2021 (ALJ Margaret Miller)

A wrinkle in Temporary Reinstatement Applications

Judge Miller took note that "[t]he Ninth Circuit recently rejected the *Pasula-Robinette* framework in *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. 2021). Specifically, the Court struck down the requirement that the adverse action was motivated 'at least partially' by the protected activity in favor of a **but-for** causation standard. *Id*. at 1209-11." *Grimes Rock,* 43 FMSHRC 287, n.1. (emphasis added).

In the same *Grimes Rock* case, the Commission subsequently spoke about the "**but-for"** standard in temporary reinstatement applications. *Grimes Rock*, 43 FMSHRC 299, 301 (June 2021) (Commissioners Althen and Rajkovich, Chairman Traynor *concurring in result only* that the complaint was not frivolously brought). There, the majority, consisting of Commissioners Althen and Rajkovich, noted:

> The Commission has recognized that the 'scope of a temporary reinstatement hearing is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought.' *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990) ("*JWR*"); *Sec'y of Labor on behalf of Jones v. Kingston Mining, Inc*., 37 FMSHRC 2519, 2522 (Nov. 2015). The 'not frivolously brought' standard reflects a Congressional intent that 'employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. *JWR*, 920 F.2d at 748, n.11.
>
> At a temporary reinstatement hearing, the Judge must determine 'whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.' *JWR*, 920 F.2d at 744. As the Commission has recognized, '[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

Id. at 301.

As the majority, Commissioners Althen and Rajkovich then elaborated about the scope of temporary reinstatement proceedings in light of the **but-for** causation standard articulated by the Ninth Circuit, stating:

> Upon adopting the '*Marion approach*' in *Secretary of Labor on behalf of Cook v. Rockwell Mining, LLC* in which the scope of a temporary reinstatement hearing was at issue, the Commission held that a temporary reinstatement hearing must be a full evidentiary process. 43 FMSHRC____, slip op. at 9, No. WEVA 2021-0203

> (Apr. 23, 2021), citing *Sec'y of Labor on behalf of Kevin Shaffer v. Marion County Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018) (separate opinion of Acting Chair Althen and Commissioner Young). **During the proceeding, a Judge must consider any evidence which is relevant to the adverse action. *Id.* In other words, 'all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- even that which seems directed to an affirmative defense or rebuttal of the miner's claim.'** *Id*. (emphasis added).
>
> The *Marion approach* gives operators an opportunity to provide evidence that the complaint *was* frivolously brought. 43 FMSHRC___, slip op. at 9 (emphasis added [by majority]). **It is permissible, therefore, for a Judge to consider evidence regarding allegations of a miner's unprotected misconduct to determine if the miner has a viable case. However, such evidence may not serve as a basis for denial of reinstatement if it requires resolution of a credibility determination. *Id.* at 10. In a temporary reinstatement hearing, the Judge may not resolve credibility disputes or make rulings on credibility.**

Id. (emphasis added).

The reference above to the '*Marion approach*' requires some background in order to appreciate its foundation. As just noted, in *Grimes Rock*, 43 FMSHRC 299, (June 2021), the two-members constituting the majority in that case referenced three cases: *Sec'y of Labor on behalf of Kevin Shaffer v. Marion County Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018) (separate opinion of Acting Chair Althen and Commissioner Young) ("*Marion*"), *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. April 14, 2021), ("*CalPortland*") and *Secretary of Labor on behalf of Cook v. Rockwell Mining, LLC* 43 FMSHRC 157 (Apr. 23, 2021) ("*Cook v. Rockwell Mining*").

Marion, the source for the '*Marion approach,*' involved a temporary reinstatement proceeding. It is noteworthy because, though four Commissioners were involved in that decision, separate opinions were issued – Commissioners Jordan and Cohen in one and Acting Chairman Althen and Commissioner Young in the other.

By dubbing the views of two commissioners as the '*Marion approach,*' Commissioners Rajkovich and Althen in effect elevated the opinion of two commissioners over the equally viable opinions of Commissioners Jordan and Cohen. This is significant because the two sets of Commissioners expressed very different views about what is needed to establish that an application is not frivolously brought.

For their part, Commissioners Jordan and Cohen expressed that the 'non-frivolously brought standard' in a section 105(c)(2) action may be likened to the "reasonable cause to believe" standard applied in other statutes. *Marion* at 41-42. They added that "[a]n important point to remember in reviewing a district court's determination of reasonable cause is that the district judge need not resolve conflicting *evidence* between the parties. *Id*. at 42 (emphasis added).

Speaking to the temporary reinstatement hearing itself, they noted that "the Judge must determine 'whether the evidence mustered by the miner to date established that [his or her] complaint [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify

permanent reinstatement. … [and that] [i]t [is] not the [J]udge's duty, nor is it the Commission's, to resolve the conflict in *testimony* at this preliminary stage of proceedings. *Id.* (emphasis added).

Last, those Commissioners remarked that evidence that the miner "was discharged for unprotected activity relates to the operator's rebuttal or affirmative defense. The Judge will need to resolve *the conflicting evidence in the context of the full discrimination proceeding*. *Id.* at 44.

In contrast, Commissioners Althen and Young agreed that the Secretary's burden was to show that the claim is not frivolous, but they added that to make that showing it is necessary to prove it by a preponderance of the evidence. *Id.* at 46. From their perspective that translated to the Secretary showing that that "the Secretary has demonstrated that it is more probable than not that the claim is not frivolous." *Id.* Under that view, those Commissioners added to the previously required showing, expressly stating that "[t]he burden of proof in a temporary reinstatement case, therefore, contains ***two legal standards*: "*preponderance of the evidence" and "non-frivolous*.**"** *Id.* (emphasis added).

