May 2023

TABLE OF CONTENTS

COMMISSION DECISIONS

05-08-23	CONTINENTAL CEMENT COMPANY, LLC	CENT 2021-0013	Page 237
05-08-23	CONTINENTAL CEMENT COMPANY, LLC	CENT 2021-0013 correction	Page 258

COMMISSION ORDERS

05-02-23	CONSOL PENNSYLVANIA COAL COMPANY, LLC	PENN 2023-0011	Page 279
05-16-23	GCC PERMIAN	CENT 2022-0218	Page 283
05-16-23	MORTON SALT, INC.	CENT 2022-0237	Page 286
05-16-23	HANSON AGGREGATES PENNSYLVANIA, LLC	PENN 2022-0124	Page 289
05-16-23	WAYNE J. SAND & GRAVEL, INC.	WEST 2022-0295	Page 292
05-18-23	DUININCK, INC.	LAKE 2022-0058	Page 296

ADMINISTRATIVE LAW JUDGE DECISIONS

05-02-23	IRON CUMBERLAND, LLC	PENN 2023-0007	Page 299
05-08-23	LEHIGH CEMENT COMPANY, LLC	PENN 2022-0133	Page 303

05-10-23	TWIN STATE MINING, INC.	WEVA 2023-0051	Page 313
05-18-23	MARYLAND ENERGY RESOURCES, LLC	YORK 2023-0024	Page 317
05-22-23	GREENBRIER MINERALS, LLC	WEVA 2023-0166	Page 324
05-23-23	CANYON FUEL COMPANY, LLC	WEST 2021-0188	Page 328
05-23-23	GREENBRIER MINERALS, LLC	WEVA 2023-0166	Page 380
05-24-23	CACTUS CANYON QUARRIES, INC.	CENT 2022-0010-M	Page 384
05-25-23	NEVADA GOLD MINES LLC	WEST 2022-0201	Page 403

ADMINISTRATIVE LAW JUDGE ORDERS

05-08-23	CONSOL MINING COMPANY, LLC	WEVA 2023-0035	Page 426
05-11-23	CONSOL MINING COMPANY LLC	WEVA 2023-0141	Page 431
05-15-23	DAVID A. ROSE FARM & AG SERVICES	SE 2023-0159-RM	Page 434
05-17-23	SEC. OF LABOR o/b/o PAUL KIRK v. CEMEX CONSTRUCTION MATERIALS FLORIDA, LLC	SE 2023-0007-DM	Page 437
05-31-23	SEC. OF LABOR O/B/O LARRY ANDERSON v. KALAMAZOO MATERIALS, INC., AND ROCK PROS USA, LLC, and any and all successors in interest	WEST 2023-0238	Page 443

No Review Was Granted or Denied During The Month Of May 2023

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 8, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of TARA OTTEN	
v.	Docket No. CENT 2021-0013
CONTINENTAL CEMENT COMPANY, LLC	

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

DECISION

BY: Jordan, Chair; Rajkovich and Baker, Commissioners

This case, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), concerns a complaint filed by the Secretary of Labor on behalf of Tara Otten, pursuant to section 105(c) of the Act, 30 U.S.C. § 815(c).[1] The Secretary alleges that Continental Cement Company ("Continental") violated section 105(c)(1) when it withheld pay from Otten because she exercised her statutory rights as a designated representative of miners pursuant to section 103(f) of the Mine Act, 30 U.S.C. § 813(f) (miners' representatives shall have the "opportunity to accompany [an inspector] during the physical inspection [of the mine]" while "suffer[ing] *no loss of pay* during the period of [her] participation.") (emphasis added).

After a hearing, a Commission Judge issued a decision holding that Continental violated sections 103(f) and 105(c)(1) of the Mine Act when it refused to pay Otten the wage-rate she would have otherwise earned on certain shifts, had she not served as a miners' representative. 44 FMSHRC 121, 149 (Feb. 2022) (ALJ). The Judge awarded Otten backpay of $388.39 plus pre-judgment interest and assessed a civil penalty of $17,500 against Continental. *Id*. at 159. Thereafter, Continental filed a petition for discretionary review of the Judge's decision, which the Commission granted. For the reasons herein, we affirm the Judge's decision.

[1] Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides that:

> [n]o person shall discharge or in any manner discriminate against . . . or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners . . . because of the exercise by such miner, representative of miners . . . on behalf of himself or others of any statutory right afforded by this Act.

I.

Factual and Procedural Background

At the time of the events at issue, Tara Otten worked as a "Laborer" in the Yard department at Continental's underground limestone mine in Hannibal, Missouri. Otten also served as a designated representative of miners pursuant to section 103(f) of the Mine Act.

The United Steelworkers represents Continental's employees; a collective bargaining agreement ("CBA") governs the terms and conditions of their employment. According to the CBA, if there are an insufficient number of "Mobile Equipment Operators" on a shift, the most senior qualified "Laborer" is given the opportunity to perform mobile equipment work and is paid at the higher Mobile Equipment Operator hourly rate.[2] Therefore, in instances when Otten was the most senior qualified Laborer in the Yard department, she would receive the first opportunity for an available mobile equipment assignment.

On certain shifts that occurred between March 2020 and January 2021, Otten accompanied an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") as the designated miners' representative on inspections of the mine.[3] During these shifts, a Laborer operated mobile equipment and received the corresponding pay upgrade. It is undisputed that as the senior Laborer, Otten would have had the first opportunity to operate the mobile equipment on these shifts, had she not acted as a miners' representative.

Otten testified that she previously received Mobile Equipment Operator pay when she served as a miner's representative during shifts on which she would have otherwise operated mobile equipment. Vol II, Tr. 253-55. Otten further testified that she was assigned to operate mobile equipment "generally every day." Vol. II, Tr. 268.

A dispute arose when Heather Ames, a Continental human resources manager, instructed the payroll specialist to retract the Mobile Equipment Operator pay upgrades that Otten's supervisor had coded on her timecard for shifts on which Otten worked as a miners' representative (March 24-26, 31 and April 1-2, 2020). Ames testified that she believed that according to the new CBA, a miner must actually operate mobile equipment to receive the corresponding wage rate. Vol. II, Tr. 179, 182, 214-15. Ames relied upon the CBA's "zipper clause" which she understood to cancel past-practices concerning wage upgrades. Jt. Stip. at 24

[2] According to the CBA's Wage Rate Schedule, effective May 5, 2019, the Laborer rate was $25.05 an hour and the Mobile Equipment Operator hourly rate was $28.21. Effective May 3, 2020, the Laborer hourly rate was $25.68, and the Mobile Equipment Operator hourly rate was $28.92. Jt. Stip. at 21.

[3] Specifically, Otten participated in MSHA inspections that took place on March 24, 2020; March 25, 2020; March 26, 2020; March 31, 2020; April 1, 2020; April 2, 2020; June 9; 2020; July 8, 2020; July 14, 2020; July 15, 2020; July 21, 2020; July 22, 2020; January 28, 2021; and January 29, 2021. Jt. Stip. 30.

("This Agreement supersedes and cancels prior practices and agreements . . . ."). Accordingly, Ames believed that Otten should instead be paid as a Laborer for these specific shifts.[4]

Otten filed a grievance alleging that Continental wrongfully withheld pay, which Continental denied. On April 28, 2020, Otten filed the subject discrimination complaint with MSHA. The Secretary filed a complaint on behalf of Otten with the Commission.[5]

The Judge concluded that section 103(f) requires that a miners' representative receive the same compensation she would have otherwise received had the inspection not occurred. The Judge held that Continental structured its pay practices in a manner that may dissuade a miners' representative from exercising her statutory rights in violation of sections 103(f) and 105(c)(1). The Judge conducted two discrete analyses in support of his conclusion. In his primary analysis the Judge stated that the Secretary establishes a violation of section 105(c)(1) by demonstrating, by a preponderance of the evidence, that the miners' representative suffered a loss of pay in violation of section 103(f). 44 FMSHRC at 149. As an alternative analysis, the Judge utilized the traditional *Pasula-Robinette* test for discrimination, finding that the loss of pay was motivated by Otten's exercise of protected rights. *Id*. at 150.

On review, Continental raises numerous arguments as to why the Judge erred in his analysis and why his findings lack evidentiary support. For the reasons which follow, we reject those arguments, and we affirm the Judge.

II.

Disposition

Section 103(f), 30 U.S.C. § 813(f), establishes walkaround rights for miners who accompany MSHA inspectors on mine safety inspections. It provides that:

> . . . a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine . . . Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection.

[4] Continental later reinstated partial pay upgrades for March 31 and full upgrades for April 1-2 because Otten performed mobile equipment work during those shifts. Jt. Stip. 57, 77. Otten operated mobile equipment after finishing her duties as a miner's representative.

[5] On January 29, 2021, Otten became a full-time Mobile Equipment Operator.

The Act's legislative history states that section 103(f) was included in the Mine Act to:

> enable miners to understand the safety and health requirements of the Act and [thereby] enhance miner safety and health awareness. To encourage such miner participation, it is the Committee's intention that the miner who participates in such inspection and conferences be *fully compensated* by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

S. Rep. No. 95-181, 95th Cong., 1st Sess, at 28-29 (1977), reprinted in Senate Subcomm. on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616-17 (1978) (emphasis added).

With respect to section 105(c) of the Mine Act, its legislative history has led the Commission and courts to conclude that the section is to be construed "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the [Act]." S. Rep. at 36, Legis. Hist. at 624 (quoted in *Moses v. Whitley Development Corp*., 4 FMSHRC 1475, 1480 (Aug. 1982)); *see also Sec'y of Labor v. Cannelton Industries,* 867 F.2d 1432, 1437 (D.C. Cir. 1989). In *Moses*, the Commission held that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against "'not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference . . . .'" *Id*. at 1478 (quoting S. Rep. No. 95-191, at 36, Leg. Hist. at 624).

A. Continental Violated Sections 103(f) and 105(c)(1) of the Mine Act.

Section 103(f) of the Mine Act plainly requires an operator to compensate a miners' representative with the pay she would have received had she not exercised her statutory rights. 30 U.S.C. § 813(f) ("[s]uch representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation.). Our plain reading of the section is fully consistent with Congress' stated intention "to encourage [ ] miner participation" by providing "full compensation." S. Rep. No. 95-181, 95th Cong., 1st Sess, at 28-29 (1977); *see also Magma Copper Co.,* 1 FMSHRC 1948, 1951-52 (Dec. 1979) ("[t]he purpose of the right to walkaround pay granted by section 103(f) is [] clear: to encourage miners to exercise their right to accompany inspectors.").

We affirm the Judge's primary analysis and his holding that Continental interfered with miner representative Otten's statutory rights in violation of section 105(c)(1) when it paid her at a lower hourly rate than she would have otherwise earned. 44 FMSHRC at 149.

The Judge's decision is supported by *Roger L. Stillion v. Quarto Mining Co.,* 12 FMSHRC 932 (May 1990), in which the Commission concluded that the failure to compensate a miners' representative as required by section 103(f) demonstrates that the operator discriminated

against the miners' representative. The Commission considered whether the miner was entitled to compensation pursuant to section 103(f) and whether the right was violated. *Id*. at 937-39. Notably, the Commission *did not* find it necessary to consider whether the operator was motivated by discriminatory animus.[6]

We also find the Judge's analysis to be fully consistent with *Sec'y obo Richard Truex v. Consolidation Coal C*o., 8 FMSHRC 1293, 1299 (Sept. 1986). In *Truex*, the Commission found that the operator interfered with the miners' representative's section 103(f) rights in violation of section 105(c)(l). As in *Stillion*, the Commission in *Truex* did not base its liability findings on whether the operator was motivated by discriminatory animus. The Commission therefore ordered backpay, finding "Consol's attempt to use the Contract as a defense [to be] irrelevant." *Id*.

The record in this case is clear. Continental does not dispute that Otten would have earned a higher wage-rate on the shifts at issue if she had not exercised her walkaround rights and instead accepted the available mobile equipment assignment. In fact, Heather Ames testified that she instructed the payroll specialist to retract the pay upgrades "[b]ecause [Otten] was accompanying the MSHA [inspector] during an inspection." Vol. II, Tr. 58-62, 67-68, 72. She further testified Otten "could say she didn't want to go on the inspection. There are other miners' reps." Vol II, Tr. 79-80. Furthermore, in an email to her colleague Ames wrote "if Tara [Otten] is unavailable for a job, she is not available – no different than if she was on vacation or in the store house filling in, she would not get the upgrade because junior people below her received the upgrade. She chooses to work with MSHA." J Ex. 7-j. Ames confirmed, in a written statement to MSHA, that Continental would not pay wage upgrades to miners' representatives when a less senior employee receives the upgrade. J Ex. 3.[7] Because Otten exercised her statutory walkaround rights, she suffered an adverse action (loss of pay in violation of section 103(f)).[8]

---

[6] The parties' arguments addressing animus and the *Pasula-Robinette* test are addressed *infra* in subsection B.

[7] Our dissenting colleague claims that the Secretary submitted only "inclusive" evidence regarding animus to support a finding that the violation was motivated by protected activity. Slip op. at 14. While our analysis as set forth herein does not turn on an evaluation of Continental's motivation, we note the record evidence described above.

[8] Also, our dissenting colleague claims the majority has arbitrarily dismissed a statutorily required element of section 105(c) by ignoring the operator's motivation. Slip op. at 14-15. However, what the statute explicitly requires is *causality*. 30 U.S.C. § 815(c)(1) (no person shall discriminate against a miner "because of" the exercise of a statutory right). None of the cases cited by our colleague support his proposition that the definition of "because" must inherently require a showing of motivation. Slip op. at 14. Of course, in standard discrimination cases motivation has traditionally played a critical role in establishing causality. However, as discussed further below, we find that discriminatory motivation is not required to establish causality under the conditions of this case. The record clearly shows that this miner suffered a loss expressly prohibited by the Act because of her exercise of an expressly protected right. A finding of discrimination is consistent with the statutory requirements of section 105(c).

The operator argues that it complied with the Mine Act's requirements when it paid Otten her Laborer rate of pay for time served as a miners' representative. We disagree. Otten suffered a prohibited "loss of pay during the period of [her] participation in the inspection" when she was paid less for the shifts than she would have otherwise earned. 30 U.S.C. § 813(f). Continental "unfairly penalize[d] the miner for assisting the inspector" contradicting the legislative purpose of the section.[9] S. Rep. No. 95-181 at 28-29, Legis. Hist. at 616-17.

Additionally, Continental argues that according to the CBA, Otten was only entitled to the wage upgrade provided that she actually operated the mobile equipment. In the event of a conflict between the terms of the parties' agreement and the requirements of a federal statute, the statutory requirements take precedence. *See Barrentine v. Arkansas-Best Freight System, Inc*., 450 U.S. 728, 740-41 (1981) ("[W]e have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement."); *see also W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (*citing Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948) ("As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy.")).

To the extent that the CBA may conflict with section 103(f), the requirements of section 103(f) control. *See also R. Mullins v. Beth-Elkhorn Coal Corporation*, 9 FMSHRC 891, 899 (May 1987) (citations omitted) ("we do not decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights; nor do we unnecessarily thrust ourselves into resolution of labor or collective bargaining disputes.").

Any agreement between mine operators and unions must meet or exceed the statutory floor.[10]

Continental maintains that it did not discriminate against Otten or otherwise interfere with her rights, noting that during the same payroll processing period it also retracted the wage upgrades for Laborers that had performed carpentry work. Continental maintains it interpreted the CBA's zipper clause as canceling all informal prior pay practices, including its informal practice of providing pay upgrades for working as a miners' representative or as a carpenter. The analogy Continental draws between miner's representatives and carpenters is inapposite, performing carpentry work, in and of itself, is not a protected activity. Again, section 103(f) protects the pay of miners performing the statutory role of a "miners' representative" and is not superseded by any private agreement.

[9] Continental also alleges that previous decisions of Commission Administrative Law Judges support its position. To the contrary, we conclude that the Judge's decision in this matter is consistent with previous decisions of our Judges. In any event, Commission Judge's decisions are not precedential according to Commission Procedural Rule 69(d), 29 C.F.R. § 2700.69(d).

[10] Furthermore, the evidence demonstrates that on at least one occasion Otten was not assigned to operate mobile equipment, but was provided with upgraded pay because a junior Laborer was assigned to operate mobile equipment. The CBA provides Continental management with the discretion to grant unilateral wage increases. Vol II, Tr. 93-94.

B. A Showing of Discriminatory Animus is Not Required to Establish a Violation of Section 103(f).

Continental argues that it did not interfere with Otten's section 103(f) rights in violation of section 105(c)(1) because it was not motivated by a discriminatory animus. Continental argues that the Secretary must demonstrate that Otten's loss of pay was motivated by the exercise of protected activity in accordance with the *Pasula-Robinette* test for discrimination, in order for Continental to be liable for the alleged violations of the Mine Act. [11]

The Secretary likewise argues that a finding of discriminatory animus is a necessary element of a claim. However, the Secretary maintains that the Judge's alternative analysis – finding that Continental was motivated by Otten's exercise of protected rights when it retracted the pay upgrades – is supported by substantial evidence. The Secretary relies upon *Sec'y of Labor on behalf of Glover v. Consolidation Coal Co*., 19 FMSHRC 1529 (Sept. 1997), in which the Commission applied the *Pasula-Robinette* test for discrimination and found that the operator violated section 105(c)(1) when it transferred the positions of two miners' representatives in retaliation for the exercise of their rights.

We disagree with Continental's and the Secretary's contentions. As established *supra*, the Commission has not required that a miners' representative demonstrate that a loss of pay was motivated by discriminatory animus to prove unlawful interference with section 103(f) rights. In fact, permitting the operator to provide an affirmative defense – as Continental seeks to do – would be inconsistent with the operator's duty to comply with the explicit "no loss of pay" requirement in section 103(f) of the Mine Act. *See Sec'y on behalf of Truex*, 8 FMSHRC at 1299 (finding the operator's affirmative defense "irrelevant").

---

[11] According to the *Pasula-Robinette* framework, in order to establish a prima facie case under section 105(c) the complainant must establish that the adverse action was motivated in any part by the complaint's exercise of protected activity. *Sec'y on behalf of Pasula v. Consolidation Coal Co., 2* FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3rd Cir. 1981); *Sec'y on behalf of Robinette* v. *United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). An operator may defend affirmatively against a prima facie case by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See Robinette*, 3 FMSHRC at 817-18; *Pasula, 2* FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

The Ninth Circuit has rejected the *Pasula-Robinette* test in *Thomas v. CalPortland Co*., 993 F.3d 1204, 1209-10 (9th Cir. 2021). *Thomas* has been remanded to the Commission and remains a pending matter on our docket. Continental's Hannibal mine is located in the Eighth Circuit, and thus the Ninth Circuit ruling is not binding. Nevertheless, the Judge found that the loss of pay to Ms. Otten would not have occurred "but for" her engaging as a miners' representative during a walkaround inspection. We conclude that the Judge's findings under his alternative analysis are supported by substantial evidence, reasonable inferences drawn from the record, and proper consideration of relevant testimony.

We also find *Glover* to be readily distinguishable. Transfers of positions are not generally prohibited under the Mine Act. A transfer is unlawful, however, when motivated by discriminatory animus in violation of section 105(c)(1). In contrast, the "loss of pay" while exercising rights as a miners' representative is *always* expressly prohibited by section 103(f) of the Mine Act, regardless of intent. 30 U.S.C. § 820(a) ("The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary . . . .")*; see also Nally & Hamilton Enterprises*, 38 FMSHRC 1644, 1650 (July 2016) (citations omitted) ("Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault.").

Accordingly, consistent with Commission precedent, we find that a showing of animus is not required to establish a violation of section 103(f) and that *Pasula-Robinette* is not the appropriate test for evaluating a miners' representative's claim of an unlawful loss of pay in that regard.[12]

C. We Affirm the Judge's Penalty Assessment.

Continental additionally argues that the Judge erred in assessing a $17,500 civil penalty. Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), provides that the Commission is authorized to assess all penalties under the Mine Act and that such penalties must reflect consideration of six statutory factors.[13] The Commission's review of a Judge's discretionary penalty assessment is a two-step process. First, the Commission reviews the Judge's findings on the penalty factors for the support of substantial evidence and, second, the Commission reviews the Judge's overall assessment for an abuse of discretion. *Solar Sources I*, 42 FMSHRC 181, 208 (Mar. 2020).

Here, the Judge found that the operator's previous violation history, size of the mine and the size of the controlling entity were all moderate. 44 FMSHRC at 159. However, the Judge concluded that the negligence and gravity factors were significant. *Id*. at 158.

Continental asserts that the Judge erred in his assessment of the mine's violation history, failing to account for its lack of a prior history of section 105(c) violations. Continental is incorrect. It is well established that the Commission considers the operator's *general* violation history, not just its history of similar violations, when assessing a penalty. *See Solar Sources Mining*, *LLC,* 43 FMSHRC 367, 373 (Aug. 2021) (citations omitted).

Continental also argues that the Judge erred in his gravity finding. The operator wrongly maintains that the Judge should have considered its reliance on the CBA as a mitigating factor.

---

[12] We make no other finding regarding the *Pasula-Robinette* test in this proceeding.

[13] [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 [operator] charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

We conclude that the Judge's findings are supported by the record and that the Judge did not otherwise abuse his discretion in assessing a civil penalty. *See American Coal Co. v. FMSHRC*, 933 F.3d 723, 726 (D.C. Cir. 2019), *aff'g* 40 FMSHRC 1011 (Aug. 2018) ("we review the ALJ's penalty calculation for an abuse of discretion."); *see also Donovan ex rel. Chacon v. Phelps Dodge Corp*., 709 F.2d 86, 92 (D.C. Cir. 1983) (Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached."); *Island Creek Coal Co*., 15 FMSHRC 339, 347 (Mar. 1993) ("[i]t would be inappropriate for the Commission to reweigh the evidence … or to enter *de novo* findings based on an independent evaluation of the record.").

Accordingly, we affirm the penalty assessed by the Judge.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision in all respects.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

Commissioner Althen, concurring in part and dissenting in part:

I.

The record supports a loss of pay in violation of section 103(f).

I concur that the Complainant, Tara Otten, suffered a loss of pay due to not receiving an upgrade in pay to the status of a Mobile Equipment Operator ("MEO") on the days in question. I emphasize that nothing is illegal or improper in paying a miner for the work the miner performs on a given day. There is no legal deficiency with Article VI Section 9 of Continental Cement Company, LLC's ("Continental") contract with the United Steel Workers of America.

Here, however, the record permits no conclusion other than that Otten would have worked as an MEO on the days in question and, therefore, would have received upgraded MEO pay for those days. She was entitled to MEO pay for her time as a walkaround representative on those days.

II.

The Commission should overrule the discredited *Pasula/Robinette* standard and apply the "because" standard used in federal discrimination statutes.

Section 103(f) does not provide a private right of action for a miner to recoup a loss of wages. The miner must rely upon the Mine Safety and Health Administration ("MSHA") to recover lost pay.

Two routes are available to MSHA. It may cite the operator for a violation under section 104(a), 30 U.S.C § 814(a), for causing a loss of pay. For 103(f) citations issued under section 104(a), a strict liability section, MSHA must only prove a loss of pay from the miners' representative's participation in the inspection. A section 104(a) citation is straightforward and does not require proof of action motivated by protected activity. *See Magma Copper Co. v. Sec'y of Labor*, 645 F.2d 694 (9th Cir. 1981).

Alternatively, MSHA or a miner may file a discrimination complaint under section 105(c). 30 U.S.C. § 815(c). Section 105(c) requires proof of motivation "because of" protected activities. As relevant, Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . [1] ***because such miner*** . . . has filed or made a complaint under or related to this Act . . . or [2]***because such miner*** . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or [3] ***because such miner*** . . . has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such

> proceeding, or [4] ***because of the exercise by such miner*** … on behalf of himself or others **of any statutory right afforded by this Act**.

30 U.S.C. § 815(c)(1) (emphasis added).

The Secretary asserted a section 105(c) violation in this matter. By doing so, the Secretary accepted an obligation to prove its claim under the statute's requirements.[1]

The Commission's traditional standard of proof for a section 105(c) discrimination violation has been the *Pasula-Robinette* test. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). Under that test, the complainant or Secretary establishes a prima facie case of discrimination by proving (1) that the miner engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The operator may raise an affirmative defense by claiming it would have taken the same action for a reason other than protected activity. Despite its years as the Commission standard, it is now clear the *Pasula-Robinette* test is invalid.

In 2021, the United States Court of Appeals for the Ninth Circuit invalidated the *Pasula-Robinette* test, holding: "Section 105(c)'s unambiguous text requires a miner asserting a discrimination claim under Section 105(c) to prove but-for causation." *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1211 (9th Cir. 2021). The *CalPortland* case focused squarely upon section 105(c). The Commission must now apply that standard in cases within the Ninth Circuit. However, more compelling is that the circuit court's holding is correct. Indeed irrefutable. In *CalPortland*, the circuit court cited numerous Supreme Court decisions. *Id.* at 1209-10, *citing Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009). Those cases and CalPortland compel the application of the but-for standard to section 105(c) cases.

As the inevitable result of *CalPortland*, Judges now hedge their decisions by referring to *Pasula-Robinette* and *CalPortland*. Continued citation to *Pasula-Robinette* will inevitably result in parties and Commission Judges trying, arguing, and deciding cases under two standards. In this case, the Judge added a tagline in the decision that he would have reached the same result

[1] The majority finds the Administrative Law Judge ("ALJ") grounded his decision on the basis that it was unnecessary to prove the statutorily required elements of discrimination. The majority errs in accepting and endorsing the Judge's error. It is startling to read the majority describe section 105(c) as a strict liability section to which intent does not apply. The concept of strict liability in the Mine Act is derived from the section 110(a) of the Act (30 U.S.C. § 820(a)) which authorizes the imposition of civil penalties for violations of mandatory health or safety standards. *See Allied Prod. Co. v. FMSHRC*, 666 F.2d 890, 893 (5th Cir. 1982). I disagree with the majority's attempt to expand strict liability into section 105(c) proceedings, beyond what Congress clearly intended. Moreover, if strict liability is to be incorporated into section 105(c) proceedings, the majority's decision must be read to only do so in the limited context of a section 103(f) contest. To do otherwise would present a major change in long-standing Commission precedent and fly directly in the face of the plain letter of the law.

under the but-for standard. Such pro forma references to but-for causation may result, as in this case, in a minimized finding of but-for causation without meaningful discussion. The Commission should forego whistling *Pasula-Robinette* in the wind and formally adopt the proper standard. The correct issue on this appeal is whether Continental's insufficient payment was "because" of animosity toward the exercise of walkaround rights. In other words, we should apply the but-for standard and decide the issue based on whether the preponderance of the evidence shows protected activity-motivated discrimination.

However, application of *Pasula-Robinette*, in this case, would not change the result because that test requires proof of causation based upon protected activity. Here, the majority fails to apply any causation standard without explaining why an explicit element of section 105(c) does not apply to section 103(f) cases.

In 2016, the Commission rejected a challenge to *Pasula-Robinette*. *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1919-21 (Aug. 2016). However, times change, and Commission Judges now plot a course between two tests. It is time for the Commission to recognize the inevitability of the proper test for discrimination and adjust its test to the correct "but for" standard.

III.

The record does not contain substantial evidence that Otten received her regular pay "because" she acted as a miners' representative. Continental's human resource manager decided the appropriate pay "because" of Continental's collective bargaining agreement with Otten's union.

A. Relevant facts

Continental operates the Hannibal Underground Mine in Missouri. The United Steel Workers of America represents the hourly employees at the plant. The Union negotiated a collective bargaining agreement ("CBA") with Continental for union-represented employees, including Otten. As with most union contracts, the CBA created classified employee positions and established pay rates for each classification.

Two classifications were Laborer and Mobile Equipment Operator. Laborers are hourly-rate employees who perform primarily general clean-up work throughout the plant, lawn work, labor work involved in refractory replacement in kiln and cooler, snow removal from roadways and sidewalks, and painting. A Laborer is expected to be capable of operating various types of mobile equipment as needed. Of course, the work of an MEO is to exclusively operate mobile equipment.

The CBA pay rates provide slightly more than $3.00 per hour additional pay for employees classified as MEO workers. The CBA, however, also provides that management could require a Laborer to perform MEO work. When a Laborer does so, the CBA requires Continental to pay the MEO classification wage rate, stating, "[w]hen work of a higher paid

classification is required of any employee, he/she shall receive the higher rate of pay for a minimum of four hours." J. Ex. 4, at 14. Under the CBA, this upgraded pay depended upon the performance of MEO work. If a Laborer performed MEO work for less than four hours, the Laborer received the higher rate for four hours. If the employee performed MEO work for more than four hours, the employee received MEO pay for the entire day.[2]

Otten's default classification was Laborer. She also was a miners' representative. All agree that she frequently performed MEO work and received the upgraded pay according to the CBA when she performed such work. Continental paid her according to her classification as a Laborer when not performing such work.

