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No Review Was Granted or Denied During The Month Of February 2024

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

February 2, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. AMERICAN SODA, LLC	Docket No. WEST 2020-0278

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

DECISION

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to American Soda, LLC,[1] alleging that the operator failed to immediately contact MSHA, as required by 30 C.F.R. § 50.10(b), after a miner suffered an injury which had a reasonable potential to cause death. American Soda contested the citation before a Commission Administrative Law Judge. After a hearing on the merits, the Judge found that the Secretary demonstrated that the operator violated the mandatory safety standard.[2] 43 FMSHRC 477 (Nov. 2021) (ALJ). American Soda then filed a petition for discretionary review, which the Commission granted.

The Commission vote is split on whether to affirm the decision of the Judge. We, Chair Jordan and Commissioner Baker, write first and vote to affirm the Judge's decision; the separate opinions of our colleagues follow. In the absence of a majority decision, the Judge's decision shall stand as if affirmed. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3rd Cir. 1992).

I.

Factual and Procedural Background

[1] At the time the citation was issued and during the proceedings before the Judge, American Soda was known as Solvay Chemicals, Inc.

[2] The Judge also affirmed the citation's significant and substantial designation and found that the violation was the result of a moderate degree of negligence. He assessed a $6,159 civil penalty. The "significant and substantial" terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1).

A. Factual Summary

On January 31, 2020, at approximately 11:05 a.m., a section of roof fell at American Soda's underground trona mine in Sweetwater County, Wyoming. Rock struck and injured miner Delbert Hauser.

Prior to the roof fall, Hauser had been operating a bore miner. The bore miner's shear pin became damaged during active mining operations. Hauser backed the machine out from the cut. Hauser then gathered his tools and attempted to make repairs at the front of the machine, in close proximity to the recent cut and unbolted roof. Miner Shane Dodge came over to assist. As they were working, a section of the unbolted roof collapsed, striking Hauser.[3] Tr. 259.

Hauser further testified that a large slab of rock from the roof fell onto him, dislodged his hard hat, and drove him into the ground. An additional smaller rock subsequently struck him directly on his unprotected head. Hauser stated that the second rock "rang [his] bell pretty good." Tr. 128. The larger rock tore the clothes on his back. Tr. 129. Hauser testified that immediately afterwards, he was unable to see out of his swollen right eye and his left eye was full of blood and dirt. Tr. 129. Hauser could feel blood weep from a gash on the back of his head. Tr. 133. Hauser believed that his body was going into shock. Tr. 130. Hauser gathered himself and moved to the front side of the bore miner. He testified that when one of his fellow miners saw the extent of his injuries, he observed the co-worker vomit. Tr. 131.

Dodge testified that after the fall he saw Hauser lying on the ground, without a hard hat. Tr. 209. Dodge testified that upon getting up, Hauser appeared "dazed and confused," had a gash on the back of his head and kept on saying "I'm all right." Tr. 199. Neil Mattinson, the production foreman, and Wendalle Boyd, a crew member, were standing by the rear of the bore miner when the roof fell. Mattinson called the hoistman and told him that Hauser had been struck by a rock, and needed an ambulance. Tr. 259-60, 278-81. Although Dodge, Mattinson, and Boyd were in the area when the roof fell, no one testified to seeing the roof fall or the size of the rocks that hit Hauser.

Hauser's fellow miners treated him on the scene with a first aid kit, bandaging his head and providing an ice pack. Hauser reportedly refused to be placed on a backboard or in a cervical collar. Hauser testified that he has little memory of these events. Tr. 129-32. His fellow miners testified that he appeared to be coherent. Mattinson and Dodge traveled in the mantrip with Hauser to the hoist, a journey of 20 to 30 minutes. Hauser then walked onto the hoist and rode another three to five minutes to the surface.

Shawn Marshall, the mine's operations manager, was on the surface when he was notified that Hauser had been injured in a rock fall underground. Marshall did not ask about the size of the fall. He told Jamie McGillis, an employee trained in first aid, that she should meet Hauser. McGillis spoke with Hauser when he returned to the surface, but did not observe his

[3] MSHA Inspector Rodney Gust testified that based on the results of his accident investigation, he believed that Hauser was standing under unsupported roof at the time of the roof fall. Tr. 42-45.

head injury as it was bandaged. Marshall observed Hauser walking on his own at the surface and did not believe that he was going to "succumb to his injuries." Tr. 184.

Hauser was evacuated by ambulance to the local hospital where medical personnel used three or four staples to close the wound on the back of his head. Tr. 135, 314. A CT scan of Hauser's head revealed that his right eye orbital socket was shattered. Hauser later underwent eye surgery at the University of Utah Hospital in Salt Lake City. Tr. 136-38.

On the day of the incident, between 11:10 a.m. and 11:30 a.m., Michael Crum, a health, safety, environment and quality manager, was notified that Hauser was being transported out of the mine after suffering an injury. Tr. 343. Crum received an update that Hauser had been struck by a roof fall, and suffered a head laceration, but was conscious and able to walk. Tr. 305, 342.

Crum did not see or speak to Hauser before he left on the ambulance to the local Rock Springs hospital. Tr. 307, 313-14. Instead, Crum talked to Marshall, who stated that when he observed Hauser on the surface, Hauser appeared coherent and walked himself to the ambulance. Tr. 307-08. Accordingly, Crum decided that Hauser's injuries did not have a reasonable potential to cause death and therefore, did not report the event to MSHA. Tr. 308, 341-42. Prior to his determination, Crum did not talk to the miners who were in the vicinity of the roof fall when it occurred (Boyd, Dodge, or foreman Mattinson). Tr. 346-47.

Marshall traveled to the hospital. Per Crum's instruction, Marshall asked an attending doctor whether Hauser's injuries were life threatening. According to Marshall, the doctor responded that the injuries were not. Tr. 173, 317. Marshall informed Crum.

Back at the mine, Mattinson, along with Tyler Hanks, the shift foreman, traveled underground to perform an investigation, including measuring the area from which the rock fell. Hanks determined that it was approximately five feet wide, by ten feet long, and one to three inches thick. Mattinson testified that the rock that fell was mainly trona, which is very dense and hard. After the investigation was complete, mining resumed. Had the accident been reported to MSHA, the Mine Act would have required that the operator preserve the scene for investigation.

On February 1, 2020, the next day, MSHA received an anonymous report that a roof fall at the mine had injured a miner. Inspector Rodney Gust travelled to the mine to investigate. Gust was unable to measure the material that fell because the operator did not preserve the accident scene. However, based on the impression in the roof, nine feet above the ground, it was obvious from where the material originated. The resulting void was approximately five feet long, twelve and a half feet wide, and one to three inches thick. Tr. 37, 67. Inspector Gust concluded that approximately 800 to 900 pounds of material fell from the roof. He determined that based on the information known to the operator immediately after the accident, MSHA should have been called.

On February 4, 2020, Gust issued Citation No. 9475179 to the operator for an alleged violation of 30 C.F.R. § 50.10(b). Gust testified that concussions and blunt force trauma to the head, neck and upper torso have a reasonable potential to cause death.

Hauser testified at the hearing that he has continued to suffer from a variety of disabling ailments including a constant migraine, occasional nausea, short term memory loss, vision problems, neuropathy in his fingers, dizziness, and balance issues. As a result of the injuries, Hauser testified that he walks with a cane, is unable to watch TV for more than a short period of time, drives less, and spends a significant amount of time sitting in the dark. Tr. 138-39.

B. The Judge's Decision

On November 9, 2021, the Judge issued a decision affirming the citation. The Judge found that Hauser was hit in the head and back by a rock with enough force to knock him to the ground. No one at the mine saw the roof fall or knew the exact size of the rock that hit Hauser in the head, but the size of the void in the roof from which the material fell was substantial. The rock knocked off Hauser's hardhat and caused serious injuries to both the back of his head and right eye. Mattinson, the crew foreman, became aware of the injury directly after it occurred. Despite this information, MSHA was not called on the day of the incident.

The Judge recognized that "getting hit on the head by a heavy object can lead to an intracerebral hemorrhage, *i.e.* bleeding in the brain" and that "[a]dverse symptoms of a brain hemorrhage will often not be visible within 15 minutes of an accident." 43 FMSHRC at 489-90.

The Judge found that given the facts, a reasonable person, presented with a similar situation, would have erred on the side of calling MSHA within 15 minutes. *Id*. at 489. The Judge noted that the "extremely short [15-minute] timeframe" requires a mine operator to make a determination "based on a very limited knowledge of the facts surrounding the injury and the nature of the accident." *Id.* at 489.

II.

Disposition

The Mine Act requires that "[i]n the event of any accident occurring in any coal or other mine, the operator shall notify [MSHA] . . . and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigation of the cause or causes thereof." 30 U.S.C. § 813(j).

In response to a series of multiple fatality mining accidents, Congress passed the Mine Improvement and New Emergency Response Act of 2006 (the "MINER Act"), which included an update to this section. S. Rep. No. 109-365, at 1-2, 9. Congress added the specific requirement that mine operators notify MSHA within 15 minutes of an accident. 30 U.S.C. § 813(j) ("within 15 minutes of the time at which the operator realizes that . . . an injury . . .of an individual at the mine which has a reasonable potential to cause death, has occurred").

MSHA promulgated an emergency safety standard, incorporating the 15-minute notification requirement at 30 C.F.R. § 50.10. Section 50.10(b) states, in pertinent part, that "[t]he operator shall immediately contact MSHA at once without delay and within 15 minutes . .

. once the operator knows or should know that an accident has occurred involving . . . (b) [a]n injury of an individual at the mine which has a reasonable potential to cause death."

As the Third Circuit recognized:

> [I]t is plain that the notification requirement was designed to serve the Mine Act's unyielding purpose of protecting miners by encouraging rapid notification, thereby allowing MSHA to effectively initiate an emergency response and to ensure the preservation of evidence for use in investigations. The notification requirement should be interpreted to effectuate that purpose.

Consol Pa. Coal Co., LLC v. FMSHRC, 941 F.3d 95, 106 (3rd Cir. 2019). In *Consol*, the Third Circuit stated that in determining whether an injury has the reasonable possibility to cause death, a mine operator should be guided by principles that favor MSHA notification. In accordance with that principle:

> First, reasonable doubts must be resolved in favor of notifying MSHA; second, liability must be assessed based on whether a reasonable person in the circumstances would view the injuries as having a reasonable potential to cause death; third, the totality of the circumstances must be considered; and fourth, the focus must be on the information available around the time of the injury, so post-hoc medical evidence is less probative.

Id. at 103. In total, the notification requirement "must be analyzed on an objective basis, asking whether a reasonable person in the circumstances would view a miner's injury as having a reasonable potential to cause death." *Id.* at 107.

The Commission has stated that given the need for prompt notification, "the nature of the accident" is highly relevant in determining whether an event is reportable. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 475 (Mar. 2015) (citations omitted). The nature of the accident includes the mechanism of the injury. *Id.* at 475-76.

The Commission reviews a Judge's findings regarding the violation in accordance with the substantial evidence standard. 30 U.S.C. § 823(d)(2)(A)(ii)(I) (the Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing a Judge's factual determinations). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989). Substantial evidence may be met by "reasonable inferences drawn from indirect evidence." *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 989 (Dec. 2006). Substantial evidence means "more than a scintilla but less than a preponderance." *Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012).

As we will demonstrate, the Judge's finding that a reasonable person would have concluded that, based on the totality of the circumstances and information available at the time of

injury, that Hauser's injuries had a reasonable potential to cause death, is supported by substantial evidence in the record.

It is undisputed that a large amount of material from the roof fell. The area from which the fall occurred was at minimum five feet wide, ten feet long, and one to three inches thick. Tr. 35-37; 208, 269, 291-92; Jt. Ex. 31. The roof was approximately nine feet high. Inspector Gust estimated that based on his own measurements, approximately 800 to 900 pounds of rock was dislodged in the fall. Tr. 63. Foreman Mattinson testified that that the rock that fell was mainly trona, which is "very dense . . . way harder than coal." Tr. 298-99. Mattinson heard the roof fall and assisted in tending to Hauser's resulting injuries directly thereafter.

Although it was unknown how much of this roof material hit Hauser, the undisputed evidence demonstrates that Hauser was struck with enough force to knock him to the ground, knock his hardhat off, and to cause injuries to both sides of his head. Specifically, a rock cut open the back of his head and his eye socket shattered.[4] Hauser testified that first a large rock hit him, knocked off his hardhat and drove him into the ground; subsequently a second smaller rock hit his unprotected head. Tr. 127-28, 137. Dodge corroborated that the fall knocked off Hauser's hardhat. Tr. 127, 209. The wound on the back of Hauser's head was deep enough to require staples to close it. His eyes appeared bloodied and swollen. Mattinson immediately went to get the first aid kit and then called to the surface to get Hauser an ambulance. Tr. 259. Mattinson thought Hauser had a possible head and neck injury and tried to convince him to get onto a backboard.[5] Tr. 263. Taken together, these facts would cause a reasonable person to conclude that Hauser was struck by a rock with considerable force directly in the head. As the Judge stated, because no one knew the size of the rock that hit Hauser in the head, a reasonable person should have resolved doubts on the side of notification.[6]

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[4] The Judge found that Hauser "hit the floor hard with his face." 43 FMSHRC at 489. American Soda argues that the Judge's finding is not supported by the evidence. We disagree. Hauser testified that he landed "face-down." Tr. 137. Furthermore, as a result of the fall, Hauser's eyes became swollen shut and obstructed by blood and dirt.

[5] Although Mattinson testified that Hauser "appeared fine to me," he acknowledged that he was unable to see the extent of Hauser's injuries after they were bandaged. Tr. 262.

[6] In his separate opinion, Commissioner Althen reweighs the evidence *de novo* instead of considering if substantial evidence supports the Judge's decision, as is required of the Commission under the Mine Act. *See* 30 U.S.C. § 823(d)(2)(A)(ii)(I) (the Commission is bound by statute to review a Judge's decision under the substantial evidence standard); *see also Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998) and *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 185 (Feb. 1991). Commissioner Althen then independently concludes that the weight of the evidence does not support a finding that Hauser faced a reasonable potential for death. Slip Op. at 12. Because Commissioner Althen uses an incorrect standard of review, his conclusion is defective. *See Northshore Mining Co. v. Sec'y of Labor*, 46 F.4th 718, 727 (8th Cir. 2022) ("we may not reverse merely because substantial evidence may support an opposite conclusion"). Furthermore, substantively, Commissioner

(continued…)

It is well established that blunt force trauma to the head can cause an injury with a reasonable potential for death. In fact, the preamble to the safety standard at section 50.10 notes that the head injuries that result from roof falls are the types of injuries that are known to cause a reasonable potential for death. *See* Emergency Mine Evacuation, 71 Fed. Reg. 71,430, 71,434 (2006) ("Based on MSHA experience and common medical knowledge, some types of 'injuries which have a reasonable potential to cause death' include concussions . . . major upper body blunt force trauma . . . [t]hese injuries can result from various indicative events, including . . . roof instability"). As the Judge stated, "getting hit on the head by a heavy object can lead to an intracerebral hemorrhage, *i.e.* bleeding in the brain" and that "[a]dverse symptoms of a brain hemorrhage will often not be visible within 15 minutes of an accident."[7, 8] 43 FMSHRC at 489-90.