Commissioners Althen and Young expanded upon the application of their view, stating that "all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- *even that which seems directed to an affirmative defense or rebuttal of the miner's claim.* While we agree that the Judge should not make credibility and value determinations of the operator's rebuttal or affirmative defense, if the *totality of the evidence or testimony admits of only one conclusion*, there is no conflict to resolve. It is the Judge's duty to determine whether the claim is frivolous, in light of undisputed or conclusively-established facts and inescapable inferences." *Id.* at 47. (emphasis added).

The second of the three cases cited by Commissioners Althen and Rajkovich in *Grimes* was *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. April 14, 2021). It should be recalled that *Grimes* was a temporary reinstatement case. In contrast, *CalPortland* was not a temporary reinstatement case. Instead, the Ninth Circuit's decision was a 105(c)(3) proceeding, often distinguished as a 'full' discrimination proceeding.[1] In matters of discrimination, the Mine Act clearly distinguishes between temporary reinstatement and full discrimination proceedings. *See,* 30 U.S.C. §§ 815 (c)(2) and (c)(3).

It is certainly true that the Ninth Circuit rejected the *Pasula-Robinette* framework *in a full discrimination action*.[2] However, nowhere in that decision will one find the words frivolous,

[1] The 'full discrimination proceeding, also referred to as the "full evidentiary hearing" and 'the later discrimination proceeding,' are all terms used to distinguish such proceeding from the temporary reinstatement proceeding. *See, e.g., Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011) and *Sec'y of Labor on behalf of Kevin Shaffer v. Marion County Coal Co*., 40 FMSHRC 39, 44 (Feb. 2018)

[2] The Ninth Circuit described the *Pasula-Robinette* framework as one where "a miner proves a prima facie case of discrimination by showing that: (1) he engaged in protected activity and (2) was subject to an adverse action motivated "at least partially ... by his protected activity. … " The mine operator may then rebut the prima facie case by showing: "(1) the miner was not engaged in any protected activity, or (2) the adverse employment action was not even partially

(continued…)

temporary, or reinstatement or remedial. Again, the reason those words are absent is simple – that case did not involve temporary reinstatement. As such, any '**but-for**' references, are applicable only in a full discrimination proceeding, and therefore inapplicable in the very distinct temporary reinstatement proceeding.

The last of the three decisions referenced by the two-members constituting the majority in *Grimes Rock*, 43 FMSHRC 299, (June 2021) was *Sec*. obo *Cook v. Rockwell Mining*, 43 FMSHRC 157 (April 2021). That case involved a temporary reinstatement decision by the Commission, which produced an interesting result. Two Commissioners, Chairman Traynor and Commissioner Rajkovich, found that the complaint was not frivolous. Commissioner Althen voted to remand the matter "for the full hearing to which [Rockwell Mining] was entitled." *Id*. at 171. In that respect, Commissioner Rajkovich agreed with Commissioner Althen that the judge failed "to conduct a full hearing by excluding evidence offered by the respondent to prove it terminated the complainant as a result of a gross safety violation. Such evidence was relevant to the respondent's claim of no showing of animus and that unprotected activity supported the termination. The evidence was relevant and admissible. The failure to hear this evidence was an error." *Id*. at 169. Though Commissioner Rajkovich's decision appeared to have duality, agreeing with the conclusion that the complaint was not frivolous, while also agreeing with Commissioner Althen about the proper scope of a temporary reinstatement proceeding, he determined that the failure regarding the scope of the hearing was 'harmless.' *Id.* at 158, 167.

In reaching agreement with Commissioner Althen on the scope of a temporary reinstatement proceeding, Commissioner Rajkovich looked to *Sec'y of Labor on behalf of Shaffer v. Marion County Coal Co.*, 40 FMSHRC 39 (Feb. 2018) as the law of the Commission. As discussed above, in that decision two Commissioners, Acting Chair Althen and Commissioner Young, held that "all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- even that which seems directed to an affirmative defense or rebuttal of the miner's claim." *Id.* at 47.

As also noted above, there were two separate opinions issued in *Marion.* Commissioners Jordan and Cohen did not buy into the views regarding the proper scope of the temporary reinstatement proceeding, as expressed by Commissioners Althen and Young. Thus, on the scope issue, there was no definitive Commission decision in *Marion*. It was in *Cook v. Rockwell Mining*, 43 FMSHRC 157 (Apr. 23, 2021) that Commissioner Rajkovich dubbed the views of Commissioners Althen and Young as "the *Marion* approach." *Id*. at 165. Accordingly, in *Rockwell Mining,* the views of Commissioners Althen and Rajkovich, adopted "the *Marion* approach" which then became the law of the Commission. *Id*. at 158.

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[2] (…continued)
motivated by the miner's protected activity." Or, if the mine operator cannot rebut the prima facie case, it may assert an affirmative defense by demonstrating—by a preponderance of evidence—that: (1) the adverse action was also motivated by the miner's unprotected activity; and (2) the adverse action would have been taken in response to the unprotected activity alone." citing *Secretary ex rel. Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799 (1980), *rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). *CalPortland* at 1208.

The Court notes that the Application for Temporary Reinstatement in this matter, *Secretary obo Ronald Collins*, involves a mine located in Virginia. As such, apart from Commission law, when consulting decisions from the United States Courts of Appeals, it is the Fourth Circuit Court of Appeals that one looks to for applicable law. Nevertheless, this decision encompasses both the Ninth Circuit's expression as well as the Fourth Circuit's and follows the Commission's decision in *Grimes Rock*, 43 FMSHRC 299, (June 2021), instructing application of the **but-for** review

Here, out of an abundance of caution, the Court applies the traditional test[3] for determining if an application for temporary reinstatement is frivolous, but in addition applies the **but-for** standard expressed in *Thomas.* Both applications produce the same result: the Secretary's Application for temporary reinstatement of Ronald D. Collins is not frivolously brought.

JOINT STIPULATIONS

1. Next Endeavor Ventures, Inc., is and was at all relevant times through this proceeding, the operator of Mine #1, Mine ID number 44-07394, located in Keokee, Virginia.