On the dates in question, Otten had or would have had the opportunity to perform MEO work at the MEO pay rate. On those dates, however, an MSHA inspector was present at the mine, and Otten chose to exercise her walkaround rights with the MSHA inspector. It is undisputed that based upon experience, Otten would have taken that opportunity for MEO work had she not chosen to exercise the right of a miners' representative.

Initially, Otten received pay at the rate of an MEO for the days in question. Subsequently, a Continental Human Resources specialist, Heather Ames, reviewed Continental's pay records including those of Otten and two other union-represented workers. According to Ames, she alone decided to apply the terms of the CBA. Ames found that Otten did not perform MEO work on certain days and, therefore, was not entitled to upgraded MEO pay under the CBA. On the same day, Ames reversed the paid upgrade for the two other employees because the upgrade pay provision did not apply to them. Ames testified that she later found that she had made a mistake for certain days and then partially reinstated the upgrades for Otten.

The evidence establishes that Ames made these pay decisions based on the terms of the CBA. Ames testified that she, and she alone, decided to reduce the pay and then partially upgrade the pay of Otten and other workers. No witness or evidence impeached Ames' testimony that she made these decisions.

---

[2] Article VI, Section 9 of the CBA provides:

> When work of a higher paid classification is required of any employee, he/she shall receive the higher rate of pay for a minimum of four hours. If the employee exceeds four hours of work at the higher classification, then he/she shall receive the higher rate of pay for the entire day. When work of a lower paid classification is temporarily required of any employee, he/she shall receive his/her regular straight time hourly rate of pay.

J Ex. 4, at 14; Jt. Stip. 23.

B. The Judge's Decision

The Judge's decision initially recognized that *Pasula-Robinette* is the Commission's test for discrimination. He correctly found that under that test, a miner proves discrimination "when [she] proves by a preponderance of the evidence that the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by that protected activity." 44 FMSHRC 121, 148 (Feb. 2022) (ALJ).

The Judge acknowledged that "it is true that the Commission has applied the *Pasula-Robinette* framework in [s]ection 103(f) walkaround cases." *Id.* at 149. Immediately after that, however, the Judge asserted that he did not need to apply the third factor (adverse action motivated in any part by that protected activity) of *Pasula-Robinette* to find a violation of section 103(f).

The Judge concluded, "the Court does not believe that the Secretary *must* show, per the *Pasula-Robinette* framework, that Continental's refusal to pay Otten the wage upgrades was motivated by Otten's walkaround activities." *Id.*[3] Incredibly, the majority now accepts the Judge's deeply flawed reasoning and states violations of section 105(c) need not contain any element of expressly required causation.

Finally, after a brief discussion of the penalty factors, the Judge imposed a penalty of $17,500.

C. To Prevail on a Section 105(c) accusation, the Secretary Must Prove Three Factors: Protected Activity, Adverse Action, and Adverse Action Because of the Protected Activity. The Majority Errs by Disregarding the Necessity for Finding Causation by Protected Activity.

The majority correctly, albeit implicitly, decides that the Secretary did not prove the violation of section 103(f) was "because of protected activity." The Secretary introduced inconclusive evidence to suggest that certain supervisory employees of Continental may have harbored ill feelings toward Otten due to other safety activities. However, the record clearly demonstrates that Ames, and Ames alone, decided to pay Otten Laborer wages per the CBA.

As the Judge fleetingly acknowledged but then abandoned, motivation is critical for finding a violation of section 105(c). Indeed, all three elements—protected activity, adverse action, and motivation by the protected activity—are expressly articulated in the statute and are necessary to establish discrimination. Indeed, one might conclude that motivation is the lynchpin

[3] It may be that the Judge felt and Commission mistakenly feels a need to find a violation of section 105(c) for Otten to prevail on the section 103(f) claim or that prevailing on the section 103(f) automatically required a finding of discrimination. That would be incorrect. MSHA's filing of the discrimination claim was sufficient to put both the right to pay and the occurrence of discrimination before the Commission. A supported finding of a failure to meet the requirements of section 103(f) may then be made separately even when the Secretary does not prove discrimination under section 105(c).

of section 105(c) violations. Each day miners raise issues related to safety, thereby engaging in protected activity. Each day operators take adverse actions regarding miners. Section 105(c) crucially mandates that discrimination occurs only when the protected activity motivates the adverse action.

It is in this respect that the majority departed from the law. The majority declares by fiat that a clearly expressed requirement for a section 105(c) violation does not apply if the case involves section 103(f). The majority does not provide any support or explanation for arbitrarily dismissing an explicit factor for a violation. Nowhere does the majority explain why the express language of section 105(c) unambiguously requiring motivation does not apply in a section 103(f) context.

Circuit court cases uniformly recognize that "because" in section 105(c) means "because" and, therefore, a complainant must establish a motivational nexus between the protected activity and adverse action. *See generally CalPortland Co.*, 993 F.3d at 1208-1211; *Harrison County Coal Co. v. FMSHRC*, 790 Fed. Appx. 210, 213 (D.C. Cir. 2019); *Con-Ag, Inc. v. Sec'y of Labor*, 897 F.3d 693, 700-02 (6th Cir. 2018); *Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 318 (6th Cir. 2013); *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 88 (D.C. Cir. 1983).

The importance of section 103(f) neither requires nor suggests tarring Continental with a discrimination tag based upon Ames' belief that, per the CBA, Otten was only entitled to Laborer's wages. The majority finds discrimination by removing the necessary element of motivation from a section 105(c) violation, even though the Secretary concedes it is necessary.

In disclaiming the express requirement of the Mine Act, the majority does not cite the words of the Act, legislative history, or any policy requisite. Without meaningful analysis, the majority would establish that a violation of section 103(f) is a per se violation of section 105(c). In doing so, it primarily relies on one case. *Stillion v. Quarto Mining Co.*, 11 FMSHRC 523 (Apr. 1989) (ALJ), *aff'd* 12 FMSHRC 932 (May 1990).[4]

[4] The majority mischaracterizes the facts and decision in *Sec'y on behalf of Truex v. Consolidation Coal C*o., 8 FMSHRC 1293 (Sept. 1986). The Commission in *Truex,* expressly included "motivation" as part of the proof for a section 105(c) violation. Further, it explained that an operator could defend a 105(c) case by showing the action was not motivated by protected activity. *Id*. at 1297. The facts were that the safety supervisor knew Truex was a miner's representative and that he intended to attend a meeting with an MSHA inspector who would be arriving momentarily. Nonetheless, the safety supervisor ordered Truex to report to work at a location that would have prevented Truex from accompanying the inspector. Truex was forced to take unpaid leave in the form of "union business" to attend the meeting and was then barred from working for the rest of his shift. The operator claimed that, pursuant to the union contract, a miner could not be paid for a partial shift if he had claimed to be on "union business." The Commission found that the contract was irrelevant to the defense of the section 105(c) allegations, not because a union contract could not be used to demonstrate the operator's motivation, but because the discrimination happened before the operator invoked the contractual (continued…)

Quarto does not support the majority "per se" concept. At best, the ALJ and Commission decisions are cursory. To the extent the decisions recite facts, it is clear the failure to pay arose from the operator's animus to the walkaround. The operator refused to pay a miner any money "because" he did the walkaround with an MSHA inspector. Moreover, the Commission did not even discuss the standards for finding a section 105(c) violation or any issue of motive or causation.

In *Quarto*, a miner alleged violations of sections 103(f) and 105(c). The ALJ decision does not discuss *Pasula-Robinette* or any elements of section 105(c). Having not discussed section 105(c) in his decision, the ALJ did not discuss any requirements for finding a section 105(c) violation. The entirety of the ALJ's finding is: "Respondent violated § 103(f) of the Act by refusing to pay Complainant his regular rate of pay for his time spent accompanying a federal mine inspector on October 6, 7, and 8, 1987." 11 FMSHRC at 527. The Judge did not make any finding concerning section 105(c) or its necessary elements. Had the Judge considered motivation, he would have found it in the case. Further, the Judge did not impose any penalty upon the operator nor invite MSHA to do so. *See Stillion v. Quarto Mining Co.*, 11 FMSHRC 875 (May 1989) (supplemental decision on damages).

Upon review, the Commission mistakenly stated at the outset of its decision that the Judge had found discrimination. However, the Commission's conclusion of law did not find a section 105(c) violation. The Commission's concluded "that in the circumstances of the present case Stillion had a right to walkaround pay under section 103(f)." 12 FMSHRC at 939. As with the ALJ's decision, the Commission's decision did not discuss the essential elements of discrimination, *Pasula-Robinette*, or motive or causation, let alone dispense with motivation as an element of section 105(c). Further, the Commission also did not impose a penalty.

Therefore, *Quarto* supports a section 103(f) violation. However, *Quarto* does not reach a legal conclusion that a section 105(c) violation occurred, does not discuss the requirements for a section 105(c) violation, would have found motivation under the facts of the case, and does not support a claim of per se violations.

The majority expressly recognizes that the Secretary argues that a finding of discriminatory animus is a necessary element of a claim. Slip Op. at 7. The Secretary does not contend that violations of section 103(f) are per se violations of section 105(c). The Secretary's failure to make such an argument is an appropriate recognition that section 105(c) requires motivation (causation) arising from protected activity. The Secretary's position is correct.

[4] (…continued)
terms and was thus irrelevant. *Id*. at 1299. There is no resemblance to this case in which the operator did not take any action to prevent the miner's exercise of walkaround rights and paid the miner for the time spent on the walkaround.

IV.

The Facts Suggest Only a Small Penalty.

The Mine Act sets forth six factors in setting penalties: (1) effect on the operator's ability to continue in business; (2) an appropriate reduction for demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation; (3) the appropriateness of such penalty to the size of the business of the operator charged; (4) the operator's history of previous violations; (5) whether the operator was negligent; and (6) the gravity of the violation. 30 U.S.C. § 820(i).

Factors one and two play no role in this case. The proposed penalty would not affect the ability of the operator to continue in business. The statute allows mitigation of penalties when an operator acts rapidly to achieve compliance. In this case, believing in the legality of its use of the CBA, Continental continued to make payments in the same fashion after the Secretary filed the complaint. The failure to capitulate immediately to the Secretary's legal position with which an operator in good faith disagrees is not a reason to increase the penalty. Regarding size, the Hannibal mine is a mid-size operation, so size does not weigh heavily for or against a particular penalty.

Despite a long operational history, Continental has no history of a prior finding of a violation of section 103(f). The present case is a one-off in which the operator incorrectly thought it should use the CBA. Of course, even in discrimination cases, the Commission also considers the operator's history of safety violations. However, strict liability violations of operational safety rules have little to do with a tendency of an operator to be motivated to retaliate against a miner based on protected activity. Certainly, the absence of even one prior violation weighs heavily in favor of a low penalty.

It is difficult to know what to make of the ALJ's brief discussion of negligence. The ALJ cites a Commission decision to propose that the negligence issue is whether the operator engaged in intentional conduct in committing the violation rather than whether it intended to discriminate. 44 FMSHRC at 157, *citing Sec'y on behalf of Poddey v. Tanglewood Energy, Inc*., 18 FMSHRC 1315, 1319 (Aug. 1996) (Commissioners Marks and Riley).[5] Continental's actions were intentional to the extent Ames' decision to apply the CBA was intentional. In *Tanglewood Energy*, the Commission found that, although the conduct was intentional, the actions constituted low negligence. *Id.* at 1319-20. Continental, through Ames, had an objective, albeit mistaken, belief that it should apply the CBA to Otten's work. Continental's legal position was untenable. However, there is no evidence that Continental took the position in bad faith or, in taking an incorrect position, it failed to exercise reasonable care. Thus, substantial evidence supports that negligence is a minor factor in the penalty consideration.

[5] In determining negligence, the Commission considers whether an operator has met its duty of care. The Commission considers the actions of a reasonably prudent person familiar with the mining industry, the relevant facts, and the purpose of the regulation. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016). In short, did the operator act with the prudence a reasonable operator would have exercised under the same or similar circumstances.

Interestingly, *Tanglewood* has greater relevance to the gravity consideration than negligence. In *Tanglewood*, the Commission rejected the Secretary's argument that every section 105(c) violation must be presumed to have a chilling effect. *Id.* at 1320. As with any violation, the gravity of section 105(c) violation must be based on the evidence.

Objective and subjective evidence determine gravity. *Id.* at 1321. The subjective element is the chilling effect upon miners that rests upon "the testimony of the complainant or other miners." *Id*., *citing Sec'y on behalf of Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 558 (Apr. 1996). From an objective standpoint, the question is whether there is evidence that the incident "reasonably tended to discourage miners from engaging in protected activities." *Id*.

In this case, the Secretary presented no evidence of any subjective or objective discouragement of such activity. The Secretary did not present any objective data or measurement showing any adverse effect upon Continental's miners. Otten was the only hourly miner who testified, and her continued performance of walkaround activities demonstrates that she was not discouraged. Thus, there is no evidence of a subjective chill upon miners. In sum, there is no evidence that this one-time occurrence had any subjective or objective adverse effect on Continental's miners' willingness to exercise their statutory rights. As with all factors of a penalty consideration, we must base the decision regarding gravity on evidence and not a Judge's desire to punish an operator. The gravity factor is low without any subjective or objective evidence of a chilling effect.

In summary, the effect on the ability to stay in business and mitigation through abatement are irrelevant here. Continental's size is moderate. The absence of any prior violation cuts in favor of a low penalty. Ames' actions were intentional in that she intended to do what she did but unintentional in any sense of a knowing violation of section 105(c). Finally, there is no subjective or objective evidence of a chilling effect. So, the gravity is low.

V.

Conclusion.

Here, the majority's unwarranted decision to delete a fundamental element from section 105(c) is more than a wrong result. The decision muddies proof of section 105(c) violations when the disparity between *Pasula-Robinette* and *CalPortland* already troubles the water. It creates uncertainty regarding whether there are other situations in which a majority might substitute its own wishes over that of Congress and decide by fiat to alter the statute's requirements. For the first time, it creates a per se violation of section 105(c). It fails to explain why a section 103(f) violation automatically violates section 105(c), even though finding a section 103(f) violation vindicates the miner's rights.

The Commission should find a violation of section 103(f). The evidence does not show Continental's actions were because of protected activity. Continental did not violate section 105(c). The violation of section 103(f) warrants no or only a minor penalty.

I concur with the violation of se

ction 103(f) and respectfully dissent from the finding of a violation of section 105(c) and the assessed penalty.

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

Emily O. Roberts, Esq.
Senior Trial Attorney
Office of the Solicitor
U.S. Department of Labor,
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Roberts.Emily.O@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Scott.Emily.T@dol.gov

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Thomas. R. Chibnall, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
7700 Bonhomme Ave., Suite 650
St. Louis, MO 63105
Thomas.Chibnall@ogletree.com

R. Lance Witcher, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
7700 Bonhomme Ave., Suite 650
St. Louis, MO 63105
Lance.Witcher@ogletree.com

Melanie Garris
Civil Penalty Compliance Division Chief
U.S. Department of Labor
Office of Assessments
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@dol.gov

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520 N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Administrative Law Judge William B. Moran
Federal Mine Safety & Health Review Commission,
1331 Pennsylvania Avenue, NW, Suite 520 N
Washington, DC 20004-1710
WMoran@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 8, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of TARA OTTEN	
v.	Docket No. CENT 2021-0013
CONTINENTAL CEMENT COMPANY, LLC	

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

DECISION

BY: Jordan, Chair; Rajkovich and Baker, Commissioners

This case, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), concerns a complaint filed by the Secretary of Labor on behalf of Tara Otten, pursuant to section 105(c) of the Act, 30 U.S.C. § 815(c).[1] The Secretary alleges that Continental Cement Company ("Continental") violated section 105(c)(1) when it withheld pay from Otten because she exercised her statutory rights as a designated representative of miners pursuant to section 103(f) of the Mine Act, 30 U.S.C. § 813(f) (miners' representatives shall have the "opportunity to accompany [an inspector] during the physical inspection [of the mine]" while "suffer[ing] *no loss of pay* during the period of [her] participation.") (emphasis added).

After a hearing, a Commission Judge issued a decision holding that Continental violated sections 103(f) and 105(c)(1) of the Mine Act when it refused to pay Otten the wage-rate she would have otherwise earned on certain shifts, had she not served as a miners' representative. 44 FMSHRC 121, 149 (Feb. 2022) (ALJ). The Judge awarded Otten backpay of $388.39 plus pre-judgment interest and assessed a civil penalty of $17,500 against Continental. *Id*. at 159. Thereafter, Continental filed a petition for discretionary review of the Judge's decision, which the Commission granted. For the reasons herein, we affirm the Judge's decision.

[1] Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides that:

> [n]o person shall discharge or in any manner discriminate against . . . or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners . . . because of the exercise by such miner, representative of miners . . . on behalf of himself or others of any statutory right afforded by this Act.

I.

Factual and Procedural Background

At the time of the events at issue, Tara Otten worked as a "Laborer" in the Yard department at Continental's underground limestone mine in Hannibal, Missouri. Otten also served as a designated representative of miners pursuant to section 103(f) of the Mine Act.

The United Steelworkers represents Continental's employees; a collective bargaining agreement ("CBA") governs the terms and conditions of their employment. According to the CBA, if there are an insufficient number of "Mobile Equipment Operators" on a shift, the most senior qualified "Laborer" is given the opportunity to perform mobile equipment work and is paid at the higher Mobile Equipment Operator hourly rate.[2] Therefore, in instances when Otten was the most senior qualified Laborer in the Yard department, she would receive the first opportunity for an available mobile equipment assignment.

On certain shifts that occurred between March 2020 and January 2021, Otten accompanied an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") as the designated miners' representative on inspections of the mine.[3] During these shifts, a Laborer operated mobile equipment and received the corresponding pay upgrade. It is undisputed that as the senior Laborer, Otten would have had the first opportunity to operate the mobile equipment on these shifts, had she not acted as a miners' representative.

Otten testified that she previously received Mobile Equipment Operator pay when she served as a miner's representative during shifts on which she would have otherwise operated mobile equipment. Vol II, Tr. 253-55. Otten further testified that she was assigned to operate mobile equipment "generally every day." Vol. II, Tr. 268.

A dispute arose when Heather Ames, a Continental human resources manager, instructed the payroll specialist to retract the Mobile Equipment Operator pay upgrades that Otten's supervisor had coded on her timecard for shifts on which Otten worked as a miners' representative (March 24-26, 31 and April 1-2, 2020). Ames testified that she believed that according to the new CBA, a miner must actually operate mobile equipment to receive the corresponding wage rate. Vol. II, Tr. 179, 182, 214-15. Ames relied upon the CBA's "zipper clause" which she understood to cancel past-practices concerning wage upgrades. Jt. Stip. at 24

[2] According to the CBA's Wage Rate Schedule, effective May 5, 2019, the Laborer rate was $25.05 an hour and the Mobile Equipment Operator hourly rate was $28.21. Effective May 3, 2020, the Laborer hourly rate was $25.68, and the Mobile Equipment Operator hourly rate was $28.92. Jt. Stip. at 21.

[3] Specifically, Otten participated in MSHA inspections that took place on March 24, 2020; March 25, 2020; March 26, 2020; March 31, 2020; April 1, 2020; April 2, 2020; June 9; 2020; July 8, 2020; July 14, 2020; July 15, 2020; July 21, 2020; July 22, 2020; January 28, 2021; and January 29, 2021. Jt. Stip. 30.

("This Agreement supersedes and cancels prior practices and agreements . . . ."). Accordingly, Ames believed that Otten should instead be paid as a Laborer for these specific shifts.[4]

Otten filed a grievance alleging that Continental wrongfully withheld pay, which Continental denied. On April 28, 2020, Otten filed the subject discrimination complaint with MSHA. The Secretary filed a complaint on behalf of Otten with the Commission.[5]

The Judge concluded that section 103(f) requires that a miners' representative receive the same compensation she would have otherwise received had the inspection not occurred. The Judge held that Continental structured its pay practices in a manner that may dissuade a miners' representative from exercising her statutory rights in violation of sections 103(f) and 105(c)(1). The Judge conducted two discrete analyses in support of his conclusion. In his primary analysis the Judge stated that the Secretary establishes a violation of section 105(c)(1) by demonstrating, by a preponderance of the evidence, that the miners' representative suffered a loss of pay in violation of section 103(f). 44 FMSHRC at 149. As an alternative analysis, the Judge utilized the traditional *Pasula-Robinette* test for discrimination, finding that the loss of pay was motivated by Otten's exercise of protected rights. *Id*. at 150.

On review, Continental raises numerous arguments as to why the Judge erred in his analysis and why his findings lack evidentiary support. For the reasons which follow, we reject those arguments, and we affirm the Judge.

II.

Disposition

Section 103(f), 30 U.S.C. § 813(f), establishes walkaround rights for miners who accompany MSHA inspectors on mine safety inspections. It provides that:

> . . . a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine . . . Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection.

[4] Continental later reinstated partial pay upgrades for March 31 and full upgrades for April 1-2 because Otten performed mobile equipment work during those shifts. Jt. Stip. 57, 77. Otten operated mobile equipment after finishing her duties as a miner's representative.

[5] On January 29, 2021, Otten became a full-time Mobile Equipment Operator.

The Act's legislative history states that section 103(f) was included in the Mine Act to:

> enable miners to understand the safety and health requirements of the Act and [thereby] enhance miner safety and health awareness. To encourage such miner participation, it is the Committee's intention that the miner who participates in such inspection and conferences be *fully compensated* by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

S. Rep. No. 95-181, 95th Cong., 1st Sess, at 28-29 (1977), reprinted in Senate Subcomm. on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616-17 (1978) (emphasis added).

With respect to section 105(c) of the Mine Act, its legislative history has led the Commission and courts to conclude that the section is to be construed "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the [Act]." S. Rep. at 36, Legis. Hist. at 624 (quoted in *Moses v. Whitley Development Corp*., 4 FMSHRC 1475, 1480 (Aug. 1982)); *see also Sec'y of Labor v. Cannelton Industries,* 867 F.2d 1432, 1437 (D.C. Cir. 1989). In *Moses*, the Commission held that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against "'not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference . . . .'" *Id*. at 1478 (quoting S. Rep. No. 95-191, at 36, Leg. Hist. at 624).

A. Continental Violated Sections 103(f) and 105(c)(1) of the Mine Act.

Section 103(f) of the Mine Act plainly requires an operator to compensate a miners' representative with the pay she would have received had she not exercised her statutory rights. 30 U.S.C. § 813(f) ("[s]uch representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation.). Our plain reading of the section is fully consistent with Congress' stated intention "to encourage [ ] miner participation" by providing "full compensation." S. Rep. No. 95-181, 95th Cong., 1st Sess, at 28-29 (1977); *see also Magma Copper Co.,* 1 FMSHRC 1948, 1951-52 (Dec. 1979) ("[t]he purpose of the right to walkaround pay granted by section 103(f) is [] clear: to encourage miners to exercise their right to accompany inspectors.").

We affirm the Judge's primary analysis and his holding that Continental interfered with miner representative Otten's statutory rights in violation of section 105(c)(1) when it paid her at a lower hourly rate than she would have otherwise earned. 44 FMSHRC at 149.

The Judge's decision is supported by *Roger L. Stillion v. Quarto Mining Co.,* 12 FMSHRC 932 (May 1990), in which the Commission concluded that the failure to compensate a miners' representative as required by section 103(f) demonstrates that the operator discriminated

against the miners' representative. The Commission considered whether the miner was entitled to compensation pursuant to section 103(f) and whether the right was violated. *Id*. at 937-39. Notably, the Commission *did not* find it necessary to consider whether the operator was motivated by discriminatory animus.[6]

We also find the Judge's analysis to be fully consistent with *Sec'y obo Richard Truex v. Consolidation Coal C*o., 8 FMSHRC 1293, 1299 (Sept. 1986). In *Truex*, the Commission found that the operator interfered with the miners' representative's section 103(f) rights in violation of section 105(c)(l). As in *Stillion*, the Commission in *Truex* did not base its liability findings on whether the operator was motivated by discriminatory animus. The Commission therefore ordered backpay, finding "Consol's attempt to use the Contract as a defense [to be] irrelevant." *Id*.

The record in this case is clear. Continental does not dispute that Otten would have earned a higher wage-rate on the shifts at issue if she had not exercised her walkaround rights and instead accepted the available mobile equipment assignment. In fact, Heather Ames testified that she instructed the payroll specialist to retract the pay upgrades "[b]ecause [Otten] was accompanying the MSHA [inspector] during an inspection." Vol. II, Tr. 58-62, 67-68, 72. She further testified Otten "could say she didn't want to go on the inspection. There are other miners' reps." Vol II, Tr. 79-80. Furthermore, in an email to her colleague Ames wrote "if Tara [Otten] is unavailable for a job, she is not available – no different than if she was on vacation or in the store house filling in, she would not get the upgrade because junior people below her received the upgrade. She chooses to work with MSHA." J Ex. 7-j. Ames confirmed, in a written statement to MSHA, that Continental would not pay wage upgrades to miners' representatives when a less senior employee receives the upgrade. J Ex. 3.[7] Because Otten exercised her statutory walkaround rights, she suffered an adverse action (loss of pay in violation of section 103(f)).[8]

---

[6] The parties' arguments addressing animus and the *Pasula-Robinette* test are addressed *infra* in subsection B.

[7] Our dissenting colleague claims that the Secretary submitted only "inconclusive" evidence regarding animus to support a finding that the violation was motivated by protected activity. Slip op. at 14. While our analysis as set forth herein does not turn on an evaluation of Continental's motivation, we note the record evidence described above.

[8] Also, our dissenting colleague claims the majority has arbitrarily dismissed a statutorily required element of section 105(c) by ignoring the operator's motivation. Slip op. at 14-15. However, what the statute explicitly requires is *causality*. 30 U.S.C. § 815(c)(1) (no person shall discriminate against a miner "because of" the exercise of a statutory right). None of the cases cited by our colleague support his proposition that the definition of "because" must inherently require a showing of motivation. Slip op. at 14. Of course, in standard discrimination cases motivation has traditionally played a critical role in establishing causality. However, as discussed further below, we find that discriminatory motivation is not required to establish causality under the conditions of this case. The record clearly shows that this miner suffered a loss expressly prohibited by the Act because of her exercise of an expressly protected right. A finding of discrimination is consistent with the statutory requirements of section 105(c).

The operator argues that it complied with the Mine Act's requirements when it paid Otten her Laborer rate of pay for time served as a miners' representative. We disagree. Otten suffered a prohibited "loss of pay during the period of [her] participation in the inspection" when she was paid less for the shifts than she would have otherwise earned. 30 U.S.C. § 813(f). Continental "unfairly penalize[d] the miner for assisting the inspector" contradicting the legislative purpose of the section.[9] S. Rep. No. 95-181 at 28-29, Legis. Hist. at 616-17.

Additionally, Continental argues that according to the CBA, Otten was only entitled to the wage upgrade provided that she actually operated the mobile equipment. In the event of a conflict between the terms of the parties' agreement and the requirements of a federal statute, the statutory requirements take precedence. *See Barrentine v. Arkansas-Best Freight System, Inc*., 450 U.S. 728, 740-41 (1981) ("[W]e have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement."); *see also W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (*citing Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948) ("As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy.")).

To the extent that the CBA may conflict with section 103(f), the requirements of section 103(f) control. *See also R. Mullins v. Beth-Elkhorn Coal Corporation*, 9 FMSHRC 891, 899 (May 1987) (citations omitted) ("we do not decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights; nor do we unnecessarily thrust ourselves into resolution of labor or collective bargaining disputes.").

Any agreement between mine operators and unions must meet or exceed the statutory floor.[10]

Continental maintains that it did not discriminate against Otten or otherwise interfere with her rights, noting that during the same payroll processing period it also retracted the wage upgrades for Laborers that had performed carpentry work. Continental maintains it interpreted the CBA's zipper clause as canceling all informal prior pay practices, including its informal practice of providing pay upgrades for working as a miners' representative or as a carpenter. The analogy Continental draws between miner's representatives and carpenters is inapposite, performing carpentry work, in and of itself, is not a protected activity. Again, section 103(f) protects the pay of miners performing the statutory role of a "miners' representative" and is not superseded by any private agreement.