Additionally, we note that the record evidence demonstrates that the operator failed to consider the totality of the circumstances when it determined that the accident was not reportable pursuant to section 50.10(b). Michael Crum testified that the responsibility to call MSHA at American Soda lay with the safety group, which included himself.[9] Tr. 319, 337-38. Crum was notified that Hauser was being brought to the surface after suffering an injury in a rock fall, but was conscious and coherent. Tr. 305. Crum did not personally observe Hauser, but instead relied on Marshall's observations. Crum testified that Marshall informed him that Hauser was talking, coherent and exited the mine under his own power. Tr. 307-08. Accordingly, he did not believe that the injury was reportable. He further testified that he waited to hear a report from Marshall from the emergency room doctor before making a final determination. Tr. 353. Crum's decision to wait beyond the 15-minute window to hear a doctor's diagnosis from Marshall runs contrary to the Commission's requirements for the mine operator to make a

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[6] (…continued)
Althen's central claim – that information directly from miners on the scene of the accident informed Crum's decision-making – was contradicted by Crum himself. Tr. 346-47 (Q: "Did you make any effort to go and talk to anybody who'd been in the vicinity of the accident when it happened on the day of the accident in order to determine exactly what had gone on and how bad the injuries might be?" A: "No").

[7] The lingering effects of the head trauma that Hauser continues to suffer are illustrative of the severity of unobservable injuries that often accompany such events. However, as the Judge correctly recognized, Hauser's present condition does not determine whether the operator should have called MSHA within the 15-minute reporting window after the accident. *Id*. at 488 ("the most critical [facts] to my analysis are that no one saw the roof fall, no one knew the size of the rock that struck Hauser's head, and that Hauser suffered a severe blow to the head").

[8] Section 50.10(b) does not require the Secretary to prove as a matter of medical fact that the injury suffered had a reasonable potential to cause death. *Consol Pa. Coal Co.*, 40 FMSHRC 998, 1004 (Aug. 2018).

[9] In *Signal Peak,* 37 FMSHRC at 476, the Commission stated that "[o]nce a person with sufficient authority to call learns of an event injuring a miner, the clock begins to run on the period for evaluation of . . . a reasonable potential to cause death."

determination immediately, prior to a clinical evaluation, and to resolve reasonable doubts at the time of the incident in favor of notification.[10]

Furthermore, Crum testified that he *did not* consider the nature of the accident when making his determination. Tr. 351. Crum testified that he did not talk to the miners who were in the vicinity of the roof fall and treated Hauser's injuries at the scene. Tr. 346-47. Crum's own testimony that he did not consider the totality of the circumstances, including the mechanism of the injury, is additional evidence supporting the Judge's finding that the operator violated the safety standard.[11] Had Crum inquired about the nature of the accident, as is required by the mandatory safety standard, he would have discovered that there was a void in the unbolted roof measuring at least 5 feet by 10 feet.[12]

[10] As the Third Circuit held, "[t]he focus must be on the facts available at the time of injury, and post-hoc medical evidence can, at best, serve in the attenuated role of raising an inference about what the mine operator perceived, including the injury's apparent severity." *Consol*, 941 F.3d at 111. Similarly, we have found the relevant evidence to consist of "the evidence available at the scene of the accident, at the time of the accident, and immediately following the accident." *Consol*, 40 FMSHRC at 1003. Therefore, we have held that the operator's decision to notify MSHA under section 50.10 cannot be based upon "clinical or hyper-technical opinions as to a miner's chance of survival." *Cougar Coal,* 25 FMSHRC 513, 521 (Sept. 2003). Moreover, we have recognized that a doctor's diagnosis "will likely not materialize until the time to make a decision to notify MSHA has already passed." *Consol*, 40 FMSHRC at 1003.

[11] In his separate opinion, Commissioner Rajkovich expressed concern that the ALJ's decision "comes dangerously close to a holding that any blow to the head can reasonably result in death." Slip Op. at 24. However, the totality of the circumstances set forth above include the undisputed facts regarding the size and nature of the material that fell on Hauser, the impact the fall had on Hauser's body, and other relevant facts.

[12] Contrary to the separate opinion of Commissioner Rajkovich, the nature of the accident would have alerted Crum to the potential gravity of Hauser's injuries had Crum bothered to investigate. For instance, there was a large void in the unbolted roof; at the time of the fall Hauser was located either under unsupported roof or under the last roof bolt (43 FMSHRC at 478 n.5) and the material that fell from the roof was mainly trona (very dense, harder than coal). *See* Slip Op. at 23 n.5, 24 (Commissioner Rajkovich writing that "there is no useful information regarding the mechanics of the accident beyond the fact that the miner was struck in the head"). The fact that the falling material broke into smaller pieces upon impact (43 FMSHRC at 483) making it impossible to establish exactly how much struck Hauser does not relieve the operator of its obligation to consider *available* information regarding the nature of the accident.

As the Judge stated, the operator "should have known that a significant blow to the head could reasonably be expected to be fatal even when the injured miner was not displaying serious symptoms immediately following the accident."[13] 43 FMSHRC at 490.

III.

Conclusion

It is clear that the Judge's relevant findings are supported by substantial evidence, including his ultimate determination that a reasonable person would have notified MSHA within 15 minutes in these circumstances. In so finding, the Judge correctly applied Commission case law concerning the safety standard at section 50.10(b). Accordingly, we vote to affirm his decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

[13] In *Cougar Coal*, 25 FMSHRC 513, 520 (Sept. 2003), the Commission held that "[w]e are not persuaded by [the operator's] assertions . . . that because [the injured miner] was conscious and alert . . . [the operator] could reasonably surmise that [the miner's] injuries lacked the potential to cause death." In *Consol*, 40 FMSHRC at 1006, the Commission emphasized the importance of internal injuries, holding that a limited assessment at the mine which relied on the miner being conscious and alert would not be sufficient to determine the extent of internal injuries to a miner.

Commissioner Althen:

30 C.F.R. § 50.10(b) requires operators to notify the Mine Safety and Health Administration ("MSHA") within 15 minutes of the time the operator knows or should know that an accident has occurred involving an injury of an individual at the mine which has a reasonable potential to cause death.

Delbert Hauser was struck on the back, causing him to fall to the floor. A rock of unknown size caused a laceration in his scalp. He also suffered an eye injury.[1] During the period before the miner was transmitted from the mine to the hospital for stitches to his head, he interacted directly with five other miners, all of whom had first aid training, and one of whom was the first aid person on the mine rescue team. Each of the miners treated the accident as serious and took steps to make sure Hauser's life had not been threatened. However, none of them—not one—testified in a manner that supports a reasonable potential for death.[2]

Indeed, the miner from the mine rescue team who went to the collar when she learned of the situation testified directly and with convincing reasons that she did not think there was reasonable potential for death. As shown below, Hauser's fellow miners acted with dispatch to assure themselves that Hauser was not facing a reasonable possibility of death.

I.

Testimony of Witnesses to Hauser's Condition

A. Shane Dodge—Hourly Underground Production Employee

Shane Dodge had received first aid training. Tr. 196, 210. While working near Hauser, Dodge heard the roof fall. The fall hit Hauser on the back, knocking him down, but Dodge saw Hauser get up immediately after the fall. Tr. 199. Dodge testified that Hauser looked slightly confused but kept saying he was all right. When Dodge saw a cut on the back of Hauser's head, he thought it was just a cut that probably needed stitches. Tr. 200.

After standing immediately, Hauser stepped over a trim chain bar that was three feet high. Hauser took this step over the chain bar under his own power with Dodge "just, kind of, spotting him." Tr. 201. Hauser then walked 200 feet or more under his own power. Dodge and

[1] Chair Jordan and Commissioner Baker repeatedly refer to the eye injury suffered by Hauser. However, during the operative 15-minutes, it only appeared that Hauser had a bloody eye, which cannot be sufficient indicia of injury with a reasonable potential to cause death. To the extent post 15-minute medical evidence is relevant in this analysis, the only relevant evidence is that the doctor (at the hospital to which Hauser was taken for stitches) validated the operator's assessment that there was not a reasonable potential for death. The doctor told an operator witness that Hauser's injuries were not life-threatening. Tr. 173.

[2] The MSHA Inspector who issued the citation, Rodney Gust, never spoke with Hauser. Tr. 63.

other miners (Wendalle Boyd and Neil Mattinson) asked him questions to ensure he was all right. Hauser answered the questions correctly. They offered Hauser a backboard, but he refused it. Tr. 202. Hauser said, "I ain't getting on a f---ing backboard." *Id.*

They put a bandage on his head that immediately stopped any bleeding. Tr. 203. Hauser walked himself into the cage for transportation to the surface. Dodge described the injuries as "They were just, I mean, very – nothing too crazy – cuts." Tr. 209. Testifying to the general diagnosis by the crew, Dodge said, "He was walking. He was talking. I mean, he was being stubborn just like he always is. Like, everything was normal as if he just, you know, just got mildly hurt, I guess." Tr. 210.

B. Wendalle Boyd—Shuttle Car Operator

Wendalle Boyd was a shuttle car operator who heard the rock fall. As he walked toward the area, he saw Hauser. There was some blood on Hauser's head, but Boyd referred to the cut as a "scratch on his head." Tr. 216. Boyd got a first aid kit. When he returned, Hauser was walking by himself toward the cage. Bandaging the cut stopped any bleeding from the cut.

Boyd and other miners asked Hauser questions as part of a concussion protocol. Hauser answered the questions correctly. Tr. 217. As other miners were getting on the cage for the surface, they continued to ask him questions. Boyd testified that there was no degradation in Hauser's condition and that he responded appropriately. He sounded "fresh." Tr. 219.

C. Neil Mattinson—Mine Operations Forman

Neil Mattinson, who had first aid training, testified he was nearby when the roof fall occurred. He heard Wendalle Boyd ask if everyone was okay, and they answered, "Yes." Tr. 259. When asked how Hauser seemed, Mattinson testified that he was driving the mantrip and Hauser was fine. Tr. 262. He repeated that Hauser seemed "fine." Tr. 295.

Mattinson asked Hauser to let them place him on a backboard or to let them give him a C-collar, but Hauser repeatedly refused. Mattinson asked Hauser questions that Hauser answered correctly. They checked Hauser's eyes, and Hauser had regular, undilated pupils. Hauser was acting cranky which, according to Mattinson, was normal for Hauser. Tr. 264.

Mattinson testified,

> Basically, I felt it's a first-aid injury. It's some staples. He's got a cut on his head. His eye's a little swollen, nothing of significance. Everything seemed pretty normal. He seemed normal. His color was good, didn't look like he was in shock or going into shock. He was talking to me the whole way out. That's it.

Tr. 265.

As other witnesses testified, Mattinson said Hauser got out of the mantrip by himself and walked into the cage to ride to the surface. Tr. 266. Under cross-examination, Mattinson testified that only 3 seconds passed between the sound of the roof fall and him seeing Hauser on his feet. Tr. 277. Mattinson told the hoistman that Hauser would probably need a couple of stitches, and that Mattinson never saw anything that would cause him to call the hoistman back. Tr. 265.

Mattinson testified he had called it a first-aid injury. Tr. 286-87. Asked to explain what he meant, he testified,

> And I'm the not making light of the – it's not a big deal. It'd be like your kid having a crash on their bike, and they got a wound. And you clean it. You put some wrap on it. And then if it's deep enough, you're going to take them to the hospital to get some stitches.

Tr. 287.

Mattinson, who testified he was familiar with the conditions of shock, testified Hauser did not appear to be going into shock. Mattinson explained that he formed that opinion of Hauser by:

> Just him talking to me, answering my questions that I had. I was checking – I was looking at the color of his skin. His breathing was normal. He didn't have – he wasn't, like, in a panic. He seemed normal, and he could answer all the questions that I was asking him, and he seemed aware of his surroundings.

Tr. 295.

Mattinson further testified, "I was driving the man trip, and him and I were having conversations, and he seemed perfectly fine. He was engaged in the conversations. That's one of the ways I was monitoring him on the way out." Tr. 295.

D. Shawn Marshall—Operations Manager

Shawn Marshall served on the mine rescue team for ten years. Tr. 156. He was in the mine office when a safety representative informed him of the accident. He received information that Hauser was walking onto the cage to exit the mine at the surface. Tr. 159. Marshall went to the mine collar and saw Hauser walk off the cage under his own power. Tr. 161. Marshall testified that Hauser showed no sign of unsteadiness or needing any assistance. *Id.*

When asked on examination to describe his feelings about Hauser's condition based on his observations, Marshall testified:

> Q. While you were talking to him, what was your impression of his overall condition?

> A. Good. Good. I mean, I observed the black eye, the cut on his eye. He had a bandage on his head. It was white. Wasn't no signs of blood or anything. The eye wasn't bleeding. He could talk. He was standing upright. He wasn't hunched over. He wasn't, you know, exhibiting any signs of internal damage or anything. So, I felt real good about him.

Tr. 162-63.

Marshall further testified that Dave Stephenson, the Mine Safety Representative, and Jamie McGillis, a mine rescue team's first aid person, were also at the collar when Hauser arrived on the surface. Tr. 161-62. Hauser was walking on his own. Hauser started to tell Marshall what had happened and to apologize for it. Tr. 162.

At that point, Hauser walked to the ambulance and entered it himself, walking up a ladder and sitting down. Marshall then called the site manager and told him Hauser had headed to the hospital, probably for stitches.

Then, Marshall saw the General Mine Manager, Mike Crum, in the office. Crum had already talked to Dave Stephenson. Marshall told Crum that Hauser would be all right. Marshall went to the hospital, where nothing occurred to change his mind about Hauser's condition. In looking at the exhibit showing the laceration on Hauser's head, Marshall testified:

> Q. On the second photo for the back of his head, do you have any sense of how long that laceration to his scalp is?
> A. Roughly two inches.
>
> Q. Was it deep?
> A. It didn't appear to be. But, I mean, the picture says a lot. It's not a big open, gaping wound. It's a cut to the scalp. I mean, there's not a lot of muscle or anything there. It's just skin, so.

Tr. 171.

Marshall's testimony is replete with his observation that Hauser did not appear to be in a condition that would indicate a danger to Hauser's life.

E. Jamie McGillis—Underground Utility Crew Member

McGillis had worked for thirty years at the mine. At the time of the incident, she worked on an underground utility crew. McGillis was the first aid person on the mine rescue team and had considerable ongoing training for that position. She was at the curtain when Hauser arrived on the surface. She testified that she and Hauser exchanged niceties. Then, McGillis went with Hauser to the ambulance. Tr. 226. Hauser was coherent and able to understand everything that was happening. Tr. 226-27. McGillis did not see any indication of an internal injury.