2. Mine #1 is a mine as defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. At all times relevant to this proceeding, products of Next Endeavor Ventures, Inc., Mine #1 entered commerce, are the operations of products thereof of affecting commerce, within the means and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. Next Endeavor Ventures, Inc., is an operator as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), and is person as defined Section 3(f) of the Mine Act, 30 U.S.C. § 802(f).

5. Ronald Collins was previously employed by Next Endeavor Ventures, Inc. Ronald Collins is a miner within the meaning of Section 3(g), Mine Act, 30 U.S.C. § 302(g).

6. Ronald Collins was terminated from Next Endeavor Ventures, Inc., on November 19, 2022.

[3] The elements of a discrimination claim are useful guideposts in temporary reinstatement cases. Accordingly, the Court looks to whether the alleged adverse action occurred "because [a] miner … filed or made a complaint … including a complaint notifying the operator … of an alleged danger or safety or health violation in a … mine … or because of the exercise by such miner … of any other statutory right afforded by this chapter." 30 U.S.C. § 815(c)(1). Stated differently, a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

7. Next Endeavor Ventures, Inc., is subject to the jurisdiction of the federal mine safety and health review Commission. The presiding administrative law judge has the authority to hear this case and issue a decision regarding this case, pursuant to § 105 of the Act, 30 U.S.C. § 815, as amended.

SUMMARY OF THE TESTIMONIAL EVIDENCE

As mentioned above, a virtual hearing, via videoconference, was held on March 31, 2023. The hearing had but one witness, the Applicant/Complainant Ronald Dwayne Collins. He was last employed on November 19, 2022 and his employer was Next Endeavor Ventures ("NEV"). Tr. 36. The mine is a surface coal mine and is nonunion. Tr. 144. Collins has worked as a miner for 37 years and holds various certifications related to mining, including a first-class mine foreman, service foreman and an MSHA instructor card. Tr. 37. His employment with NEV began on August 29, 2022 at the NEV #1 mine. He was employed as a foreman. Tr. 39. As foreman his responsibilities included compliance with all MSHA and Virginia Energy safety regulations, the latter encompassing the Virginia Division of Mines, Minerals and Energy. Tr. 41. His supervisor was Wilk Renfroe. On August 29, 2022, Collins first day on the job, he had an accident, crushing one of his fingers. It required treatment at a medical facility, but he did not miss work because of it. Subsequently, a state inspector contacted Collins, asking if the accident had been reported. Eventually it was reported but, as it was filed late, the mine received both a state and federal violation. Tr. 46. About two to three days after Collins' accident, the State closed the mine for not having liability insurance. Tr.47.[4] Collins stated that as of the date of the hearing, the mine has yet to pay the medical bills arising from his workplace injury. Tr.49.

Collins then was asked about an MSHA inspection subsequent to his injury. This involved Brandon and Jonas Fleming. The two had been hired to run an auger at the mine. Tr. 52. Collins terminated the Flemings because, he alleged, the mine did not have an approved State and Federal ground control plan. Tr. 53-54. Collins stated that Renfroe was upset with him over the auger issue and the termination of the Flemings. Tr. 56-57. Significantly, Collins testified that Renfroe told him "that he needed that [work for] coal [ ] production, that [Collins] was gonna cost everybody their jobs, and that he was highly upset. If [Collins] didn't get with his program, [he'd] be terminated." *Id*. Collins stated that from that point on Renfroe was hostile towards him. Tr. 57.

Around October 28, 2022, Renfroe and Collins had a conversation about a new employee, Jeff Patterson, who would be operating an excavator. Tr. 58. Renfroe advised Collins that he needed Patterson to work on that weekend. Collins inquired if Patterson had his MSHA and State training and Renfroe advised he, Renfroe, would worry about that but that Patterson had the certifications. Renfroe had a similar response to Collins' inquiring about whether Patterson had his preemployment drug test. Tr. 58. Without showing him documentation on those issues, which included showing that MSHA and state training had been done, Collins advised that he would not be signing that the employee was safe to work. Tr. 58-59. When Renfroe advised that he was going to work the Patterson anyway, Collins informed that he would not be a part of that and would not physically remain on the mine site. Tr. 63, 75. Renfroe and

[4] There were questions involving the mine's workers' compensation and whether the mine had a lapse in coverage and whether that impacted Collins' coverage for his injury. The Court considers this to be tangential to the issues in this proceeding.

Collins had a heated exchange over these issues, and Collins maintained that Renfroe told him that he "was hindering his production ability with safety regs -- he said I was too strict on safety, and he was very belligerent about it. And I told Mr. Renfroe I was just trying to follow the letter of the law. He didn't like that." Tr. 72. Thus, Collins had multiple objections to allowing Patterson to work – he didn't have his Virginia miners' card, nor his drug test, nor his new employee miner training, nor his hazard and task training. Tr. 76. Because of those failings, Collins did not report for work on November 4, 2022. *Id.*

Following that, Collins received a telephone call from a state mine official, inquiring if he was aware that an employee was working at the mine illegally and that Collins' signature was on the pre-shift book. Collins informed that he had not been at the mine on that date and had not signed the pre-shift book. Tr. 79. Mr. Patterson was then removed from the mine site. Tr. 80. The state also issued a closure order at that time. Tr. 81.

On November 7, 2022, Collins went to the mine site and at that time read the alleged violation connected with the closure order. Tr. 84. The Virginia inspectors informed Collins that they were lifting the closure order but that stipulations were associated with the reopening.[5] *Id.* Collins alleged that on November 7th Renfroe's reaction to Collins' contacting the State mining agency about the preshift book issue as "the straw that broke the camel's back." Tr. 89, 95, 97. Collins reiterated to Renfroe that he would not be coming to work if Patterson was working. Tr. 97.

Collins and Renfroe had several heated conversations during the days in issue for this matter. In one, Collins asserted that Renfroe advised him that "listen you're [i.e. Collins] trying to be work safe is not going to work with this organization. I'm going to have to wash my hands of you. I'm going to have to move on. It's just getting to where it's unbearable." Tr. 101.