[9] Continental also alleges that previous decisions of Commission Administrative Law Judges support its position. To the contrary, we conclude that the Judge's decision in this matter is consistent with previous decisions of our Judges. In any event, Commission Judge's decisions are not precedential according to Commission Procedural Rule 69(d), 29 C.F.R. § 2700.69(d).

[10] Furthermore, the evidence demonstrates that on at least one occasion Otten was not assigned to operate mobile equipment, but was provided with upgraded pay because a junior Laborer was assigned to operate mobile equipment. The CBA provides Continental management with the discretion to grant unilateral wage increases. Vol II, Tr. 93-94.

B. A Showing of Discriminatory Animus is Not Required to Establish a Violation of Section 103(f).

Continental argues that it did not interfere with Otten's section 103(f) rights in violation of section 105(c)(1) because it was not motivated by a discriminatory animus. Continental argues that the Secretary must demonstrate that Otten's loss of pay was motivated by the exercise of protected activity in accordance with the *Pasula-Robinette* test for discrimination, in order for Continental to be liable for the alleged violations of the Mine Act. [11]

The Secretary likewise argues that a finding of discriminatory animus is a necessary element of a claim. However, the Secretary maintains that the Judge's alternative analysis – finding that Continental was motivated by Otten's exercise of protected rights when it retracted the pay upgrades – is supported by substantial evidence. The Secretary relies upon *Sec'y of Labor on behalf of Glover v. Consolidation Coal Co*., 19 FMSHRC 1529 (Sept. 1997), in which the Commission applied the *Pasula-Robinette* test for discrimination and found that the operator violated section 105(c)(1) when it transferred the positions of two miners' representatives in retaliation for the exercise of their rights.

We disagree with Continental's and the Secretary's contentions. As established *supra*, the Commission has not required that a miners' representative demonstrate that a loss of pay was motivated by discriminatory animus to prove unlawful interference with section 103(f) rights. In fact, permitting the operator to provide an affirmative defense – as Continental seeks to do – would be inconsistent with the operator's duty to comply with the explicit "no loss of pay" requirement in section 103(f) of the Mine Act. *See Sec'y on behalf of Truex*, 8 FMSHRC at 1299 (finding the operator's affirmative defense "irrelevant").

---

[11] According to the *Pasula-Robinette* framework, in order to establish a prima facie case under section 105(c) the complainant must establish that the adverse action was motivated in any part by the complaint's exercise of protected activity. *Sec'y on behalf of Pasula v. Consolidation Coal Co., 2* FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3rd Cir. 1981); *Sec'y on behalf of Robinette* v. *United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). An operator may defend affirmatively against a prima facie case by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See Robinette*, 3 FMSHRC at 817-18; *Pasula, 2* FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

The Ninth Circuit has rejected the *Pasula-Robinette* test in *Thomas v. CalPortland Co*., 993 F.3d 1204, 1209-10 (9th Cir. 2021). *Thomas* has been remanded to the Commission and remains a pending matter on our docket. Continental's Hannibal mine is located in the Eighth Circuit, and thus the Ninth Circuit ruling is not binding. Nevertheless, the Judge found that the loss of pay to Ms. Otten would not have occurred "but for" her engaging as a miners' representative during a walkaround inspection. We conclude that the Judge's findings under his alternative analysis are supported by substantial evidence, reasonable inferences drawn from the record, and proper consideration of relevant testimony.

We also find *Glover* to be readily distinguishable. Transfers of positions are not generally prohibited under the Mine Act. A transfer is unlawful, however, when motivated by discriminatory animus in violation of section 105(c)(1). In contrast, the "loss of pay" while exercising rights as a miners' representative is *always* expressly prohibited by section 103(f) of the Mine Act, regardless of intent. 30 U.S.C. § 820(a) ("The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary . . . .")*; see also Nally & Hamilton Enterprises*, 38 FMSHRC 1644, 1650 (July 2016) (citations omitted) ("Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault.").

Accordingly, consistent with Commission precedent, we find that a showing of animus is not required to establish a violation of section 103(f) and that *Pasula-Robinette* is not the appropriate test for evaluating a miners' representative's claim of an unlawful loss of pay in that regard.[12]

C. We Affirm the Judge's Penalty Assessment.

Continental additionally argues that the Judge erred in assessing a $17,500 civil penalty. Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), provides that the Commission is authorized to assess all penalties under the Mine Act and that such penalties must reflect consideration of six statutory factors.[13] The Commission's review of a Judge's discretionary penalty assessment is a two-step process. First, the Commission reviews the Judge's findings on the penalty factors for the support of substantial evidence and, second, the Commission reviews the Judge's overall assessment for an abuse of discretion. *Solar Sources I*, 42 FMSHRC 181, 208 (Mar. 2020).

Here, the Judge found that the operator's previous violation history, size of the mine and the size of the controlling entity were all moderate. 44 FMSHRC at 159. However, the Judge concluded that the negligence and gravity factors were significant. *Id*. at 158.

Continental asserts that the Judge erred in his assessment of the mine's violation history, failing to account for its lack of a prior history of section 105(c) violations. Continental is incorrect. It is well established that the Commission considers the operator's *general* violation history, not just its history of similar violations, when assessing a penalty. *See Solar Sources Mining*, *LLC,* 43 FMSHRC 367, 373 (Aug. 2021) (citations omitted).

Continental also argues that the Judge erred in his gravity finding. The operator wrongly maintains that the Judge should have considered its reliance on the CBA as a mitigating factor.

---

[12] We make no other finding regarding the *Pasula-Robinette* test in this proceeding.

[13] [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 [operator] charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

We conclude that the Judge's findings are supported by the record and that the Judge did not otherwise abuse his discretion in assessing a civil penalty. *See American Coal Co. v. FMSHRC*, 933 F.3d 723, 726 (D.C. Cir. 2019), *aff'g* 40 FMSHRC 1011 (Aug. 2018) ("we review the ALJ's penalty calculation for an abuse of discretion."); *see also Donovan ex rel. Chacon v. Phelps Dodge Corp*., 709 F.2d 86, 92 (D.C. Cir. 1983) (Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached."); *Island Creek Coal Co*., 15 FMSHRC 339, 347 (Mar. 1993) ("[i]t would be inappropriate for the Commission to reweigh the evidence … or to enter *de novo* findings based on an independent evaluation of the record.").

Accordingly, we affirm the penalty assessed by the Judge.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision in all respects.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

Commissioner Althen, concurring in part and dissenting in part:

I.

The record supports a loss of pay in violation of section 103(f).

I concur that the Complainant, Tara Otten, suffered a loss of pay due to not receiving an upgrade in pay to the status of a Mobile Equipment Operator ("MEO") on the days in question. I emphasize that nothing is illegal or improper in paying a miner for the work the miner performs on a given day. There is no legal deficiency with Article VI Section 9 of Continental Cement Company, LLC's ("Continental") contract with the United Steel Workers of America.

Here, however, the record permits no conclusion other than that Otten would have worked as an MEO on the days in question and, therefore, would have received upgraded MEO pay for those days. She was entitled to MEO pay for her time as a walkaround representative on those days.

II.

The Commission should overrule the discredited *Pasula/Robinette* standard and apply the "because" standard used in federal discrimination statutes.

Section 103(f) does not provide a private right of action for a miner to recoup a loss of wages. The miner must rely upon the Mine Safety and Health Administration ("MSHA") to recover lost pay.

Two routes are available to MSHA. It may cite the operator for a violation under section 104(a), 30 U.S.C § 814(a), for causing a loss of pay. For 103(f) citations issued under section 104(a), a strict liability section, MSHA must only prove a loss of pay from the miners' representative's participation in the inspection. A section 104(a) citation is straightforward and does not require proof of action motivated by protected activity. *See Magma Copper Co. v. Sec'y of Labor*, 645 F.2d 694 (9th Cir. 1981).

Alternatively, MSHA or a miner may file a discrimination complaint under section 105(c). 30 U.S.C. § 815(c). Section 105(c) requires proof of motivation "because of" protected activities. As relevant, Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . [1] ***because such miner*** . . . has filed or made a complaint under or related to this Act . . . or [2]***because such miner*** . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or [3] ***because such miner*** . . . has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such

> proceeding, or [4] ***because of the exercise by such miner*** … on behalf of himself or others **of any statutory right afforded by this Act**.

30 U.S.C. § 815(c)(1) (emphasis added).

The Secretary asserted a section 105(c) violation in this matter. By doing so, the Secretary accepted an obligation to prove its claim under the statute's requirements.[1]

The Commission's traditional standard of proof for a section 105(c) discrimination violation has been the *Pasula-Robinette* test. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). Under that test, the complainant or Secretary establishes a prima facie case of discrimination by proving (1) that the miner engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The operator may raise an affirmative defense by claiming it would have taken the same action for a reason other than protected activity. Despite its years as the Commission standard, it is now clear the *Pasula-Robinette* test is invalid.

In 2021, the United States Court of Appeals for the Ninth Circuit invalidated the *Pasula-Robinette* test, holding: "Section 105(c)'s unambiguous text requires a miner asserting a discrimination claim under Section 105(c) to prove but-for causation." *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1211 (9th Cir. 2021). The *CalPortland* case focused squarely upon section 105(c). The Commission must now apply that standard in cases within the Ninth Circuit. However, more compelling is that the circuit court's holding is correct. Indeed irrefutable. In *CalPortland*, the circuit court cited numerous Supreme Court decisions. *Id.* at 1209-10, *citing Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009). Those cases and CalPortland compel the application of the but-for standard to section 105(c) cases.

As the inevitable result of *CalPortland*, Judges now hedge their decisions by referring to *Pasula-Robinette* and *CalPortland*. Continued citation to *Pasula-Robinette* will inevitably result in parties and Commission Judges trying, arguing, and deciding cases under two standards. In this case, the Judge added a tagline in the decision that he would have reached the same result

[1] The majority finds the Administrative Law Judge ("ALJ") grounded his decision on the basis that it was unnecessary to prove the statutorily required elements of discrimination. The majority errs in accepting and endorsing the Judge's error. It is startling to read the majority describe section 105(c) as a strict liability section to which intent does not apply. The concept of strict liability in the Mine Act is derived from the section 110(a) of the Act (30 U.S.C. § 820(a)) which authorizes the imposition of civil penalties for violations of mandatory health or safety standards. *See Allied Prod. Co. v. FMSHRC*, 666 F.2d 890, 893 (5th Cir. 1982). I disagree with the majority's attempt to expand strict liability into section 105(c) proceedings, beyond what Congress clearly intended. Moreover, if strict liability is to be incorporated into section 105(c) proceedings, the majority's decision must be read to only do so in the limited context of a section 103(f) contest. To do otherwise would present a major change in long-standing Commission precedent and fly directly in the face of the plain letter of the law.

under the but-for standard. Such pro forma references to but-for causation may result, as in this case, in a minimized finding of but-for causation without meaningful discussion. The Commission should forego whistling *Pasula-Robinette* in the wind and formally adopt the proper standard. The correct issue on this appeal is whether Continental's insufficient payment was "because" of animosity toward the exercise of walkaround rights. In other words, we should apply the but-for standard and decide the issue based on whether the preponderance of the evidence shows protected activity-motivated discrimination.

However, application of *Pasula-Robinette*, in this case, would not change the result because that test requires proof of causation based upon protected activity. Here, the majority fails to apply any causation standard without explaining why an explicit element of section 105(c) does not apply to section 103(f) cases.

In 2016, the Commission rejected a challenge to *Pasula-Robinette*. *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1919-21 (Aug. 2016). However, times change, and Commission Judges now plot a course between two tests. It is time for the Commission to recognize the inevitability of the proper test for discrimination and adjust its test to the correct "but for" standard.

III.

The record does not contain substantial evidence that Otten received her regular pay "because" she acted as a miners' representative. Continental's human resource manager decided the appropriate pay "because" of Continental's collective bargaining agreement with Otten's union.

A. Relevant facts

Continental operates the Hannibal Underground Mine in Missouri. The United Steel Workers of America represents the hourly employees at the plant. The Union negotiated a collective bargaining agreement ("CBA") with Continental for union-represented employees, including Otten. As with most union contracts, the CBA created classified employee positions and established pay rates for each classification.

Two classifications were Laborer and Mobile Equipment Operator. Laborers are hourly-rate employees who perform primarily general clean-up work throughout the plant, lawn work, labor work involved in refractory replacement in kiln and cooler, snow removal from roadways and sidewalks, and painting. A Laborer is expected to be capable of operating various types of mobile equipment as needed. Of course, the work of an MEO is to exclusively operate mobile equipment.

The CBA pay rates provide slightly more than $3.00 per hour additional pay for employees classified as MEO workers. The CBA, however, also provides that management could require a Laborer to perform MEO work. When a Laborer does so, the CBA requires Continental to pay the MEO classification wage rate, stating, "[w]hen work of a higher paid

classification is required of any employee, he/she shall receive the higher rate of pay for a minimum of four hours." J. Ex. 4, at 14. Under the CBA, this upgraded pay depended upon the performance of MEO work. If a Laborer performed MEO work for less than four hours, the Laborer received the higher rate for four hours. If the employee performed MEO work for more than four hours, the employee received MEO pay for the entire day.[2]

Otten's default classification was Laborer. She also was a miners' representative. All agree that she frequently performed MEO work and received the upgraded pay according to the CBA when she performed such work. Continental paid her according to her classification as a Laborer when not performing such work.

On the dates in question, Otten had or would have had the opportunity to perform MEO work at the MEO pay rate. On those dates, however, an MSHA inspector was present at the mine, and Otten chose to exercise her walkaround rights with the MSHA inspector. It is undisputed that based upon experience, Otten would have taken that opportunity for MEO work had she not chosen to exercise the right of a miners' representative.

Initially, Otten received pay at the rate of an MEO for the days in question. Subsequently, a Continental Human Resources specialist, Heather Ames, reviewed Continental's pay records including those of Otten and two other union-represented workers. According to Ames, she alone decided to apply the terms of the CBA. Ames found that Otten did not perform MEO work on certain days and, therefore, was not entitled to upgraded MEO pay under the CBA. On the same day, Ames reversed the paid upgrade for the two other employees because the upgrade pay provision did not apply to them. Ames testified that she later found that she had made a mistake for certain days and then partially reinstated the upgrades for Otten.

The evidence establishes that Ames made these pay decisions based on the terms of the CBA. Ames testified that she, and she alone, decided to reduce the pay and then partially upgrade the pay of Otten and other workers. No witness or evidence impeached Ames' testimony that she made these decisions.

---

[2] Article VI, Section 9 of the CBA provides:

> When work of a higher paid classification is required of any employee, he/she shall receive the higher rate of pay for a minimum of four hours. If the employee exceeds four hours of work at the higher classification, then he/she shall receive the higher rate of pay for the entire day. When work of a lower paid classification is temporarily required of any employee, he/she shall receive his/her regular straight time hourly rate of pay.

J Ex. 4, at 14; Jt. Stip. 23.

B. The Judge's Decision

The Judge's decision initially recognized that *Pasula-Robinette* is the Commission's test for discrimination. He correctly found that under that test, a miner proves discrimination "when [she] proves by a preponderance of the evidence that the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by that protected activity." 44 FMSHRC 121, 148 (Feb. 2022) (ALJ).

The Judge acknowledged that "it is true that the Commission has applied the *Pasula-Robinette* framework in [s]ection 103(f) walkaround cases." *Id.* at 149. Immediately after that, however, the Judge asserted that he did not need to apply the third factor (adverse action motivated in any part by that protected activity) of *Pasula-Robinette* to find a violation of section 103(f).

The Judge concluded, "the Court does not believe that the Secretary *must* show, per the *Pasula-Robinette* framework, that Continental's refusal to pay Otten the wage upgrades was motivated by Otten's walkaround activities." *Id.*[3] Incredibly, the majority now accepts the Judge's deeply flawed reasoning and states violations of section 105(c) need not contain any element of expressly required causation.

Finally, after a brief discussion of the penalty factors, the Judge imposed a penalty of $17,500.

C. To Prevail on a Section 105(c) accusation, the Secretary Must Prove Three Factors: Protected Activity, Adverse Action, and Adverse Action Because of the Protected Activity. The Majority Errs by Disregarding the Necessity for Finding Causation by Protected Activity.

The majority correctly, albeit implicitly, decides that the Secretary did not prove the violation of section 103(f) was "because of protected activity." The Secretary introduced inconclusive evidence to suggest that certain supervisory employees of Continental may have harbored ill feelings toward Otten due to other safety activities. However, the record clearly demonstrates that Ames, and Ames alone, decided to pay Otten Laborer wages per the CBA.

As the Judge fleetingly acknowledged but then abandoned, motivation is critical for finding a violation of section 105(c). Indeed, all three elements—protected activity, adverse action, and motivation by the protected activity—are expressly articulated in the statute and are necessary to establish discrimination. Indeed, one might conclude that motivation is the lynchpin

[3] It may be that the Judge felt and Commission mistakenly feels a need to find a violation of section 105(c) for Otten to prevail on the section 103(f) claim or that prevailing on the section 103(f) automatically required a finding of discrimination. That would be incorrect. MSHA's filing of the discrimination claim was sufficient to put both the right to pay and the occurrence of discrimination before the Commission. A supported finding of a failure to meet the requirements of section 103(f) may then be made separately even when the Secretary does not prove discrimination under section 105(c).

of section 105(c) violations. Each day miners raise issues related to safety, thereby engaging in protected activity. Each day operators take adverse actions regarding miners. Section 105(c) crucially mandates that discrimination occurs only when the protected activity motivates the adverse action.

It is in this respect that the majority departed from the law. The majority declares by fiat that a clearly expressed requirement for a section 105(c) violation does not apply if the case involves section 103(f). The majority does not provide any support or explanation for arbitrarily dismissing an explicit factor for a violation. Nowhere does the majority explain why the express language of section 105(c) unambiguously requiring motivation does not apply in a section 103(f) context.

Circuit court cases uniformly recognize that "because" in section 105(c) means "because" and, therefore, a complainant must establish a motivational nexus between the protected activity and adverse action. *See generally CalPortland Co.*, 993 F.3d at 1208-1211; *Harrison County Coal Co. v. FMSHRC*, 790 Fed. Appx. 210, 213 (D.C. Cir. 2019); *Con-Ag, Inc. v. Sec'y of Labor*, 897 F.3d 693, 700-02 (6th Cir. 2018); *Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 318 (6th Cir. 2013); *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 88 (D.C. Cir. 1983).

The importance of section 103(f) neither requires nor suggests tarring Continental with a discrimination tag based upon Ames' belief that, per the CBA, Otten was only entitled to Laborer's wages. The majority finds discrimination by removing the necessary element of motivation from a section 105(c) violation, even though the Secretary concedes it is necessary.

In disclaiming the express requirement of the Mine Act, the majority does not cite the words of the Act, legislative history, or any policy requisite. Without meaningful analysis, the majority would establish that a violation of section 103(f) is a per se violation of section 105(c). In doing so, it primarily relies on one case. *Stillion v. Quarto Mining Co.*, 11 FMSHRC 523 (Apr. 1989) (ALJ), *aff'd* 12 FMSHRC 932 (May 1990).[4]

[4] The majority mischaracterizes the facts and decision in *Sec'y on behalf of Truex v. Consolidation Coal C*o., 8 FMSHRC 1293 (Sept. 1986). The Commission in *Truex,* expressly included "motivation" as part of the proof for a section 105(c) violation. Further, it explained that an operator could defend a 105(c) case by showing the action was not motivated by protected activity. *Id*. at 1297. The facts were that the safety supervisor knew Truex was a miner's representative and that he intended to attend a meeting with an MSHA inspector who would be arriving momentarily. Nonetheless, the safety supervisor ordered Truex to report to work at a location that would have prevented Truex from accompanying the inspector. Truex was forced to take unpaid leave in the form of "union business" to attend the meeting and was then barred from working for the rest of his shift. The operator claimed that, pursuant to the union contract, a miner could not be paid for a partial shift if he had claimed to be on "union business." The Commission found that the contract was irrelevant to the defense of the section 105(c) allegations, not because a union contract could not be used to demonstrate the operator's motivation, but because the discrimination happened before the operator invoked the contractual (continued…)

Quarto does not support the majority "per se" concept. At best, the ALJ and Commission decisions are cursory. To the extent the decisions recite facts, it is clear the failure to pay arose from the operator's animus to the walkaround. The operator refused to pay a miner any money "because" he did the walkaround with an MSHA inspector. Moreover, the Commission did not even discuss the standards for finding a section 105(c) violation or any issue of motive or causation.

In *Quarto*, a miner alleged violations of sections 103(f) and 105(c). The ALJ decision does not discuss *Pasula-Robinette* or any elements of section 105(c). Having not discussed section 105(c) in his decision, the ALJ did not discuss any requirements for finding a section 105(c) violation. The entirety of the ALJ's finding is: "Respondent violated § 103(f) of the Act by refusing to pay Complainant his regular rate of pay for his time spent accompanying a federal mine inspector on October 6, 7, and 8, 1987." 11 FMSHRC at 527. The Judge did not make any finding concerning section 105(c) or its necessary elements. Had the Judge considered motivation, he would have found it in the case. Further, the Judge did not impose any penalty upon the operator nor invite MSHA to do so. *See Stillion v. Quarto Mining Co.*, 11 FMSHRC 875 (May 1989) (supplemental decision on damages).

Upon review, the Commission mistakenly stated at the outset of its decision that the Judge had found discrimination. However, the Commission's conclusion of law did not find a section 105(c) violation. The Commission's concluded "that in the circumstances of the present case Stillion had a right to walkaround pay under section 103(f)." 12 FMSHRC at 939. As with the ALJ's decision, the Commission's decision did not discuss the essential elements of discrimination, *Pasula-Robinette*, or motive or causation, let alone dispense with motivation as an element of section 105(c). Further, the Commission also did not impose a penalty.

Therefore, *Quarto* supports a section 103(f) violation. However, *Quarto* does not reach a legal conclusion that a section 105(c) violation occurred, does not discuss the requirements for a section 105(c) violation, would have found motivation under the facts of the case, and does not support a claim of per se violations.

The majority expressly recognizes that the Secretary argues that a finding of discriminatory animus is a necessary element of a claim. Slip Op. at 7. The Secretary does not contend that violations of section 103(f) are per se violations of section 105(c). The Secretary's failure to make such an argument is an appropriate recognition that section 105(c) requires motivation (causation) arising from protected activity. The Secretary's position is correct.

[4] (…continued)
terms and was thus irrelevant. *Id*. at 1299. There is no resemblance to this case in which the operator did not take any action to prevent the miner's exercise of walkaround rights and paid the miner for the time spent on the walkaround.

IV.

The Facts Suggest Only a Small Penalty.

The Mine Act sets forth six factors in setting penalties: (1) effect on the operator's ability to continue in business; (2) an appropriate reduction for demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation; (3) the appropriateness of such penalty to the size of the business of the operator charged; (4) the operator's history of previous violations; (5) whether the operator was negligent; and (6) the gravity of the violation. 30 U.S.C. § 820(i).

Factors one and two play no role in this case. The proposed penalty would not affect the ability of the operator to continue in business. The statute allows mitigation of penalties when an operator acts rapidly to achieve compliance. In this case, believing in the legality of its use of the CBA, Continental continued to make payments in the same fashion after the Secretary filed the complaint. The failure to capitulate immediately to the Secretary's legal position with which an operator in good faith disagrees is not a reason to increase the penalty. Regarding size, the Hannibal mine is a mid-size operation, so size does not weigh heavily for or against a particular penalty.

Despite a long operational history, Continental has no history of a prior finding of a violation of section 103(f). The present case is a one-off in which the operator incorrectly thought it should use the CBA. Of course, even in discrimination cases, the Commission also considers the operator's history of safety violations. However, strict liability violations of operational safety rules have little to do with a tendency of an operator to be motivated to retaliate against a miner based on protected activity. Certainly, the absence of even one prior violation weighs heavily in favor of a low penalty.

It is difficult to know what to make of the ALJ's brief discussion of negligence. The ALJ cites a Commission decision to propose that the negligence issue is whether the operator engaged in intentional conduct in committing the violation rather than whether it intended to discriminate. 44 FMSHRC at 157, *citing Sec'y on behalf of Poddey v. Tanglewood Energy, Inc*., 18 FMSHRC 1315, 1319 (Aug. 1996) (Commissioners Marks and Riley).[5] Continental's actions were intentional to the extent Ames' decision to apply the CBA was intentional. In *Tanglewood Energy*, the Commission found that, although the conduct was intentional, the actions constituted low negligence. *Id.* at 1319-20. Continental, through Ames, had an objective, albeit mistaken, belief that it should apply the CBA to Otten's work. Continental's legal position was untenable. However, there is no evidence that Continental took the position in bad faith or, in taking an incorrect position, it failed to exercise reasonable care. Thus, substantial evidence supports that negligence is a minor factor in the penalty consideration.

[5] In determining negligence, the Commission considers whether an operator has met its duty of care. The Commission considers the actions of a reasonably prudent person familiar with the mining industry, the relevant facts, and the purpose of the regulation. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016). In short, did the operator act with the prudence a reasonable operator would have exercised under the same or similar circumstances.

Interestingly, *Tanglewood* has greater relevance to the gravity consideration than negligence. In *Tanglewood*, the Commission rejected the Secretary's argument that every section 105(c) violation must be presumed to have a chilling effect. *Id.* at 1320. As with any violation, the gravity of section 105(c) violation must be based on the evidence.

Objective and subjective evidence determine gravity. *Id.* at 1321. The subjective element is the chilling effect upon miners that rests upon "the testimony of the complainant or other miners." *Id*., *citing Sec'y on behalf of Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 558 (Apr. 1996). From an objective standpoint, the question is whether there is evidence that the incident "reasonably tended to discourage miners from engaging in protected activities." *Id*.

In this case, the Secretary presented no evidence of any subjective or objective discouragement of such activity. The Secretary did not present any objective data or measurement showing any adverse effect upon Continental's miners. Otten was the only hourly miner who testified, and her continued performance of walkaround activities demonstrates that she was not discouraged. Thus, there is no evidence of a subjective chill upon miners. In sum, there is no evidence that this one-time occurrence had any subjective or objective adverse effect on Continental's miners' willingness to exercise their statutory rights. As with all factors of a penalty consideration, we must base the decision regarding gravity on evidence and not a Judge's desire to punish an operator. The gravity factor is low without any subjective or objective evidence of a chilling effect.

In summary, the effect on the ability to stay in business and mitigation through abatement are irrelevant here. Continental's size is moderate. The absence of any prior violation cuts in favor of a low penalty. Ames' actions were intentional in that she intended to do what she did but unintentional in any sense of a knowing violation of section 105(c). Finally, there is no subjective or objective evidence of a chilling effect. So, the gravity is low.

V.

Conclusion.

Here, the majority's unwarranted decision to delete a fundamental element from section 105(c) is more than a wrong result. The decision muddies proof of section 105(c) violations when the disparity between *Pasula-Robinette* and *CalPortland* already troubles the water. It creates uncertainty regarding whether there are other situations in which a majority might substitute its own wishes over that of Congress and decide by fiat to alter the statute's requirements. For the first time, it creates a per se violation of section 105(c). It fails to explain why a section 103(f) violation automatically violates section 105(c), even though finding a section 103(f) violation vindicates the miner's rights.

The Commission should find a violation of section 103(f). The evidence does not show Continental's actions were because of protected activity. Continental did not violate section 105(c). The violation of section 103(f) warrants no or only a minor penalty.

I concur with the violation of section 103(f) and respectfully dissent from the finding of a violation of section 105(c) and the assessed penalty.

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

Emily O. Roberts, Esq.
Senior Trial Attorney
Office of the Solicitor
U.S. Department of Labor,
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Roberts.Emily.O@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Scott.Emily.T@dol.gov

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Thomas. R. Chibnall, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
7700 Bonhomme Ave., Suite 650
St. Louis, MO 63105
Thomas.Chibnall@ogletree.com

R. Lance Witcher, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
7700 Bonhomme Ave., Suite 650
St. Louis, MO 63105
Lance.Witcher@ogletree.com

Melanie Garris
Civil Penalty Compliance Division Chief
U.S. Department of Labor
Office of Assessments
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@dol.gov

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520 N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Administrative Law Judge William B. Moran
Federal Mine Safety & Health Review Commission,
1331 Pennsylvania Avenue, NW, Suite 520 N
Washington, DC 20004-1710
WMoran@fmshrc.gov

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 2, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. PENN 2023-0011 A.C. No. 36-07230-559759
v.	Docket No. PENN 2023-0012 A.C. No. 36-07416-559760
CONSOL PENNSYLVANIA COAL COMPANY, LLC	Docket No. PENN 2023-0013 A.C. No. 36-10045-559765

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 28, 2022, the Commission received from Consol Pennsylvania Coal Company, LLC ("Consol") three motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers LAKE 2023-0011, LAKE 2023-0012, and LAKE 2023-0013 because they involve similar factual and procedural issues. 29 C.F.R. § 2700.12.