Responding to a series of questions from counsel, she testified:

> Q. Any sense of what his respirations were?
> A. He breathed normally.
>
> Q. And how about capillary refill?
> A. I believe the EMT that was in the ambulance did the capillary refill. We put the oxygen – oximeter on his finger.
> Q. And did that give a low result, or did that give a normal result?
> A. It was normal.
>
> Q. And was he able to follow commands?
> A. He followed commands. He talked to us, was coherent, knew where he was at that time.

Tr. 243.

Finally, McGillis testified that while she was with Hauser, she did not think that his injuries or symptoms had a reasonable potential to cause death. Tr. 245.

F. Michael Crum—Health, Safety, Environment, and Quality Manager

Due to his position, Michael Crum had received first aid training. Tr. 303. He went to the mine office for more information when he learned of the accident. Upon reaching the office, he learned that Hauser was conscious and coherent. Tr. 305.[3] Crum went to the collar. However, Hauser had left before Cum got there.

Crum talked to Shawn Marshall, who told Crum of his observations. Tr. 307-08. Crum relied upon his conversations with another miner, Dave Stephenson, and Marshall, who had talked with the other witnesses. Based upon those reports, including, among other things, that Hauser was upright, talking, coherent, had walked from the cage to the ambulance, and got in the ambulance by himself, Crum concluded that they had not seen any symptoms indicating a reasonable potential for death. It is appropriate to observe that Crum based his decision upon firsthand information from Stephenson and Marshall, recapitulating all the preceding facts.[4]

In discussing his decision regarding calling MSHA, Crum explained:

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[3] Crum found out that Hauser had to wait two hours at the hospital for treatment. Crum instructed Marshall to follow-up at the emergency room where they went for stitching. Marshall did so and was told the injury was not life threatening. Tr. 314-15.

[4] It is unfair for Chair Jordan and Commissioner Baker to attempt to use Crum's desire to be kept up to date on Hauser as a basis for not paying attention to the overwhelming evidence regarding a reasonable possibility of death. Such a request is the action of a responsible and thoughtful manager desiring to be assured continually of an employee's status and welfare. It speaks well of Crum and does nothing to support their erroneous view.

> [that Hauser] was walking . . . was coherent . . . never lost consciousness . . . had a laceration to his head, had some scrapes on his back, got out, walked to the Jeep. He was, really, kind of, directing his own care, according to the miners that were there. He walked onto the cage, walked off the cage, walked in – you know, got himself into the ambulance. At no time was anybody – at that point, no one thought that his injuries were life-threatening, including [the operator's] . . . medical responder.

Tr. 332 (emphasis added).

On cross-examination, MSHA's attorney asked Crum to summarize why he did not think he needed to make a 15-minute call. Crum responded:

> The information we received from the hoistman from underground that Del was up, he was moving, he was conscious, he was getting in the Jeep, and they were bringing him out. There was nothing that was said that was conveyed by Neil Mattinson, by the hoistman, by Jamie McGillis, by either Shawn Marshall or Dave Stephenson that indicated that we had an injury that had reasonable potential to cause death.

Tr. 342-43.

MSHA's attorney then elicited testimony by asking if the next piece of information Crum received was a call or a text from Shawn Marshall from the hospital saying that the doctor said that Hauser's injuries were not life-threatening. The attorney asked specifically, "Is that the next piece of information?" Tr. 345-46. Crum affirmed that he believed it was. The doctor confirmed that the injury was not life-threatening.

II.

Disposition

For injury reporting violations, the Commission has an established formula for determining whether an operator must inform MSHA of the injury. Examining the totality of the circumstances, the Commission must determine if a reasonable person would conclude that the injury had a reasonable potential to result in death. If reports on the severity of an accident indicate a reasonable potential for death, the operator should err on the side of caution.

Regarding the scope of the probative evidence, operators need not, and indeed cannot, perform an exhaustive accident investigation or medical exam in 15 minutes but instead, are required to attempt to assess the situation in good faith and without delay. *See Consol Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). Thus, the "totality of the circumstances" encompasses only readily available information, such as any observable indicators of trauma and, to a lesser extent, the nature of the accident. *Signal Peak*, 37 FMSHRC 470, 476 (Mar. 2015), *Consol*

Pennsylvania Coal Co., 40 FMSHRC 998, 1004 (Aug. 2018) ("***Of course, the primary information relevant to the analysis is the nature of the injury and the miner's condition***"). The primacy of the miner's condition is vital in this case because the ALJ gave virtually no consideration to the miner's condition, as reported by a host of miners. Instead, the ALJ based his decision solely on the absence of evidence over the size of a rock that caused a superficial cut to Hauser's head.

A. Totality of the Circumstances

As there were no first-hand witnesses to the instant when the fall of rock occurred, the exact nature of the accident is unknown. However, combining the testimony of the miners, the only fair summary of the facts is that some portion of the roof struck Hauser in the back with enough force to cause him to fall. A separate rock of unknown size caused a two-inch superficial cut on the top of his head. Hauser immediately stood up on his own without any loss of consciousness and stepped over a three-foot high barrier. He told another miner that he was all right and walked by himself hundreds of feet to a cage for the surface. During that time, miners quickly stopped any bleeding by applying a bandage.

Counsel for the Secretary stated in her opening statement that Hauser "brushed the rocks off of his body." Tr. 5. Shane Dodge, the first miner to see Hauser, was asked if he saw Hauser brush rocks off his back. He testified, "Yeah, when he was getting up, there were, like, teeny tiny rocks coming off of him, yeah, nothing too crazy." Tr. 209.

Of course, the first question in investigating an accident is: "How is the miner?" Here, multiple experienced miners with first aid training and, cumulatively, dozens of years of mining experience, testified that Hauser needed medical attention for a cut on his head but was not so hurt as to be in any potential danger of death. His condition did not create a concern of a reasonable potential for death.

Hauser's color was good. Tr. 265. His pupils were normal. Tr. 264. His breathing and oxygenation were fine. He talked coherently. Tr. 305. He adamantly refused the offer of a backboard or any other assistance. Throughout the walk and the ride to the surface, miners asked him questions to assure themselves of his mental condition. Hauser answered the questions appropriately. At the surface, the mine emergency first aid specialist asked him questions and saw him step into an ambulance. She did not believe he was in danger of death. Tr. 234. No miner with whom he interacted testified that he/she believed there was a reasonable potential for death or that he/she had any fear for Hauser's life at any point.[5]

[5] In some cases, observed facts of an accident may give context to the injury and give rise to a reasonable possibility for death. For example, in *Consol Pa. Coal Co., LLC v. FMSHRC*, 941 F.3d 95 (3rd Cir. 2019), a multi-ton piece of equipment rolled into another stationary multi-ton piece of equipment crushing a miner's abdomen between them. Fellow miners had to dislodge the injured miner from between the large pieces of equipment. On the scene, the miner lost the ability to move his legs and was showing signs of bleeding in the abdominal cavity.

(continued…)

The *Secretary's counsel* chose to bring out during cross-examination the treating doctor's opinion that there was *not* a reasonable potential for death. Tr. 345. That testimony, while of minor probative value by itself, added to the overwhelming evidence that Hauser's condition did not create a reasonable possibility of death. The doctor's medical examination revealed by the Secretary did add to the quantum of evidence that the experienced miners who helped Hauser and cumulatively advised Crum were correct that the injury did not create a reasonable possibility of death, and that Crum acted reasonably in accepting their opinions.[6]

The cumulative testimony is that Hauser was conscious, aware of his surroundings, carrying on normal conversations, able to answer questions typically, walking and climbing steps by himself, had good color, did not have memory problems, and was not nauseous or feeling sick. In short, none of the reasonable miners, all with first aid training, had any concern that Hauser had a reasonable potential for death. Michael Crum, the manager and responsible official, decided not to call MSHA based on all this information regarding Hauser's physical condition.[7] The critical question is whether Crum exercised the judgment of a reasonable person when he decided not to call MSHA. He did. The evidence noted above and immediately below demonstrate that the reports from the scene by a host of experienced miners showed that there was no reasonable cause to believe Hauser's condition posed a reasonable potential for death.

B. Reasonable Potential to Cause Death

In this case, the views of many reasonable persons weigh fully, indeed outcome determinatively, against a finding of a violation. Five miners saw Hauser after the accident and

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[5] (…continued)
While it was not known with medical certainty that this injury had the reasonable potential for death, the condition of the miner—in the context of knowledge that the miner was crushed between large pieces of equipment—was sufficient to trigger the reporting requirement.

In this case, nobody witnessed the precise moment of Hauser falling to the floor. However, virtually instantly thereafter, witnesses saw Hauser brushing the small pieces of rock off his back, immediately standing up, and stepping over equipment. He had a bloody eye and a small bleeding cut on his head that immediately stopped bleeding upon application of a bandage. None of the miners that treated him testified to a lump or bump of any kind at any place on his body or on his head.

[6] Chair Jordan and Commissioner Baker object to any reference to the doctor's opinion even though the Secretary brought out this evidence. Elsewhere, however, they mention that although no one asserted the eye injury was reasonably likely to cause death, it eventually required surgery. Slip Op. at 3. They object to relevant evidence going to the potential for death but rely upon later-learned evidence of a non-life-threatening injury.

[7] Recapitulating Crum's testimony, he testified, "There was nothing that was said that was conveyed by Neil Mattinson, by the hoistman, by Jamie McGillis, by either Shawn Marshall or Dave Stephenson that indicated that we had an injury that had reasonable potential to cause death." Tr. 342-43.

were able to examine the nature of his injuries and his general condition. No one claims that any miner acted in bad faith or gave erroneous testimony. Moreover, it is indisputable that a fact-finder could only conclude that the miners acted reasonably and with dispatch. Each took careful note of Hauser's situation and treated him appropriately. From their testimony, it is beyond doubt that none of these five reasonable persons viewed the injuries as having a reasonable potential to cause death.[8]

These five reasonable and experienced miners characterized the injuries as (1) "everything was normal as if he just, you know, just got mildly hurt." Tr. 210. (2) Hauser seemed "fresh." Tr. 219. (3) "Basically, I felt it's a first-aid injury. It's some staples . . . He seemed normal. His color was good, didn't look like he was in shock or going into shock. He was talking to me the whole way out." Tr. 265. (4) "He wasn't, you know, exhibiting any signs of internal damage or anything. So, I felt real good about him." Tr. 162-63. (5) "He breathed normally [his oxygen] was normal [h]e followed commands [and] was coherent." Tr. 244.

None of the five identified any indicia of an injury that would lead a reasonable person to believe Hauser suffered a potentially fatal injury. Our colleagues do not even meaningfully discuss the case from the standpoint of Hauser's condition. The testimony revealed that Hauser stood immediately, stepped over a three-foot high barrier, spoke coherently (indeed forcefully to Shane Dodge), had a cut that stopped bleeding with the application of a bandage, walked by himself, answered questions quickly and correctly, climbed steps into the transport, did not exhibit dizziness or nausea, had good skin color, normal eye dilation, and a good oxygen level.

Chair Jordan and Commissioner Baker correctly state that the notification requirement "must be analyzed on an objective basis, asking whether a reasonable person in the circumstances would view a miner's injury as having a reasonable potential to cause death." Slip Op. at 5, citing *Consol Pa. Coal Co., LLC v. FMSHRC*, 941 F.3d 95, 107 (3rd Cir. 2019). They do not claim and cannot cite evidence to assert that any experienced and trained miners witnessing Hauser's condition were unreasonable, partly or in the aggregate. The ALJ did not find that their testimony lacked credibility. Most importantly, they are the miners who reported Hauser's condition to Crum. He based his decision not to call MSHA on their first-hand, knowledgeable evaluations. Tr. 307. It was undoubtedly objectively reasonable for Crum to rely upon the miners' reports in making his decision.

Elsewhere, Chair Jordan and Commissioner Baker erroneously assert that this opinion "reweighs" the evidence. Slip Op. at 7 n.6. This opinion "recites" the evidence and finds that the direct eyewitness testimony of multiple qualified witnesses as to Hauser's actual condition rebuts, as a matter of law, the ALJ's conclusion that, because no one had found in 15 minutes the specific piece of debris from the crumbled rocks at the scene that caused a superficial and easily stitched cut on Hauser's head, the operator should have found a reasonable possibility of death.

[8] The ultimate question is whether Crum acted reasonably in deciding that the event did not require a call to MSHA to report a reasonable potential for death. The reports of these miners and other managers were the totality of information available to him. This information synthesized, distilled, and reported to him demonstrate that Crum's decision was reasonable.

The ALJ's view disregards the unanimous opinion of every miner who saw Hauser that there was ***not*** a reasonable possibility of death.

As the testimony was uniform in assessing Hauser's condition, it would be improper for the Commission to craft uncertainty where none existed. Before rebuking the operator for failing to err on the side of caution by reporting an injury, the Commission must be able to identify specific fact-based reasons that should have caused miners to fear for Hauser's life. Uninformed fears by a Judge hundreds of miles from the scene months after the accident and not taking into consideration evidence of the miner's condition is wholly inadequate. Reasons for doubt arise from the facts of the case—witnesses' testimony and other evidence. Such doubts depend upon whether reasonable persons viewed the injuries as having a reasonable potential to cause death and the totality of the circumstances.[9]

The ALJ issued an insupportable decision without medical testimony, opinion, or support. Neither the ALJ's decision nor the opinion of Chair Jordan and Commissioner Baker attempts to cite any medical expert or any medical evidence that every cut on a scalp creates a potential for death. Only pebbles or small pieces of rock remained at the scene. The ALJ concluded on his own without supportive evidence that every cut from an impact to the head, superficial or not, created a reasonable potential for death. He cannot and does not cite any authority for that proposition. Thus, his conclusion had no evidentiary, scientific, or medical basis.[10]

Lastly, although the circumstances of the accident are less relevant to the analysis, I note that the 15-minute time frame is brief and often does not leave any time for miners to consider the full circumstances of the accident. Indeed, the immediately identifiable facts of the accident do not establish that a potentially fatal accident occurred. As recited above, witnesses within seconds of the incident saw Hauser brush off small rocks or pebbles, stand, go over a barrier, answer questions coherently, and obtain relief from a small cut on his head by application of a bandage. Taken as a whole, the testimony demonstrates that none of the witnesses who

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[9] It would be foolish to submit that "reasonable doubt" simply adds an additional round of potentiality to the analysis meaning the Mine Act would provide for reporting if there were "a reasonable potential of a reasonable potential for death." Reasonable potential must mean witness testimony or other evidence that demonstrates observations or occurrences that may have led a reasonable person to think that there was a reasonable potential for death.