Collins also asserted that on November 17, 2022,[6] he had a conversation with JD Harrison, who was identified as a future foreman, along with Kelly Willis. Tr. 102. On that day, Collins asked Harrison if he had all his paperwork in order. According to Collins, Harrison responded that Renfroe said he was good to go. Tr. 103. Collins determined that Harrison did not have any of that paperwork. Tr. 104. Though Harrison maintained that inspector Herschel Fleming, a state inspector, informed that no additional drug test was needed. Tr. 104, 107. Upon checking with the inspector, Harrison's contention was rejected, and he had to leave the mine property. Tr. 105. Renfroe was angry with Collins requiring that Harrison have a drug test. Collins stated that during this exchange, Refroe uttered expletives and that he had to get rid of

[5] There were allegations swirling about the issue of whether Collins or someone else signed the preshift book. It is unnecessary to resolve this issue in the context of the temporary reinstatement application, as the central issue remains – is this application for reinstatement frivolous?

[6] Collins and Renfroe had another dispute on November 17. This related to whether an excavator required a cage to be installed on the machine. Tr. 116. Whether the excavator in fact required a cage was not resolved at the reinstatement hearing nor was the issue necessary to resolve. The only purpose in the context of the proceeding is to show yet another safety-related dispute between Collins and Renfroe.

Collins. Tr. 106. Harrison did leave the mine to get a drug test. Tr.108. The following day Collins saw Harrison doing his training with Gary Whisman. Tr. 115.

In yet another incident, this time on November 18th, Collins observed an employee running a dozer with no one else present. Tr. 119. When Collins inquired of the employee whether he had his training and certifications, and drug test, the employee answered that he did not. Tr. 120. Collins had this employee leave the mine site as well. Tr. 120-121. However, not long after, Collins saw the same employee at the site. Not long after the second confrontation, the employee was back again, but on this occasion another employee was watching the miner operate the dozer. Tr. 121. Renfroe told Collins to leave the employee alone and if Collins didn't like it, Renfroe told him he could "go to the house," mine parlance for being fired. Tr. 121.[7]

On Saturday, November 19, 2022, Collins had a phone conversation with Jeff Patterson, at which time he was informed that the mine didn't need his services anymore. Tr. 129. Collins was also asked about one of the mine's owners, whom he identified as Emma. He was unsure if her last name was Vasquez or Marquez. Tr. 132. In any event, Collins met her at the mine on one occasion sometime in the middle of October that year when a State inspector was present as a complaint had been called regarding the mine. Collins recounted that Emma remarked that in her view there was a 'mole' at the mine and if she found out who it was, that individual would be fired. Tr.133. Renfroe too, Collins asserted, made a similar remark – if the mine found out "who was tipping the inspectors off on the safety issues" that person would be terminated. Tr. 134. Later, Renfroe told Collins that he suspected Collins was the person making the complaint. Tr. 135.

During the hearing there was also a reference to a Ms. Kayleigh Mulkey. Collins knows her. Tr. 140. Ms. Mulkey was never employed at the Respondent's mine during the time of Collins employment there. *Id.* Instead, she was employed with a nearby mine, A&G Coal Corp. Tr. 140-141. This subject arises in the context of the Respondent's Answer to the reinstatement application wherein it alleges that Collins sexually harassed a woman in violation of the mine's sexual harassment policy. Respondent's Answer, Sixth Defense.

In that connection, Collins was asked about his employment packet when he began working for the Respondent. He contended that he never saw a sexual harassment policy as part of that packet. Tr. 141. He also denied ever having any conversations with the Respondent's ownership or management about that subject. Tr. 141-142. Later, Collins stated, he received the employment packet again via e-mail. One was sent to him by an administrative assistant with the mine, Amy Cutshaw. Tr. 142. Collins stated that when he was terminated by the Respondent, Mr. Patterson never told him that he was fired because of sexual harassment. Tr. 147.

On cross-examination, Collins agreed that Renfroe does not need a miner's card because he doesn't work on the site and because he is part of management. Tr. 151. Respondent's

[7] It is noted that during the hearing there were a few occasions when the exact date of an event was unclear. The Court has two observations about this. First, the exact dates were not crucial to the determination in this hearing – whether Collins' claim was non-frivolous. Second, of far greater importance, is that Mr. Collins had a number of safety issues while employed with the mine. The Respondent offered no witnesses to contradict Mr. Collins claims in that regard, leaving its challenges solely to the cross-examination of the Applicant.

attorney questioned Collins about the particulars of the mine's ground control plan vis-à-vis the excavator and its proximity to the wall. Tr. 151-153. However, the Court would comment that such questions are extraneous in the context of a temporary reinstatement application because Collins was at least raising a safety issue. There is no indication in the record that his concern was pretextual or made in bad faith.

Collins was also questioned by Respondent's counsel about his first discrimination report and the subsequent discrimination report he signed some three weeks later. Tr. 156- 158. Respondent's counsel noted that the second report (i.e. Collins' amended complaint) added claims that were not made in his initial complaint. It is true that Collins filed an amended complaint on December 22, 2022, and that he added grounds for his complaint in that document. At the hearing, Collins testified to the grounds listed in his initial complaint and those asserted in his amended complaint. The Court would note that it is guided by the testimony at the hearing with regard to its assessment of Mr. Collins' testimony about his alleged safety issues, which assessment does not involve credibility determinations. Some areas of cross-examination, such as whether Collins submitted bills regarding his finger injury to Next Endeavor are not pertinent to the frivolous issue here.

Respondent's counsel also questioned Collins regarding his issues concerning employee training certifications and whether, for those tasks he could act as an instructor, he could've conducted the training himself. Two observations are made about this line of inquiry. First, Collins denied that he was certified to do all of the required training. Second, according to Collins' testimony, the dispute was connected with Renfroe's irritation that Collins was raising the training issues. At least on its face, that relates to the issue of whether Renfroe was upset with Collins' safety concerns, an issue not to be resolved in the temporary reinstatement proceeding.