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that one proposed assessment (No. 000559759) was delivered to the operator on August 6, 2022, and two proposed assessments (Nos. 000559760, 000559765) were delivered to the operator on August 8, 2022. The assessments became final orders of the Commission on September 6, 2022, and September 7, 2022, respectively.

On August 29, 2022, MSHA received three partial payments from the operator related to citations that the operator chose not to contest on the three proposed assessments. Consol asserts that it also mailed its three notice of contest packets on August 15, 2022. MSHA sent Consol one delinquency notice related to Proposed Assessment No. 000559759 on October 21, 2022, and two delinquency notices related to Proposed Assessment Nos. 000559760 and 000559765 on October 24, 2022, indicating that MSHA had not received the operator's contests.

It appears that the operator's notices of contests were not mailed via certified mail or other trackable mail service. The Secretary does not oppose the requests to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA's regulations at 30 C.F.R. § 100.7 and the Commission's procedural rules.

Having reviewed Consol's request and the Secretary's response, we find that the notices of contest were not timely received due to inadvertence and that the operator promptly filed motions to reopen upon receiving the delinquency notices.[2] In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

[2] We strongly encourage Consol to take necessary steps to ensure that future penalty contests are timely filed in accordance with the Commission's procedural rules. Similar requests to reopen untimely contests may not be favorably considered.

Distribution:

Marcy Presto
Consol Energy, Inc.
275 Technology Drive, Suite 101
Canonsburg, PA 15317-6506
marcypresto@consolenergy.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 16, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. GCC PERMIAN	Docket No. CENT 2022-0218 A.C. No. 41-00060-555004

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 16, 2022, the Commission received from GCC Permian a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 26, 2022, and became a final order of the Commission on June 27, 2022. GCC Permian asserts that the notice of contest was timely mailed on June 6, 2022, however the safety manager failed to verify that the correct address was used, and the paperwork was accidentally sent to MSHA's penalty collections office

in St. Louis along with the payment of the uncontested citations. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

Distribution:

Matthew Lawson
GCC Permian
P.O. Box 1547
Odessa, TX 79760
mlawson@gcc.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 16, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MORTON SALT, INC.	Docket No. CENT 2022-0237 A.C. No. 16-00970-558634

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 September 2, 2022, the Commission received from Morton Salt, Inc., a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on July 22, 2022, and became a final order of the Commission on August 22, 2022. Morton Salt explains that mail is transferred from the operator's P.O. Box to the mine site on regularly scheduled days. The operator asserts it mistakenly believed the 30-day deadline for contesting the proposed assessment was calculated

from receipt at the mine site (July 26) rather than receipt at the P.O. Box (July 22). Morton Salt believed it had timely contested the proposed assessment when it mailed its notice of contest on August 23, one day after the assessment became final. The operator adds that it will correct its process to ensure notices of contest are sent within 30 days from receipt at the post office. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Morton Salt's request and the Secretary's response, and in light of the brief nature of the delay, the operator's prompt filing of a motion to reopen, and the operator's stated intent to correct the issue, we find that the operator's failure to timely contest the proposed assessment was the result of excusable mistake. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.[1] 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

[1] Morton Salt's motion to reopen specifies seven citations the operator wishes to contest. The Secretary subsequently modified and issued a new proposed assessment for one of those citations. The proposed assessment was timely contested and assigned to an Administrative Law Judge (Docket No. CENT 2023-0009). Accordingly, Morton Salt's motion is moot with respect to Citation No. 9649715.

Distribution:

Donna Vetrano Pryor, Esq.
Husch Blackwell LLP
1801 Wewatta Street, Suite 100
Denver, CO 80202
donna.pryor@huschblackwell.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May16, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HANSON AGGREGATES PENNSYLVANIA, LLC	Docket No. PENN 2022-0124 A.C. No. 36-00029-556370

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 26, 2022, the Commission received from Hanson Aggregates Pennsylvania, LLC ("Hanson Aggregates") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 24, 2022, and became a final order of the Commission on July 25, 2022. Hanson Aggregates claims it was dealing with various high-level staff disruptions at the time, including the transfer of the operations manager,

the hiring of a new safety manager, and the temporary absence of the plant manager. As a result, the proposed assessment was briefly overlooked and the notice of contest was filed one day late, on July 26. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Hanson Aggregate's request and the Secretary's response, we find that the brief delay in filing the notice of contest was the result of excusable neglect arising from unusual levels of staff disruption. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

Distribution:

Margaret S. Lopez, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
One PPG Place, Suite 1900
Pittsburgh, PA 15222
Margaret.lopez@ogletree.com

Philip K. Kontul, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart P.C.
One PPG Place, Suite 1900
Pittsburgh PA 15222
Philip.kontul@ogletree.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 16, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. WAYNE J. SAND & GRAVEL, INC.	Docket No. WEST 2022-0295 A.C. No. 04-01915-551153

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 1, 2022, the Commission received from Wayne J. Sand & Gravel, Inc. ("WJSG") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 10, 2022, and became a final order of the Commission on May 10, 2022. WJSG asserts it never received the mailed proposed assessment and notes the operation's remote location. After receiving a delinquency notice on June 28, 2022, the operator requested a copy of the proposed assessment on July 19,

and submitted its notice of contest (by fax) the same day. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed.

Tracking data from the United States Postal Service indicates the assessment package was delivered to a California Post Office and marked available for pickup on March 18, 2022, then sent back to its facility of origin on April 4. The Secretary asserts the assessment was finally delivered on April 10, but was not signed for. It is unclear whether WJSG's failure to receive the assessment package was the result of a USPS mail processing error (e.g. incorrect address) or operator error (e.g. failure to regularly check a P.O. Box).

We strongly encourage the operator to enact procedures to ensure mail is timely received despite the operation's remote location, such as regularly checking P.O. Boxes and ensuring personnel are available to sign for packages. Future motions to reopen may not be granted where a notice of contest is untimely due to inadequate mail receipt procedures.

Ultimately, however, having reviewed WSJG's request and the Secretary's response, we find that the delay in this instance was excusable. We note that, due to a mail processing error, WSJG did not timely receive the proposed assessment. Furthermore, WSJG promptly acted to file its notice of contest once it became aware of the issue. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

Distribution:

Brett Jones
Wayne J. Sand & Gravel, Inc.
P.O. Box 27
Moorpark, CA 93020-0027
Fax: 805-523-1805

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 18, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. DUININCK, INC.	Docket No. LAKE 2022-0058 A.C. No. 21-03663-540443

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"). The record reveals that the proposed assessment was delivered to the Operator on August 30, 2021. On September 22, 2021, the Mine Safety and Health Administration ("MSHA") received full payment of $1,359.00 for all three citations by a check dated September 9, 2021. A "To Whom It May Concern" letter from the operator accompanied the check. The signatory to the letter stated that he was an experienced and knowledgeable safety professional. The letter expressly disclaims any intention to contest the citation and demonstrates the payment of the penalty was a conscious payment by a knowledgeable operator.

Subsequently, the operator filed a letter requesting reopening. Even there, however, the operator disclaims any desire to contest the citation. Instead, it asked for an opportunity to discuss its safety practices with MSHA.

30 C.F.R. § 100.6(a) provides MSHA with sole discretion to grant a request for a conference where issues may be discussed. The Commission grants reopening in accordance with the factors set forth in Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. 2700.1(b); Fed. R. Civ. P. 60(b). The operator does not allege a mistake, inadvertent conduct, excusable neglect, or other reason justifying relief that led to its payment and the proposed

penalty assessment becoming a final order. The motion reflects that the operator made the deliberate choice to pay the penalties after receiving the penalty assessment rather than to contest the penalties before a Commission Administrative Law Judge.

Accordingly, the request to reopen is DENIED.[1]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

[1] We further note that the Commission cannot order MSHA to have a conference with an operator.

Distribution:

Terry P. Keenan
Safety Manager
Duininck Inc.
408 6th Street
Prinsburg, MN 56281
Terry.Keenan@duininck.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, DC 20004
Office: (202) 434-9933 / Fax: (202) 434-9949

May 2, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. PENN 2023-0007 A.C. No. 36-05018-564091
v.	
IRON CUMBERLAND, LLC, Respondent	Mine: Cumberland Mine

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement and has set forth the factual basis for the proposed penalty. The Respondent has agreed to the proposed penalty amounts. As reflected in the table below, the originally assessed amount for the citations at issue was $19,503.00 and the proposed settlement amount is $13,773.00.

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9258018	$774.00	$349.00	Modify Negligence to Low
9580404	$840.00	$407.00	Modify Negligence to Low
9258023	$774.00	$349.00	Modify Negligence to Low
9257972	$563.00	$234.00	Modify Persons Affected to 1, down from 7 affected, asserting only one miner would be expected to slip and fall; **58% reduction in the penalty**
9580420	$234.00	$234.00	None
9580423	$1,358.00	$610.00	Modify Negligence to Low; **55% reduction in penalty**
9580424	$407.00	$407.00	None
9580425	$349.00	$133.00	Modify Injury or Illness to Unlikely, Modify Significant and Substantial Designation to No

9256357	$1,156.00	$1,156.00	None
9256358	$1,156.00	$1,156.00	None
9256359	$563.00	$407.00	Modify Persons Affected to 5
9580430	$1,358.00	$1,358.00	None
9581721	$1,471.00	$296.00	Modify Injury or Illness to Unlikely, Modify Significant and Substantial Designation to No; **80% reduction in penalty**
9580436	$2,573.00	$1,156.00	Modify Negligence to Low; **55% reduction in penalty**
9257973	$481.00	$215.00	Modify Negligence to Low; **55% reduction in penalty**
9580439	$273.00	$133.00	Modify Negligence to Low; **51% reduction in penalty**
9581722	$3,841.00	$3,841.00	None
9580802	$518.00	$518.00	None
9580803	$518.00	$518.00	None
9580806	$296.00	$296.00	None
TOTAL	**$19,503.00**	**$13,773.00**	

The Court has considered the Secretary's Motion and approves it ***solely*** on the basis of the Commission's decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. **Under those decisions, the Court's role in reviewing settlement motions is circumscribed by those decisions, with the result that reasonable inquiry by the Court is not permitted.**

For example**,** were it permitted to make inquiry, the Court would have questions regarding the claim in the motion with respect to **Citation No**. **92580404**, as it implies that the inspector would be obligated to have seen the cited hazards shortly after the preshift examination, a patently unreasonable proposition. The motion asserts that the missing sliding guard and the damaged cutting wheel both could have occurred subsequent to the preshift exam. That both issues would exist pushes plausibility. Inspectors, aware that the absence of a preshift exam violation has been frequently invoked of late by mine operators, should consider whether a citation may be in order for inadequate preshift exams.

In fact, to his credit, the issuing inspector for a different violation, Travis Hamrick, did just that, citing the mine operator in **Citation No. 9258023**, for failing to note *multiple* hazardous conditions along the 75 Headgate longwall belt. That alleged, but now-admitted, inadequate preshift was associated with the issuance of two other citations flowing from the inadequate exam. Though the inspector's citation made it clear that all three citations were related, the

operator asserts again that the inspector did not observe the conditions at the time of the preshift exam itself. The Court lauds the MSHA inspectors for their efforts in protecting miners.

There are other, troublesome, results in the motion. For example, in **Citation No. 9580423**, the now-admitted violation involved a failure to provide a clear travelway of at least 24 inches on both sides of the 76 Tailgate belt. The standard invoked, 30 C.F.R. §75.1403, the statutory 'Other Safeguards' provision, has been cited **82 (eighty-two) times** at this mine in the past two years. The motion's resulting **55% reduction in the penalty** is based upon designating the negligence from moderate to low. But low negligence anticipates "considerable mitigating circumstances." The justification offered is that the mine ***had placed*** *a pump in the area*. If that is sufficient to constitute ***considerable*** *mitigation,* that is a low bar to meet such a classification.

Although the Court could discuss other reductions in this motion, as a last example, **Citation No. 9581721** involved a now-admitted violation of the mine's ventilation plan. That plan, Inspector Stephen A. Wilt noted, requires that all sprays on the longwall stage loader are to have a *minimum* opening of 3/32 inch, but the sprays at the discharge end of crusher in this instance only had openings of 1/16 inch. In short, the spray openings were more than two times insufficient.

However, the Secretary buys into the assertion that it's a small difference and as such it would not appreciably contribute to overexposure of dust. Motion at 6. That's an interesting take from the Secretary of Labor, as her role is to protect miners from dust and given that *the minimum* opening is to be 3/32. It strikes the Court as disconcerting that the Secretary's representative would essentially agree that the *more than half shortcoming* for the sprays is no big deal. That may not be so comforting to the miners who have to inhale the dust.

And it is problematic that the Secretary's attorney in effect says failure to comply with the *minimum requirements* imposed by MSHA transforms the violation from reasonably likely *to unlikely to result in injury*, and this even though it is indisputable that lung impairments for miners is an incremental consequence of dust exposure and that this mine has been cited **43 (forty-three) times** for violating this standard in the past two years. Such a stance, to this Court, seems inimical to the Secretary's role of protecting the safety and health of miners. It also seems fair to ask whether reducing the regularly assessed penalty from $1,471.00 down to a mere $296.00, runs counter to Congress' clearly expressed intent that penalties are to be of sufficient magnitude to cause mine operators to calculate that compliance is less expensive than non-compliance. In the Court's view, a $296.00 penalty favors the latter approach.

Accordingly, despite the Court's expressed misgivings over some of particulars in these settlements, it is duty-bound to follow the Commission's decisions on the subject of settlements. For that reason, per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citations listed in the table above are modified per that table and that the amounts for each citation are similarly reflected.

It is further **ORDERED** that, within 30 days of this order, the operator pay the penalty of **$13,773.00**, a sum reduced from the original regular assessment amount of $19,503.00, and representing a **29%** overall reduction in the penalty. Upon receipt of payment, this case is **DISMISSED**.

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

Distribution:

Robert S. Wilson, Esq., Office of the Solicitor, Division of Mine Safety and Health, 201 12th Street South, Suite 500, Arlington, Virginia 22202-5450. Email: Wilson.robert.s@dol.gov

R. Henry Moore, Esq., Fisher Phillips, Six PPG Place, Suite 830, Pittsburgh, Pennsylvania 15222. Email: hmoore@fisherphillips.com

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, DC 20004
Office: (202) 434-9933 / Fax: (202) 434-9949

May 8, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. LEHIGH CEMENT COMPANY, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0133 A.C. No. 36-00190-562077 Mine: Nazareth Plant I

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Conference and Litigation Representative, ("CLR"), has filed a motion to approve settlement. The originally assessed amount was **$35,274.00** and the proposed settlement is for **$17,610.00**, **representing a 50% overall reduction in the penalty for this docket**. The changes are reflected in the following table:

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9667158	$8,549.00	$3,841.00	Modify to Low negligence. **55% reduction in the penalty**
9667164	$1,869.00	$378.00	Change "injury or illness" to "unlikely; and not significant & substantial. **80% reduction in the penalty**
9667165	$1,869.00	$378.00	Change "injury or illness" to "unlikely; and not significant & substantial. **80% reduction in the penalty**
9667160	$296.00	$296.00	None
9667161	$3,274.00	$1,472.00	Modify to Low negligence. **55% reduction in the penalty**
9667163	$661.00	$296.00	Modify to Low negligence. **55% reduction in the penalty**

9667166	$3,274.00	$3,274.00	None
9667167	$4,884.00	$662.00	Change "injury or illness" to "unlikely; and not significant & substantial. Modify to Lost Workdays or Restricted Duty. **86% reduction in the penalty**
9667168	$4,884.00	$3,274.00	Modify to Lost Workdays or Restricted Duty. **33% reduction in the penalty**
9667169	$4,884.00	$3,274.00	Modify to Lost Workdays or Restricted Duty. **33% reduction in the penalty**
9667170	$169.00	$169.00	None
9667171	$661.00	$296.00	Modify to Low negligence. **55% reduction in the penalty**
TOTAL	**$35,274.00**	**$17,610.00**	**50% (fifty percent) overall reduction in the penalty for this docket**.

Citation No. 9667165, issued by MSHA Inspector Kyle C. Stofko, invoked 30 C.F.R. § 56.14112(a)(1). That standard speaks to the construction and maintenance of guards. It plainly and clearly provides that "[g]uards shall be constructed and maintained to (1) [w]ithstand the vibration, shock, and wear to which they will be subjected during normal operation." Here, the inspector found "the tail guard of the 694 conveyor *was missing* the left *and* right guards. This condition has exposed the winged tail pulley to contact approximately 36" f[ro]m the catwalk. *The rear guard was also bent and deformed creating jagged edges and openings to the tail pulley* and is against the travelway. Guards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation. The area is accessed on a regular basis. This condition has existed for an unknown amount of time and exposes persons to permanently disabling injuries. **Photos taken**."

Penalty Petition at 18 (emphasis added).

The Secretary requests Citation No. 9667165 be modified to unlikely and to delete the significant and substantial designation, resulting in an **80% reduction in the penalty** from **$1,869.00 to $378.00** for this now-admitted violation. The Secretary's motion states that "the Respondent would present evidence that the tail section of 694 conveyor *had guards* in place to prevent accidental contact. The framework and location of the emergency stop cable would make contact with the moving machine parts difficult." Motion at 3. (emphasis added).

Analysis for Citation No. 9667165 with its 80% penalty reduction

In violations such as this, the Court believes it should be able to view critical, likely dispute-ending, photographs.

Further, the Secretary should cease advancing irrelevant considerations on the subject of significant and substantial violations, as the United States Courts of Appeal have definitively addressed that subject.

In putative support for reducing the penalty to $378.00, the Secretary offers two assertions: 1. the Respondent's claim that the conveyor had guards in place and 2. the emergency stop cord would make contact with the moving machine parts difficult.

As to the first assertion, there is direct conflict with the inspector's words that the tail guard of the 694 conveyor *was missing* the left and right guards. Further, the motion says nothing about the third hazard identified in the citation – that the rear guard was also bent and deformed, creating jagged edges and openings to the tail pulley and against the travelway. Inspector Stofko wisely took photographs of what he observed. The Court applauds the inspector's taking photographs as they can provide useful supportive evidence. The Secretary makes no mention of the photographs in the motion.

Those photos would likely put to rest the issue of the guards, but the Commission forbids its front-line reviewers of settlement motions, its administrative law judges, from seeing the photographs. The federal courts have noted on numerous occasions that "[a] picture is worth a thousand words. A photograph, especially when coupled with text, can convey a powerful message." *Manzari v. Assoc. Newspapers*, 830 F.3d 881 (9th Cir. 2016), *Harris-Billups v. Anderson,* 61 F.4th 1298, 1300 (11th Cir. 2023). However, none of the thousands of pictorial 'words' in this docket are available for the Court to see.

The second assertion, that *the emergency stop cord* would make contact with the moving machine parts difficult, is to have no part in the analysis as it is not to be considered in evaluating whether a violation is "significant and substantial." Yet, despite the Court reminding the Secretary on many, many occasions that such irrelevancies are off the table, the Secretary continues to assert them. Whether out of brazenness or ignorance, the Court does not know why these continue. However, the federal courts of appeals have made it clear, rejecting such alternative safety measures as cognizable excuses. For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

> "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' *Cumberland Coal*, 717 F.3d at 1029; *see also Buck Creek*, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Further regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

> interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"—that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id.* at 1028–1029.

Id. at 118-119.

As the D.C. Circuit further held in *Consolidation Coal*, 895 F3d 113 (D.C. Cir. 2018):

> Ample Commission precedent holds that such considerations are irrelevant to the likelihood-of-injury analysis. That is because the third prong of the *Mathies* test focuses on the risk of injury created by the safety violation itself. *See*, *e.g.*, *Secretary of Labor v. Black Beauty Coal Co.*, 38 FMSHRC 1307, 1313–1314 (2016) ("[T]he methane monitor, fire suppression system and devices, water sprays, CO monitors, fire brigade, breathing devices and turnout gear for firefighters are the sort of safety measures that we, and the appellate courts, have held to be irrelevant to the [significant and substantial] analysis under the Act."); *Secretary of Labor v. Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (2015) ("When deciding whether a violation is [significant and substantial], courts and the Commission have consistently rejected as irrelevant evidence regarding the presence of safety measures designed to mitigate the likelihood of injury resulting from the danger posed by the violation."). The Commission itself has characterized this rule as "well settled." *Black Beauty Coal Co.*, 38 FMSHRC at 1312.
>
> The same is true of miner precaution. Because the safety standards are there to protect miners, the hope or expectation that miners will protect themselves "is not relevant under the *Mathies* test." *Secretary of Labor v. Newtown Energy Inc.*, 38 FMSHRC 2033, 2044 (2016); *see also Secretary of Labor v. Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (1992) ("We reject the judge's conclusion that the 'exercise of caution' may mitigate the hazard."); *Secretary of Labor v. United States Steel Mining Co.*, 6 FMSHRC 1834, 1838 (1984) (dismissing argument that the violation of a cable marking requirement was not reasonably likely to cause injury because miners could determine the identity of cables by process of elimination); *Secretary of Labor v. Great W. Elec. Co.*, 5 FMSHRC 840, 842 (1983) (considering miner skill "ignores the inherent vagaries of human behavior"). As the Commission has pointed out, while "miners should, of course, work

> cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe conditions." *Eagle Nest, Inc.*, 14 FMSHRC at 1123. This reading also has the benefit of advancing the stated purpose of the Mine Act, which gives "the first priority and concern" to the "health and safety of its most precious resource—the miner," in view of "an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm." 30 U.S.C. § 801(a), (c).
>
> This court's precedent is of the same mind. In *Secretary of Labor v. Federal Mine Safety & Health Review Commission* (*Jim Walter Resources, Inc.*), 111 F.3d 913 (D.C. Cir. 1997), this court held that the Commission could not rely on aggravating facts external to a safety violation to conclude that the violation was of such nature as to significantly and substantially contribute to a hazard, *id.* at 915. The Secretary's reading of *Mathies* relies on this same principle in reverse: that circumstances external to a violation cannot be used to reduce the likelihood that harm will ensue.
>
> Likewise, in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), this court again interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"—that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id.* at 1028–1029."

Consolidation Coal, 895 F.3d 113,118-119 (D.C. Cir. 2018)

Yet, in the face of these decisions from the federal courts of appeals, the Secretary, in this instance through its non-attorney representatives – Conference Litigation Representatives, in this case, Mr. Ridley, habitually repeat such rejected bases. The Court places this continued use of such irrelevant claims squarely on the Secretary. As non-attorneys, the CLRs are fed these assertions, merely reciting what they are told by the Solicitor to include in the motions. It is unfair to foist their misstatements on them. They simply repeat what they are told to include in settlement motions. As such, the Secretary, through the façade of CLRs, cannot deliberately misstate or ignore case law that is unfavorable to her position. *See, Teamsters v. B&M Transit,* 882 F.2d 274, 280 (7th Cir. 1989),[1] *Robb v Electronic Data,* 990 F.2d 1253 (5th Cir. 1993), *EEOC v Taylor Electric*, 155 F.R.D. 180, (N.D. Ill. 1994), *Home Casual Enterprise,* 2013 WL 4821311 (W.D. Wis. 2013) (citing *Teamsters v. B&M Transit, Inc.,* at 280).

[1] *Teamsters v. B&M Transit* cites a host of other cases for this principle: a party is not entitled to deliberately **ignore or misstate case law** that is unfavorable to its position. *See Fred A. Smith Lumber Co. v. Edidin,* 845 F.2d 750, 753 (7th Cir. 1988); *Szabo Food Service,* 823 F.2d at 1081. *Id.*

Citation No. 9667164

For Citation No. 9667164, MSHA Inspector Stofko found a nearly identical, and arguably worse, violation of the same guarding standard, 30 C.F.R. § 56.14112(a)(1). This now-admitted violation was found on the *same day* as Citation No. 9667165, a mere 15 minutes earlier.

The Inspector's description of the condition informed:

> While inspecting the finish mill located at plant 1, it was found that the 633 conveyor head section and the Gypbelt head section ***were both missing multiple guards*** for the pulleys and drive components. The conveyor head sections were directly stacked over each other. This area is accessed on a regular basis for travel greasing and maintenance. Guards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation. All unguarded hazards were less than 7' from the catwalk. These conditions have existed for an unknown amount of time. Persons injured as a result of the violation cited would receive permanently disabling injuries. **Photos taken**.

Penalty petition at 16 (emphasis added)

Given the recounting above for Citation No. 9667165, one will not be surprised to read that the non-attorney representative for the Secretary offers the same serving for listing the gravity as 'unlikely,' and removing the significant and substantial designation:

> The Respondent would present evidence that the 633 conveyor and Gyp belt had guards in place to prevent accidental contact with the moving machine parts. *The location is not easily accessible to miners.*

Motion at 3 (emphasis added).

There is no indication that the federal appeals courts have said that such improper considerations would be acceptable when presented in settlement motions, as opposed to a hearing, as such an inconsistent stance would not be logical.

Analysis for Citation No. 9667164

Here too, the inspector's photos would likely resolve the claim about the presence, or lack thereof, of guards. There is no point in recounting the problems identified by the Court regarding Citation No. 9667165 because they are same. While the Court is obligated to follow Commission case law *and does so respectfully*, it is of the view that if important photographs cannot be viewed by the Commission's administrative law judges and if the Secretary is continued to be permitted to cite irrelevant considerations in settlements, forbidden by the federal courts of appeals, in those situations section 110(k) is at risk of becoming a phantom requirement.

It is the Court's best recollection that only one commissioner expressed that the Commission's judges may not see photographs when reviewing settlements. These subjects were not expressly covered in the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. It is the Court's hope that as these identified problems were not addressed in those decisions, and therefore not contemplated, the Commission may address them.

Citation No. 9667167

This now-admitted violation of 30 C.F.R. § 56.20003(a), was also issued by MSHA Inspector, Kyle Stofko. The standard, titled, "Housekeeping," provides that "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The citation stated in the condition or practice section:

> Located in the area of the 523 pan drive it was found that the floor contained spillage and various debris throughout the floor. This area was traveled through in the condition cited. The spillage was clinker up to 2" in size on the smooth floor. There was also found piled machine parts in areas that would require travel for the 521disconnect. The affected floor area containing spillage was approximately 20' x 15'. Workplaces and passageways shall be kept clean and orderly. This condition has existed for an unknown amount of time and exposes persons to permanently disabling injuries. **Photos taken**. **Standard 56.20003(a) was cited 37 times in two years** at mine 3600190 (36 to the operator, 1 to a contractor).

Penalty petition at 22. (emphasis added).

> The motion presents the following:
>
> The Secretary requests Citation No. 9667167 be modified to unlikely and delete the significant and substantial designation with lost workdays or restricted duty. The Respondent would present evidence that the area of the 523-pan feeder is located under the stairwell and is not regularly traveled or in a regular travelway. The injury expected from a slip trip or fall to the floor would result in lost workdays or restricted duty. No miners were in the area at the time of the inspection.

Motion at 4.

Analysis for Citation No. 9667167

No stranger to the requirements of this "Housekeeping" standard, *in this docket alone*, **fully eight (8) of the twelve (12) citations involved violations of 30 C.F.R. § 56.20003(a). All eight have been admitted to being violated.** Not mentioned by the CLR in the motion, and

not disputed, is that the affected area had clinker up to 2 inches in size on the smooth floor and piled machine parts over the approximate 20 feet by 15 feet area.

The motion suffers from several significant deficiencies. The Respondent admits that the floor is traveled, contending *only* that it is not *regularly* traveled. The Respondent does not challenge that the floor contained spillage and various debris throughout the cited area, nor does it dispute the area involved, nor that the floor was smooth, nor that "[t]his area was traveled through in the condition cited." With no basis for the claim, the Respondent asserts that the expected injury would be lost workdays or restricted duty. The MSHA inspector listed the expected injury as 'permanently disabling.' Further, the claim that an injury would be limited to lost workdays or restricted duty qualifies as a reasonably serious injury and consequently does not impair the inspector's 'significant and substantial' designation.