[10] Obviously, the absence of medical evidence that every cut creates a potential for death does not mean that such injuries should be shrugged off or treated as matters of no concern. The proper course of action is exactly what was done by the miners in this case. The injured miner must be immediately assisted and evaluated. The miner must be treated and transmitted to a facility for attention to cuts or other injuries. However, it is contrary to the Mine Act to fabricate a reasonable potential for death where the evidence demonstrates such potential did not exist. All the evidence that was discovered and known in this case compel against finding a duty to call MSHA.

examined him and bandaged the superficial cut on his head considered there was a reasonable potential for death, and that Crum reasonably relied upon them.

III.

Conclusion

The evidence demonstrates that substantial evidence does not support a finding that Hauser's injury created a reasonable potential of death. No medical evidence supports a finding that every cut creates a reasonable potential for death. The overwhelming weight of the evidence demonstrates that substantial evidence does not support a finding that Hauser faced a reasonable potential for death.

The finding of a violation should be reversed.

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

Commissioner Rajkovich:

Operators generally have ten working days to report accidents, occupational injuries, or occupational illnesses to the Mine Safety and Health Administration ("MSHA"). 30 C.F.R. §§ 50.20, 50.20-1. However, if the operator knows or should know of an accident involving an "injury . . . at the mine which has a reasonable potential to cause death," the operator must notify MSHA within 15 minutes.[1] 30 C.F.R. § 50.10(b). To determine whether this increased burden applies, the Commission must ask whether, based on the totality of information available at the time of the accident, a reasonable person would view the injuries as having a reasonable potential to cause death. *Consol Pa. Coal Co. LLC v. FMSHRC*, 941 F.3d 95, 103 (3rd Cir. 2019). There is no presumption that every head injury is to be considered potentially fatal. With that in mind, a reasonable person could not have considered the information available at the time and concluded that Delbert Hauser faced a reasonable prospect of dying due to his accident. Accordingly, substantial evidence does not support the Judge's finding of a violation.

The totality of information available to the operator[2] in the short-term aftermath of the accident was as follows:

- Mechanics of the Accident: During a roof fall, some amount of rock struck miner Delbert Hauser. The size and weight of the rock that hit Hauser was (and still is) unknown. The only information available regarding the force of the impact is that it was heavy enough to dislodge Hauser's hardhat and knock him to the ground, but light enough that he could push off the fallen rock and stand up.[3] Tr. 127-28, 186, 209.

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[1] By its plain language, this increased reporting burden applies to accidents which have a *reasonable prospect of killing the injured miner*, not just a reasonable potential for serious injury or a remote possibility of death.

[2] Here, Michael Crum, manager of health, safety, environment and quality, was the person responsible for deciding whether MSHA needed to be contacted immediately. Chair Jordan and Commissioner Baker take issue with Crum's decision-making process, specifically his reliance on others' observations and his failure to consider the nature of the accident. Slip Op. at 8-9. Five witnesses testified that they observed and treated Hauser's injuries, and confirmed he had a 2-inch laceration to his scalp and bruising around his right eye, but he was coherent and able to walk under his own power. Tr. 160-62, 199-200, 202-04, 210, 218, 232-34, 263-67. It was not unreasonable for Crum to rely on multiple consistent reports, given the need for a prompt decision. Regardless, any investigative failures on Crum's part are harmless in this instance. Based on the testimony of those who *did* personally observe Hauser, the field of available information simply did not suggest a reasonable potential for death. Nothing in the record suggests Crum could have gained additional information beyond these listed facts that would have changed his determination.

[3] The *total amount* of fallen rock was subsequently estimated at 800 to 900 pounds, but no one saw the rock strike Hauser. Tr. 41, 207. As Hauser was able to stand up again, we can rationally assume he was *not* struck with the entire weight. Chair Jordan and Commissioner

(continued…)

- Physical Injuries: Hauser had a two-inch cut on the back of his head, and one eye was swollen and bleeding. Tr. 129, 133, 199-200, 226-27, 233.
- Indications of Trauma: Hauser was a bit dazed immediately after the accident (Tr. 199) but was conscious, coherent, able to talk, and able to walk to the ambulance unassisted. Tr. 184, 226, 307.

As discussed below, these facts are insufficient to reasonably suggest (or even raise reasonable doubts regarding) a reasonable potential for death.

Some types of injuries have been recognized as posing a reasonable potential for death, such as concussions, cases requiring CPR, limb amputations, major upper body blunt force trauma, or extended unconsciousness. Emergency Mine Evacuation, 71 Fed. Reg. 71,430, 71,434 (2006). While this list is non-exhaustive, it clearly indicates the standard is meant to address injuries that pose a reasonable risk of brain trauma, cardiac arrest, internal injury, or severe external blood loss. Here, it cannot reasonably be argued that the visible injuries themselves (the head laceration and swollen eye) were potentially fatal. Accordingly, the question is whether the totality of circumstances reasonably suggested a hidden potentially fatal condition such as brain trauma or internal injury.

The facts in this case are significantly distinguishable from other cases in which the Commission has found an immediately reportable injury based on the totality of circumstances. In *Consol*, a miner was conscious and had a strong pulse, but had been crushed between two multi-ton pieces of equipment, was in severe pain, could not move or feel his legs, and had a distended stomach. 941 F.3d at 114. In *Signal Peak Energy LLC*, a miner had no obvious signs of concussion but had been propelled 50-80 feet, had difficulty moving and breathing, and had a significant back protrusion. 37 FMSHRC 470, 475 (Mar. 2015). In *Cougar Coal Co.*, a miner was conscious and alert but had fallen 18 feet, hit his head on a power center on the way down, and had no pulse when he was first found. 25 FMSHRC 513, 520 (Sept. 2003). In each case, circumstantial facts regarding the mechanics of the injury and the miners' physical symptoms reasonably suggested internal bleeding, spinal injury, brain injury, and/or cardiac arrest.

Here, in contrast, a miner was conscious and alert, had been hit in the head by a rock of unknown weight (heavy enough to knock him down but not keep him down), and had a two-inch laceration on his head and a swollen and bloody eye. While the accident was clearly painful and potentially serious, none of those facts, taken together or in concert, reasonably suggest internal bleeding, brain injury or other potentially fatal conditions.[4]

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[3] (…continued)
Baker note that section 50.10 is partly intended to ensure the preservation of evidence. Slip Op. at 4. In this instance, however, even if the fallen rock had been left on the ground, it is hard to imagine how observing the fallen material could have assisted in determining *which portion* struck Hauser.

[4] Chair Jordan and Commissioner Baker note that a miner being conscious and alert, in and of itself, is insufficient to conclude that there was no reasonable potential for death. Slip Op. (continued…)

Chair Jordan and Commissioner Baker emphasize the importance of the mechanism of injury. Slip Op. at 5, *citing Signal Peak*, 37 FMSHRC at 475. It is appropriate to consider the nature of the accident as part of the totality of circumstances, and known facts regarding the mechanism of injury can carry great weight in some instances. However, this is a very different case from *Signal Peak*, in which the operator was aware that the miner had been thrown 50-80 feet. 37 FMSHRC at 475 n.10. Here, the available information regarding the mechanism of injury did not reasonably imply a reasonable potential for death, for the simple reason that *no useful information regarding the mechanism of injury was available*.

As the Judge conceded, all the operator had were "known unknowns" (43 FMSHRC at 489)—Hauser had been struck with some amount of rock, but there was no way to determine from the physical evidence of the rock fall *how much* of the rock hit him, *i.e.* the force of the impact.[5] All the operator could know was that Hauser *could have* been struck with considerable force, and that is true of every unobserved impact injury. Section 50.10 is analyzed under a reasonable person standard. *Consol*, 941 F.3d at 107. A reasonable person would not assume every unobserved impact injury carries a reasonable potential to cause death.[6] The lack of information regarding the mechanism of injury does not weigh in favor of an immediately reportable accident in this case.

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[4] (…continued)
at 9 n.13, *citing Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003); *Consol Pa. Coal Co. LLC*, 40 FMSHRC 998, 1006 (Aug. 2018). That is true but inapposite. A miner's alertness may not conclusively establish that (s)he was not in fatal danger, but it is still part of the totality of circumstances and may be considered. (After all, if a miner was *not* conscious and alert, that would certainly be considered evidence of a concussion). In the cited cases, the fact that the miner was alert was insufficient to overcome numerous indicators of potentially fatal injury. Here, there are no indicators of potentially fatal injury to overcome.

[5] The inspector subsequently determined the size and weight of the entire rock fall. However, this is not *useful* information regarding the mechanics of the accident because (1) it was not available at the time and (2) Hauser was not struck by the entire rock fall. Useful information in this context would be the size and weight of the portion of the rock fall that actually struck Hauser, *i.e.,* the force of the impact. This was not available. It may sometimes be possible to infer the force of an impact from other facts, such as the miners' injuries. Here, however, no other available information supports an inference of sufficiently considerable force to create a reasonable potential for death. *See* p. 24, *infra*.

[6] Chair Jordan and Commissioner Baker cite the proposition that reasonable doubts should be resolved in favor of immediate notification. *Consol Pa. Coal Co. LLC v. FMSHRC* 941 F.3d 95, 103 (3rd Cir. 2019). I would emphasize that doubts must be *reasonable*, and doubts without at least some basis in fact are inherently *un*reasonable. The requirement to resolve reasonable doubts in favor of notification does not require operators to resolve *all unknowns* in favor of notification. Here, there are no facts regarding the mechanism of injury from which reasonable doubt might arise. It is not reasonable to be told "someone was hit in the head with a rock, I don't know how hard" and be concerned that person might die.

Chair Jordan and Commissioner Baker also emphasize the general dangers of head trauma, agreeing with the Judge's statement that "a significant blow to the head could reasonably be expected to be fatal even when the injured miner was not displaying serious symptoms immediately following the accident." Slip Op. at 9, citing 43 FMSHRC at 490. Of course, serious blows to the head can pose very real dangers. However, the question is not whether serious blows to the head can be fatal, but whether *this* blow to the head was serious enough to be potentially fatal.

Consistent with the framework in *Consol*, 941 F.3d at 103, whether a particular blow to the head was serious enough to reasonably pose a risk of death must be determined based on the totality of circumstances. Looking at all the information available to the operator at the time of the accident, there must be some fact(s) to reasonably suggest a potentially fatal condition. These may be physical symptoms such as loss of coherence, or information regarding the mechanics of the accident such as the weight or distance involved. *See, e.g., Consol*, 941 F.3d at 114 (miner crushed between multi-ton equipment); *Signal Peak*, 37 FMSHRC at 475 (miner propelled 50-80 feet).

Here, as discussed above, the mechanics of the injury provided no useful information regarding the force of the impact that struck Hauser. *See* Slip Op. at 23, 23 n.5, 21 n.3 *supra*. As for physical symptoms, Hauser was conscious and alert and appeared to have suffered no effects aside from the two-inch cut, the swollen and bloody eye, and having been temporarily knocked down. Aside from the basic fact that Hauser was hit in the head, there are no circumstances that would suggest brain trauma or internal injury to a reasonable person. Nonetheless, based on those same facts, my colleagues conclude that the impact was "considerable" enough to reasonably result in death.[7] Slip Op. at 7.

This comes dangerously close to a holding that *any* blow to the head can reasonably result in death, and therefore any blow to the head is immediately reportable, regardless of any (lack of) evidence regarding the impact of the blow. In other words, blows to the head would be *per se* immediately reportable accidents. The Secretary does not propose, and we should not adopt, such an approach. Where (as here) there is no useful information regarding the mechanics of the accident beyond the fact that the miner was struck in the head, and none of the physical repercussions of the accident suggest an injury with a reasonable potential to cause death, it is only reasonable to expect the injury to be fatal if *every* blow to the head can reasonably be expected to be fatal. Common sense tells us this is not so.

There is no question that Hauser has suffered an unfortunate injury with long-term ramifications. However, Section 50.10(b) requires immediate reporting where, based on the totality of information available at the time, a reasonable person would believe there is a

[7] Rather than referring to Hauser's eye as swollen and bloody, the opinion of Chair Jordan and Commissioner Baker specifically notes that his eye socket was shattered. Slip Op. at 6. However, that information was not available until after Hauser had been medically evaluated. Post-hoc medical evidence regarding the seriousness of Hauser's eye injury—which *still* carried no risk of fatality – carries little weight, if any. *Consol*, 941 F.3d at 111.

reasonable potential for death. That standard is not met here. The information available to the operator was that a miner had been hit in the head with some amount of rock sufficient to temporarily knock him down, cause a two-inch cut on his head and damage his eye, but not cause him to lose consciousness or become disoriented. No reasonable person would conclude, based on that information, that Hauser had a reasonable prospect of dying from his injuries.

Accordingly, I would overturn the Judge's finding of a violation.

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

Distribution:

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 16, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ITAC[1]	Docket No. SE 2023-0197 A.C. No. 31-00212-573986[2]

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

ORDER

BY: Jordan, Chair; Althen and Rajkovich, 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 June 5, 2023, the Commission received from ITAC, 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

[1] The operator's motion to reopen refers to the operator as "Industrial TurnAround Corporation." However, in its 2000-7 Legal Identity Report, the operator lists its name as "ITAC." For the purposes of this proceeding, we will use "ITAC," the operator's official name on file with MSHA.

[2] The operator's motion to reopen incorrectly lists number 31-00212-573989 in the caption, but the assessment attached to its motion is 31-00212-573986.

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 to 13203 N. Enon Church Road on April 3, 2023, and became a final order of the Commission on May 3, 2023. On June 20, 2023, MSHA sent ITAC a delinquency notice. ITAC explains that the proposed assessment was mailed to its former address, which has since been occupied by Rivers Bend East Office Group & Technology Center I, LLC ("Rivers Bend"). It states that on May 25, 2023, ITAC's Senior Procurement Agent went to its former address to look for missing packages and was provided with a number of misplaced mail and packages kept in a locked office, including the assessment package. The operator hand-delivered the assessment package to ITAC's Corporate Office Attendant, who delivered the package the next day to the appropriate personnel to handle the processing of the assessment.

On the next business day, May 30, ITAC contacted MSHA to notify MSHA of the circumstances involving the assessment package. MSHA informed the operator that because no contest had been received, a final order had been issued. ITAC also was informed that MSHA's address of record for the operator was the 13203 N. Enon Church Road address. ITAC began taking steps to prevent reoccurrence of this situation by updating its address of record with MSHA.

The Secretary opposes reopening. The Secretary argues that MSHA mailed the Proposed Penalty Assessment to the operator's address of record and that a U.S. Postal Service delivery record indicates that the "item was delivered to an individual at the address" on April 3, 2023, and that the item was signed for by ITAC. The Secretary contends that the operator's failure to fulfill its legal responsibility to update its address of record does not constitute excusable neglect warranting reopening.