It is true enough, as Respondent's Counsel noted, that Collins's complaint, per the Secretary's Exhibit B, did not contain his allegations that Mr. Renfroe told him that this was the "last straw, or Wilk Renfroe cussing you, or Wilk Renfroe doing this or Wilk Renfroe bringing people to the mine site that weren't properly trained, or Wilk Renfroe bringing people to the site that didn't have their drug test," Tr. 164- 165. The Court is again guided by Collins' testimony at the hearing, which was effectively augmented by the absence of any rebuttal testimony, as the Respondent did not present any witnesses.[8]

In what the Court views as a subject that is not and cannot be resolved at this stage of Collins' safety complaint, Respondent's Counsel's foray into whether Collins was terminated for sexual harassment, it is noted that much time was expended concerning the location of *another* mine, which mine, it was conceded, was not part of Next Endeavor Ventures' operations. This was an attempt to somehow link Ms. Kaleigh Milkey, an employee of that *other* mine, with the sexual harassment claim Respondent was making against Collins. Tr. 165- 192. Being generous, the Court would say that, at least for the purposes of the temporary reinstatement application, this whole line of questioning went nowhere.

[8] Respondent's Witness List identified four individuals: Michael Hughes, the MSHA investigator for this matter, the Complainant, Mr. Collins, Wilk Renfroe and Jeff Patterson. As noted, the only witness at the hearing was Ronald Collins.

SUMMARY AND ADDITIONAL FINDINGS

The following observations are made about the detailed testimony from Mr. Collins, as set forth above. None of these observations involve credibility determinations by the Court. Instead, they are made strictly in the context of whether Collins' application for temporary reinstatement was frivolously brought. To be clear, the Court finds, without reservation or hesitation, that Collins application is not frivolous. Stated another way, the *totality of the evidence or testimony admits of only one conclusion* – Collins' complaint is not frivolous.

Collins raised several health and safety concerns to management. Each constituted protected activity. Some of these issues were also brought to the attention of the mine safety division within the state of Virginia as well as with MSHA. A miner's raising a safety or health issue of any sort is protected, whether tied to a particular provision under state or federal mining law or not. For example, as detailed above, Collins raised a safety concern with Wilk Renfroe concerning: an employee who did not have a pre-employment drug screening; the failure of an employee to have a Virginia miners card; and an alleged failure to have the requisite miner training before starting work.

There was also an issue related to the safety concerns Collins raised. This relates to whether Collins in fact signed the book on a given day or whether his signature was forged. That issue has not been resolved but it does tend to show possible employer animus towards Collins attributable to his refusal to sign the books. There was also an issue over the mine's alleged failure to file an accident report with MSHA in connection with an injury Collins incurred on the job.

Further, was also testimony from Collins that, on more than one occasion, he was admonished for not going along with the mine's wish that certain safety or health requirements be overlooked. Chiefly, these disputes involved Collins and Mr. Renfroe. The Court notes that Renfroe was present during the entire temporary reinstatement hearing, as the Respondent's designated company representative. This means that Renfroe heard nearly all of the testimony from Collins.[9] Yet, at the conclusion of the testimony from Collins, and noting that Collins was the sole witness for the Secretary, the Respondent elected to forego presenting testimony from any other witness, limiting its effort to cross-examination of Collins.

The Court notes and finds that the safety and health issues Collins testified about all occurred during a short period of time before Collins was terminated from employment with the mine. Therefore, a nexus established between Collins' protected activity and the adverse action – termination of his employment with NEV. Respondent's contentions are in the nature of claimed affirmative defenses and do not impact the issue in a temporary reinstatement proceeding.

Respondent contended that the Secretary didn't carry its burden of proof in this Application for temporary reinstatement. In making that argument, Respondent asserts that based on Mr. Collins first complaint he asserted only two grounds – that his hospital bills were not paid

[9] There was a very brief period of time, involving only minutes, when Mr. Renfroe was not present during the virtual hearing, but Respondent's Counsel did not request that the hearing testimony pause until Renfroe returned.

and the issue of whether his signature was fraudulently in the preshift book. The Court notes that nothing prohibits a complaint from being amended.

Respondent also contends that failure to have drug testing or the certificate to show the testing was done, is not a safety issue and that Collins other safety issues, as set forth above, are not cognizable. With regard to the latter, the Court notes that a miner need only have a reasonable, good faith belief in a safety hazard. *See, e.g*, *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, Apr. 1981), *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989). Respondent further maintains that Collins' text messages to Ms. Mulkey, an employee at *another* mine, constituted sexual harassment and constituted the basis for his termination.

CONCLUSION

Upon consideration of the testimony of Ronald D. Collins, the Court finds that the testimony and exhibits in support of this application for temporary reinstatement amply support that it is not frivolously brought. The Court finds that the Complainant has raised a non-frivolous issue as to each element of the prima facie case and finds that, under the traditional non-frivolous test as well as any **but-for** analysis that may be applied, Complainant more than met his burden of proof.

ORDER

The Application for Temporary Reinstatement is hereby **GRANTED.** It is **ORDERED** that Ronald D. Collins be temporarily reinstated, retroactive to **March 22, 2023** to the position he held on the date of his discharge from Next Endeavor Ventures, LLC at the NEV #1 mine.

This **ORDER** shall remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, *or other order* of this court or the Commission. The Court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint as soon as possible.

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

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April 28, 2023

Warrior Met Coal Mining LLC,

Contestant

v.

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

Respondent;

CIVIL CONTEST PROCEEDINGS

Docket No. SE 2023-0030
Docket No. SE 2023-0031
Docket No. SE 2023-0032

Mine: No. 4 Mine
Mine ID No. 01-01247

Docket No. SE 2023-0028
Docket No. SE 2023-0029

Mine: No. 7 Mine
Mine ID No. 01-01401

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

Petitioner

v.