In asserting that "[n]o miners were in the area at the time of the inspection," the CLR, *and therefore the Secretary who instructs the CLRs what to assert in settlement motions*, ignores that the evaluation of whether a violation is 'significant and substantial' is measured by examining continued normal mining operations, *without* any assumptions as to abatement. *Mach Mining*, 809 F.3d 1259, 1267 (D.C. Cir. 2016). Thus, the remark that no miners were in the area *at the time of the inspection* is an impermissible consideration. "[I]njuries resulting in lost workdays or restricted duties … establishes that the hazard contributed to by the violations would be reasonably likely to result in an injury of a reasonably serious nature as required by our S&S analysis." *Spartan Mining*, 35 FMSHRC 3505, 3509 (Dec. 2013). The Secretary should instruct its non-attorney representatives to cease including impermissible factors in the evaluation of whether a violation is significant and substantial. [2]

---

[2] This ignorance over the requirement that the 'significant and substantial' determination is to be measured by examining continued normal mining operations, without any assumptions as to abatement, and that alternative safety measures are not a cognizable excuse, is repeated throughout this settlement motion as noted below, with the bold text below showing the improperly asserted grounds which pertain to three of the other citations in this docket:

For Citation No. **9667163,** the Secretary requests it be modified to Low negligence. **The Respondent would present evidence that the area of the 616-dust collector has been provided with hand tools and a suction hose that are readily available in case of any spillage. The miners have received training to clean the area prior to walking through the area.**

For Citation No. 9667168, the Secretary requests it be modified to lost workdays or restricted duty. The Respondent would argue that the injury expected from a slip, trip or fall in the area around the 522 elevator and the 521 conveyor would result in lost workdays or restricted duty. **The area has a significant handrail around that outer edge of the elevated platform to prevent falling to levels below.**

For Citation No. 9667169, the Secretary requests that it be modified to lost workdays or restricted duty. The Respondent would present evidence that injury expected from a slip, trip or

(continued…)

Not to be ignored is Citation No. 9667158.

Citation No. 9667158

This Citation for which the Secretary seeks a **55% reduction** in the regularly assessed proposed penalty presented and extremely serious situation, for which none of the facts in the Condition or Practice section are disputed. That section states:

> While inspecting the level 5 sump pumps in the Plant 2 quarry it was found that safe access was not maintained. The access path from the water truck fill area to the pump control switch was found to be along the edge of the pond that had a 9' shear drop to the water below. The path was uneven with large loose rock and found to be within 3' of the edge of the pond. The pump control switch was also within 4' of the edge of the pond. The catwalk access for the pumps was found to be broken away from the anchoring block and secured with a come-along and a cable. This condition created a gap between the anchoring block (That doubles as a flat access platform) and the catwalk. This access point also is located at the edge of the pond at the 9' drop to the water below. Safe means of access shall be provided and maintained to all working places. There was no personal floatation devices available in this area. The area is normally accessed by one person multiple times per day to fill the water truck and the pumps are accessed 2 times per month for pump maintenance. The conditions cited have existed since May of 2022. Persons injured as a result of the violation cited would receive fatal injuries. Photos taken.

Penalty Petition at 6.

Here again, the diligent Inspector Stofko took photographs to record what he observed.

The Secretary's Motion requests Citation No. 9667158 be modified to Low negligence. The Respondent would present evidence that a miner took it upon himself to use a frontend loader to modify the area without management's knowledge. The condition was not reported to the mine operator on the workplace exams.

Analysis for Citation No. 9667158

The multiple, extensive, hazards, as described above, cannot be brushed aside on the frontend loader operator because several of them could not have been created by the operation of that machine. Further, while the offered excuse could arguably be a basis for moderate

---

[2] (…continued)
fall on the 550-dust collector landing would result in lost workdays or restricted duty. **The outer edge is provided with a significant handrail system consisting of a mid-rail and upper rail.**

To Inspector Stofko's credit, he also took photos for each of these now-admitted violations he observed: Citation No. 9667163, Citation No. 9667168, and Citation No. 9667169.

negligence, a level of negligence the issuing inspector bestowed on the operator, it could not be a basis for low negligence as no 'considerable' mitigating circumstances were offered in the settlement for this violation.

Conclusion

Despite the many troublesome aspects discussed in this decision, the Court is presently constrained when reviewing motions for approval of settlement. As such, it has considered the Secretary's Motion and approves it *solely* on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. Per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

Accordingly, the motion to approve settlement is **GRANTED**, the citations contained in this docket are **MODIFIED** as set forth in the table above and Lehigh Cement Company, LLC is **ORDERED** to pay the Secretary of Labor the sum of **$17,610.00** within 30 days of this order.[3] Upon receipt of payment, this case is DISMISSED.

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

Distribution:

Norman C. Ridley, Conference and Litigation Representative, U.S. Department of Labor, MSHA, 178 Thorn Hill Road, Suite 100, Warrendale, PA 15086 ridley.norman@dol.gov

Philip K. Kontul, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, PC, One PPG Place, Suite 1900, Pittsburgh, PA 15222 philip.kontul@ogletree.com

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, DC 20004
Office: (202) 434-9933 / Fax: (202) 434-9949

May 10, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. TWIN STATE MINING, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0051 A.C. No. 46-09496-565217 Mine: Mine No. 43

DECISION APPROVING SETTLEMENT

The Secretary has filed a Motion to Approve Settlement to which Respondent has agreed. I have considered the six statutory civil penalty criteria contained at § 110(i) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 820(i), and find that the proposed penalty amounts are appropriate. It is hereby ORDERED that:

The penalty for the now-admitted violation in this case is reduced as follows:

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9566590	$3,546	$2,500	No modifications to the inspector's evaluation but 30% reduction in penalty

Citation No. 9566590 alleges a now-admitted violation of 30 C.F.R. §75.517. That standard is derived from a statutory provision. It is titled "Power wires and cables; insulation and protection," and provides "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected."

The issuing inspector described the condition or practice as follows:

> The cable on the #1 roof bolter located on the #2 section is not insulated adequately and fully protected, in that when checked there are 2 damaged places in the cable exposing the inner leads and one of the damaged areas has damage to one of the

> inner leads exposing the inner bare wires to miners. Standard 75.517 was cited 26 times in two years at mine 4609496 (26 to the operator, 0 to a contractor).

Petition for civil penalty at 19.

The citation was terminated upon the following action:

Both affected areas have been cleaned and the damaged lead has been repaired and the cable has been taped up in both places. *Id.* (emphasis added).

The Settlement Motion offers the following for the penalty reduction:

> The basis for the penalty reduction is that the Respondent claims it would present evidence at hearing that the bolter's power cable was insulated adequately and fully protected upon the inspector's arrival, and that the inspector himself instructed that the tape which served to protect and insulate the cable be removed. Thus, Respondent claims that but for the inspector requiring the removal of the tape which was insulating and protecting the inner leads of the cable, there would have been no inner leads exposed and no violation of section 75.517. In light of this dispute, the parties agree to disagree over the meaning of the potential evidence, and the proposed modifications are acceptable to the parties in lieu of the hearing process.

Motion at 3.

Analysis:

Violations of this nature are especially serious. One need look no further than a 2022 fatality attributable to this very standard. As stated in the MSHA fatal electrical accident report: "On September 1, 2022, at approximately 4:40 p.m., Kristofer Ball, a 33 year-old roof bolter with approximately 12 years of mining experience, was fatally injured when he contacted an energized 480-volt trailing cable. The accident occurred because the mine operator did not: 1) fully protect the roof bolting machine's trailing cable, and 2) provide adequate task training for handling the roof bolting machine's trailing cable." https://www.msha.gov/data-reports/fatality-reports/2022/september-1-2022-fatality/final-report.

Other fatalities attributable to this standard have occurred. See, for example: https://arlweb.msha.gov/FATALS/2003/FTL03c21.htm and https://arlweb.msha.gov/readroom/FOIA/2007InternalReviews/Sago%20Internal%20Review%20Report.pdf

Although the Court can appreciate that the $1,046.00 reduction in the penalty must be balanced against the cost of proceeding to a hearing, if that is the test for settlement then many citations would be impacted by such a *de facto* policy. Further, a $1,000.00 plus penalty reduction is not a negligible sum.

Here, it is noted that the Secretary does not buy into the Respondent's claim and that is understandable because the inspector found *two* damaged areas and it does not stand to reason that inspectors would be in the business of creating violations, which is essentially the claim being lodged here. *Something* caught the inspector's attention. It is unlikely in the extreme that an inspector would require an adequately insulated and fully protected cable to be untapped, only to have it retaped.

From the Court's perspective, situations like this are more likely to be resolved if it had the ability to see the inspector's notes. Based on the information available, it appears that Inspector Don L. Vest was diligently performing his inspection responsibilities, an observation the Secretary implicitly adopts. Also, as the Court has recently noted, photographs, where they can be safely taken in the underground coal mining environment, may dispel what may be frivolous claims by mine operators. Of course, the Court would need to have the ability to see such photographs, an option presently not available.

Conclusion

Despite the Court's concerns, as expressed above, review of settlement motions is presently circumscribed by Commission case law. As such, the Court has considered the Secretary's Motion and approves it *solely* on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. Per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

Accordingly, the motion to approve settlement is **GRANTED**, and **Twin State Mining, Inc**. **is ORDERED** to pay the Secretary of Labor the sum of **$2,500.00** within 30 days of this order.[1] Upon receipt of payment, this case is DISMISSED.

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

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

Distribution:

Andrenna H. Berggren, Office of the Regional Solicitor, 201 12th Street South, Arlington, VA 22202, Berggren.Andrenna.M@dol.gov

Justin K. Chandler and Jonathan Ellis, Steptoe & Johnson PLLC, STEPTOE & JOHNSON PLLC, Chase Tower, Seventeenth Floor, P.O. Box 1588, Charleston, WV 25326 Justin.Chandler@steptoe-johnson.com and Jonathan.Ellis@steptoe-johnson.com

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933
FAX: 202-434-9949

May 18, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	CIVIL PENALTY PROCEEDING Docket No. YORK 2023-0024 A.C. No. 18-00780-567820
MARYLAND ENERGY RESOURCES, LLC, Respondent	Mine: Casselman Mine

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary's Conference Litigation Representative ("CLR"), who is not an attorney, has filed a Motion to Approve Settlement. The Respondent has agreed to the modifications for the two violations in this matter and to the enormous reductions in the civil penalty amounts. The originally assessed amount for the now-admitted violations was $5,296.00 and the proposed settlement total amount is $698.00, (six hundred ninety-eight dollars). Individually, the two violations were each assessed at $2,648.00, with the reductions for each reduced to $349.00 (three hundred forty-nine dollars). These represent penalty reductions of 87% for each violation. Both violations, originally a (d)(1) citation and a (d)(1) order, have been modified to 104(a) citations. The modifications and the settlement amounts are summarized in the following table:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
YORK 2023-0024			
9250036	$2,648.00	$349.00	Modify Injury or Illness to Unlikely, Modify S&S Designation to No, Modify Type of Action to 104(a), Modify Type of Issuance to Citation **87% reduction in penalty**

9250037	$2,648.00	$349.00	Modify Injury or Illness to Unlikely, Modify S&S Designation to No, Modify Type of Action to 104(a) **87% reduction in penalty**
Total	**$5,296.00**	**$698.00**	**87% overall reduction in penalty**

Citation No. 9250036, issued as a (d)(1) order, alleged a now-admitted violation of 30 C.F.R. § 77.503. Titled "Electric conductors; capacity and insulation," it provides "[e]lectric conductors shall be sufficient in size and have adequate current carrying capacity and be of such construction that a rise in temperature resulting from normal operation will not damage the insulating materials."

The MSHA Inspector who issued this (d)(1) order, Louis Bernatowicz, stated in the Condition or Practice section of the citation:

> The #12 AWG Electric Conductors for the 14 - 120 Volt A.C. Outlets in the Cart Charging Building are *not sufficient in size and do not have adequate current carrying capacity and are not of such construction that a rise in temperature resulting from normal operation will not damage the insulating materials*. **4 of the 14 outlets show evidence of overheating with damaged and melted plastic in the receptacles. 5 of the last 10 monthly electrical exams of the Cart Charging Building show receptacles were replaced.**
> This violation is an unwarrantable failure to comply with a mandatory standard.

Petition for civil penalty at 9 (emphasis added).

To terminate the (d)(1) order:

> The 12 - 120 Volt AC outlets in the Cart Charging Building were rewired with #10 AWG copper wire. 30 Amp Ground Fault Circuit Interrupter Breakers labeled 1 through 12 were also installed for each individual 3 or 4 prong 30 amp receptacle numbered 1 through 12. The 10 Battery Chargers in the Cart Charging Building are individually identified with numbers 11 through 14, and either 3 or 4 prong 30 amp twist lock plugs were installed on all chargers except #11 which is out of service for output plug repair. A contractor was brought in to help rewire the building. The 2 240 Volt AC outlets labeled A and B that had extension cords running to 2 chargers will not be used due to the different plug types on the chargers. The 2 - 240 Volt AC extension cords running to the 2 - 120 volt AC battery chargers were removed. The Cart Charging Building was examined by an electrician and the exam recorded in the record book on the surface stating the charger circuits were upgraded to 30 amp from 20 amp.

Id. at 10.

In the Motion, "Respondent contends that injury from the cited condition would not be reasonably likely to occur, asserting that the circuits were properly grounded and

therefore did not pose a shock hazard. The inspector noted that gravity evaluations were based on fire hazards resulting from the overheating of the inadequately sized conductors. However, the affected circuits were in an open, metal shed on the surface where little potential for fire propagation or entrapment existed." Motion at 4.

Citation No. 9250037, is related to the just described violation identified in Citation No. 9250036. Issued as a (d)(1) citation, Citation No. 9250037 alleged a now-admitted violation of 30 C.F.R §77.502. Titled "Electric equipment; examination, testing, and maintenance," it provides that "Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. **A record of such examinations shall be kept**."

For this now-admitted violation, issued 9 minutes before Order No. 9250036, Inspector Bernatowicz, stated in the Condition or Practice section of the citation:

> The Battery Chargers in the Cart Charging Building and the Shop are not frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. ***No*** **record of the examinations for the 14 battery chargers in the Cart Charging Building and the Shop are being kept. The chargers have been in use at the mine for at least 8 months.**
> Standard 77.502 was cited 1 time in two years at mine 1800780 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Petition for civil penalty at 5 (emphasis added).

To terminate the (d)(1) citation the following occurred:

> The Battery Chargers in the Cart Charging Building and the Shop have been individually identified with numbers 1 through 14. The Battery Chargers have been properly examined by a electrician with the results recorded in the book maintained on the surface. Battery Chargers 1 through 4 in the shop and charger number 11 in the Cart Charging Building have been removed from service with the plugs cut off and removed. Chargers 1 through 4 are in the shop and are 60 amp output chargers with the nameplate tag identifying 2 of the chargers as 15 amp max input and the other 2 chargers as 30 amp max input. The 3 other 60 amp output battery chargers at the mine in the Cart Charging Building have name plate tags identifying the max input as 30 amps. All of the nameplate tags on the 14 battery chargers at the mine state input voltage as 110 Volt AC. The 2 battery chargers in the Cart Charging Building that were plugged into 220/240 Volt AC Receptacles were removed from service, plugs changed and plugged into 110/120 Volt AC. The operator stated the 2 battery chargers in the Shop that were plugged into 220/240 Volt AC will be only be used on 110/120 Volt AC when they are placed back in service. All chargers now in service have new 30 amp rated plugs, and are plugged into 30 amp 110/120 Volt AC receptacles.

Id. at 7.

In the Motion "Respondent contends that injury from the underlying condition would not be reasonably likely to occur, asserting that the chargers were being examined weekly in conjunction with the corresponding vehicles, and that the circuits were properly grounded and therefore did not pose a shock hazard. The inspector noted that gravity evaluations were based on fire hazards (associated with the underlying conditions referenced in Order No. 9250036 …) resulting from the overheating of the inadequately sized conductors. However, the affected circuits were in an open, metal shed on the surface where little potential for rapid fire propagation or entrapment existed." Motion at 3.

Analysis

Both of these, now-admitted, violations involve serious hazards and required significant remedial actions to cure the hazards found by the diligent MSHA Inspector, Louis Bernatowicz.

Battery chargers can present serious safety and health risks. These hazards which are associated with the use, handling, storage, or when the battery is charging. They include: overheating, fire or explosion, electrical shock from battery chargers, thermal burns and exposure to corrosive battery electrolytes. https://weeklysafety.com/blog/batteries

The charging of lead-acid batteries "can be hazardous. The two primary risks are from hydrogen gas formed when the battery is being charged and the sulfuric acid in the battery fluid, also known as the electrolyte. Hydrogen gas can lead to fires and explosions, and worker exposure to sulfuric acid can lead to chemical burns and other adverse health effects. Improper handling of batteries can also lead to shocks and electrocution, and battery charging can also result in the release of other harmful contaminants." https://www.ccohs.ca/oshanswers/safety_haz/battery-charging.html#:~:text=The%20two%20primary%20risks%20are,and%20other%20adverse%20health%20effects.

The two conceded violations in this docket arose from the same circumstance, as they were discovered in the mine's Cart Charging Building.

The 104 (d)(1) Order, No. 9250036, Insufficient outlet size and inadequate current capacity

As noted, this now-admitted violation was issued for the failure to have electric conductors of sufficient in size and adequate current carrying capacity and for their failing to be of such construction so that a rise in temperature resulting from normal operation will not damage the insulating materials. The inspector's condition or practice section of the Order details egregious violations. The inspector found that **29%** (twenty-nine percent) of the outlets showed evidence of overheating with damaged and melted plastic receptacles. And the operator cannot claim ignorance of this problem, not with 5 of the last 10 monthly electrical exams resulting in receptacles being replaced. This speaks loudly to the issue of unwarrantable failure, supporting the inspector's finding in that regard.

These uncontested findings are in accord with *Peabody Midwest,* 44 FMSHRC 515 (Aug. 2022), wherein the Commission reiterated its long-standing law "that unwarrantable failure means aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997, 2001 (Dec. 1987). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at the facts and circumstances of each case to see if any aggravating factors exist, such as the operator's knowledge of the existence of the violation, whether the violation was obvious, whether the violation posed a high degree of danger, the extent of the violative condition, the length of time that the violative condition has existed, the operator's efforts in abating the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining* Co., 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co*., 31 FMSHRC 1346, 1350-57 (Dec. 2009)." *Id.* at 522

And though the foregoing is more than sufficient to support Inspector Bernatowicz's evaluation in all respects, the remedial actions to bring the Cart Charging Building into compliance make this abundantly clear:

> The 12 - 120 Volt AC outlets in the Cart Charging Building were rewired with #10 AWG copper wire. 30 Amp Ground Fault Circuit Interrupter Breakers labeled 1 through 12 were also installed for each individual 3 or 4 prong 30 amp receptacle numbered 1 through 12. The 10 Battery Chargers in the Cart Charging Building are individually identified with numbers 11 through 14, and either 3 or 4 prong 30 amp twist lock plugs were installed on all chargers except #11 which is out of service for output plug repair. A contractor was brought in to help rewire the building. The [two] 240 Volt AC outlets labeled A and B that had extension cords running to 2 chargers will not be used due to the different plug types on the chargers. The [two] - 240 Volt AC extension cords running to the 2 - 120 volt AC battery chargers were removed. The Cart Charging Building was examined by an electrician and the exam [was thereafter] recorded in the record book on the surface stating the charger circuits were upgraded to 30 amp from 20 amp.

Id. at 10.

In the Court's opinion, the Respondent's contention that injury from the cited condition would not be reasonably likely to occur, asserting that the circuits were properly grounded and therefore did not pose a shock hazard, is misguided and insufficient. The Court considers the excuse as an effort of misdirection from the many hazardous conditions found by the inspector. As described above, the hazards are not limited to fire. For that reason, the "metal shed" excuse does not address all the associated hazards. The Court finds the inspector's determination of negligence as 'high' to be well-supported – the Order, the facts reported in it, which were not challenged, establishes this.

The 104 (d)(1) Citation, No. 9250037, Failure to frequently examine, test, and properly maintain electric equipment *and to keep a record of such examinations*

For this other, now-admitted violation, connected with the Cart Charging Building, Inspector Bernatowicz found an equally egregious violation, having determined that there was ***no record*** **being kept of the examinations for the 14 battery chargers in the Cart Charging Building and the Shop. This was a long-standing violation, as the chargers had been in use at the mine for at least 8 months.** The operator challenges *none of these facts.* Instead, it advances largely the same arguments it made for the first violation – that shock hazards and fire and entrapment were not reasonably likely. The operator adds the claim that the chargers were being examined weekly. However, one would have to respond that those exams, if they actually were being conducted, were, to be polite, grossly inadequate.

Behind the excuse presented by the operator, is the suggestion that this was only a recordkeeping violation. The Court does not adopt this perspective – recordkeeping is no second-class requirement, impervious to significant and substantial and unwarrantable findings. If viewed as lesser safety and health requirements, their importance is seriously diminished. Recordkeeping requirements keep mine operators on the up and up. And here, the operator did not keep such required records for eight (8) months. It is no excuse to claim, as the operator does here, that the chargers were being examined weekly. Anyone could *claim* that. It is for that reason that the standard requires *records* of exams. Further, where recordkeeping is involved, the Court believes that the measure of what constitutes a "significant and substantial" violation should be flexible, much as exposure to dust is not measured by a one-time exposure. Similarly, where a mine operator habitually fails to comply with a recordkeeping requirement, under the continued normal mining operations principle, sooner or later such failures will produce a reasonable likelihood of a reasonably serious injury. If that is not true, then it would seem that all recordkeeping violations would not be S&S, a result which would eviscerate their importance.

Based on the information available to the Court and given that it is precluded from reasonable inquiry, it is clear that the (d)(1) citation and order were well supported. Further, penalty reductions of this order run counter to Congress' express direction that penalties are to be of sufficient magnitude to make compliance the less expensive option over non-compliance. The $349.00 penalties in the motion do not meet with Congress' instruction.

Despite the foregoing, the Court is not permitted to make reasonable inquiry about settlement motions. With that restriction, the Court has considered the Secretary's Motion and approves it *solely* on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. Per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

Should the Commission agree that the motion is inadequate for the reasons articulated by the Court, it has the authority to review, per 29 C.F.R. 2700.71.

The motion to approve settlement is **GRANTED**, and Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $698.00 within 30 days of the date of this decision.[1] The violations are modified, as reflected in the table above, to Section 104(a) citations, with the gravity reduced to unlikely. As a consequence, the modifications erase the significant and substantial determinations.

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

Distribution:

Chris A. Weaver, CLR, U.S. Dept. of Labor, MSHA, 604 Cheat Road, Morgantown, WV 26508 (weaver.chris@dol.gov)

R. Henry Moore, Esq., Fisher & Phillips, LLP, Six PPG Place, Suite 830, Pittsburgh, PA 15222 (hmoore@fisherphillips.com)

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

It is vital to include Docket and A.C. Numbers when remitting payments.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933
FAX: 202-434-9949

May 22, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0166 A.C. No. 46-09514-569163
GREENBRIER MINERALS, LLC, Respondent	Mine: Muddy Bridge

DECISION APPROVING SETTLEMENT

Before: Judge Moran

It is **ORDERED** that the Conference and Litigation Representative (CLR), Ray A. Cartwright, be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Resources Corporation*, 16 FMSHRC 2359 (Nov. 1994).

This case is before me upon a Petition for Assessment of a Civil Penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The motion is brought by non-attorney representatives, known as "conference and litigation representatives ("CLRs"). The CLR has filed a motion to approve settlement of the violations involved in this matter. The parties have moved to approve the proposed settlement as follows:

Citation/Order No.	MSHA's Proposed Assessment	Settlement Amount	Modification
WEVA 2023-0166			
9568959	$1,069.00	$535.00	Modified from "Reasonably Likely" to "Unlikely", and consequentially removing the "Significant and Substantial" designation
TOTAL	**$1,069.00**	**$535.00**	**50% reduction in penalty from regular assessment figure**

Involved in this matter is a section 104(a) citation for a now-admitted violation of 30 C.F.R. §75.1725(a). That standard, titled "Machinery and equipment; operation and maintenance," provides at the cited subsection that "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

In issuing the citation, MSHA Inspector Emory Pack found that a Mac 12 emergency ride, company number 001, had a non-functioning parking brake. The inspector noted that the machine is used to transport miners from the end of the track to the No. 1 section. Petition for Civil Penalty at 17. As the inspector marked the violation as reasonably likely to result in an injury producing lost workdays or restricted duty, he properly designated it as significant and substantial. The negligence was listed as moderate. *Id.*

That the inspector properly so evaluated the non-functioning brake was borne out by the fact that the parking brake was replaced. *Id* at 18

The Motion asserts the following in support of the modification and the 50% penalty reduction:

> Respondent disputes the level of likelihood of injury characterized by the citation. Respondent contends the **service brakes**[1] on the personnel carrier were working properly when tested. **Respondent further contends the terrain the personnel carrier travels is slightly rolling and not very steep. When the personnel carrier is parked and unattended, the transmission is left in reverse, and the wheels are turned into the rib.** Respondent states this citation does not have a confluence of factors to support the S&S determination. The Secretary does not necessarily agree with Respondent's position but does recognize a legitimate factual and legal dispute and believes that settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act. Therefore, the Secretary agrees to modify the citation from "Reasonably Likely" to "Unlikely" and to delete the "Significant and Substantial" designation. The Secretary also agrees to accept a reduced penalty, which reflects the modification to the issuance.

Motion at 3 (emphasis added).

Analysis

The support offered is a display of irrelevant considerations, because it is entirely composed of factors that are not to be considered, per the clear directions from the United States Courts of Appeals. Those Courts have rejected the 'alternative safety measures' raised by the Respondent when analyzing the significant and substantial designation. Accordingly, redundant safety measures are not to be considered in evaluating a hazard.

[1] The citation was for the non-functioning parking brake, *not the service brake.*

For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

> "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' Cumberland Coal, 717 F.3d at 1029; see also Buck Creek, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Further regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

> interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"—that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id.* at 1028–1029.

Id. at 118-119.

Such irrelevancies do not acquire legitimacy in the context of settlements because to do so, would mean that a lesser standard is applied. It is disconcerting that the Secretary's non-attorney representatives continue to advance these rejected justifications[2] for penalty reductions, as it displays a lack of respect for the holdings of the Courts of Appeals and Congress' explicit direction that penalties must be sufficient to encourage operators to comply with safety and health standards, as opposed to noncompliance with the attendant benefit of paying greatly reduced penalties.

Despite the above observations, the Court is not permitted to make reasonable inquiry about settlement motions. With that restriction, the Court has considered the Secretary's Motion and approves it solely on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. The Court must and does adhere to all Commission precedent. Per the Commission's decisions on the scope

[2] As the CLRs are not attorneys, the Court realizes they simply follow the orders from the Solicitor as to the claimed justifications, even if they are without merit.

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

Accordingly, the motion to approve settlement is **GRANTED**, the citation contained in this docket is **MODIFIED** as set forth above, and it is **ORDERED** that **Greenbrier Minerals, LLC** pay the Secretary of Labor the sum of **$535.00** within 30 days of this order.[3]

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

Distribution:

Ray A. Cartwright, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 100 YMCA Drive, Madisonville, KY 42431 cartwright.ray@dol.gov

Lorna Waddell, Legal Counsel, DINSMORE & SHOHL LLP, 215 Don Knotts Blvd., Suite 310, Morgantown, WV 26501 lorna.waddell@dinsmore.com

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

It is vital to include Docket and A.C. Numbers when remitting payments.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

May 23, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CANYON FUEL COMPANY, LLC, Respondent, & DEWEY TANNER, employed by CANYON FUEL COMPANY, LLC, Respondent, SHANE ALLRED, employed by CANYON FUEL COMPANY, LLC, Respondent, JAKE WILSON, employed by CANYON FUEL COMPANY, LLC, Respondent, JED GORDON, employed by CANYON FUEL COMPANY, LLC, Respondent, MICHAEL COOPER, employed by CANYON FUEL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2021-0188 A.C. No. 42-01566-532508 Docket No. WEST 2021-0229 A.C. No. 42-01566-535306 Docket No. WEST 2021-0254 A.C. No. 42-01566-536066 Docket No. WEST 2021-0314 A.C. No. 42-01566-540906 A Docket No. WEST 2021-0315 A.C. No. 42-01566-540910 A Docket No. WEST 2021-0317 A.C. No. 42-01566-540907 A Docket No. WEST 2021-0318 A.C. No. 42-01566-540908 A Docket No. WEST 2021-0319 A.C. No. 42-01566-540909 A Mine: Skyline Mine #3

DECISION AND ORDER

Appearances: Jason S. Grover, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner
Rebecca Mullins, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner
R. Henry Moore, Esq., Fisher & Phillips LLP, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Young

SUMMARY

Order No. 8541891, 30 C.F.R. § 75.202(a): Failure to protect from falls of roof, face, and ribs. A rib burst occurred, covering a miner in coal and resulting in injuries.