ITAC does not dispute that the assessment was mailed to the correct address of record. Corporate counsel for ITAC contacted Rivers Bend and confirmed that the locked office containing ITAC's unclaimed mail belonged to an employee of Rivers Bend. ITAC has otherwise been unable to determine who signed for delivery of the assessment package. Thus, although USPS indicated that the assessment had been delivered to ITAC's former address and "signed by ITAC," the recipient of delivery is unclear. In addition, it appears that ITAC may not have been aware that its former address was listed as its address of record with MSHA since ITAC has received only two citations since 2009, including the citation at issue. Given that this is likely the contractor's first contest of a citation in fourteen years, ITAC's mistake in failing to update its address was an excusable one.

We note that the motion to reopen was timely filed once ITAC discovered the error. 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 June 5, 2023, within 30 days of having received the assessment package on May 25, and before the delinquency notification was received. Therefore, the motion was filed within a reasonable amount of time.

Having reviewed ITAC's request and the Secretary's response, we find that the operator has demonstrated good cause for its failure to timely respond and acted in good faith by timely filing its request to reopen. 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. We note, however, that a repeated failure to update one's address of record would indicate an inadequate internal process and may result in future motions to reopen being denied. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

Commissioner Baker, dissenting:

I respectfully dissent.

Section 109(d) of the Mine Act requires each operator of a coal or other mine to file with the Secretary of Labor the name and address of such mine, the name and address of the person who controls or operates the mine, and any revisions in such names or addresses. 30 U.S.C. § 819(d). Under the authority granted by the Act, the Secretary has promulgated regulations requiring an operator to provide MSHA with, among other things, its correct address of record. 30 C.F.R. § 41.11. If any changes occur with respect to this information, an operator is required to notify MSHA of the change within 30 days of its occurrence. 30 C.F.R. § 41.12. Any failure by an operator to notify MSHA in writing of a change is considered a violation of Section 109(d) of the Act and subject to a civil penalty as provided in section 110 of the Act. 30 C.F.R. § 41.13. The regulations further provide:

> Service of documents upon the operator may be proved by a post office return receipt showing that the documents could not be delivered to such address of record because the operator had moved without leaving a forwarding address or because delivery was not accepted at that address, or because no such address existed.

30 C.F.R. § 41.30.

In light of these statutory and regulatory requirements, the Commission has denied motions to reopen, in part, because the operator failed to maintain its correct address of record. *See Southwest Rock Products, Inc.*, 45 FMSHRC ___, No. WEST 2021-0275 (Aug. 30, 2023). In addition, the Commission has previously held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *See e.g. Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010).

In the instant case, it is undisputed that the proposed assessment was delivered to the operator's address of record on April 3, 2023, and became a final order of the Commission on May 3, 2023. ITAC's excuse for its failure to respond to the proposed assessment in a timely manner is that it changed offices in 2009 without notifying MSHA. As a result, it did not learn about the assessment until May 25, 2023, when its Senior Procurement Agent went to its former address to look for missing packages. It was not until May 30, 2023, 14 years after the deadline, that ITAC contacted MSHA, and performed its legal obligation to update its address of record.

The operator's failure to update its address of record does not constitute excusable neglect. In fact, the explanation is itself an independent violation of the Mine Act that could have been cited. Rather than excuse the operator's failure to timely contest the citation, it compounds the error. Further, the operator's processing system amounted to allowing mail to pile up at the wrong

address for months at a time. Obviously, that is inadequate and unreliable and does not justify the operator's failure here. I note that the Secretary opposes reopening.

It is significant that the operator provided no justification for why it took 14 years to update its official address. The majority supplies its own justification for the operator's delay, noting, "it appears that ITAC may not have been aware that its former address was listed as its address of record with MSHA since ITAC has received only two citations since 2009, including the citation at issue."

Leaving aside the fact that the operator did not cite this information in support of its motion, I do not believe that the long gap between citations issued to the operator is relevant. An operator, under the relevant regulations, is defined as "any owner, lessee, other person who operates, controls, or supervises a coal or other mine or any designated independent contractor performing services or construction at such mine." 30 C.F.R. § 41.1(a). As a result, the regulations requiring operators to inform MSHA of a change of address (among other things) apply equally to all operators, including an operator that could be characterized as "infrequent." All operators must conform their behavior to the requirements of the Mine Act, and in the interest of fairness we must consider failure to comply with those requirements consistently.

Therefore, I would find that ITAC failed to establish good cause and I would deny ITAC's motion to reopen.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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February 21, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CHAD BUUS, employed by UNITED STATES STEEL – MINNESOTA ORE OPERATIONS	Docket No. LAKE 2024-0016 A.C. No. 21-00820-581886A

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 October 13, 2023, the Commission received from Chad Buus ("Buus") 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).

On August 7, 2023, Buus received a proposed penalty assessment from the Secretary. On September 7, 2023, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days.

The operator asserts that it timely filed its contest of the assessment on August 16, 2023, via the Mine Safety and Health Administration's (MSHA) contest email address. MSHA's records confirm that the contest was timely received but had not been assigned or processed by the agency. When this error was brought to MSHA's Civil Penalty and Compliance Office's attention, the contest was assigned and processed. Based upon these circumstances, the Secretary submits that the Motion to Reopen should be denied as moot. Alternatively, the Secretary does not oppose the Motion to Reopen.

Having reviewed Buus' request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the

Commission." 30 U.S.C. § 815(a). Here, Buus notified the Secretary of the contest. This obviates any need to invoke Rule 60(b). Accordingly, the operator's motion to reopen is moot, and this case is remanded 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.

/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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February 21, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
	Docket No. LAKE 2024-0051 A.C. No. 33-00968-560122
	Docket No. LAKE 2024-0052 A.C. No. 33-00968-570892
	Docket No. LAKE 2024-0053 A.C. No. 33-00968-570975
	Docket No. LAKE 2024-0054
v.	A.C. No. 33-00968-571806
	Docket No. LAKE 2024-0055 A.C. No. 33-00968-572422
	Docket No. LAKE 2024-0056 A.C. No. 33-00968-574067
	Docket No. LAKE 2024-0057 A.C. No. 33-00968-576146
LEESVILLE LAND LLC	Docket No. LAKE 2024-0058 A.C. No. 33-00968-580230
	Docket No. LAKE 2024-0059 A.C. No. 33-00968-582187
	Docket No. LAKE 2024-0060 A.C. No. 33-00968-585210

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

ORDER

BY THE COMMISSION:

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

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment in Docket No. LAKE 2024-0051 was delivered to the operator on August 16, 2022, and became a final order of the Commission on September 15, 2022. The proposed assessment in Docket No. LAKE 2024-0052 was delivered to the operator on February 7, 2023, and became a final order of the Commission on March 9, 2023. The proposed assessment in Docket No. LAKE 2024-0053 was delivered to the operator on February 15, 2023, and became a final order of the Commission on March 17, 2023. The proposed assessment in Docket No. LAKE 2024-0054 was delivered to the operator on February 28, 2023, and became a final order of the Commission on March 30, 2023. The proposed assessment in Docket No. LAKE 2024-0055 was delivered to the operator on March 15, 2023, and became a final order of the Commission on April 14, 2023. The proposed assessment in Docket No. LAKE 2024-0056 was delivered to the operator on April 10, 2023, and became a final order of the Commission on May 10, 2023. The proposed assessment in Docket No. LAKE 2024-0057 was delivered to the operator on May 18, 2023, and became a final order of the

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

Commission on June 19, 2023. The proposed assessment in Docket No. LAKE 2024-0058 was delivered to the operator on July 11, 2023, and became a final order of the Commission on August 10, 2023. The proposed assessment in Docket No. LAKE 2024-0059 was delivered to the operator on August 18, 2023, and became a final order of the Commission on September 18, 2023. The Secretary's records do not specify the final order date for Docket No. LAKE 2024-0060. However, the statement date for the proposed assessment in this case was September 13, 2023.

Leesville asserts that its former Safety Director had limited experience with contesting citations, failed to understand the assessment process, and did not timely contest assessments. Mine management received a notice from MSHA that the mine's enforcement history "was trending in the wrong direction and could lead to a Pattern of Violations consideration." Operator's Affidavit at 3. On November 1, 2023, Leesville hired a new experienced safety director to handle proposed assessments and mine safety and health-related duties. Upon assuming the position, the new safety director discovered numerous failures by his predecessor and promptly took steps to file motions to reopen and implement new procedures for ensuring proposed assessments are timely evaluated and contested. The operator claims to be resolving outstanding delinquencies and working with MSHA to improve mine safety and health conditions. They claim the new Safety Director has made significant improvements and seeks reopening to contest a discrete number of citations. In view of Leesville's changes and willingness to work with MSHA, the Secretary does not oppose the motion to reopen.

In Docket No. LAKE 2024-0051, the motion to reopen was filed more than one year after becoming a final order. Under Federal Rule of Procedure 60(c), motions to reopen alleging mistake, inadvertence or excusable neglect must be made no more than a year after entry of the final order. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Therefore, Leeville's motion as to this case is untimely and is denied with prejudice.

In the remaining cases, having reviewed Leesville's request and the Secretary's response, we find that the failure to contest was the result of a single employee failing to understand the contest procedures. Leesville's prompt action upon discovering the issue and willingness to hire additional support to work with MSHA constitute a basis for reopening. *Vulcan Electrical Servs.*, 45 FMSHRC 597, 98 (July 11, 2023) (reopening when an employee did not understand the significance of the timing for filing a contest and the operator took prompt action to correct the issue).

In the interest of justice, we hereby reopen these matters 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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
721 19th ST. SUITE 443
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February 1, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. CENT 2023-0216 A.C. No. 41-03401-578784
v.	
BILLY COOPER STONE CO., INC., Respondent.	Mine: Cooper Stone

AMENDED DECISION AND ORDER[1]

Appearances: Maria C. Rich-DoByns, CLR, U.S. Department of Labor, MSHA, 1100 Commerce Street, Room 462, Dallas, TX 75242

Micah Flippen, Billy Cooper Stone Co., Inc., P.O. Box 678, Jarrell, TX 76537

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Billy Cooper Stone Co., Inc., ("Cooper Stone" or "Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.[2] This case involves two Section 104(a) citations with a total proposed penalty of $1,757.00.

The parties presented testimony and documentary evidence regarding the citation at issue at a virtual hearing held on November 15, 2023. MSHA Inspector Jason Hoermann testified for the Secretary. Billy Cooper Stone Co., Inc., owner Micah Flippen and employee Dan Wilson testified for the Respondent. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I **AFFIRM** Citation Nos. 9741862 and 9741863, as modified herein.

[1] This decision has been amended to reflect the total settlement amount, including citations that were settled outside of hearing.

[2] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. Billy Cooper Stone Co., Inc., at all times relevant to these proceedings, engaged in mining activities and operations at the Cooper Stone Mine (Mine I.D. 41-03401) ("Cooper Stone") in Williamston County, Texas.

2. Billy Cooper Stone Co., Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the "Mine Act").

3. Billy Cooper Stone Co., Inc.'s mining operations affect interstate commerce within the meaning and scope of § 4 of the Mine Act, 30 U.S.C. § 803.

4. Respondent is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Mine where the contested citations in these proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Mine Act.

6. The individual whose signature appears in Block 22 of the contested citations at issue in this proceeding is an authorized representative of the United States of America's Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citations at issue in these proceedings.

7. The citations at issue in this proceeding were properly served upon Billy Cooper Stone Co., Inc., as required by the Mine Act.

8. The penalties associated with the violations in this docket if imposed, will not affect the Mine's ability to remain in business.

9. The Respondent agrees to withdraw contest of Citation No. 9741859 and agrees to pay the assessed penalty of $905.00.

10. The Respondent agrees to withdraw contest of Citation No. 9741860 and agrees to pay the assessed penalty of $905.00.

11. The Respondent agrees to withdraw contest of Citation No. 9741861 and agrees to pay the assessed penalty of $905.00.

12. The Parties agree that Citation No. 9741864 be modified from "Fatal" injury to "Permanently Disabling", and the penalty be modified from $905.00 to $407.00. For support of this modification, the Respondent asserts that the expected injury would not be as serious as alleged; the welder does not produce a high voltage. The Secretary under these specific circumstances agrees that the expected injury is more appropriately described as "Permanently Disabling."

13. The moving machine parts described in Citation No. 9741862 are required to be guarded to protect persons from contact per 30 C.F.R. § 56.14107(a).

14. The area described in Citation No. 9741863 is a roadway, over which vehicular traffic may travel.

15. The area described in Citation No. 9741863 is within the property boundaries of Cooper Stone, LLC, 3786 FM 487, Jarrell, Texas 76537.

16. Cooper Stone abated Citation No. 9741863 by placing berms along the roadway. Tr. 6.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Billy Cooper Stone Co., Inc., operates the Cooper Stone Mine, a dimensional stone mine located in Williamston County, Texas. Tr. 13, 18-19; Jt. Stip. 1. On April 19, 2023, MSHA Inspector Jason Hoermann arrived at the mine to conduct a regular EO-1 inspection. Tr. 21. While inspecting the site, he was accompanied by two members of mine management, Dan Trejo and Dan Wilson. Tr. 23.

While inspecting the rock chopper area, Hoermann issued a citation for a splitter that did not have the proper guards. Tr. 34; Ex. S-1-1. Hoermann testified at hearing that the lack of guards on the machine presented an entanglement hazard. Tr. 36. While he could not recall at hearing whether he determined if the splitter was locked out or not, he stated that he would generally make a note during his inspection process if a piece of machinery was locked out. Tr. 40-41. His notes from this inspection did not state that the machine was locked out at the time he issued the citation. Tr. 41; Ex. S-3-2. Concerning the splitter's condition, rock was lying on the belt, dirt debris was located on top of a catch table, and a hammer and gloves that are typically used to clean off the machine were nearby. Tr. 41-42; Ex. S-1-4, S-1-5, S-1-6. No guards were lying in the area or installed on the machine and there were no signs of repair. Tr. 42-43. Hoermann testified that he would have issued the citation regardless of whether the splitter was locked out or not because this evidence indicated that it had been used in a condition without guards, exposing miners to a hazard. Tr. 41-43, 80.

Dan Wilson, one of the members of mine management who accompanied Inspector Hoermann on April 19, 2023, testified for the Respondent. He testified that the splitter had not been in use on the day of the inspection, nor was he aware of its use in the 70 days prior to that when he started his employment with Cooper Stone. Tr. 128-29. He did not check on the day of the inspection if the splitter was tagged out or not but stated that the splitter had been de-energized. Tr. 132-33. He also testified that it is common practice for employees to lay equipment down wherever there is space when it is not needed, as an explanation for the tools located in the splitter's vicinity. Tr. 131-32. Micah Flippen, owner of Cooper Stone, also testified that it was normal for employees to lay tools and other equipment "anywhere they wish[ed]" and that the company made every effort to ensure the machine was de-energized. Tr. 165-66. To demonstrate that the machine had been locked out at the time of the citation, the Respondent submitted a photograph that could not be authenticated by Dan Wilson, who was present on the day of the inspection. Tr. 146-47; R-1.