Warrior Met Coal Mining LLC,

Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2023-0041
A.C. No. 000566006
Docket No. SE 2023-0051
A.C. No. 000567006
Docket No. SE 2023-0056
A.C. No. 000567766
Docket No. SE 2023-0067
A.C. No. 000568866
Docket No. SE 2023-0101
A.C. No. 000570906

Mine: No. 4 Mine
Mine ID No. 01-01247

Docket No. SE 2023-0042
A.C. No. 000566007
Docket No. SE 2023-0053
A.C. No. 000567007
Docket No. SE 2023-0057
A.C. No. 000567767
Docket No. SE 2023-0068
A.C. No. 000568867

Docket No. SE 2023-0089
A.C. No. 000570247
Docket No. SE 2023-0098
A.C. No. 000561080
Docket No. SE 2023-0099
A.C. No. 000570907
Docket No. SE 2023-0118
A.C. No. 000571802

Mine: No. 7 Mine
Mine ID No. 01-01401

ORDER GRANTING THE ACTING SECRETARY'S AMENDED MOTION TO DISMISS AND DENYING WARRIOR MET'S MOTION TO CONSOLIDATE THESE CASES WITH NEWLY FILED INTERFERENCE CASE

Before: Judge Thomas P. McCarthy

These consolidated contest and civil penalty proceedings are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (1994). In this matter, the Acting Secretary has issued five 104(a) citations and thirteen penalty assessments to Warrior Met Coal Mining LLC ("Respondent"), each alleging a violation under section 103(f) of the Mine Act. The five citations are currently docketed as "Contest Proceedings,"[1] while the thirteen penalty assessments are docketed as "Civil Penalty Proceedings."[2] The collective citations issued by the Acting Secretary allege that Respondent violated the Mine Act on multiple occasions by denying "miners' representatives" access to the No. 4 and No. 7 Mines. Respondent denies these allegations and asserts that the individuals claiming to be miners' representatives were not properly designated by an individual or individuals actively working in a coal or other mine. *See* 30 U.S.C. § 802(g); *see also Cyprus Empire Corp.*, 15 FMSHRC 10 (Jan. 25, 1993).

I. Procedural History

On November 8, 2022, Respondent timely filed two documents titled "Notice of Contest and Unopposed Request for Expedited Hearing." The first of these filings concerned Docket Nos. SE 2023-0028 and -0029, which both involve alleged violations at the No. 7 Mine. The second filing concerned Docket Nos. SE 2023-0030, -0031, and -0032, which each relate to alleged violations relating to the No. 4 Mine. On December 2, 2022, the Secretary of Labor filed

[1] The "Contest Proceedings" are before this tribunal as Docket Nos. SE 2023-0028, -0029, -0030, -0031, and -0032.

[2] The "Civil Penalty Proceedings" are before this tribunal as Docket Nos. SE 2023-0041, -0042, -0051, -0053, -0056, -0057, -0067, -0068, -0089, -0098, -0099, -0101, and -0118.

Answers to each Notice of Contest.[3] The matter was set for hearing on April 24, 2023 in Birmingham, Alabama.

Following these initial submissions, the parties engaged in a protracted parley involving complex discovery that was at times directly overseen by this tribunal. Both parties engaged in written discovery and Respondent conducted depositions of an MSHA District Manager, Assistant District Manager, and Coal Field Office Supervisor. On January 11, 2023, the Acting Secretary submitted a Motion in Limine to Exclude Irrelevant Evidence and Testimony. On January 27, 2023, Respondent filed a Motion for Temporary Relief requesting that the undersigned

> consolidate all Petitions for Civil Assessment of Civil Penalties against [Respondent] [Dockets Nos. SE 2023-0041, SE 2023-0042, SE 2023-0051, SE 2023-0053, SE 2023-0056, and SE 2023-0057] and prohibit any future Petitions for Civil Assessment of Civil Penalties against [Respondent] related to the Enforcement Actions or any similar circumstances pending the resolution of this matter.

Resp't App. for Temp. Relief at 3. Respondent then filed a Motion to Compel on January 31, 2023, seeking to require the Acting Secretary to "fully respond to [Respondent's] Interrogatories and Requests for Production of Documents, and to provide further testimony." Resp't Mot. to Compel at 1.

On February 2, 2023, my office received 1) Respondent's Opposition to the Secretary's Motion in Limine, 2) Respondent's Motion to Postpone and Reschedule Hearing and Related Prehearing Deadlines, and 3) the Secretary's Opposition to Respondent's Application for Temporary Relief. On February 7, 2023, the undersigned held a conference call with the parties to discuss outstanding motions, including Respondent's Motion to Compel and the Acting

[3] The Secretary and, after March 11, 2023, the Acting Secretary, submitted Civil Penalty Petitions on the following dates:

- January 6, 2023, for SE 2023-0041 and -0042;
- January 17, 2023, for SE 2023-0056 and -0057;
- January 19, 2023, for SE 2023-0051 and -0053;
- February 21, 2023, for SE 2023-0067 and -0068;
- March 2, 2023, for SE 2023-0089;
- March 21, 2023, for SE 2023-0098, -0099, and -0101; and
- April 3, 2023, for SE 2023-0118.

Respondent submitted Answers to eight of the thirteen Civil Penalty Petitions, which were received on:

- February 6, 2023, for SE 2023-0041 and -0042;
- February 15, 2023, for SE 2023-0051, -0053, -0056, and -0057; and
- March 23, 2023, for SE 2023-0067 and -0068.

Secretary's Motion in Limine. During the conference call, the parties were encouraged to narrow and work toward resolution of outstanding discovery issues. In addition, the Secretary was ordered to provide a privilege log consistent with Fed. R. Civ. Proc. 26(b)(5)(A)(ii). Further, the undersigned agreed to review disputed documents *in camera* if the parties were unable to resolve redaction or privilege issues through a privilege log or protective order.