Fact of violation	Yes	p. 13
S&S	Yes	p. 14
Negligence	Moderate	p. 16
Unwarrantable Failure	No	p. 18
Penalty	$25,000.00	p. 19

Order No. 8541892, 30 C.F.R. § 50.10(b): Failure to immediately notify MSHA following injury of an individual which has a reasonable potential to cause death.[1] Operator did not immediately report a rib burst that buried a miner in coal and caused significant injuries.

Fact of violation	Yes	p. 20
S&S	Yes	p. 33
Negligence	High	p. 35
Unwarrantable Failure	Yes	p. 37
Penalty	$50,000.00	p. 42

Individual Liability under Order No. 8541892, 30 U.S.C. § 820(c): Aggravated failure to immediately report an accident with a reasonable potential to cause death.

Shane Allred	$1,000.00	p. 47
Michael Cooper	$1,500.00	p. 49
Jed Gordon	No Liability	p. 49
Jake Wilson	No Liability	p. 49
Dewey Tanner	No Liability	p. 49

[1] The violation was originally cited under section 50.10(c). This Court allowed amendment to allege a violation of section 50.10(b) instead. Order Granting Mot. to Amend Order, Docket No. WEST 2021-0188 et al., at 3 (Apr. 27, 2022).

I. INTRODUCTION

This case is before me upon petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act" or "Act"), 30 U.S.C. § 815(d) (2023). At issue are two orders under section 104(d)(1), issued to Respondent, Canyon Fuel Company, LLC ("Canyon Fuel" or "Respondent").[2] The parties presented testimony and documentary evidence at a hearing on May 17–19, 2022, and filed post-hearing briefs.

Canyon Fuel owns and operates Skyline Mine #3, located near Scofield, Utah. Joint Stipulations ¶ 1, 2 (May 6, 2022) ("Stips."). Skyline is a large, underground coal mine, subject to the jurisdiction of the Mine Act. *Id.* ¶ 3, 16. Order No. 8541891 alleged a failure to protect miners from mine roof, face, and rib falls. Order No. 8541892 alleged a failure to report an immediately reportable injury that had a reasonable potential to cause death. For reasons set forth below, I **AFFIRM** both violations, but **MODIFY** Order No. 8541891 to "Moderate" negligence and remove the "Unwarrantable Failure" designation. I also find Shane Allred and Michael Cooper personally liable for the violation of Order No. 8541892.

II. STANDARDS

A. Violation

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

B. Significant and Substantial ("S&S")

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

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely

[2] This Court approved settlement of three violations: 8541894, 8541895, and 8541897. Decision Approving Partial Settlement, Docket No. WEST 2021-0188 et al., at 2 (May 19, 2022). The Secretary also vacated two violations: 8541893 and 8541896. S. Mot. to Approve Partial Settlement, Docket No. WEST 2021-0188 et al., at 2 (May 11, 2021). Individual civil penalties against Messrs. Tanner, Allred, Wilson, Gordon, and Cooper are also before the Court.

> to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

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

An S&S determination must be based on the assumed continuation of normal mining operations. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.").

C. Negligence

Judges may use a traditional negligence analysis, rather than relying upon Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–02 (Aug. 2015) (citing *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151–52 (7th Cir. 1984)) ("Part 100 regulations apply only to the proposal of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way on Commission proceedings."). The reasonably prudent person standard should be that of one "familiar with the mining industry, the relevant facts, and the protective purposes of the regulation." *Brody Mining, LLC*, 37 FMSHRC at 1702.

D. Unwarrantable Failure

Unwarrantable failure is "aggravated conduct constituting more than ordinary negligence," *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987)), and characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* (citing *Emery Mining Corp.*, 9 FMSHRC at 2003–04); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995).

Whether conduct is "aggravated" is based on the following factors:

> [1] [T]he operator's knowledge of the existence of the violation, [2] whether the violation was obvious, [3] whether the violation posed a high degree of danger, [4] the extent of the violative condition, [5] the length of time that the violative condition has existed, [6] the operator's efforts in abating the violative condition, and [7] whether the operator has been placed on notice that greater efforts are necessary for compliance.

Peabody Midwest Mining, LLC, 44 FMSHRC 515, 522 (Aug. 2022) (citing *Manalapan Mining Co.*, 35 FMSHRC at 293; *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009)). A judge must examine "all relevant factors, rather than relying on one to the exclusion of others." *IO Coal Co.*,

31 FMSHRC at 1351 (citing *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999)) (acknowledging that a judge may determine that some factors are less important or not relevant but must consider them all).

A high degree of danger posed by a violation alone may support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding a violation to be aggravated based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals*, 10 FMSHRC 705, 709 (June 1998) (finding unwarrantable failure where roof conditions were "highly dangerous"). The absence of significant danger, however, does not necessarily preclude a finding of unwarrantable failure. *Manalapan Mining*, 35 FMSHRC at 294.

An objectively reasonable, good faith belief in a violative practice's compliance is a defense against unwarrantable failure. *IO Coal Co.*, 31 FMSHRC at 1357.[3] A respondent must therefore present facts demonstrating both a good faith belief, and the reasonableness of that belief. *See W. Ala. Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1888 (Sept. 2015) ("A party's conclusory statement that it acted in good faith cannot be treated as a binding determination of material fact.").

E. Penalty

The Commission considers the following factors, from Section 110(i) of the Act, in assessing penalties under the Act:

> [T]he operator's [1] 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) (2006).

F. Individual Liability

Section 110(c) liability for an agent is stated as follows:

[3] "[I]f an operator acted on the *good-faith* belief that its cited conduct was actually in compliance with applicable law, and the belief was *objectively reasonable under the circumstances*, the operator's conduct will not be considered to be the result of unwarrantable failure when it is later determined that the operator's belief was in error." *Id.* at 1358 (quoting *Kellys Creek Res., Inc.*, 19 FMSHRC 457, 463 (Mar. 1997) (citing *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615–16 (Aug. 1994))) (emphasis added).

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. § 820(c) (2023). "Knowingly" requires a finding that the agent knew or had reason to know of the violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362–64 (D.C. Cir. 1997).

To establish section 110(c) liability, the Secretary must prove only that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the regulation. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Miners & Chem. Corp.*, 402 U.S. 558, 563 (1971)); *see also Ernest Matney*, 34 FMSHRC 777, 784 (Apr. 2012) ("[S]ection 110(c) liability does not hinge on whether an agent engaged in 'willful' conduct."). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16.

The Commission recently affirmed a liability finding where a judge used a three-part test for individual liability: (1) that the agent knew or had reason to know about the violative condition; (2) that the agent was in a position to remedy the condition; and (3) that the agent failed to act to correct the condition. *Peabody Midwest Mining, LLC*, 44 FMSHRC at 526–27, 259. The agent's conduct—or failure to act—must be "aggravated." *Id.* at 527.

Section 110(c) liability is predicated on aggravated conduct more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).[4] A judge may use the factors for aggravated conduct that the Commission expressed for an unwarrantable failure analysis. *See Matney*, 34 FMSHRC at 784 (citing *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994)) ("The judge erred by failing to reconcile his unwarrantable failure findings with his section 110(c) analysis.").[5] A circuit court recently reviewed and reinstated a judge's

[4] A finding of high negligence may support an individual liability finding when conduct is found to be aggravated. *See Target Indus. Inc.*, 23 FMSHRC 945, 965 (Sept. 2001) (affirming 110(c) liability where the judge found that the violations were "extremely serious" and the result of high negligence); *Austin Powder Co.*, 21 FMSHRC 18, 27 (Jan. 1999) (affirming a finding of liability where the judge found "high negligence," but the record also demonstrated "aggravated conduct").

[5] The Commission in *Matney*, in reversing a judge's finding against individual liability, specifically referenced the cited condition's "readily apparent" character, as well as the nature and extent of the condition and failure to conduct adequate inspections. 34 FMSHRC at 784–86.
(continued…)

individual liability findings based on factors comparable to those for unwarrantable failure. *Northshore Mining Co. v. Sec'y of Labor*, 46 F.4th 718, 729, 739 (8th Cir. 2022) (upholding an unwarrantable failure finding and reinstating individual liability findings against agents for failure to maintain an elevated walkway in good condition, resulting in injury).[6]

A finding of unwarrantable failure for the underlying violation alone is insufficient to hold a prosecuted agent individually liable. The elements of such a finding, however, can be imputed to an agent where he or she is reasonably responsible for the violative area or action and fails to exercise reasonable care to protect miners. *See Matney*, 34 FMSHRC at 785, 786. In *Matney*, the Commission found that the "readily apparent" nature demonstrated that a shift foreman should have known that the condition existed. *Id.* at 785. It was his failure to be

---

[5] (…continued)
Another opinion has also noted this confluence, stating:

> It is well established that section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. Slip op. at 10 (citing *BethEnergy Mines*, 14 FMSHRC at 1245). Similarly, the Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). But the Commission has never distinguished between these two holdings and explained what the term "aggravated conduct" means in the context of section 110(c) -- a gap in Commission jurisprudence that I believe needs to be addressed.

Austin Powder Co. & Bruce Eaton, 21 FMSHRC 18, 31 (Jan. 1999) (Verheggen, Comm'r, concurring).

[6] For comparison, the Commission's decision to affirm the judge's unwarrantable failure findings cited the following as substantial evidence: (1) the violation existed for over a year; (2) the physical extent of the violation included the entire walkway; (3) the report clearly notified the operator; (4) there was no evidence that the operator attempted to repair the walkway; (5) while there was no evidence that the condition caused the event that day, or that there was a danger of falling through the walkway due to the existence of wire mesh, the danger of falling in a narrow walkway while walking on taconite (pellets) could not be discounted; (6) the deficiencies were obvious; and (7) "the engineering report made it clear that the walkway was not safe for use." 43 FMSHRC 1, 26 (Jan. 2021); *see also* 41 FMSHRC 50, 64–66, 72–73 (Feb. 2019) (ALJ).

The judge's 110(c) liability findings mirrored those the Commission (and the circuit court) accepted for unwarrantable failure. Regarding knowledge, the judge cited knowledge of the report's recommendations. 41 FMSHRC at 74. The agents' knowledge was also supported by the obviousness of the violation, including that the condition existed for over a year and was extensive. *Id.* at 72, 73. The agents' position to effect a remedy was demonstrated by their ability to implement fall protection and their control of the area generally. *Id.* at 52, 72. Finally, regarding inaction, "there was no evidence that the operator [including the two agents] attempted to repair the walkway." 43 FMSHRC at 26.

sufficiently thorough in his duties that led the Commission to find him liable. *See id.* at 786 ("The evidence compels the conclusion that a preshift examiner, exercising reasonable care, would have identified the hazardous roof conditions and taken action to remedy the hazards.").

Like unwarrantable failure, an agent's reasonable, good faith belief is a defense to individual liability under section 110(c). *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1150 (Oct. 1998) (citing *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (Aug. 1994)). In line with the requirement that the belief be reasonable, an agent cannot defend against individual liability by relying on the existence of "usual procedures" found to be "wholly inadequate." *See LaFarge, Constr. Materials*, 20 FMSHRC at 1150; *see also Matney*, 34 FMSHRC at 786 (quoting *Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984)) ("[A] supervisor's blind acquiescence in unsafe working conditions would not be tolerated.").

III. Factual Findings

On August 25, 2020, just before 5:08 p.m.,[7] Complainant Bryce Adams was working in the 8 Right Longwall when a rib burst occurred. Tr. 15, 33–35.[8] It was strong enough to send rib material 3 feet deep and 5 feet wide from the rib to the 8 Bay, a large piece of equipment that Mr. Adams was maintaining.[9] *Id.* at 33, 449. The material struck him in the back and forced him into the 8 Bay, slamming his forehead on a bolt head on the machine and covering him in coal up to the top of his torso. *Id.* at 16, 35, 232–34. He had blood running down his face, *id.* at 36, 233, and he believed his legs might be broken because of their positioning, though he could not move his extremities, *see id.* at 36–37 ("I was packed in there so tight that I couldn't even -- I couldn't wiggle my fingers; I couldn't wiggle my toes.").[10]

Steve Childs first reacted, yelling for assistance and informing Charlie Wilson—who immediately called to inform Shane Allred, the shift foreman and responsible person on duty. Tr.

---

[7] Shane Allred testified that he was notified at 5:08 p.m. by production foreman, Charlie Wilson. Tr. 262–63; *see also* Ex. JX-6 (noting the "Time of accident" as "5:08 p.m." on the Mine Accident, Injury and Illness Report).

[8] A disparity in terms generally existed between the parties. The Secretary consistently referred to the incident as a "rib burst." Respondent, however, referred to it as a "rib roll," which intuitively seems a less violent description. I would note that one of Respondent's witnesses, and an individual liability respondent, Michael Cooper, did use the term "burst" during cross-examination. *Id.* at 326 (recalling the report from Shane Allred). I need not delineate between the terms, but I will use "burst" throughout the decision. It is sufficient for my evaluation that material from the rib detached and covered Mr. Adams.

[9] The 8 Bay is an approximately 3 feet tall and 20 feet long metal machine that runs a conveyor. Tr. 54, 273, 286, 449.

[10] Mr. Adams claimed he briefly lost consciousness, *id.* at 35–36, 55, but he admitted on cross-examination that he could not recollect if he ever informed anyone, *id.* at 55–56.

36; *see id.* at 263 (testimony of Shane Allred that Mr. Wilson had communicated with Mr. Childs). Mr. Allred was informed that Mr. Adams was "covered up with coal along the 8 Bay of the longwall." *Id.* at 262–63.

Dayna Anderson, a trained emergency medical technician ("EMT") miner, was also immediately called to respond. Tr. 90 (testimony of Dayna Anderson that he heard someone was buried over the mine phone); *id.* at 264–65 (testimony of Shane Allred that he called Conspec[11] from his truck to find Mr. Anderson and have a county ambulance called). Mr. Allred immediately began to drive to the incident site.

Michael Cooper, the mine safety manager, was informed of the incident by Conspec shortly thereafter. Tr. 301–02.[12] He reported the incident to Jed Gordon, the operations manager, between 5:20 and 5:25. *Id.* at 336. Mr. Cooper then informed Jake Wilson at 5:30. *Id.* at 373. He finally informed Dewey Tanner between 5:30 and 5:40. *Id.* at 435. The same limited information was given to all of them: Mr. Adams had been covered with coal on the longwall. *Id.* at 335–36, 374. 437.

During the 30 minutes these calls were being made, five-or-six miners, Tr. 38, including John Bonnanci, the longwall foreman, and Mr. Childs, were working "feverishly" to dig out Mr. Adams. *Id.* at 235. Mr. Bonnanci noticed the laceration, and he and Mr. Childs wrapped Mr. Adams' head with gauze. *Id.* at 19, 233–34. Mr. Adams also complained of "bad" neck pain, *id.* at 38, so the other miners brought him a cushion on which to rest his head while they continued uncovering him, *id.* at 38–39, 234.

It took approximately 30 minutes to uncover Mr. Adams. Tr. 235.[13] During this time, Mr. Allred spoke with Mr. Wilson again while en route to the site, but he did not ask any questions or receive any further information about Mr. Adams' injuries during the trip. *Id.* at 262–63, 265–66. Mr. Adams was loaded onto a backboard, supplied with oxygen, and covered with a blanket. *Id.* at 39, 236.

When Mr. Allred arrived at the scene, Mr. Adams was wearing a cervical collar. He was conscious and coherent and mentioned pain in his right knee, upper back, neck, and forehead; and the gauze on his head was soaked through with blood. Tr. 92–93, 98.

---

[11] Conspec is the mine's communications center. Tr. 20. Conspec personnel made internal notifications and coordinated external medical support. *Id.* at 20, 264–65, 301–02.

[12] Jed Gordon testified that Mr. Cooper called him between 5:20 and 5:25. *Id.* at 336. Mr. Cooper had therefore been informed between 5:08 and 5:20.

[13] This is supported by the testimonies of Messrs. Allred and Anderson. Mr. Allred stated it took 10 minutes to walk to his truck upon receiving the report, and then 30 minutes to drive to the site. *Id.* at 286. When he arrived, Mr. Adams was already uncovered and on a stretcher. *Id.* at 266. Mr. Anderson arrived just before Mr. Allred, noting Mr. Adams was no longer covered. *Id.* at 91–92.

Mr. Adams joked with Mr. Allred that he could walk out if they needed. Tr. 60, 269. Mr. Allred checked with Mr. Anderson whether Mr. Adams' leg was fractured, whether he might die, and whether he had movement in his extremities. *Id.* at 268–69.

Mr. Anderson did not tell anybody that he thought Mr. Adams' injuries were "life threatening," though he testified that he would have reported the incident based on the injury. Tr. 101–02. Mr. Allred did not assess the injuries as "life threatening." *Id.* at 274; see also *id.* at 291 ("[O]nce I was able to speak with him and talk to him and see what his condition was, yeah, he seemed actually really normal to me.").

Mr. Adams was loaded onto the mine ambulance to be evacuated to the surface. Mr. Anderson and Mike Allred, Mr. Adams' work group supervisor, Tr. 84, rode with him. *Id.* at 270.[14] Mr. [Shane] Allred told miners to stay out of the area until they could evaluate; he knew Messrs. Gordon and Wilson were on the surface and would come inspect. *Id.* at 273. He then called Mr. Cooper to review the injuries and decide whether the incident was reportable. *Id.* at 273–74. He told Mr. Cooper that he did not think it was reportable. *Id.* at 274.

Mr. Cooper reported that Mr. Adams' head had been bandaged, the bleeding was under control, and that he had neck and back pain and a possible broken leg. Tr. 274, 303–04. Mr. Cooper relayed this information to Mr. Gordon, *id.* at 326, 361–62, and Mr. Tanner, *id.* at 437. Mr. Allred called Mr. Wilson and gave him the same assessment. *Id.* at 375. All respondent-witnesses stated that they observed, or were informed, that Mr. Adams was conscious and coherent during the time between the incident and when he was transported to the hospital. *Id.* at 267, 325, 339, 376, 439.

While these calls occurred, Mr. Adams was being further tended to on his way out of the mine. Mr. Anderson rewrapped his head wound, noting that "[he] could see his skull," and "it was dented in." Tr. 93.[15] Mr. Adams continued to experience significant pain in his neck, head, and right leg and knee. *Id.* at 41, 42. Mr. Adams recalled feeling sick, cold, and clammy, and Mr. Anderson believed he went into shock. *Id.* at 40–41, 95, 97. Mr. Anderson testified that he ran out of oxygen to give Mr. Adams after 40 crosscuts, about half-way through the trip. *Id.* at 40, 95.

The Carbon County ambulance crew and a flight medic were waiting on the surface when Mr. Adams arrived. Tr. 20, 95. He was transferred from the mine ambulance to be evaluated by the ambulance paramedics. *Id.* at 20, 42, 56–57, 463.

Marty Wilson, a responding county paramedic, testified that Mr. Adams did not seem to be in danger of death at the time. Tr. 471–72. In explaining her conclusion, she said that Mr. Adams was talking and coherent and could move all extremities; his pupils reacted normally; he

---

[14] There was no testimony about a relationship between Shane and Mike Allred. Mr. Adams only specified that they were "[d]ifferent people." *Id.* at 41.

[15] Mr. Anderson reassured Mr. Adams that the wound was looking good, but he silently shook his head at Mike Allred to indicate that it did not. *Id.* at 99.

had good blood pressure; his pulse showed no signs of shock; his respiration and oxygen were acceptable; he had a good Glasgow coma score;[16] he had a perfect revised trauma score; and he had favorable scores regarding a head injury. *Id.* at 464–72.

Messrs. Gordon and Wilson observed and spoke with Mr. Adams during this evaluation. Tr. 42, 56–57, 338–41, 377–78. Mr. Gordon felt the injuries were "not life threatening" based on observation and Mr. Adams' responses to questions. *Id.* at 339, 342–43. Mr. Adams responded to Mr. Wilson's queries, noting that he was cold and wet. *Id.* at 377. He then joked with Mr. Wilson, requesting that someone take the chew can out of his pocket so his wife would not find it. *Id.* at 378. Mr. Wilson similarly did not feel the injuries were "life threatening" based on the interaction. *Id.*

Mr. Wilson spoke with Messrs. Anderson and Allred to review the injuries. Tr. 342. Mr. Anderson described the length and depth of the laceration, but he did not mention the possible shock and again did not say that he thought the injuries were "life threatening." *Id.* at 342, 379, 388. Messrs. Wilson and Gordon decided the incident was not reportable based on what they were told. *Id.* at 362. Mr. Wilson then called Mr. Tanner to inform him that Mr. Adams seemed to be in good shape, and that it had been determined that the injury was not reportable. *Id.* at 439–40. Mr. Adams had been transported to the Life Flight helicopter, which took him to the hospital. *Id.* at 17, 43. Messrs. Gordon and Wilson then went underground to investigate the incident site. *Id.* at 345, 380.

Messrs. Gordon and Wilson testified that one of the props that had been set prior to the incident that injured Mr. Adams had been dislodged, and that similarly placed rib mesh was still attached to the roof where coal had fallen from beneath. Tr. 345–46, 381–82. These had been installed after a similar incident, at a rib inby the same section, five days earlier [August 20, 2020] that buried an 8 Bay controller. *See id.* at 46, 241, 280, 357, 418; Ex. GX-2, DOL 0037. Though production did not continue that shift,[17] Mr. Gordon testified that he and others continued on to inspect the longwall. *See* Tr. 347 ("[W]e continued on, we traveled the face to make sure there were not more existing conditions or more existing conditions that would cause another problem somewhere.").

Mr. Cooper arrived at the hospital before Mr. Adams' wife, Aubrey, but he was unable to enter to observe Mr. Adams because of COVID restrictions. Tr. 74–75, 308. Ms. Adams testified that her impression was that her husband's injuries were very serious, that multiple doctors were involved in his treatment, and that he was in pain. *Id.* at 77–78.

Mr. Adams was taken to surgery about an hour after she arrived. Tr. 77. Ms. Adams texted Mr. Cooper to update him about her husband's condition. *Id.* at 79, 310 (informing him

[16] This assessment determines a patient's "level of responsiveness," dealing with "eye movement, how they respond verbally, and their motor function," which are combined for a 15-point scale. Tr. 469. Mr. Adams scored a 15. *Id.*

[17] Mr. Bonnanci testified to this, Tr. 242, and Mr. Tanner stated that the mine could not produce that night because the conveyor was hung up, *id.* at 440.

that Mr. Adams had a skull fracture, was in surgery, and had a C5 vertebra injury). Mr. Cooper forwarded that update to Messrs. Allred, Gordon, Wilson, and Tanner. *Id.* at 275, 311, 344, 390, 440.[18]

Mr. Adams stayed in the hospital for four days. Tr. 77–78. Ultimately, he learned he broke his C1 vertebra, fractured his skull, and tore "a bunch of stuff" in his knee. *Id.* at 43, 79, 292, 310, 362, 390, 440. He had a plate inserted in his head, wore a cervical collar for six weeks, and had surgery on his knee. *Id.* He was not able to return to work until March 2021. *Id.* at 43–44. He testified that several of his coworkers expressed they did not know how he survived the incident. *Id.* at 44–45.

Mr. Madrigal, an MSHA inspector, visited the mine the next morning, August 26, 2020, after hearing about the incident from miners at a different mine. Tr. 114–15. He questioned Mr. Cooper about the incident upon seeing the stretcher outside of his office. *Id.* at 118, 312. Mr. Madrigal then went underground with Darrell Burr and Jason Layton, the engineering manager. *Id.* at 313, 401. He did not issue a Section 103(k) order ("K-Order"), but he informed Daniel Lyons, the citation-issuing inspector, that the rib rolled on a person and caused an injury. *Id.* at 127, 130. Mr. Cooper submitted a 7000-1 [non-"Immediately Reportable"] form to report the incident following Mr. Madrigal's visit. *Id.* at 315, 330; Ex. JX-5.

Mr. Lyons visited the mine on August 27, 2020, with Kendell Whitman, the MSHA assistant district manager for District 9. Tr. 115. They did not go underground to inspect the area—choosing only to interview miners—but noted Respondent had mined past the area where the rib had collapsed. *Id.* at 116, 127, 131. Mr. Lyons issued the citations after the interviews. *Id.* at 116.[19]

John Lewis, an MSHA electrical, roof control and ground control supervisor, visited the mine with Mr. Whitman on August 27 and traveled underground to inspect. Tr. 166–67. He testified that the pillars were "not yielding like they should," claiming they were too big. *Id.* at 167–70.[20] Neither Mr. Lyons nor Mr. Lewis issued a K-Order. *Id.* at 130, 176.

[18] Messrs. Cooper, Gordon, and Wilson discussed notifying MSHA at that point, but they agreed the injury was not immediately reportable. *Id.* at 390.

[19] Mr. Lyons testified that he would think an incident was reportable "[i]f [he] was aware of a miner that was struck by a violent rib burst that caused him to smash into the control panel and suffer neck and back pain as well as bleeding from the head, and was buried for over 45 minutes." *Id.* at 150.

[20] Mr. Layton obtained two separate engineering evaluation reports following the incident. *Id.* at 403; *see* Ex. GX-5, 6. He claimed the pillars were the same size approved by MSHA in another section. *Id.* at 405. The reports were not determinative that the pillars were oversized. *Id.* at 413–14.

IV. ORDER NO. 8541891

This order was issued by Inspector Lyons on September 10, 2020. Ex. GX-2, DOL 0037. He assessed gravity as "occurred," "permanently disabling," "S&S," and one person affected. *Id.* He assessed negligence as "high," and found that the violation was a result of unwarrantable failure. *Id.* The description reads:

> A serious injury accident occurred August 25th 2020, on the 8 Right Longwall located at the head gate along the stage loader when a violent bounce caused the rib to blow out, striking and covering up a miner, with the coal that was blown off the rib of the yield pillar. No standing support was installed in the area prior to the bounce. He received serious injuries to his head and neck, including a concussion by the blunt force trauma received to his head. Also receiving [sic] an injury to his lower extremity. The roof, face, and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to fall of ribs and coal or rock out bursts.
>
> During the accident investigation it was determined that an additional geological event or a bounce occurred on the 20th of August. This event was recorded on the USGS as a 1.6 on the rector [sic] scale as an earthquake. The resulting event buried the 8 bay controller with coal, on the 8 Right Longwall section. Production on the 8 Right MMU was interrupted for approximately 1 and 1/2 shifts, to clean up the blown out material.
>
> The operator engaged in aggravated conduct constituting more than ordinary negligence, by not protecting the persons by controlling the ribs in the areas where persons work or travel. This violation is an unwarrantable failure to comply with a mandatory standard.

Id. DOL 0037–38.

A. Violation

The cited provision states, "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a) (2023). The Secretary must demonstrate "(1) that the roof fall occurred in an area where persons work or travel and (2) that the roof was not supported to protect persons from hazards related to falls." *Jim Walter Res., Inc.* (*JWR*), 37 FMSHRC 493, 495 (Mar. 2015); *see also* S. Post-Hr'g Br. 4 (Aug. 5, 2022) ("S. Br.").

Respondent asserts that section 75.202(a) is an objective, performance-based standard. *See* Resp't Posthr'g Br. 39–40 (Aug. 5, 2022) ("Resp't Br.") (citing *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275 (Dec. 1998); *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987); *JWR*, 30 FMSHRC 872, 879 (Aug. 2008) (ALJ)). But while the reasonably prudent person standard for evaluating alleged violations of this provision may still be in

place, it only applies now to situations in which there has not been a roof fall resulting in an injury to a miner. *See JWR*, 37 FMSHRC at 496 ("The roof fall that pinned [miner] under a piece of rock, resulting in his death, amply demonstrates that the roof was not supported in a manner to protect him from hazards relate to falls.").

The Commission in *JWR* declined to follow *Canon Coal Co*. *Id.* at 496 n7; *see also id.* at 498 (Comm'r Cohen, concurring) (stating that the decision effectively overruled *Canon Coal Co.*, but that it does not affect all subsequent Commission decisions relying on it where, like *Harlan Cumberland Coal Co.*, a roof fall had not actually occurred). The ALJ decisions cited by Respondent were all published before *JWR*.

Here, a rib burst in fact occurred and a miner was injured. Tr. 35, 326; S. Br. 3; Resp't Br. 1. I therefore find *JWR* controlling and hold that such occurrence demonstrated that the roof was not supported in a manner to protect miners from associated hazards. Mr. Adams was working in the area at the time of the burst and his resulting injury. Under *JWR*, and the strict liability approach governing Mine Act violations, the Secretary successfully demonstrated a violation.