When traveling on roads to inspect another area of the mine, Hoermann issued a citation for a missing berm on a 40-foot section of roadway. Tr. 50. The road appeared to be heavily traveled with equipment tracks and was narrow at only fifteen feet with an eight-foot drop-off leading to a pond. Tr. 51, 55-56. The inspector determined that this combination of conditions created a rollover hazard for vehicles traveling along the road. Tr. 57. Inspector Hoermann did not observe machinery operating on the road or mining equipment in the area but noted that there were signs that the area had been mined for dimensional stone, as evidenced by Vermeer saw cuts. Tr. 94-95, 109. He also testified that the area was moist where the berm had sloughed off. Tr. 95. Cooper Stone promptly terminated the violation by replacing the missing berm with blocks. Tr. 61-62.

Concerning the ownership of the road, Hoermann determined the road belonged to Cooper Stone because the road connected into a network of other roads and there was no signage or other indicators that demonstrated ownership by an entity other than Cooper Stone. Tr. 60-61. He also stated that if a mine's employees are traveling in an area, it is the mine's responsibility to correct any hazard an employee may be exposed to. Tr. 84. The Respondent presented evidence that the road was under the control of Heartland Quarries, a separate entity that leased the road from Cooper Stone, and asserted that Heartland was responsible for its maintenance. Tr. 136-39, 169-70, Ex. R-2, R-5. Mine employee Dan Wilson testified that Heartland Quarries had created new roads and manipulated roads that had been used by Cooper Stone in the past at its own discretion. Tr. 138-39. He admitted that the road where the citation was issued had been used by Cooper Stone in the past, but that it was not a normal travel way for Cooper Stone employees. Tr. 154-56, 161. Micah Flippen testified further that Heartland Quarries was in the process of stripping the area and had been manipulating the road and that Cooper Stone was not managing either the berm or the road at the time of the citation. Tr. 166, 169. Further, he testified that the largest piece of equipment owned by Cooper Stone is a "skid steer that is maybe six feet wide" and that they would not build a road that was so much wider than their equipment. Tr. 167. He also stated that rain had occurred in the area recently, explaining the moist ground that the inspector observed at the location of the citation, and that it was probable that the berm had sloughed off due to this recent rain. Tr. 169.

IV. DISPOSITION

A. Citation No. 9741862

During his inspection on April 19, 2023, Hoermann issued 104(a) Citation No. 9741862, which alleged:

> The head pulley for the discharge belt and the chopper chains were not guarded on the No. 3 Hydrasplit Chopper. The head pulley guards were missing [,] and the chain guard was lying on the ground. This condition exposes miners using the chopper to an entanglement hazard resulting in serious injuries.

Ex. S-1-1; Tr. 35-36.

Hoermann designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.14107(a) that was unlikely to cause an injury that could reasonably be expected to be "permanently disabling," would affect one miner, and was caused by Respondent's moderate negligence. Ex. S-1-1.

1. Fact of Violation

The Commission has long held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a "preponderance of the evidence," the most common standard in civil law and the standard applicable here, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

30 C.F.R. § 56.14107(a) states that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

The Secretary asserts that it is undisputed by both parties that the machine did not have proper guards at the time of the citation and that there was no indication of ongoing repair. Sec'y Br. at 10-11. Further, the inspector testified that there was substantial evidence that the machine had been used without guards and that he would have issued the citation anyway regardless of whether the splitter was properly locked out. Tr. 41-43. Cooper Stone contends that the machine was in fact locked out and tagged out at the time the citation was issued but failed to present any testimonial evidence to that effect. Resp Br. at 1-2. While the Respondent submitted a photograph that appeared to show that the machine was locked and tagged out, this photograph could not be authenticated at hearing. Especially critical is the failure to establish when the splitter was locked and tagged out. Therefore, I cannot place much evidentiary weight on the photograph. Tr. 146-47; Ex. R-1. I do place weight on and credit the inspector's testimony that, even had the splitter been locked and tagged out, he would have issued the citation given the evidence it had been used without the presence of the required guards. Accordingly, I find that the Secretary has presented sufficient evidence to show that Cooper Stone violated 30 C.F.R. § 56.14107(a).

2. Gravity

Hoermann designated the citation as unlikely to cause an injury that could be reasonably expected to result in a permanently disabling injury. Ex. S-1-1. He testified at hearing that he selected "unlikely" because the machine was not in use at the time of his inspection and the machine was a spare. Tr. 43. He selected permanently disabling because the pulley located on the machine could grab loose clothing or a hand, leading to crushing injuries and possible amputation. Tr. 43-44. Because the splitter was not in immediate use, it was unlikely to cause injury, so Hoermann marked the gravity as not significant and substantial. Tr. 44. Hoermann also testified that one person would be affected since one person would be injured by the head pulley

at a time. Tr. 44. Respondent did not contest the gravity designations for this violation, and I find the designations made by the inspector to be appropriate.

3. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). MSHA's regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

Hoermann marked the violation as moderate negligence because the violation was visible and it was obvious that the machine was unguarded, and because the operator had been cited in the past "for another guarding violation." Tr. 44-45. At the time of this citation, management stated that they did not know that the cited machine was unguarded, and never mentioned that the machine was locked out or was down for repairs during the inspection. Tr. 45-46. Hoermann testified that the operator should have been aware that machine parts should be guarded, but the Assessed Violation History Report does not indicate any such prior machine related guarding violations. Tr. 45. Ex. S-4-1. Because there is no evidence of the operator's previous history regarding such guarding violations, I lower the negligence from moderate to low.

B. Citation No. 9741863

During his inspection on April 19, 2023, Hoermann issued 104(a) Citation No. 9741863, which alleged:

> The roadway going to the upper bench at the main pit was missing a 40 ft section of berm. The roadway had an 8 ft drop off on the North side and tire tracks were observed within 2 ft from the edge. The roadway is used by mobile equipment to move blocks from the pit to the saw area. This condition exposes equipment operators to a [roll-over] hazard resulting in serious injuries.

Ex. S-2-1; Tr. 55-56.

Hoermann designated the citation as a significant and substantial violation of 30 C.F.R. § 56.9300(a) that was reasonably likely to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," would affect one miner, and was caused by Respondent's moderate negligence. Ex. S-2-1.

Fact of Violation

30 C.F.R. § 56.9300(a) provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

The Secretary argues that Cooper Stone violated this standard by failing to have a berm on a narrow road with an eight-foot drop-off. Owner operator Flippen testified that the road was not under Respondent's control, and that the area was not actively being mined by Cooper Stone. Instead, the road was being controlled and manipulated by Cooper Stone's, lessee, Heartland Quarries. I find that the ownership of the road in this matter is irrelevant to the issuance of a citation, because if a mine's employees are traveling on a road, per inspector Hoermann's credited testimony it is that mine's duty to ensure that the road is in compliance with all safety regulations. Tr. 84. I also note the parties stipulated to the fact that the road in question is within the property boundaries of Cooper Stone. Jt. Stip. 15. It is also undisputed that the road in question was missing a berm at the time of the citation. I affirm the finding that there was a violation of 30 C.F.R. § 56.9300(a).

1. Gravity and S&S

Hoermann designated the citation as reasonably likely to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty." Ex. S-2-1. He explained at hearing that the road was narrow and very compacted, which indicated heavy use. Tr. 57. He selected "lost workdays and restricted duty because the equipment would likely roll over on its side, leading to broken bones, sprains, contusions, and cuts. Tr. 57-58. The Respondent did not contest the gravity of the expected injury. I affirm the finding that the injury would likely result in lost workdays or restricted duty to one miner.

The citation was also designated as significant and substantial. To establish that a violation is significant and substantial, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).

The Secretary has established a violation and therefore satisfies step 1. But the Secretary has failed to satisfy step 2 because she has not shown that the occurrence of a roll-over hazard is reasonably likely to occur to one of Respondent's employees. There are too many intervening factors to establish that the rollover hazard was reasonably likely, particularly concerning the lack of evidence demonstrating Respondent's use of the road. At the hearing, the inspector testified that he did not see equipment working in the area and that mine management were unaware of the berm's condition. Tr. 59, 109. Further, Respondent presented testimony at trial that indicates that the road was not in use at the time of the inspection. Tr. 166-69. Additionally,

Cooper Stone contends that their equipment is significantly narrower than the road itself. Tr. 167. The danger to Respondent's employees presented by the missing berm remained relatively remote given these facts. Accordingly, the berm violation was not S&S and I lower the likelihood of injury to unlikely.

2. Negligence

Hoermann determined that the violation was a result of Cooper Stone's moderate negligence. It was visible and obvious that the 40-foot section of berm was missing, but the mitigating circumstances of nobody using the road at the time of inspection and the lack of reporting about the situation decreased the negligence to moderate. Tr. 59. Further, the inspector determined that the road belonged to Cooper Stone because the road tied into the network of roads leading to the pit and there was no signage or barriers to indicate the road belonged to another entity. Tr. 60.

As stated above, it is the mine's duty to ensure compliance with safety regulations if their employees are traveling on a road, regardless of the actual ownership of the road. However, given the considerable mitigating circumstances and the low frequency that Cooper Stone was using the road at the time of the citation, I reduce Cooper Stone's negligence from moderate to low for this citation.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

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

30 U.S.C. § 820(i).

For Citation No. 9741862, the Secretary proposed a regularly assessed penalty of $407.00. As discussed above, there is no evidence aside from the inspector's unsupported testimony regarding the operator's prior machine guarding violation history. It is undisputed that Cooper Stone is a small operator with approximately 30 employees. Tr. 21. The parties also stipulated that the penalty will not affect Cooper Stone's ability to continue in business. Jt. Stip. 8. As discussed above, I find that this non-S&S violation was unlikely to result in an injury causing permanently disabling injuries and was the result of Cooper Stone's low negligence. Finally, Cooper Stone demonstrated good faith by quickly terminating the citation. In light of these considerations, I find that a penalty of $350.00 is appropriate.

For Citation No. 9741863, the Secretary has proposed a regularly assessed penalty of $1,350.00. The mine operator has had berm violations in the past. Ex. S-4-1. The parties stipulated that the penalty will not affect Cooper Stone's ability to continue in business. Jt. Stip. 8. As discussed above, I find that this is a non-S&S violation that was unlikely to result in an injury causing lost workdays or restricted duty and was the result of Cooper Stone's low negligence. Finally, Cooper Stone Co., Inc., demonstrated good faith by quickly remedying the citation, even under the belief that they were not responsible for the missing berm. I have considered the representations and documentation submitted and conclude that a penalty of $600.00 is appropriate under the criteria set forth in Section 110(i) of the Act.

VI. ORDER

It is hereby **ORDERED** that Citation No. 9741862 is **AFFIRMED** as modified to reduce the negligence to low and that Citation No. 9741863 is **AFFIRMED**, as modified to reduce the likelihood of injury or illness to "Unlikely", reduce the negligence to low, and to remove the S&S designation. In accordance with this decision regarding Citation Nos. 9741862 and 9741863 and the partial settlement reached by the parties for the other citations in this docket, Billy Cooper Stone Co., Inc, is **ORDERED** to pay the Secretary the total sum of **$4,072.00** within 40 days of this order.[3]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

Distribution: (Electronic and Certified mail)

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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February 22, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. THUNDER BASIN COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2023-0157 A.C. No. 48-00977-571261 Mine: Black Thunder

DECISION AND ORDER

Appearances: Gregory W. Tronson, U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd, Suite 515, Denver, CO 80204-3516

Kenneth J. Polka, CLR, U.S. Department of Labor, MSHA, P.O. Box 25367, DFC, Denver, CO 80225

Christopher G. Peterson, Fisher & Phillips LLP, 1125 17th Street, Suite 2400, Denver, CO 80202

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Thunder Basin Coal Company, LLC, ("Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.[1] This case involves one Section 104(a) citation with a total proposed penalty of $3,006.00.

The parties presented testimony and documentary evidence regarding the citation at issue at a hearing held on August 23, 2023, in Gillette, WY. MSHA Inspector Errol Scott Arnett testified for the Secretary. Equipment Dump Manager James Braswell, Equipment Operator and Miner's Representative Patricia Gregory, Safety Department Member and Equipment Operator Kayla Schipman, Safety Manager Lynn Busskohl, Production Superintendent Ryan Woodard,

[1] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. GX–#," and "Ex. R–#," respectively.

and Production Superintendent Bradley Erdman testified for the Respondent. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I **VACATE** Citation No. 9151820.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. The Respondent is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Mine where the contested citations in these proceedings were issued.

2. The Thunder Basin Coal Company LLC Black Thunder Mine is a "mine" as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. The mine is subject to the jurisdiction of the Mine Act.

4. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

5. Payment of the total proposed penalty in this matter will not affect the Respondent's ability to continue in business.

6. The individual whose name appears in Block 22 of the citation in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.

7. The citation contained in this matter was properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated in the citation, as required by the Mine Act.

Tr. 7.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Thunder Basin Coal Company, LLC, operates the Black Thunder Mine, a large-scale surface coal mine. Tr. 334. On September 23, 2022, MSHA Inspector Errol Scott Arnett arrived at the mine to conduct a regular EO-1 inspection. Tr. 25. While inspecting the site, he was accompanied by safety manager Lynn Busskohl and miner's representative Patricia Gregory. Tr. 25-26. This was the inspector's first visit to the facility. Tr. 33.

Inspector Arnett issued Citation No. 9151820 because he believed that the ground control plan was inadequate for failing to address the hazards of berm bumping or driving through a berm. Tr. 51-54; Ex. GX-1. He testified that he observed two sets of tire tracks from different pieces of equipment imprinted into the soil of the berm. Tr. 33-34. One set of tracks indicated what he termed a "normal push": the dozer pushed material perpendicular to the berm, pushing the material over the berm or creating a new berm. Tr. 34-35. The other tire track indicated that the dozer drove on or near the flat, making an "abrupt swooping" motion to the right, leaving an

impression into the berm all the way to the top of the berm. Tr. 35, 56; Ex. GX-3-2, GX-3-4. In the inspector's opinion, this was not normal practice. Tr. 36. Because the dozer was driving on uncompacted material near the top of the berm, he believed there was potential for the weight of the vehicle to tilt it over, leading to fatal injuries. Tr. 42-45. Arnett did observe some superficial cracks in the soil but that did not give him much concern. Tr. 56, 163; GX-3-7. On the back side of the berm there was roughly an angle of repose of 30-35 feet in vertical height. Tr 58. GX – 3-11. In summary, he believed that the berm had no substantial compaction and that there was no way of stopping breakthrough. Tr. 111.