On February 13, 2023, the undersigned issued an Order Denying Respondent's Application for Temporary Relief. On February 15, 2023, the Secretary submitted a Response to Respondent's Motion to Compel. On February 21, 2023, following receipt of the Secretary's Response, the undersigned held a follow-up conference call to further discuss all discovery issues outstanding, including the discoverability of certain topics, the production of documents by MSHA to Respondent, the submission of other documents for *in camera* review, and further depositions of MSHA and United Mine Workers of America ("UMWA") representatives.[4] At the conclusion of this conference call, Respondent was given until March 3, 2023, to file a Reply to the then Acting Secretary's Opposition, and the Acting Secretary was given until March 10, 2023, to file a Sur-Reply. Respondent timely filed a Reply on March 10, 2023, and the Acting Secretary submitted a Sur-Reply on March 10, 2023.

On March 24, 2023, my office received a notice of appearance from legal counsel for the UMWA and a Motion to Revoke Third Party Subpoena *Duces Tecum*.

On March 26, 2023, the Acting Secretary filed a Motion to Dismiss all of the five Contest Proceedings and five of the thirteen Civil Penalty Proceedings in the exercise of her prosecutorial discretion. *See RBK Construction, Inc.*, 15 FMSHRC 2099, (October 1993). My office received a first amended version of this Motion to Dismiss on April 2, 2023, which was updated to include all thirteen of the pertinent Civil Penalty Dockets. On April 10, 2023, my office received a second amended version of the Acting Secretary's Motion to Dismiss ("Amended Motion to Dismiss").[5]

Also on April 10, 2023, the Acting Secretary filed a section 105(c)(1) interference complaint with two counts. Count One alleged that Respondent interfered with the exercise of statutory rights by miners and miners' representatives at the No. 4 and No. 7 mines by refusing to allow properly designated miners' representatives to accompany MSHA on inspections, thereby discouraging miners and their representatives from exercising their rights under section 103(f) and chilling their participation in MSHA inspections. Count Two alleged that Respondent interfered with the exercise of statutory rights by miners and miners' representatives at the No. 4

[4] With regard to Respondent's discovery requests seeking the identity of striking miners who designated UWMA representatives, the undersigned found that MSHA was not obligated to disclose the names of the designating miners. *Wolf Run Mining*, 446 F. Supp. 651, 655-56 (N.N. W. Va. 2006). Accordingly, with regard to that issue, the undersigned granted the Secretary's Motion in Limine and denied Warrior Met's Motion to Compel. Given the parties' representation that they were working towards a settlement of the above matters, the undersigned found it unnecessary to definitively rule on other outstanding discovery or evidentiary issues at that time.

[5] Specifically, the Acting Secretary moves to vacate all contest and civil penalty proceedings in the above-captioned matter.

and No. 7 mines by filing a motion to hold the UMWA and individual picketers in contempt of Alabama Circuit Court for alleged violations of the Court's latest injunction, including their attempts to exercise section 103(f) rights, thereby chilling miners and miners' representatives exercise of those rights.

Also on April 10, 2023, Respondent filed a Motion to Consolidate the above-captioned collective Contest and Civil Penalty Proceedings with the Interference Complaint, docketed as SE 2023-0146 and -0147. On April 12, 2023, the Chief Judge assigned the interference proceeding to my office.

On April 14, 2023, the Acting Secretary filed an Amended Interference Complaint in Docket Nos. SE 2023-0146 and -0147, alleging that Respondent chilled miners' and miners' representatives' exercise of section 103(f) rights when it filed a Motion for Contempt in Alabama Circuit Court in response to alleged continued violations of the Circuit Court's injunction. In this Amended Complaint, the Acting Secretary alleges that Respondent refused to allow designated miners' representatives to accompany MSHA on inspections on November 4, 2022; November 8–9, 2022; November 14–17, 2022; November 22–23, 2022; November 29, 2022; December 1–2, 2022; December 5–6, 2022; December 8, 2022; December 15, 2022; January 11–13, 2023; January 20, 2023; January 26–27, 2023; January 30, 2023; February 22–23, 2023; March 10, 2023; and March 13, 2023. *See* Sec'y Am. Compl., ¶¶ 9–44. The Acting Secretary dropped Count One of the original interference complaint and alleged that in January 2023, the UMWA, Floyd Conley, Eddie Pinegar, and Keri Bester filed section 105(c) complaints with MSHA alleging interference with protected rights. The sole remaining count remained the same as Count TWO of the original complaint alleging section 105(c)(1) interference by pursuit of state court contempt charges for the exercise of statutory rights under the Mine Act, including section 103(f) walkaround rights.

On April 18, 2023, the undersigned held a conference call with the parties to ascertain their respective positions on the pending motions. During that call, the undersigned learned that on about February 16, 2023, the UMWA made an unconditional offer to return to work effective on or about March 2, 2023. In addition, the undersigned represented that I was inclined to grant the Acting Secretary's Motion to Dismiss, and deny Warrior Met's Motion to Consolidate, but reserved decision until both parties had an opportunity to file a written response to each other's respective motions. On April 20, 2023, the Acting Secretary filed an Opposition to Respondent's Motion to Consolidate, and Respondent filed a Response to the Acting Secretary's Amended Motion to Dismiss. For the reasons set forth below, I deny Respondent's Motion to Consolidate, and grant the Acting Secretary's Amended Motion to Dismiss all of the above-captioned dockets.

II. Analysis

Although the procedural history in this case is lengthy, the undersigned must resolve only a relatively straightforward inquiry – whether to consolidate interference Dockets SE 2023-0146 and -0147 with the eighteen total dockets that the Acting Secretary has moved to dismiss. Commission Rule 12 states that "The Commission and its Judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues." 29 C.F.R. § 2700.12. The Commission has held that "[a] determination to consolidate

lies in the sound discretion of the trial judge." *Pennsylvania Electric Company*, 12 FMSHRC 1562, 1565 (Aug. 1990).

The Acting Secretary has exercised her unreviewable discretion to vacate the eighteen above-captioned citations. *See RBK Constr., Inc.*, 15 FMSHRC 2099 (Oct. 1993). The Acting Secretary contends that there is nothing for the undersigned to do procedurally except dismiss these cases.