B. Gravity

1. Likelihood

The hazard—inadequately supported rib material falling and contacting a miner—in fact occurred. I therefore affirm the likelihood determination.

2. Severity

The likelihood contemplated is that of the expected resulting injury. The severity evaluation assumes the occurrence of the hazard. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on "the reasonable likelihood of serious injury," with gravity inquiry, which focuses on "the effect of the hazard *if* it occurs") (emphasis added).

The Secretary asserts the severity of the contemplated injury is permanently disabling. There is sufficient evidence, acknowledged by Respondent, that Mr. Adams suffered a fractured skull, broken vertebra, and damage to his knee. Tr. 43, 79, 292, 310, 362, 390, 440; S. Br. 6–7; Resp't Br. 6. I find that such injuries are reasonably likely to result in total or partial loss of use of any member or function of the body and therefore affirm the severity as characterized by the inspector.[21]

[21] I hold in this decision, and the record establishes, that Mr. Adams could have been killed by the rib burst, *see* Section V.A.2., *infra*, and the severity might have been assessed as "fatal." The Secretary's characterization in the order apparently flows from the fact that an incident actually occurred, but a miner did not die as a result.

3. Number of Persons Affected

The inspector assessed that one miner would be affected by the hazard. I agree that one miner was likely to be, and in fact was, injured by a roof fall. I thus affirm the inspector's enumeration of persons who would likely be affected.

4. S&S

I affirm the S&S designation for the following reasons.

a. Step 1: The violation has been established.

The occurrence of an injury-causing rib burst demonstrates a failure to adequately protect miners working in the area from hazards related to rib bursts. This is sufficient to constitute an underlying violation of a mandatory safety standard for the purposes of *Mathies* Step 1.

b. Step 2: The violation was reasonably likely to result in the discrete safety hazard against which the regulation is directed—falling material striking a miner.

Mathies Step 2 is a two-part process: (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC at 1868. This finding must be based on "the particular facts surrounding the violation." *Northshore Mining Co.*, 38 FMSHRC 753, 757 (Apr. 2016).

The standard requires that ribs be supported or controlled to protect miners working there from hazards related to bursts. The hazard the standard aims to prevent is falling material striking a miner. The issue is therefore whether a reasonable likelihood exists that rib material would strike a miner.

Here, a rib burst occurred, and Mr. Adams was driven into the 8 Bay and covered in coal, requiring approximately 30 minutes to uncover him. The fact of occurrence is sufficient to find that the violation was reasonably likely to cause the occurrence of the contemplated hazard.

c. Step 3: The falling material striking a miner was reasonably likely to cause an injury—e.g., fractured skull and vertebra, and knee injury.

Mathies Step 3 asks whether the hazard, not the violation itself, is reasonably likely to cause an injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010). In evaluating the likelihood of injury, judges must assume the occurrence of the hazard. *See Newtown Energy, Inc.*, 38 FMSHRC at 2037.

Both parties acknowledged that Mr. Adams sustained a skull fracture, vertebral fracture, and knee damage. *See* Section IV.B.2., *supra*. That the occurrence of the contemplated hazard resulted in these injuries is sufficient to find the hazard was reasonably likely to cause an injury.

d. Step 4: It is reasonably likely that such an injury would be of a reasonably serious nature.

An inspector's conclusion that a possible injury is of a reasonably serious nature has been held sufficient for *Mathies* Step 4. *See Consol Pa. Coal Co.*, 43 FMSHRC at 149 (finding it sufficient that the inspector characterized the potential injury as "serious" and noted potential injuries). The Commission also does not require a specific type of injury for it to be considered serious. *See S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013).

Here, Inspector Lyons testified that he thought the injury was reportable—i.e., it had a reasonable potential to cause death. Tr. 150–51. There was also, however, particularly compelling testimony from Mr. Anderson that he "could see [Mr. Adams'] skull," *id.* at 93, and that he told another miner "[i]t didn't look good," *id.* at 99. I also credit Mr. Adams' own testimony about the seriousness of his injuries. *Id.* at 43.

Taken together with the circumstances of the accident, the care and treatment required, and the description of the resulting injuries, I find that the injury resulting from the hazard was reasonably likely to be of a reasonably serious nature.

C. Negligence

I find that the negligence was improperly characterized by the inspector as "high." Those charged with ensuring the rib is properly supported are familiar with the mining industry, the relevant facts, and the protective purpose of the provision. While a reasonably prudent person in the position of the mine's management should have recognized that more effort was needed to protect miners from a rib burst in this area, there was mitigation. I therefore assess negligence as "moderate."

The Commission has declined to disturb a moderate negligence finding where a judge found that roof problems were obvious at the time of citation, and credible testimony demonstrated that an exam was completed without noticing the existence of the problem. *See Hubb Corp.*, 22 FMSHRC 606, 614 (May 2000) (vacating the penalty assessments only for judge's failure to adequately address all section 110(i) criteria); 20 FMSHRC 615, 621–22 (June 1998). The Commission has similarly declined to disturb a high negligence finding where the judge found: (1) the conditions were obvious, extensive, and had existed for "quite some time;" the roof fall had potentially fatal consequences to miners; and the operator had made no effort to correct the conditions. *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3103, 3104 (Dec. 2014).

The Secretary asserts that Respondent's actions after the August 20 incident suggested an "aggravated lack of care." S. Br. 7 (citing *Ky. Fuel Corp.*, 40 FMSHRC 28, 31 (Feb. 2018) (quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015))). I disagree. *Kentucky Fuel Corp.* involved a failure to block machinery. 40 FMSHRC at 28. The following findings were found to be substantial evidence in support of high negligence: "materials needed to properly block the vehicle against motion were not available at the mine site, mine personnel had not been

adequately trained in blocking techniques, and the truck's brake system was not adequately maintained." *Id.* at 32.

In *Brody Mining, LLC*, the Commission reversed a judge's negligence reduction to moderate because it relied on a single mitigating circumstance, but that circumstance—lack of methane at the time—was not relevant to negligence. 37 FMSHRC at 1703. Here, mitigating circumstances relevant to rib bursts were present, and materials and action were not entirely lacking, in contrast to *Kentucky Fuel Corp.*

Respondent did not address negligence directly, but it noted in its unwarrantable failure analysis that a similar [vacated] citation for a roof control plan violation was designated "moderate." Resp't Br. 44.[22] Respondent argued that it planned and maintained adequate pillar design, conducted rib bolting and meshed the ribs, and installed additional supports between August 20 and the present incident. *Id.* at 45. Respondent only cites its own witnesses' direct examination testimony to make this claim, however.

Inspector Lyons testified that he assessed the violation as high negligence because there was a known geological event five days earlier in a nearby location, and Respondent "did nothing to control the rib." Tr. 120.[23] I disagree that Respondent did nothing, but the Secretary demonstrated a lack of adequate mitigation.

Mr. Lewis testified that he noticed that the pillars in the area were not yielding as they should. Tr. 167–70. Respondent produced Jason Layton, the operator's engineering manager, to testify that the same-sized pillars were approved by MSHA for a new district. *Id.* at 405.[24] He claimed there was no indication that a pillar would fail on August 25, *id.* at 414–15, but was

[22] I note here that I do not accept Respondent's contention that the two citations were duplicative. *See id.* at 35–39. I agree with the Secretary that the provisions impose "separate and distinct duties," and that plans can be violated in ways that do not involve the failure alleged here. *See* S. Br. 23 (citing *Ky. Fuel Corp.*, 38 FMSHRC 1614 (July 2016)). Further, the plan violation citation was vacated, and I find that this citation is properly before me.

[23] Significant testimony was elicited, and documents produced, about the noted geological event/earthquake associated with the August 20 incident. *See* Ex. R-E; Resp't Br. 41; Tr. 119–25, 152, 397–401. The inspector's narrative suggests that the prior burst registered as a geological event. If the Secretary's theory is that the burst was so powerful that it registered on the Richter Scale, Respondent effectively demonstrated that the timing and location of that recorded event did not match the burst. If the Secretary's theory is that the recorded geological event may have been a catalyst for the burst, putting Respondent on notice that further mitigation was needed, such evidence is unnecessary because the rib burst itself would put Respondent on notice. Further, the Secretary did not address the geological event in her brief.

[24] He acknowledged that two engineering reports were not determinative that the pillars were adequate. *Id.* at 409–12. These reports, however, were sought because of the event that injured Mr. Adams, *id.* at 403, so they would have no bearing on Respondent's knowledge, or negligence, at the time of citation.

subsequently asked on cross-examination if the failure of the pillar inby the same section on August 20 was an indication, *id.* at 418.

Mr. Layton responded, "I guess I don't recall that that came to my attention. It could have." *Id.* I credit Mr. Lewis' evaluation and find that Mr. Layton did know, or should have known, about the burst five days earlier on the nearby rib, and that should have been an indication of the area's inadequacy.

Regarding mesh and rock props in the violative area, there is evidence that such mitigation existed, but there is also evidence that Respondent knew it was insufficient. Mr. Adams, and the Secretary in her brief, claimed that Respondent failed to take additional measures after August 20. Tr. 46; S. Br. 7.

This, however, is not supported even by Mr. Adams' testimony. Though he claimed Respondent could have done more, he hedged and stated he did "not think any or it [rib mesh and timbers or rib jacks] was done." Tr. 47. He then stated on cross-examination that there was mesh, but only on the top part, and that some was hanging. *Id.* at 54.

Mr. Allred testified that there was mesh, though some had come down, and two out of three props remained in place. Tr. 271–72.[25] This was confirmed by Mr. Gordon, who testified that he went underground to check out the area and found one of the props had been dislodged by the rib burst. *Id.* at 346. Mr. Wilson was with Mr. Gordon, and he testified that props remained, and rib mesh was still attached at the top of the roof and coal had fallen from underneath. *Id.* at 381–82. Mr. Gordon, however, did acknowledge that Mr. Bonnanci told him about the August 20 burst—that a bolt had broken, and mesh rolled over onto the 8 Bay. *Id.* at 357–58. Respondent was thus on notice that its mesh and bolts in the area were inadequate to prevent a rib burst.

I do not find the violation here to be the result of the operator's high negligence because, though the condition had potentially fatal consequences, it was not necessarily obvious, the operator was only on notice of possible hazard for five days, and the operator had made efforts to mitigate hazardous conditions in the area. This was nevertheless a significant breach of the duty of care, given the extreme danger posed by the hazard.

D. Unwarrantable Failure

I find that this violation was not the result of the operator's unwarrantable failure to comply with a mandatory standard. I have already found that the cited negligence was overestimated, so Respondent did not display more than ordinary negligence in its violation here. The violation posed a high degree of danger, as demonstrated by the incident and Mr. Adams' injuries, but the Secretary has not sufficiently shown that Respondent's abatement efforts were lacking to an aggravated degree—a factor that I consider paramount here.

[25] The Secretary noted, in his violation and unwarrantable failure analyses, that Mr. Allred admitted the mesh and rock props were inadequate. S. Br. 4, 9. This, paradoxically, demonstrates that measures were in fact taken.

Respondent had knowledge of a possible hazard because of the rib burst that occurred nearby five days earlier. This, however, is not necessarily knowledge of the violative condition of the area at issue. The Secretary asserts the violative condition was obvious, specifically citing Mr. Lewis' testimony that the pillars were noticeably too big to yield and the third-party engineering reports. S. Br. 9. The reports, however, were sought after the incident at issue, and are a matter of some dispute. *See supra* notes 20 & 24.

I credit Mr. Lewis' testimony and conclude that there was mitigation, though inadequate. This does not necessarily mean that the condition was obvious to Respondent; Mr. Lewis did not testify that he told Respondent about this inadequacy prior to the incident.

The violative condition likely existed for the duration of mining in the area, but knowledge of the violation cannot be attributed to Respondent until the August 20 incident. The Secretary made no argument specifically to the duration other than to state that Respondent had been aware of the condition since that time. *See* S. Br. 8–9. The extent of the violative condition is unknown. However, there are sufficient facts to support an inference that it extends to the rib at issue, the nearby rib that burst on August 20, and any surrounding areas where Respondent found it necessary to install additional mitigation.

The operator had been placed on notice by the August 20 incident that greater efforts were necessary for compliance.[26] The Secretary, however, did not demonstrate that the operator's efforts, while inadequate, were the result of an aggravated lack of care.

I agree with Respondent that the Secretary and her witnesses erroneously claim that the operator did nothing. Resp't Br. 45. While inadequate to prevent a rib burst and sufficient for a finding of violation, Respondent installed additional mitigation to prevent a rib burst, or at least limit the possible severity. *See* Section IV.C., *supra*.

E. Penalty

Respondent has been cited seven times in the last two years at this mine for violation of this regulation. Ex. GX-2, DOL 0038; Ex. GX-3 [MSHA Assessed Violation History Report]. I find that the Secretary has properly considered Respondent's violation history in the calculation. I accept that the Secretary has properly evaluated the size of the mine. The parties have stipulated that payment of this penalty will not affect the Respondent's ability to continue in business, and my penalty assessment would not support such a conclusion. *See* Stips. ¶ 7.

[26] It is also relevant that Respondent has been cited for violation of this provision seven times in the last two years. *See* Section IV.E., *infra*. "[T]he Commission may consider these past violations." *Enlow Fork Mining Co.*, Docket No. PENN 94-259, 1997 WL 14346, at *9 (Jan. 15, 1997) (citing *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992) ("[T]he Commission has not limited the circumstances under which past violations may be considered by a judge in determining whether an operator's conduct demonstrated aggravated conduct.")).

I have affirmed the reasoning underlying the Secretary's gravity assessment, but the proposed penalty of $74,700.00 was based, in part, on the negligence and unwarrantable failure determinations. I have found that negligence was overestimated, and an unwarrantable failure determination is not supported. Further, Respondent made efforts before the incident at issue, and following the incident [engineering reports] to achieve compliance and better safety.

On the other hand, the history of seven previous violations within the relevant reporting period, including a previous incident in a nearby pillar only five days earlier, and the high degree of danger posed by the hazard, should have prompted a more thoughtful consideration of the circumstances and the potential for the cited area to collapse. I therefore assess a penalty of $25,000.00.

V. ORDER NO. 8541892

This order was issued by Inspector Lyons on September 10, 2020. Ex. GX-1. He assessed gravity as "occurred," "permanently disabling," "S&S," and one person affected. *Id.* He assessed negligence as "high," and found that the violation was a result of unwarrantable failure. *Id.* The description reads:

> The mine operator failed to report an Immediately Reportable Accident which occurred at approximately 17:00 hours on August 25, 2020. The mine conditions present on the Longwall headgate in the 8 Right section created such an unsafe condition that a miner suffered multiple, severe injuries that have a reasonable potential to cause death. The blunt force trauma that created these injuries "concussion, upper body blunt force trauma", [sic] was caused by a violent bounce which blew a rib out onto the miner while he was trouble shooting the face conveyor. Immediate reporting is necessary to address unsafe or potentially life threatening conditions and practices at a mine. The mine operator has had two injuries on the Longwall face in the last 6 months, six in the last two years. This violation is an unwarrantable failure to comply with a mandatory standard. The operator engaged in aggravated conducted constituting more than ordinary negligence by not reporting the accident that occurred on August 25, 2020 that resulted in life threating injuries to a Miner.

Id.

A. Violation

The cited provision states, "The 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) an injury of an individual at the mine which has a reasonable potential to cause death." 30 C.F.R. § 50.10(b). The Secretary asserts this incident caused at least reasonable doubt which should have favored notification, and that Respondent myopically focuses on assessment of whether Mr. Adams' injuries were life threatening. *See* S. Br. 12 (citing *Signal Peak Energy, LLC*, 37 FMSHRC 470, 474 (Mar. 2015)).

Respondent cites *Signal Peak* to assert that the inquiry is whether a reasonable person, based on readily available information, thought the injury was life threatening. Resp't Br. 11–13 (citing 37 FMSHRC at 474; *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990)). It relies heavily on its witnesses' testimony that nobody at the mine thought Mr. Adams' injuries were life threatening or told those to whom they reported that they were. I find that "life-threatening injury" is not the standard, and that this incident should have been reported to MSHA. For the following reasons, I affirm the violation.

1. Standards

a. Whether the injury is "life threatening" is *not* the standard for evaluating whether an incident is reportable.

Respondent states that "'life threatening' is commonly used as a synonym for an injury that has a 'reasonable potential to cause death,'" claiming that the case turns on whether the injury was life threatening. Resp't Br. 12. This is not supported by the cited authority. *Signal Peak* stressed evaluation of the readily available nature of the accident rather than relying merely on the injury itself:

> [R]eadily available information such as the nature of the accident is highly relevant in determining whether an injury is reportable, while permitting operators to wait for a medical or clinical opinion would "frustrate the immediate reporting of near fatal accidents."

37 FMSHRC at 476 (quoting *Cougar Coal Co.*, 25 FMSHRC 513, 520–21 (Sept. 2003)).

The page cited by Respondent only refers to the language in stating the *parties' contentions* regarding the proper evaluation of "reasonable potential to cause death": (1) the judge's statement that it means a "not far-fetched" possibility [of death]," and (2) respondent's statement that it is "synonymous with 'life-threatening.'" *Id.* at 474. Following this description, the Commission concluded that the injuries there had a reasonable potential to cause death and declined to further define the term. *Id.*

Further discussion was provided, however. The Commission noted that the judge rejected the operator's argument that the injury must qualify as life threatening. *Id.* at 474 n.8.

The Commission neither agreed nor disagreed with this finding; it simply acknowledged that Commissioner Cohen agreed with that distinction. *Id.* The Commission then made two statements demonstrating it agreed with the judge that reasonable potential to cause death is *not synonymous* with life threatening.

First, it stated, "The Judge correctly discerned that the reporting requirement . . . contemplates a subjective immediate evaluation governed by the concern for the 'possible,' not an objective clinical examination . . . ." *Id.* Next, it continued, "The Judge's analysis is consistent with the Commission's decision in *Cougar Coal Co.* (citation omitted), in which we stated that 'the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions

as to the miner's chance of survival.'" *Id.* These demonstrate that the judge's analysis based on a "not far-fetched" possibility—not respondent's contention that the requirement is synonymous with "life-threatening"—is consistent with Commission precedent.

The other references to "life-threatening" are in its discussion of reckless disregard and in Commissioner Althen's dissent regarding penalty assessment. The majority summarized the judge's findings, noting that "the doctor . . . believed 'absolutely' that Stewart's injuries were life-threatening." *Id.* at 482. This was one of twelve considerations in support of the judge's finding of reckless disregard.

But a doctor's assessment of something as "life-threatening" is irrelevant to the *initial* determination. *See id.* at 477 (citing *Consolidation Coal Co.*, 11 FMSHRC 1935, 1936–38 (Oct. 1989)) ("By waiting for a medical opinion at the hospital rather than spending that time gathering readily available information, information which in this case would have been sufficient to trigger the notification requirement, Rice failed to conduct a sufficiently prompt investigation.").

Commissioner Althen asserted that the judge created a new interpretation of reasonable potential to cause death, arguing that MSHA and other Commission Judges have equated "reasonable potential to cause death" with "life threatening," and that such interpretation was supported by the final rule's preamble. *Id.* at 491 n.6, 492 (Althen, Comm'r, dissenting). "Life threatening" appears, *relevantly*, twice in the "Section 50.10 Immediate Notification" portion of the final rule.

First, the rule states, "Timely reporting can be crucial in emergency, *life-threatening* situations to activate effective emergency response and rescue." *Emergency Mine Evacuation*, 71 Fed. Reg. 71,430, 71,435 (Dec. 8, 2006) (emphasis added). Next, it states:

> Based on MSHA's experience under the ETS, "within 15 minutes" provides adequate time for operators to notify MSHA with sufficient information. For example, the mine operator often knows the general character of an event, such as an explosion or inundation, and can report it under the 15-minute requirement *before knowing whether a person has been injured or killed or whether the event is life threatening*.

Id. (emphasis added).

Prior to this, the language is only used regarding SCSRs, "enabling miners to breathe in the presence of hazardous or life-threatening contaminants," *id.* at 71,431, and regarding emergency training and response to "assure that underground coal miners can respond quickly and appropriate to life threatening mine emergencies." *id.* These two references to "life-threatening" are not directly relevant to what is required for reporting, and to the extent they are relevant, they clearly support reporting in the circumstances presented by this case.

The Commission majority's refusal to adopt a "life threatening" standard where a reasonable potential to cause death is at issue is consistent with the language and structure of the

entire standard. Section 50.2(h) identifies twelve circumstances which must be immediately reported in accordance with Section 50.10. Only the first two, involving the death of an individual at the mine, or an injury to a miner with a reasonable potential to cause death, and the last, which is the death or bodily injury of a person not at the mine from an event at the mine, are based on physical injuries to persons. 30 C.F.R. §50.2(h)(1)–(12).

All the other defined "accidents" are based on the *event* itself: an inundation, roof fall, rock burst, instability, damage to a hoist, etc. The inclusion of all these conditions highlights the common element for all twelve, i.e., the agency's need to determine what happened, and why, in order to protect miners from being exposed to similar hazards.

The rule therefore first requires immediate reporting to ensure an effective MSHA response, including inspection to ensure other miners are not exposed to the same hazard, *see* Section V.B.4.b., *infra*. Next, the rule demonstrates that an operator can (and should) report an event—meaning it has a reasonable potential to cause death—based on the general character of the event, without being able to fully evaluate a resulting injury during the reporting window.

This is wholly consonant with the Commission's holding in *Cougar Coal*, *supra*, against waiting on medical confirmation that an injury is life threatening before reporting. Therefore, even if the support provided for Respondent's contention was not in the dissenting opinion, that argument would yet be unpersuasive.

The ALJ cases cited by Commissioner Althen are similarly unsupportive of his explicit contention that the two phrases should be equated. The judge in *Vulcan Construction Materials, L.P.* did not require a "life-threatening" injury. The decision cited the same page of the final rule quoted above, regarding SCSRs and emergency training to claim that the notification requirement "allows MSHA to address unsafe or potentially life-threatening conditions . . . when a quick response could make a difference." 35 FMSHRC 2868, 2879 (Aug. 2013) (ALJ). The case involved a miner found after having a heart attack.

The next mention of "life threatening" in *Vulcan* addressed the Commission's *Cougar Coal Co.* decision, but the judge acknowledged the *Cougar Coal* judge's error in requiring proof of life-threatening injuries from medical records. *Id.* at 2884.

Finally, in response to the operator's argument that it would have called an ambulance if it thought the injury was life threatening, the judge in *Vulcan* again turned to *Cougar Coal* to state:

> This Court recognizes that the ultimate cause of an incident does not control whether it must be immediately reported as an accident. But the apparent cause, or lack thereof, bears heavily on whether a mine operator knew or should have known that an injury with a reasonable potential to cause death has occurred. *See Cougar Coal Co.*, 25 FMSHRC at 520 (noting that the nature of the events surrounding the injury, as well as the actual injury sustained, must be considered when determining whether the accident had a reasonable potential to cause death).

Id. at 2887.

The judge in *Vulcan* therefore held that the nature of the accident is highly relevant, and his decision is consistent with Commission precedent. *See Cougar Coal; see also Signal Peak,* 37 FMSHRC at 476 (noting that the nature of the events surrounding an injury, as well as the injury sustained, must be considered when determining whether the accident had a reasonable potential to cause death.).

The judge in *Cemex, Inc.* did find that the Secretary failed to establish the violation because the injuries—burns to hands—were not life threatening. 35 FMSHRC 1355, 1365 (May 2013) (ALJ). But the context and the underlying authority are crucial. The judge properly distinguished the minor injuries at issue from those in *Cougar Coal*, where after suffering a severe electrical shock, the miner fell from a significant height and suffered a head injury.

However, *Cougar Coal* did not rely on the injury being "life threatening"—*the term was not even used*. The judge therefore incorrectly injected the term "life threatening" from *Cougar Coal's* description of significant causes and injuries sufficient for notification, depriving Respondent of any relevant support for its position here.

Respondent also cites *Walker Stone Co.*, 23 FMSHRC 180 (Feb. 2011) (ALJ), *Consolidation Coal Co.,* 9 FMSHRC 1950, (Nov. 1987) (ALJ), and *Climax Molybdenum,* 2 FMSHRC 1967, (July 1980), but the ALJ holdings in these cases, in addition to being non-binding, all occurred before the Commission's decisions rejecting a "life-threatening" standard in *Signal Peak* and *Cougar Coal*.

Respondent thus disregards the actual, and inconvenient, state of the law, which requires the decision to report to be based on information available in the immediate aftermath of the event. *See Signal Peak*, 37 FMSHRC at 476 (quoting *Cougar Coal*, 25 FMSHRC at 520–21) ("[P]ermitting operators to wait for a medical or clinical opinion would 'frustrate the immediate reporting of near fatal accidents.'"); *Consol Pa. Coal Co., LLC, v. FMSHRC*, 941 F.3d 95, 111 (3d Cir. 2019) ("The focus of the notification requirement must be on the information available at the time of injury, so post-hoc medical evidence is less probative.").

While Respondent's reliance on the Third Circuit's approximation of the standard's language with "life threatening" in *Consol Coal,* 941 F.3d at 106 n.13, is not facially defective in the same way as the inapt ALJ decisions, it is nonetheless deficient, because it misconstrues the Commission's holding in *Signal Peak,* and glosses over the jurisprudential reasoning and record facts in that case.

The Third Circuit's decision, in noting the Commission's use of the term "life threatening," first observed (correctly) that the Commission "'has not found it necessary to'" define "reasonable potential to cause death." *Id.* (citing *Signal Peak*, 37 FMSHRC at 474). The Court then characterized the Commission as having found "that it was *enough to say the accident was 'life-threatening*[,]' because, in that case, the miner's 'injuries *clearly [fell] within the realm of a reasonable potential to cause death*[.]'" *Id.* (quoting 37 FMSHRC at 474 (citation and internal quotation marks omitted)) (emphasis added).

The Court's analysis improperly implies a relationship that does not exist between the Commission's clear reliance on the actual text of the standard and the term "life threatening:"

> Therefore, the Commission both here and in *Signal Peak* concluded that the *injuries at issue had a reasonable potential to cause death under a "life threatening" standard*. We follow the Commission's lead in that regard and use "life threatening" as a working interpretation of "reasonable potential to cause death.

Id. (emphasis added).[27]

While the term "life threatening" was noted frequently in the factual background of *Signal Peak*, the Commission there, as explained above, did not use it as the basis for its conclusion that respondent failed to notify. In the Commission decision reviewed by the Third Circuit, the phrase "life threatening" was only used once, in the description of judge's findings. *See Consol Pa. Coal Co.*, 40 FMSHRC 998, 1001, 1010 (Aug. 2018) (affirming the judge's decision wherein he concluded there was justifiable concern about possible internal bleeding, "which could be life threatening").

The Commission, therefore, did not *require* the injury to be life threatening in either case. It did not adopt the respondent's asserted interpretation in *Signal Peak*, and it did not specifically analyze the violation under that standard in *Consol*. As noted by the Third Circuit, it was simply "enough to say the accident was 'life-threatening.'" This is because, while the injuries need not be life threatening to require reporting, life-threatening injuries are certainly within the ambit of those that do require it.

b. An operator must err on the side of reporting where the known circumstances of the incident suggest a reasonable potential to cause the death of a miner involved—though the extent of injury may evade immediate determination.

To be held accountable for failing to report an accident under the cited standard, Respondent must have had knowledge, or have had reason to know, of event and injury circumstances that had a reasonable potential to cause death. This knowledge, and Respondent's determination of the severity and requirement to notify MSHA, must be made based on the totality of the circumstances and focus on the information available during the reporting window, rather than on actual medical evidence. *See Consol*, 40 FMSHRC at 109, 111, *aff'd*, 941 F.3d 95 (3d Cir. 2019).

Further, the duty to notify must be interpreted from the perspective of a reasonable person in the circumstances, familiar with the mining industry and the protective purpose of the standard. *Id.* at 107; *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990). Finally, and most critically here, any reasonable doubt must be resolved in favor of notification. *Consol*, 40

[27] This problem does not diminish the logical or legal force of the Court's otherwise well-reasoned opinion.

FMSHRC at 107. Reasonable doubt is based on the facts available during the reporting window. If the operator is unable to conclusively determine, within 15 minutes, that the accident does not involve an injury that has a reasonable potential to cause death, then even if the operator reasonably doubts the potential for fatal injury, it must notify MSHA.