In addition to the dozer tire tracks on the berm, there were also haul tire tracks imprinted into the berm and a depression roughly 18 or 19 inches deep that trucks had been making in the toe of the berm Tr. 46, 56-57, 58; Ex. GX-3-9. This depression indicated that haul trucks were stopping in a weak spot in the foundation of the dumping location and causing sinkage. Tr. 46, 112, 169. Rather than stopping in the berm, the inspector believed the best practice would be to dump the load in front of the berm and then push the material into the existing berm, thereby creating a new berm. Tr. 48-49. When the inspector questioned the mine's personnel on the issue of stopping in the berm, he was informed that it was not common practice to stop in the berm and drivers are instructed to stop short of the berm. Tr. 51; Ex. GX-2-5.

As a result of these concerns, the inspector requested to see the mine's ground control plan. Tr. 51-52. After reviewing the plan, the inspector determined that it was insufficient, based in part on his own experience reviewing ground control plans. Tr. 52-53. The only statement pertaining to berms stated that "'[b]erms are maintained at the outer edge of truck dumps to prevent overtravel or overturning.'" Tr. 53; Ex. GX-10-4. The inspector believed that this was not enough to train or enough to prevent the possibility of rollovers, breakthroughs, and push-throughs. Tr. 54. He supported this assertion with the fact that the mine had an incident where a haul truck overturned when it backed through a berm on June 3, 2022, although he was unaware of this previous incident when he issued the citation. Tr. 60-62; Ex. GX-4. He testified that the best practice to prevent overturning fatalities is to dump material from a safe location and push the material over the edge with a bulldozer. Tr. 71.

To further support the citation, the inspector referenced the MSHA inspection handbook, which instructs inspectors to look for signs of unsafe dumping practices such as backing up at an angle, hitting or traveling up the berm, and excessive braking or stopping and turning close to the edge before dumping. Tr. 80; Ex. GX-7-12, GX-7-13. The guidebook also instructed to ensure that equipment operators dump short "if there is uncertainty about the stability of the dumping location." Tr. 80. Other educational materials stated that berms are meant to prevent a vehicle from going over a berm but that they are not designed to be bumped or hit. Tr. 100; Ex. GX-8. The inspector also referenced MSHA fatality alerts involving rollover accidents and berms that could have been prevented using a dump short and push procedure. Tr. 69-73, 102; Ex. GX-5, GX-6. This research was conducted after the citation had already been issued. Tr. 71-73, 87.

In response to the citation, the inspector held conversations with the operator to update and submit a ground control plan that addressed his concerns with the berm and the reason why he issued the citation. Ultimately, he elected to cite the ground control standard rather than the berm standard in order to prompt change in the language of the ground control plan. Tr. 175.

James Braswell, a dump operator with fifteen years' experience, testified for the Respondent. Tr. 179-80. He had been running the dump on the day of the citation and had been operating the dozer whose rubber tire track was visible in the berm. Tr. 179-80, 184. Braswell testified that he had looked at the berm with the inspector and had explained to the inspector that when he was rebuilding the berm, he sometimes used a feathering motion because the dozer's blade could articulate. Tr. 182. It was part of his practice to travel up the berm a bit to fill in any low spots and maintain a stable berm. Tr. 184. Further, the GPS in his dozer provided information regarding his location, elevation, and angle. Tr. 186-87. He had never been instructed not to do this feathering motion, and instead had been trained to move the material where it is needed. Tr. 209.

Regarding the material that comprised the berm, Braswell described it as a "soft virgin material" that hasn't been compacted and that heavy haul trucks are likely to leave an impression at the tow of the berm. Tr. 197, 199-202, 216. This compaction always occurs at the edge of the berm, and the cracks in the berm itself are tiny superficial cracks. Tr. 201, 222. When there are indications of berm failure, cracks will occur in the front of the berm and the berm will start opening up. Tr. 221. On the day of the citation, he did not see any instability in the berm and that the dump was solid. Tr. 190, 215. Further, if the dozer were to fall through the berm, it would just sink into the soft material and would not flip over because the weight of the vehicle is in the back half. 90 percent of the weight is in the rear of the machine. It's fairly light in the front end. There was one tire up on the berm which barely made an impact, maybe one to two inches in depth. Tr. 211-13, 246; RX 6. In addition, the length of the rubber tire dozer is almost 30 feet long. If there was a breakthrough the dozer would just roll through it or settle in, not flip. Tr. 235-236; Ex. RX6. Lynn Busskohl, a member of the mine management who observed the inspection, corroborated this in his own testimony by reiterating that the weight of the dozer is in the back, as stated in the vehicle's manual. Tr. 302-04; RX 6.

Patricia Gregory, a miner's representative, and Kayla Schipman, an employee with the safety department, testified for the Respondent about the berm's condition on the day of the citation. Gregory accompanied the inspector and stated that she was not overly concerned with seeing the rubber tire marks on the berm and that she did not see any evidence of a haul truck powering up or riding up on the berm. Tr. 255-59. The haul truck's contact with the berm was incidental, and that the trucks are going slowly enough to feel when they make contact with the berm. Tr. 263, 265-66. She had no concerns that the berm would fail. Tr. 259. Schipman, who did not accompany the inspector but saw the berm when she was called to bring the mine's ground control plan to the area, testified that she thought the berm looked good with adequate height and thickness, and that it was not unusual to see tire tracks in the berm. Tr. 270-71, 291. She also testified that she had driven haul trucks at the mine before, and that when the truck approaches the berm it is going very slow and that drivers are instructed to look for conditions in the berm that would indicate cracks or weaknesses. Tr. 272-73. Trucks are instructed to stop backing up when they are in the toe of the berm, and when the trucks just touch the berm, there is a feeling of resistance. Tr. 275, 278. Busskohl also confirmed that this is the way haul trucks approach the dump in the mine. Tr. 299.

Two production superintendents, Ryan Woodard and Bradley Erdman, testified for the Respondent. Woodard provided additional information regarding the composition of the berm, explaining that it was made out of a clay loam material that is safe for haul trucks to compact as

they advance a dump. Tr. 362. He also did not have any concerns about the berm's integrity because if there had been vehicles riding up on the berm, it would have knocked part of the berm away. Tr. 361. He observed that the berm was "perfectly in place" with no material sloughing or falling away. Tr. 361-62. If there had been sloughing, the procedure would have been to dump short. Tr. 365. Erdman supported the prior witnesses' testimony about the berm's condition, saying that he believed the berm had good integrity and that there was nothing to give him pause. Tr. 378, 382. He saw the tire tracks but did not think that they compromised the integrity of the berm and that the contact points were normal. Tr. 379.

In response to his previous statements in the inspector's notes, Woodard confirmed that he had told the inspector that it was not a common practice for the rubber tire track to be that high on the berm. Tr. 363-64. He did testify that the dozer is there to make the berm safe for other pieces of equipment and it was designed to be operated in that manner. Tr. 364, 370. He further explained that the dozer operator has to ride up on the berm in order to build it up, and it is not normal to see tire tracks on the berm because material falling out of the dozer's blade will cover the tracks. Tr. 367-68. The blade is concave so it holds some of the material. As it comes back down the rest of the material falls out of the blade and covers up the tracks which also helps fill in compacting as you do it. Tr. 368. The weight of the dozer is in the back of the machine, there was no danger of the dozer overturning, and the dozer operator was using the machine as it was intended to be used. Tr. 370-72.

IV. DISPOSITION

During his inspection on September 23, 2022, Arnett issued 104(a) Citation No. 9151820 which alleged:

> There are significant tire markings pressed into the existing soil berm located at the 5 South dump. The operator is using a Cat 854 G RT dozer to push material over the spoil dump. There are two sets of tracks against the berm, from the RT dozer and haul trucks. This creates an over-turn hazard and exposes the miner to fatal injuries from blunt force trauma and crushing injuries.
>
> A new Ground Control plan must be submitted addressing the dumping procedures. The current ground control plan is dated March 26, 2018.

Ex. GX-1-1.

Arnett designated the citation as a significant and substantial violation of 30 C.F.R. § 77.1000 that was reasonably likely to cause an injury that could reasonably be expected to be "fatal," would affect one miner, and was caused by Respondent's moderate negligence. Tr. 107-09; Ex. GX-1-1.

The Commission has long held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law and the standard applicable here, simply requires the trier of fact "to believe that

the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

30 C.F.R. § 77.1000 states that "[e]ach operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability."

This standard requires each operator to establish and follow a ground control plan that provides safe working conditions at the mine site. "The requirement to "insure safe working conditions" is a mandate over and above the particular requirements contained in the plan itself, which means although an operator may comply with all parts of its submitted and acknowledged plan, it may still be in violation of the standard if the plan does not provide a safe workplace." *Central Appalachia Mining* 29 FMSHRC 430, 437 (June 2007). In order to find that a ground control plan is inadequate, there must first be a hazard or unsafe condition present that is not addressed or that is not addressed sufficiently in the ground control plan. It is undisputed that at the time of the citation, the only statement in the ground control plan pertaining to berms was "[b]erms are maintained at the outer edge of truck dumps to prevent overtravel or overturning" and that the Respondent was not in violation of this provision as written. Ex. GX-10-4.

The facts of the case, the overall testimony of the witnesses and the preponderance of the evidence do not indicate that such a hazard was present to render the ground control plan deficient. There were no signs of sloughing or cracking in the berm, and the inspector stated in his testimony that he was not concerned with the superficial cracks visible in the toe of the berm. I credit each of the Respondent's witnesses who consistently and without equivocation credibly testified that the berm appeared stable and that they did not consider the berm to be dangerous in any way. Notably, this included Patricia Gregory, whose responsibilities include miner safety as a miner's representative. Further, the testimony indicates that management was aware of the dump short and push method advocated for by the inspector but did not believe that the berm conditions, at that time, warranted employing this method when dumping. Finally, I place little weight on the prior tipping incident that had occurred at this mine because it is apparent it occurred due to operator error rather than deficiencies in Respondent's ground control plan. The inspector also did not rely on this prior incident when deciding to cite the Respondent for an inadequate ground control plan.

While the dozer operator admitted that he had driven onto the berm and was the source of the rubber tire tracks imprinted there, testimony and evidence indicate that the dozer was meant to perform these maneuvers. The dozer's blade is articulated, which allows the operator to carry out feathering motions with the blade. Both the equipment manual and the testimony from the operator as well as mine management state that the weight of the vehicle is in the back and not in the vehicle's blade. Further, the dozer was equipped with a GPS that provided the operator with information regarding his position, reducing the chance that he would drive on top of the berm. Based on the vehicle's features, I find that the dozer's operation in this manner to not be hazardous and that there is minimal, if any risk that the vehicle will overturn. While the production superintendent acknowledged he told the inspector at the time of the citation that it

was not common practice for the rubber tire to run up on the berm like that, that does not detract from the evidence that the articulated blade and dozer is designed for this type of work in order for it to make the berm safe for other equipment.

Concerning the haul truck tire marks, I find the testimony regarding the composition of the berm's material by the Respondent's witnesses to be credible. The material was described as a virgin clay material that is uncompacted and that truck tires are likely to leave an impression in it. The inspector did not refute this and did not testify regarding his understanding of the material. It was also his first visit to the mine when he issued the citation. The Respondent's witnesses are likely to have a greater understanding of the berm's composition and the ground conditions present at the time of the citation. While the haul truck tires may be incredibly close to the berm, based on the evidence presented it is not sufficient to demonstrate that the haul truck tires were rode up on the berm or otherwise generated a hazardous condition.

The Secretary did not prove by a preponderance of the evidence that the Respondent's ground control plan required updating to insure safe working conditions. I accept that when ground conditions indicate sloughing or material cracks dumping short and pushing is the best method to prevent fatalities from vehicles tipping over or driving through a berm. However, those conditions were not present at the time the citation was written. There is insufficient evidence to demonstrate that the Respondent's methods of dumping or building up the berm, in the ground conditions that existed at the time the citation was written, were unsafe. Because there is not sufficient evidence of a hazardous condition that would render the ground control plan inadequate, I vacate the citation.

V. ORDER

It is hereby **ORDERED** that Citation No. 9151820 is **VACATED.**

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 21, 2024

GRIMES ROCK, INC., Contestant	CONTEST PROCEEDING
v.	Docket No. WEST 2022-0334-RM §104(b) Order No. 9619115; 08/21/2022
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	Mine: Grimes Rock, Inc. Mine ID: 04-05432
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2023-0015-M A.C. No. 04-05432-563106-01
v.	Docket No. WEST 2023-0016-M A.C. No. 04-05432-563106-02
GRIMES ROCK, INC., Respondent	Mine: Grimes Rock, Inc.

ORDER DENYING GRIMES ROCK'S REQUEST FOR STAY

These cases are before me upon a notice of contest filed by Grimes Rock, Inc. ("Grimes Rock") and petitions for assessment of civil penalty filed by the Secretary of Labor (the "Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Grimes Rock pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act").

On November 29, 2023, I lifted the stay in these matters and ordered the parties to confer regarding the possibility of settlement and, if settlement did not appear feasible, a timetable for submitting briefs or motions for summary decision. In response to that order, the Secretary notified the court that the parties were responding to written discovery and would confer with each other following that discovery to consider how to proceed in these cases. On December 13, I ordered the parties complete discovery as soon as possible and provide a status update to the court by January 31. On January 31 Grimes Rock submitted a Request for Stay.[1] The Secretary opposed a stay in these cases. For reasons set forth below, Grimes Rock's request is **DENIED**.

[1] Grimes Rock's filing was captioned as "Respondent Grimes Rock, Incorporated's Status Report and Request for Stay Pending the United States Court of Appeal for the Ninth Circuit's Ruling on Respondent's Petition for Review of Commission's Decision Dated November 28, 2023 in the Related Saldivar Case." For purposes of this order, I refer to the filing as the "Request for Stay."

The contest docket and two penalty dockets at issue in these proceedings involve two 104(a) citations and one 104(b) order that arise from Grimes Rock's alleged failure to comply with orders issued by former Commission Judge Miller in the temporary reinstatement proceeding of Sec'y of Labor on behalf of Saldivar v. Grimes Rock Inc. in docket number WEST 2021-0178-DM (hereinafter "Saldivar temporary reinstatement proceeding" or "Saldivar case"). Citation No. 9619114, issued under section 104(a) on August 15, 2022, alleges a violation of section 105(c) of the Mine Act because Grimes Rock failed to comply with Judge Miller's May 28, 2021 Order of Temporary Economic Reinstatement and June 17, 2022 Order Granting the Secretary's Motion to Enforce. Order No. 9619115, issued under section 104(b) on August 21, 2022, alleges that Grimes Rock continued to fail to comply with Judge Miller's orders by not making certain required payments. Finally, Citation No. 9619116, issued on August 22, 2022, under section 104(a), alleges that Grimes Rock violated section 104(b) when it continued to conduct work activities at the mine site despite not complying with Order No. 9619115.