Although Respondent does not oppose the dismissal, it argues that dismissal should only come after consolidating the above-captioned proceedings with the newly filed interference proceeding. In its Response to the [Acting] Secretary's Amended Motion to Dismiss, Respondent argues that its proposed consolidation-then-dismissal framework would allow the parties to avoid a recapitulation of the complex discovery that took place in these cases, and will therefore "greatly promote judicial economy and avoid duplicative discovery disputes." Resp't Resp. to Sec'y Am. Mot. to Dismiss at 1-2. Respondent also contends that "whether striking employees constitute miners under the Mine Act such that they can validly designate miners' representatives is a central issue in the Interference Proceeding just as it was in these Contest Proceedings. *Id.* at 3 (internal quotations omitted). Respondent further contends that, because similar legal and procedural issues may arise again during the course of these newly filed interference proceedings, the

> Parties (and the Court) may be forced to largely duplicate their significant efforts in discovery because the Acting Secretary seeks a complete, unconditional dismissal of the Contest Proceedings. [Respondent] will be compelled to issue an entirely new set of written discovery requests, re-notice all depositions, re-issue third-party subpoenas, and endure the inevitable objections, motions in limine, and dilatory tactics of the Acting Secretary. (". . .")
>
> Because [Respondent] and the Acting Secretary (with significant assistance from the Court) have already engaged in extensive discovery on topics that are certain to arise again, [Respondent] respectfully requests the Court consolidate these cases prior to dismissing the Contest-Proceeding dockets. This will prevent the Parties from duplicating efforts in discovery, which could again require the Court's intervention to resolve discovery issues already addressed in the Contest Proceedings. Accordingly, the interests of judicial economy favor consolidation prior to dismissal.

Resp't Resp. to Sec'y Am. Mot. to Dismiss at 4.

The Acting Secretary opposes Respondent's arguments concerning consolidation, instead arguing that

> The question in the interference case is not whether striking miners are "miners." It is whether, from the perspective of a reasonable miner, [Respondent's] actions tended to interfere with miners' or miners' representatives' exercise of protected rights, and whether those actions were justified by a legitimate and substantial

> business interest. See 30 U.S.C. 815(c)(1); *Marshall Cnty. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 923 F.3d 192, 201-204 (D.C. Cir. 2019). That analysis focuses on any reasonable miner or miners' representative, not on any particular one. *Wilson v. Fed. Mine Safety & Health Rev. Comm'n*, 863 F.3d 876, 882 (D.C. Cir. 2017).

Sec'y Opp'n to Resp't Mot. to Consolidate at 2.

I agree with the Acting Secretary's reasoning essentially for the reasons set forth in her Opposition. It appears that the relevant question in the interference complaint is not limited *only* to whether striking miners are "miners" as defined in the Mine Act, but also, as the Acting Secretary puts it, "how a reasonable miner or miners' representative—regardless of whether any particular person was on strike—would be affected by Respondent's actions." Sec'y Opp'n to Resp't Mot. to Consolidate at 2. I also agree with the Acting Secretary's assessment that the discrete issues in the contest and penalty cases and in the recently filed interference case are different. Certainly, there will be some overlap between the facts at issue in these cases and the interference case, as they collectively relate to Respondent's alleged conduct towards striking workers during the strike at the No. 4 and No. 7 mines. However, there is now an unconditional offer to return to work and the Acting Secretary asserts that she will rely on new witnesses and different evidence in the interference matter; introduce new evidence that will purportedly show that Respondent "filed a motion in state court seeking to hold persons in contempt of court for exercising their statutory [walkaround] right to accompany MSHA;" and submit state court filings that are "unique to the interference issue and were not offered in the contest and penalty proceedings." Sec'y Opp'n to Resp't Mot. to Consolidate at 2-3.

Finally, I agree with the Acting Secretary's position that discovery in the interference case will not necessarily be duplicative of that conducted in these contest and civil penalty cases. Generally, section 105(c) complaints occur when an operator has allegedly denied or interfered with statutory rights such as walkaround rights or used other legal proceedings to interfere with statutory rights. *See Marshall Cnty. Coal Co*., 923 F.3d at 201-204. Although Respondent claims that the "Parties (and this tribunal) may be forced to largely duplicate their significant efforts in discovery because the Acting Secretary seeks a complete, unconditional dismissal of the Contest Proceedings," the discovery in the contest and penalty cases concerned citations for alleged violations of section 103(f), whereas the interference case will concern Respondent's alleged violations of section 105(c). *See* 30 U.S.C. § 815(c)(2). What is necessary to prove a violation of 105(c) is different from what is relevant to prove a violation of section 103(f), particularly since the Secretary dropped Count One of the original interference complaint.

In short, the undersigned finds insufficient evidence currently before me to conclude that the matters at issue in the interference cases are sufficiently similar to those at issue in the contest and civil penalty cases as to warrant consolidation. *See* 29 C.F.R. § 2700.12; *see also Pennsylvania Electric Company*, 12 FMSHRC at 1565. More importantly, the Acting Secretary has exercised her unreviewable discretion to dismiss the contest and civil penalty proceedings. *See RBK Constr., Inc.*, 15 FMSHRC 2099. Respondent does not oppose that dismissal, it merely seeks to delay it. I see no good reason to watch these cases languish on the Commission's docket when the Acting Secretary's unreviewable discretion to dismiss these proceedings

essentially makes resolution of these matters moot. Respondent may use any discovery already obtained in these matters as evidence, if relevant, in the interference proceeding, and may pursue additional discovery in that proceeding.

Accordingly, I deny Respondent's motion to consolidate, and grant the Acting Secretary's Amended Motion to Dismiss.

ORDERS

For the reasons discussed above, the Acting Secretary's Amended Motion to Dismiss is **GRANTED.**

Further, Warrior Met's Motion to Consolidate is **DENIED.**

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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