On November 28, 2023, the Commission issued a decision in the Saldivar temporary reinstatement proceeding. 45 FMSHRC ___; 2023 WL 8714341 (Nov. 28, 2023).[2] On December 26, 2023, Grimes Rock appealed the Commission's decision to the Court of Appeals for Ninth Circuit ("Ninth Circuit") in Case No. 23-4418.

Grimes Rock raises two primary points in its Request for Stay. First, Grimes Rock argues that this court lacks jurisdiction in these matters because of its appeal of the Commission's decision in the Saldivar temporary reinstatement proceeding. Presently the Ninth Circuit has exclusive jurisdiction over the Saldivar case. Grimes Rock asserts that because the citations and order at issue in these proceedings are entirely dependent on the questions before the Ninth Circuit in the Saldivar case, the Ninth Circuit also has exclusive jurisdiction over these proceedings. As a result, this court "would and should . . . have authority to hear this matter" only after the Ninth Circuit rules on the issues before it in the Saldivar temporary reinstatement proceeding appeal. Grimes Rock Request for Stay 8.

Second, Grimes Rock argues that, even if this court concludes it has jurisdiction, the court should exercise its discretion to stay these cases until the Ninth Circuit issues its decision on the petition for review in the Saldivar temporary reinstatement proceeding. It asserts that the Ninth Circuit could conclude that the temporary reinstatement order was invalid, that the tolling motions Grimes Rock filed with the Commission in that case should have been granted, or that other errors were made in that proceeding that would invalidate Judge Miller's orders that formed the bases of the citations and order in the present proceedings. Grimes Rock also states that because the judge dismissed Saldivar's underlying discrimination case on June 17, 2022 (WEST 2021-0265-DM) which terminated the temporary reinstatement order well before MSHA issued the citations and order in dispute here, it is not clear what authority the Secretary was proceeding under when issuing them. Grimes Rock also questions the Secretary's authority to shut down the mine absent any "health" or "safety" concerns when she issued the section 104(b) order. Finally, Grimes Rock asserts that these cases should be stayed for the same reasons cited by this court in earlier orders staying these cases while the temporary reinstatement case was on

[2] On January 4, 2024, the Commission remanded the Saldivar temporary reinstatement proceeding to this court. On February 6, 2024, I stayed that matter until further notice.

appeal to the Commission. For these reasons, it maintains that this court should stay these cases until the Ninth Circuit has been given the opportunity to sort out these issues.

The Secretary argues that a stay of these matters is not appropriate because the temporary reinstatement order that Grimes Rock appealed to the Ninth Circuit has no legal relevance to these proceedings. At the time the Secretary took the enforcement actions at issue in these proceedings, the temporary reinstatement order was not stayed and Grimes Rock was obliged to comply with that order even while its appeal was pending before the Commission. In failing to comply with the unstayed order, Grimes Rock violated the Mine Act, regardless of whether it believed that order was incorrectly issued.

I find that this court presently has jurisdiction over the above captioned proceedings. These dockets were assigned to me on January 13, 2023. There is no question that these dockets are related to the Saldivar temporary reinstatement proceeding presently on appeal to the Ninth Circuit. However, these dockets are *not* the same as the Saldivar temporary reinstatement proceeding, do not include the same issues as the Saldivar case, and were not included in Grimes Rock's appeal to the Ninth Circuit.

Section 106(a)(1) of the Mine Act states, in pertinent part, as follows:

> Any person adversely affected or aggrieved by an order of the Commission issued under this Act may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred . . . by filing . . . a written petition praying that the order be modified or set aside. . . . Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein[.]

30 U.S.C. § 816(a)(1). Although there are issues in the Saldivar temporary reinstatement proceeding[3] that relate to these proceedings, the questions that will be determined in these proceedings are not the same and, accordingly, are not subject to the exclusive jurisdiction of the Ninth Circuit.[4]

When the Commission issued its November 28, 2023, decision in the Saldivar temporary reinstatement proceeding, its findings became the law of the Commission with respect to that proceeding. At no time prior to its decision in the Saldivar case did the Commission stay Judge Miller's order of temporary economic reinstatement or stay Judge Miller's order enforcing that

[3] The Ninth Circuit's exclusive jurisdiction over the Saldivar temporary reinstatement proceeding began when Grimes Rock filed its December 26, 2023 appeal of the Commission's decision in WEST 2021-0178-DM.

[4] Here, as mentioned in my Order Granting the Secretary's Motion to Limit Discovery, the issue is whether the Secretary can establish the three alleged violations by a preponderance of the evidence.

order, while the matters were pending before them.[5] Commission Procedural Rule 45 makes clear that the filing of a petition for review of a temporary reinstatement order "shall not stay the effect of the Judge's order unless the Commission so directs[.]" 29 C.F.R. § 2700.45(f). I agree with the Secretary that because the orders pending before the Commission were not stayed at the time the Secretary took the enforcement actions at issue in these proceedings, Grimes Rock was obligated to comply with those orders, even if it believed that the orders were incorrect. *See Coleman v. Tollefson*, 575 U.S. 532, 539, (2015); *see also Chapman v. Pac. Tel. & Tel. Co.*, 613 F.2d 193, 197 (9th Cir. 1979).

Moreover, Commission case law makes clear that "[a] decision issued by . . .[the] Commission is binding on the parties unless and until stayed or overturned by a reviewing court of appeals." *Maben Energy Corporation*, 3 FMSHRC 2776, 2777 (Dec. 1981) (citing 30 U.S.C. § 816(c). The Commission's decision in the Saldivar case has not been stayed or overturned by the Ninth Circuit. Absent any direction from the Commission or the Ninth Circuit that the Commission's decision and order in the Saldivar temporary reinstatement proceeding has been stayed or otherwise modified, I must treat it as the law of the Commission.

Grimes Rock cites the decision of a Commission ALJ, *Monongalia County Coal Co.*, 41 FMSHRC 631 (Sept. 2019) (ALJ), and the dissent in a Commission decision, *Mach Mining, LLC*, 33 FMSHRC 1100 (May 2011), for the general proposition that the above captioned cases should be stayed due to their connection to the Saldivar temporary reinstatement proceeding on appeal to the Ninth Circuit. However, Grimes Rock's reliance is misplaced. Both of the cited cases involved stays requested while other Commission proceedings played out. Here, the Commission has already spoken on some issues in the Saldivar temporary reinstatement proceeding and remanded other issues back to this court.

Although Grimes Rock argues these cases should be stayed for the same reasons articulated by this court during the previous stay while the Saldivar case was pending before the Commission, I disagree. The Commission is the final authority on issues that come before the agency and its rulings are the law of the Commission unless and until overturned or modified by a reviewing court of appeals. Prior to the Commission's decision in the Saldivar case, there was no law of the Commission on the issues raised in that case that could have affected the issues in

[5] On August 30, 2022, a unanimous Commission denied Grimes Rock's request to stay Judge Miller's June 17, 2022 order enforcing the parties settlement agreement for temporary economic reinstatement. 44 FMSHRC 725 (Aug. 2022). In denying Grimes Rock's request for a stay the Commission made clear that the complainant's "failure to succeed in his discrimination case does not invalidate his previous award for temporary reinstatement[.]" *Id*. at 730.

the present cases. Now that the Commission has issued its decision, there is Commission law on those issues and I will proceed in these related cases unless otherwise directed.

For the above reasons, the I find that I retrain jurisdiction over these matters and that Grimes Rock's Request for Stay must be **DENIED**.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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February 21, 2024

GRIMES ROCK, INC., Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	CONTEST PROCEEDING Docket No. WEST 2022-0334-RM §104(b) Order No. 9619115; 08/21/2022 Mine: Grimes Rock, Inc. Mine ID: 04-05432
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner v. GRIMES ROCK, INC., Respondent	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2023-0015-M A.C. No. 04-05432-563106-01 Docket No. WEST 2023-0016-M A.C. No. 04-05432-563106-02 Mine: Grimes Rock, Inc.

ORDER GRANTING THE SECRETARY'S MOTION TO LIMIT DISCOVERY

These cases are before me upon a notice of contest filed by Grimes Rock, Inc. ("Grimes Rock") and petitions for assessment of civil penalty filed by the Secretary of Labor (the "Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Grimes Rock pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act").

On November 29, 2023, I lifted the stay in these matters and ordered the parties to confer regarding the possibility of settlement and, if settlement did not appear feasible, a timetable for submitting briefs or motions for summary decision. In response to that order, the Secretary notified the court that the parties were responding to written discovery and would confer with each other following that discovery to consider how to proceed in these cases. On December 13, I ordered the parties complete discovery as soon as possible and provide a status update to the court by January 31. On January 25, 2024, the Secretary filed a Motion to Limit Discovery. Grimes Rock opposed the motion. For reasons set forth below, the Secretary's motion is **GRANTED**.

The contest docket and two penalty dockets at issue involve two 104(a) citations and one 104(b) order that arise from Grimes Rock's alleged failure to comply with orders issued by former Commission Judge Miller in a temporary reinstatement proceeding involving Grimes

Rock, i.e., WEST 2021-0178-DM. Citation No. 9619114, issued under section 104(a) on August 15, 2022, alleges a violation of section 105(c) of the Mine Act because Grimes Rock failed to comply with Judge Miller's May 28, 2021 Order of Temporary Economic Reinstatement and June 17, 2022 Order Granting the Secretary's Motion to Enforce. Order No. 9619115, issued under section 104(b) on August 21, 2022, alleges that Grimes Rock continued to fail to comply with Judge Miller's orders by not making certain required payments. Finally, Citation No. 9619116, issued on August 22, 2022, under section 104(a), alleges that Grimes Rock violated section 104(b) when it continued to conduct work activities at the mine site despite not complying with Order No. 9619115. With that context in mind, I now turn my attention to the parties' arguments on the motion.

The Secretary, in her Motion to Limit Discovery, states that Grimes Rock "has served discovery which veers outside of the relevant and imposes an undue burden on the Secretary in litigating this case." Sec'y Mot. 2. In support of her motion, the Secretary raises three points.

First, the discovery served on the Secretary on January 23, 2024[1] "seeks facts and documents concerning MSHA's overall enforcement authority to conduct safety and health inspections at this mine and all communications between MSHA Inspector Ruben Bernal and the agency regarding those activities." Sec'y Mot. 2. However, the Secretary asserts that MSHA's authority under the Mine Act to conduct mandated inspections is not relevant to Grimes Rock's obligation to comply with the orders of an administrative law judge.

Second, the Secretary asserts that the discovery seeks information on "inspections conducted by and citations issued by MSHA Inspector Ruben Bernal in December 2023 and January 2024." Sec'y Mot. 3. However, that information is not relevant to Grimes Rock's failure to comply with the judge's order of June 2022 which led to the citations and order at issue in these proceedings.

Third, and finally, the "discovery seeks information that is deliberative and reflects the give and take of the consultative process." Sec'y Mot. 3 (Internal quotation omitted).

Consequently, given the undue burden created by requiring the Secretary to perform tasks to obtain unrelated, irrelevant and/or privileged information, the Secretary requests that the court "enter an order to limit discovery to relevant, non-privileged matter having to do with the citations at issue in these dockets, the facts that gave rise to the citations of record, and any documents not previously provided." Sec'y Mot. 4.

Grimes Rock argues that the Secretary's motion should be denied because the subject discovery is "directly relevant to Grimes' affirmative defense of retaliation/retaliatory motive." Grimes Rock Opp'n 2.[2] It asserts that the subject discovery seeks information and documents

[1] The Secretary's motion concerns a second set of discovery. According to the motion, Grimes Rock served a first set of discovery on January 12, 2024, to which the Secretary is currently preparing responses. Sec'y Mot. 2. n. 2

[2] Grimes also argues that this court presently lacks jurisdiction in this matter and asserts that the cases should be stayed. Those arguments will be addressed by a separate order.

relating to the reasons why MSHA inspected Grimes Rock's mine four times between December 19, 2023 and January 18, 2024, and is directly related to Grimes' affirmative defense that MSHA has engaged in a pattern of retaliation against Grimes Rock for exercising its rights. Grimes Rock Opp'n 6.

Further, Grimes Rock argues the Secretary failed to meet her burden of proving that the subject discovery seeks information and documents protected from disclosure by the deliberative process privilege. Grimes Rock Opp'n 9. It asserts that the Secretary did not provide an index of documents sought to be withheld so this court could determine whether those documents are subject to the asserted privilege. Grimes Rock Opp'n 10-11. It further asserts that, even if the Secretary were able to establish that the information and documents sought were both "pre-decisional and deliberative, Grimes' interest in disclosure greatly outweighs the Secretary's interest in non-disclosure." Grimes Rock Opp'n 11. As support, Grimes Rock points to the answers it filed in these matters and the "affirmative defense of retaliation/retaliatory motive, which puts the Secretary's and MSHA's policies and decision making in connection with its repeated inspections of Grimes' mine squarely at issue." Grimes Rock Opp'n 11.

The Commission's procedural rules state that "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b).

I find that the information and documents sought by Grimes Rock are not relevant to these proceedings and will not lead to the discovery of admissible evidence. The two 104(a) citations and one 104(b) order in these dockets were issued in August of 2022. The discovery sought by Grimes Rock includes information and documents relating to reasons why MSHA inspected the mine in December of 2023 and January of 2024, i.e., roughly a year and a half after the citations and order were issued. Although the Commission's rules on discovery are quite liberal, the information sought is so far outside the realm of the instant proceedings that it is entirely irrelevant.

I recognize that Grimes Rock is asserting an affirmative defense that MSHA engaged in a pattern of retaliation against Grimes Rock for exercising its rights. However, as a general matter, MSHA's motivation for issuing citations and orders is not the subject of Commission proceedings. *See Basin Resources Inc.*, 18 FMSHRC 1125 (June 1996) (ALJ), *Calvin Black Enterprises*, 5 FMSHRC 1440 (Aug. 1983) (ALJ).

The Mine Act authorizes MSHA to frequently inspect mines for violations of the Act or safety standards. Section 103(a) of the Mine Act requires MSHA to conduct inspections of each surface mine "in its entirety at least two times a year." 30 U.S.C. § 813(a). MSHA is not prohibited from inspecting a surface mine more than twice a year.[3]

[3] A single inspection of a mine can last more than one day. It appears that Grimes Rock's assertion that MSHA inspected the mine four times during December of 2023 and January of 2024 was based on it counting each day of multiday inspections as a separate inspection.

The issue in these cases is whether the Secretary can establish the three alleged violations by a preponderance of the evidence, not whether MSHA exhibited some sort of retaliatory motive when issuing the citations and order. If the Secretary is unable to establish the violations by a preponderance of the evidence, the citations and orders will be vacated.

Because I find that the information and documents sought are not relevant to these proceedings and will not lead to the discovery of admissible evidence, I do not reach the parties' arguments regarding whether the materials are privileged.

Accordingly, the Secretary's Motion to Limit Discovery is **GRANTED** and the information and documents sought by Grimes Rock in its second set of interrogatories and second set of requests for production of documents need not be provided by the Secretary.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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