It is possible to learn something—but not everything—from incidents where the Commission has found injuries to have reasonable potential to cause death based on the totality of the circumstances:

- A miner blasted 50 to 80 feet through the air with a back protrusion, severe pain, and difficulty breathing or moving. *Signal Peak*, 37 FMSHRC at 471.
- A miner crusted between multi-ton pieces of equipment, unable to move his legs [or feel one of them], and a distended stomach. *Consol*, 40 FMSHRC at 999.
- A miner suffering electric shock before falling 18 feet and hitting his head, requiring CPR. *Cougar Coal Co.*, 25 FMSHRC at 515.
- A miner pulled through a roller—7-inch space—with a "misshaped" head, that required months of surgeries. *Mainline Rock & Ballast, Inc.*, 693 F.3d 1181, 1183, 1189 (10th Cir. 2012).
- And finally, a miner suffering an obvious hip injury [noting the likely attendant complications] from a roof fall. *Webster Cty. Coal, LLC*, 39 FMSHRC 1131, 1136, 1137 (May 2017) (ALJ).

In each case, the Commission, court, or ALJ held that readily available information regarding the mechanisms of injury did not allow for any reasonable doubt as to whether the incident had a reasonable potential to cause death. But the severity of the injuries cited has been misinterpreted by Respondent as requiring that injuries be *at least* this severe, and that reporting is not required if the operator believes a miner's injuries are somehow distinguishable from the particular examples found in Commission case law.

There are several problems with this approach. First, the language of the standard is clearer than Respondent suggests. The primary term governing the requirement to "*immediately contact MSHA at once without delay*." The standard then goes on to reinforce this by imposing a duty to report "within 15 minutes . . . once the operator knows or should know that an accident has occurred." 30 C.F.R. § 50.10(b).

The reporting policy is not susceptible to a case-by-case approach at the scene of a serious incident, where a decision must be made "immediately," or within 15 minutes. Recognizing this, the Commission has not endorsed this approach. Rather, the Commission has determined that operators "must resolve any reasonable doubt in favor of notification." *Consol*, 40 FMSHRC at 1002 (quoting *Signal Peak*, 37 FMSHRC at 477). The Commission, and the Third Circuit in *Consol*, noted the impropriety of waiting for a more definitive medical analysis of a miner's condition. *See* 941 F.3d at 111; 40 FMSHRC at 1004 (holding that "[t]he notification requirement does not, and cannot, rest upon a post-medical treatment analysis," and that "[t]he decision whether to call must be made immediately and often by persons with little medical expertise").

This determination, which controls my decision, is consistent with the purpose of the standard. That purpose is not to enable care for the injured miner in circumstances such as this—it is to ensure that the agency is aware of the incident so that it may conduct its own investigation and ensure that other miners are not in danger or will not be threatened in the future by the practices or conditions that led to the reportable incident.

I emphasize that 15 minutes is the absolute limit of the time available for an operator to make a reporting determination. MSHA used three different terms, or phrases, to stress the requirement to speedily investigate and make the determination before the 15 minutes runs: "immediately," "at once," and "without delay." I would first note that regulations should be read with the understanding that MSHA intended each term to have a particular, nonsuperfluous meaning.[28] Next, even if it was not reasonable to read these other terms as having a separate and distinct meaning from 15 minutes, I find that MSHA at least emphasized—three times in one sentence—the limited inquiry a miner can make before reporting.

"Immediately" means "[o]ccurring without delay; instant." *Immediate*, BLACK'S LAW DICTIONARY (11th ed. 2019). By adding "at once," the regulations underscore the need for immediate reporting and suggest that the requirement to report arises and must be carried out instantaneously with the recognition of the duty.

By adding "without delay," the regulation utterly refutes the notion that the duty to report may extend beyond the absolute limit imposed by the final requirement of the rule. Thus, an operator may not continue to investigate, examine, or otherwise look for reasons not to report beyond the final limit imposed by Congress—15 minutes.

There may be circumstances where reporting within 15 minutes is not possible or may be inadvisable. A situation where a manager is the only miner available to provide first aid, away from any means of calling MSHA or directing others to do so, would obviously better serve the intent of the Act by taking measures to care for an injured miner. In such circumstances, the Secretary should use her prosecutorial discretion not to cite the operator.

Even if the operator is cited because of the Act's strict liability provision, a *de minimis* penalty should be assessed. But the Commission may not substitute its judgment for that of Congress, which spoke clearly in drafting this provision.

I find the failure to notify here especially troubling because the Commission has held that reporting an accident is non-prejudicial. Any actions that the operator takes that are inconsistent with the appropriate response to an accident may not be cited if there was not, in fact, an accident. *Black Beauty Coal Co*., 37 FMSHRC 687, 690 (April 2015). While there is certain to

---

[28] *See Bailey v. United States*, 516 U.S. 137, 146 (1995). Canons of statutory construction may be applied to regulations as well as statutes. *See Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 710 (8th Cir. 2013) (citing *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 46–52 (2008)); *Cremeens v. City of Montgomery*, 602 F.3d 1224, 1227 (11th Cir. 2010); *Resnik v. Swartz*, 303 F.3d 147, 152 (2d Cir. 2002); *Black & Decker Corp. v. Comm'r of Internal Revenue*, 986 F.2d 60, 65 (4th Cir. 1993).

be inconvenience and cost involved with notifying MSHA, this is a policy decision that has been made by Congress to protect miners from dangerous practices and conditions. *See* 30 U.S.C. § 813(j).

Finally, it is worth noting that the final rule provided examples for when the operator's knowledge of the general character of an event should prompt notification, including "an explosion or inundation." *See* Section IV.A.1.a., *supra*. MSHA also provided examples of reportable injuries: "concussions, cases requiring cardio-pulmonary resuscitation (CPR), limb amputations, major upper body blunt force trauma, and cases of intermittent or extended unconsciousness." 71 Fed. Reg. at 71,434.[29] The rule further says, "These injuries can result from various *indicative events*, including . . . *roof instability*." *Id.* (emphasis added).

The agency has thus provided the public with notice of its expectations. As with the exemplars provided by Commission cases, one can learn something from the examples provided. But the list is not exhaustive. Even so, most concussions are not "life threatening," and major upper-body blunt force trauma may or may not be. The problem is not merely the nature of the injuries, but the "indicative events" that produced them. As the Commission has held, these circumstances are crucial to the need to report an incident to MSHA as an accident, and they were not fully considered here.

2. Respondent was required to notify MSHA about the incident because the known character of the injury-causing event at the time it was first reported sufficiently demonstrated a reasonable potential to cause death.

a. Totality of the Circumstances

The notification from which the 15-minute MSHA notification window began to run was made to Mr. Allred at 5:08 p.m. *See Signal Peak*, 37 FMSHRC at 476 ("Once 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 whether the injury presents a reasonable potential to cause death and a determination of whether a call is required.").[30]

Though Respondent claims the event was not violent—a "rib roll," rather than a "rib burst"—the record demonstrates that at least two, and possibly three, management personnel knew within 15 minutes that material fell from the rib and covered Mr. Adams. And though

[29] I find it notable that the inspector's citation specifically cited conditions listed in the preamble—i.e., "concussion" and "upper body blunt force trauma."

[30] Mr. Cooper was notified by Conspec. Tr. 301–02. Mr. Allred called Conspec, to request Mr. Anderson [EMT], upon report of the incident from Charlie Wilson. *Id.* at 264. Nothing in the record demonstrates whether Conspec was already aware and had notified Mr. Cooper, or if it notified Mr. Cooper after the call from Mr. Allred. Mr. Gordon testified that Mr. Cooper called him between 5:20 and 5:25. *Id.* at 336. I therefore can only infer that Mr. Cooper was notified before 5:20, not that anyone was notified before 5:08.

neither Mr. Allred nor Mr. Cooper knew at the time, the record demonstrates that it took approximately 30 minutes to remove Mr. Adams from the coal.

The Secretary pointed to the severity of the injuries Mr. Adams suffered, as well as the fact that the burst threw him into the 8 Bay, causing a serious head wound. S. Br. 10; *see also id.* at 14 (emphasizing that Mr. Bonnanci knew of a "pretty good gouge in his forehead"). She claimed what was known was that a rib burst blew coal 3 feet deep into the 8 Bay, Mr. Adams was buried under coal, had a 1.5-inch cut on his head from striking the 8 Bay, and was complaining about back, neck, and leg pain. *Id.* at 15–16. She acknowledged, however, that *at the time of notification*, Mr. Allred knew that Mr. Adams was buried under coal to his neck, and he called Conspec to send an EMT and get an ambulance as soon as he learned about the accident. *Id.* (citing Tr. 262).

Regarding Mr. Cooper, the Secretary stated that he was aware of the burst, that miners had to dig Mr. Adams out, and that Mr. Adams was complaining about leg and neck pain. *Id.* at 16 (citing Tr. 303–04, 323, 326). The record demonstrates that knowledge of the head wound and neck and leg pain was not obtained until Mr. Allred was at the incident site approximately 40 minutes later. Tr. 266–67.

Respondent similarly mostly focuses on the severity of injuries, based on information available after the 15-minute reporting window had lapsed—i.e., known by Messrs. Allred and Cooper, and reported to other individual liability respondents, after Mr. Allred arrived at the incident site and observed Mr. Adams. These included a knee injury, possible back and neck injuries, and head laceration. Resp't Br. 14.

Respondent relies heavily on the arguments that Mr. Adams was conscious and coherent,[31] and that nobody thought or stated that his injuries were life threatening. *Id.* at 14, 16–17. Both are irrelevant, however.

The Commission has repeatedly rejected the assertion that because a miner is alert after an accident, a reasonable person could conclude there was no potential for death. *Cougar Coal*, 25 FMSHRC at 520; *Signal Peak*, 37 FMSHRC at 476 (noting that while the miner presented some stable vital signs, all vitals were not taken, thus evaluation was not exhaustive or conclusive and did not establish that the miner's injuries posed no reasonable potential for death); *see also Consol* 40 FMSHRC at 998-1010. Further, "life-threatening" injury is not the standard, *see* Section IV.1.a., *supra*, and knowledge of the injuries was not obtained until after the reporting window had expired.

[31] As noted elsewhere in this decision, *supra* note 35, citing another ALJ's correct assessment, the nature and extent of head injuries cannot be precisely known. In particular, the fact that someone is conscious and coherent following such an injury may not be probative of the reasonable potential of the injury to cause death. *See* Ian Lovett & Brett Forrest, *The Navy SEAL Who Went to Ukraine Because He Couldn't Stop Fighting*, WALL ST. J., May 12, 2023, at A1 (Under the sub-heading "I'll walk out," a sailor who had been wounded by a projectile that penetrated his head remained conscious and walked away from a fire fight, but lapsed into unconsciousness and died three days later.).

Respondent correctly conceded that assessment of reasonable potential to cause death does not require a medical determination. Resp't Br. 13 (citing *Signal Peak*, 37 FMSHRC at 470). It then attempts, however, to use medical findings to argue that the rib burst was not violent, and that Mr. Adams' vitals upon evacuation from the mine did not show that he had suffered injuries that in fact placed him in grave peril. *See id.* at 17–19 (noting that hospital tests did not show a violent impact because the head wound was a "surface fracture without significant trauma to the brain," and that the ambulance crew reported maximum cognitive scores and fine vitals).

Respondent cannot have it both ways, though. I agree with its original contention that it cannot rely on, and should not have waited for, a medical determination to decide whether the incident was reportable. My conclusion rests on the standard under the law as it has in fact been developed. *See Consol*, 40 FMSHRC at 111; *Signal Peak*, 37 FMSHRC at 476 (quoting *Cougar Coal*, 25 FMSHRC at 520–21).

Based on testimony from Messrs. Adams, Anderson, Allred, and Cooper, the only information available to Respondent during the reporting window was that material had fallen from the rib and covered Mr. Adams, and that he was bleeding from a head wound.[32] This is sufficient for a determination that the incident had the reasonable potential to cause death, based on the totality of the circumstances then known, and Respondent should have notified MSHA.[33]

[32] I clarify here that the fact that Mr. Adams was bleeding from a head wound was "available" information, as it was known by Mr. Bonnanci and those working to uncover Mr. Adams. I acknowledge that Messrs. Allred and Cooper were not aware of the head injury until Mr. Allred's arrival at the site. This, however, does not challenge the availability of the information to the operator, as I have found, *infra*, that Messrs. Allred and Cooper were required to be more inquisitive about the extent of the injuries.

[33] I note here that this violation was initially cited under a different subsection, which requires reporting an accident involving "an entrapment of an individual at the mine which has a reasonable potential to cause death." 30 C.F.R. § 50.10(c); *see* Order Granting Motion to Amend Order, Docket no. WEST 2021-0188 et al., at 2 (Apr. 27, 2022). Based on the amount of time it took to uncover Mr. Adams, there was a possibility that this action ultimately could have been affirmed under another provision of section 50.10 as well. This is further evidence that should have compelled reporting of this accident.

I find that a rib burst or roll that buries a miner and results in a head wound is an event that has a reasonable potential to cause death. Immediately after this incident, the mine focused appropriately on uncovering Mr. Adams. Doing so took longer than the time afforded for reporting an accident. *See* 30 C.F.R. § 50.10 (requiring notification "immediately . . . at once without delay *and* within 15 minutes" when it knows or should know that an accident has occurred).[34]

Additionally, the operator may have no information, even if the miner is conscious, about the extent of the injuries, and whether they have a reasonable potential to cause death. Respondent therefore should have erred on the side of reporting*, see Consol*, 40 FMSHRC at 107, because there was, at best, reasonable doubt as to whether Mr. Adams' [unknown] injuries had a reasonable potential to cause death.

Mr. Adams' head wound, while unnecessary to determine this incident was in fact reportable, further demonstrated a reasonable potential to cause death.[35] Mr. Adams had a skull

---

[34] This is the shortest time specified in the Act or regulations for taking any action, and was added by Congress ("*and* within 15 minutes") in the MINER Act. There is also a requirement to withdraw all miners from the mine if the main mine fan stops and ventilation is not restored within 15 minutes. 30 C.F.R. § 75.313(c)(1). This reflects the agency's clear concern that miners be protected by prompt action and underlines the urgency of the reporting requirement.

[35] Another Commission judge has aptly described the danger of head wounds:

> [G]etting hit on the head by a heavy object can lead to an intracerebral hemorrhage, i.e., bleeding in the brain. One of the most common causes of brain hemorrhage is head trauma. This fact is now common knowledge and is certainly something management of a large mine should know. These hemorrhages have a reasonable potential to cause death if not diagnosed and treated quickly. Adverse symptoms of a brain hemorrhage will often not be visible within 15 minutes of an accident.

Solvay Chems., Inc., 43 FMSHRC 477, 489–90 (Nov. 2021) (ALJ). Though this is a non-binding ALJ decision, I find it persuasive regarding "known unknowns" associated with head or other injuries attendant to rib falls and burials. The operator petitioned the Commission for review of this decision, which was granted. *See* Direction for Rev., *sub nom Sec'y v. American Soda, LLC Formerly Known as Solvay Chemicals, Inc.* (May 12, 2021). The Commission heard oral argument in the case on May 16, 2023. On May 18, two Commissioners said they would vote to affirm the ALJ's holding that the accident was reportable. If the Commission holds in accordance with their statements at the public meeting, the ALJ's decision would stand as if affirmed but would be non-precedential. *See Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 116, 117 n.2 (D.C. Cir. 2018) (holding that a two-to-two division results in the ALJ's decision being the final, reviewable, agency action). The facts in this case are similar to the facts in *Solvay/American Soda*, but distinguishable. Thus, the Commission's decision is not likely to have any precedential effect on my decision here.

fracture diagnosed at the hospital. Reacting miners at least knew he had a head laceration through which they could "see his skull."

That information was not initially known to Messrs. Allred or Cooper (or Mr. Gordon, though the record does not definitively demonstrate that he was notified within the 15-minute window). But importantly, neither *inquired* into any of Mr. Adam's injuries.[36] An operator cannot escape its duty to report by remaining uninformed of possible injuries. *See Mainline Rock & Ballast, Inc*., 693 F.3d at 1189. Like *Mainline*, knowledge of a significant laceration, and likely skull fracture, *if inquired about*, would have demonstrated a need to notify MSHA. *See* Tr. 93, 243 (demonstrating that Mr. Anderson "could see his skull" and it was "dented in," and that Mr. Bonnanci saw "a pretty good gouge in his forehead").

I also note that the extent of injury posed by closed-head trauma cannot be known without expert medical diagnosis, but such injuries must be assumed to be extremely serious until a medical evaluation may be obtained. *See Solvay Chems., Inc.*, 43 FMSHRC at 489–90. If the standard requires reporting if there is any reasonable doubt—and it does—the potential and unknown health risks posed by a closed head injury must compel reporting.

b. A reasonably prudent, experienced miner would have known that such an incident had reasonable potential to cause death, or would have at least had reasonable doubt as to whether it did not.

As discussed above, such an incident—even with unknown injuries—has a reasonable potential to cause death. Respondent's witnesses relied heavily on personal observation, or the lack of verbal reporting, that Mr. Adams' injuries were "life threatening." Some may have relied on personal experience, such as the manager who claimed, "I've been buried under coal myself." Tr. 387 (testimony of Jake Wilson). This was incorrect. With full appreciation for Mr. Wilson's grit, and the toughness and resiliency displayed on the job routinely by other miners, the Commission's precedents require a more sober reflection about miner safety and the possible injuries attendant to the entrapment of miners by falling material and other such incidents.

It doesn't matter whether Respondent inappropriately relied upon a "life-threatening injury" standard honestly or to minimize its required incident reporting. I need not make such a determination, as it is sufficient that a reasonably prudent, experienced miner should have known that a rib burst burying a miner has a reasonable potential to cause death, because such movements regularly have been the cause of fatal injuries to miners. Even if it relied on what it learned later, though, Respondent also would have been on such notice had it made proper inquiry into known or possible injuries.

---

[36] Mr. Allred did not ask about any injuries during the initial call, or during his next call with Charlie Wilson while he was driving to the incident site. Tr. 262–63, 265–66. Knowledge of the head laceration, along with his assessment that Mr. Adams' injuries were not life threatening, did not occur until his arrival at the incident site much later. Mr. Cooper only testified to assessments reported to him by Mr. Allred. *Id.* at 303–304. He was informed of the incident by Conspec, but nothing in the record demonstrates that he made further inquiry into Mr. Adams' injuries for over half an hour. *Id.* at 301–02.

At best, the operator would have had reasonable doubt as to whether the Mr. Adams' injuries had a reasonable potential to cause death, as it could not conclusively determine they did not. First, there was insufficient inquiry into whether there was a reasonable potential to cause death until Mr. Allred observed Mr. Adams, spoke with Mr. Anderson, and reported to Mr. Cooper that he did not think Mr. Adams' injuries were life threatening. All other reports of such potential were relayed to higher management or personally observed once Mr. Adams was evacuated from the mine—more than an hour after the incident.

Next, there are "known unknowns" associated with rib bursts, burials, and head injuries.[37] Miners worked to uncover Mr. Adams for approximately 30 minutes. Mr. Bonnanci was aware of Mr. Adams' head laceration from contact with the 8 Bay during that time. The miners working to uncover Mr. Adams, and those to whom the incident was reported, did not, and could not, know about possible further injuries during the reporting period.

The facts available to Messrs. Allred and Cooper in the 15 minutes after notification would not enable a reasonable miner to conclusively determine that the accident that injured Mr. Adams, and his unknown injuries, did not have the reasonable potential to cause death. This is demonstrated by the fact that such conversations about whether the accident was reportable continued throughout the efforts to uncover Mr. Adams, his evacuation from the mine, his departure to the hospital, and even after hearing about the extent of his injuries assessed at the hospital.

Though I have already found that the operator's agents should have been more inquisitive about the extent of the accident and Mr. Adams' injuries, one might argue that anybody who could have informed Mr. Allred further was working—"feverishly," no less—to uncover Mr. Adams. Such a defense is inadequate for two reasons. First, the record demonstrates that Mr. Allred in fact spoke to Charlie Wilson during his drive to the site. Second, this reinforces the existence of reasonable doubt. It is doubtful that the responsible person with authority to call MSHA will be at, or even near, an accident site when it occurs. If every available person is engaged in trying to save an injured miner, causing inability to obtain further information from them, that is sufficient to demonstrate reasonable doubt that the injuries do not have a reasonable potential to cause death. Respondent was therefore required to err on the side of reporting—enabling MSHA response and inspection to prevent others from being similarly hurt. *See Signal Peak*, 37 FMSHRC at 477 (citing 71 Fed. Reg. at 71,431).

B. Gravity

1. Likelihood

The hazard—inability of MSHA to respond or investigate—in fact occurred. MSHA was not informed until the next day, and the incident area had been mined past before an accident investigation was ordered. I therefore affirm the likelihood determination.

---

[37] Respondent should have known about—i.e., should have made adequate inquiry into—Mr. Adams' head laceration and any other possible injuries. *See* Section V.A.2.a., *supra*.

2. Severity

The Secretary asserts the severity of the contemplated injury is permanently disabling. The severity here is that of an injury resulting from the contemplated hazard, i.e., a similar incident caused by MSHA's inability to investigate and validate the safety of the violative area. I have already found that Mr. Adams' injuries were appropriately designated as permanently disabling and had the reasonable potential to cause death. Any other miner affected by a similar incident would therefore be exposed to similar injuries. I therefore affirm the severity as characterized by the inspector.

3. Number of Persons Affected

The inspector assessed that one miner would be affected by the hazard. I find it reasonable that at least one miner was vulnerable to a similar hazard during continued mining before MSHA inspection. I thus affirm the assessment of persons likely to be affected.

4. S&S

I affirm the S&S designation for the following reasons.

a. Step 1: The violation has been established.

I have found that a failure to notify MSHA about an incident with a reasonable potential to cause death occurred. *See* Section V.A.2., *supra*. This is sufficient to constitute an underlying violation of a mandatory safety standard for the purposes of *Mathies* Step 1.

b. Step 2: The violation was reasonably likely to result in the discrete safety hazard against which the regulation is directed—another similar occurrence due to MSHA's inability to promptly investigate.

The standard requires that operators notify MSHA within 15 minutes of an accident with the reasonable potential to cause death. An ambulance and life flight were on site when Mr. Adams was evacuated to the surface, so there is no contention that the failure to notify MSHA would have resulted in impairment of otherwise mobilized MSHA rescue efforts. But another purpose of reporting is to enable MSHA to investigate immediately. The Commission has held:

> [The operator] contends that the failure to timely report the accident to MSHA did not contribute to a hazard, because MSHA's involvement was not necessary to remedy [the] injuries. This interpretation unduly narrows the purpose of section 50.10. While immediate rescue efforts are a significant concern, *section 50.10 is also intended to facilitate MSHA's ability to investigate and remedy the cause of the accident*.

Signal Peak, 37 FMSHRC at 480 (emphasis added). The contemplated hazard here then is a similar rib fall incident caused by lack of MSHA investigation and remedy.

The Secretary correctly asserts the failure to report interfered with MSHA's ability to investigate. S. Br. 16. Respondent counters that the standard is not what "could" occur, Resp't Br. 26 (citing *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1677 (Dec. 2010)), thereby arguing that another similar accident is not reasonably likely, *id.* at 27. Respondent incorrectly asserts that the Secretary's analysis is directed at the rib roll, rather than the failure to report. *Id.* at 27–28.

The analysis is focused on *another* rib incident at a nearby or similarly inadequately supported area, during continued mining operations, due to lack of MSHA investigation of the violative incident. There is sufficient evidence in the record demonstrating that this hazard is reasonably likely. There was a similar incident nearby five days prior. This incident occurred with additional mitigation apparently added following the first incident.

Miners worked in the area—even if only to inspect, clear the accident site, and conduct further mitigation—between the accident and Mr. Madrigal's visit. *See* Tr. 347. It is therefore reasonably likely that the violation would cause another similarly hazardous occurrence prior to an MSHA inspection. *See Signal Peak*, 37 FMSHRC at 473, 481 (affirming a judge's S&S finding where a failure to report delayed MSHA involvement and exposed miners to uncorrected conditions, a similar fall, and similar resulting injuries).

Respondent claims MSHA had ample opportunity to inspect after being informed the next morning, and that Messrs. Gordon, Wilson, and Roberts inspected and remedied the conditions the previous night. Resp't Br. 28. Neither contention allays the hazard because MSHA was unable to inspect and propose a remedy, which is the point of the provision, and the same operator installed mitigation after the first incident that was clearly ineffective.[38]

c. Step 3: Lack of MSHA investigation was reasonably likely to result in similar injury from falling rib material.

The Secretary asserts that miners working in the area following the incident were exposed to dangers from an uncontrolled rib. S. Br. 16. Respondent, without specifically referencing Step 3, relies on the same contentions regarding its own inspection and mitigation to argue that further miners would not likely suffer similar injury from a similar event. Resp't Br. 28.

Assuming the hazard—a similar incident due to MSHA's inability to promptly investigate—occurs, a miner is reasonably likely to be injured by falling rib material. I have already found that a fractured skull or vertebra are reasonably likely to occur from a rib burst. *See* Section IV.B.4.c., *supra*. Given that such injury did in fact occur, it is reasonably likely that

[38] Also, the standard not only provides when the report to MSHA must be made, but how, including the agency's toll-free number in the regulation. 30 C.F.R. § 50.10. The ease of compliance for this provision also bears on my decision. First, it is non-prejudicial if it turns out the incident was not reportable. Second, Congress' emphasis on the haste with which the decision must be made requires miner training that makes reporting almost a reflex. The stakes are too high, and every miner and manager should train to immediately report an incident where reasonable doubt exists as to a miner's condition.

the failure to notify MSHA would result in a similar occurrence during continued mining, and that another miner would suffer similar injuries to those of Mr. Adams.[39]

d. Step 4: It is reasonably likely that such an injury would be of a reasonably serious nature.

I have found that the same injuries from falling rib material are reasonably likely. I have already found such injuries to be of a reasonably serious nature. *See* Section IV.B.4.d., *supra*. The resulting injuries from this violation are therefore reasonably likely to be of a reasonably serious nature.

C. Negligence

I find the negligence was properly characterized by the inspector as "high." Management personnel in the position to stop work and notify MSHA are familiar with the mining industry, the relevant facts, and the protective purpose of the provision. This was evidenced by their consistent questioning and reporting regarding whether Mr. Adams' injuries were life threatening. A reasonably prudent person in their position should have recognized that the incident had a reasonable potential to cause death and required MSHA notification.

The Commission has affirmed a moderate negligence finding where an operator should have known a reportable accident occurred, but the judge acknowledged that it acted quickly and efficiently to help the miner and did eventually alert MSHA. *Consol Pa. Coal Co.*, 40 FMSHRC at 1001, 1010. The Commission has also found high negligence, however, where an operator purportedly delayed notification because of its focus on evacuating survivors. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3518 (Dec. 2013). The record there demonstrated that the operator was concerned about a shut-down, and it was also sufficient for high negligence that nobody tried to contact MSHA at all, nor was there any real effort to investigate the incident for more than an hour, after Respondent knew there had been a rib burst that had buried a miner in coal. *Id.* at 3516, 3518.

In the oft-cited *Signal Peak* decision, the Commission found reckless disregard where the operator failed to take any steps to ensure the roof fall was investigated, thereby placing miners at future risk. 37 FMSHRC at 481–82. It held that the duty to report was obvious at multiple points in time. *Id.* at 482. The Commission cited the significant damage and severe and obvious injuries caused by the accident.

It took one-and-a-half hours to transport the injured miner out of the mine in *Signal Peak*, and he required a life flight. *Id.* The operator never contacted MSHA and was concerned about resuming production. *Id.* In resuming production, it changed conditions at the accident scene. It

[39] This is based on the likelihood—and occurrence—of the injury that I affirmed as "permanently disabling." The fact that the injury was not fatal, and not designated as such on the citation because the inspector assessed the actual outcome here, *see supra* note 21, does not preclude the fact of violation. While this injury was "permanently disabling," it is the character of the accident that had the reasonable potential to cause death.

did nothing to investigate and prevent recurrences. *Id.* MSHA found out about the accident from a newspaper reporter days later. The operator filed a 7000-1 accident report one-and-a-half hours after the safety director spoke with MSHA and was "anything but forthcoming." *Id.*

The Secretary claimed the injuries in this case were obvious, and management was uninquisitive. S. Br. 17–18. It further asserted that Respondent prevented MSHA from investigating, maintaining a high degree of danger to miners during continued work. *Id.* Respondent emphasized that only knowledge of laceration, knee injury, and possible back or neck injury was available. Resp't Br. 24–25. It also noted that Mr. Cooper filed the accident report the next morning. *Id.* at 24.

I have found that the duty to report was obvious from the time of notification—a rib burst burying a miner in coal with unknown injuries. *See* Section V.A.2., *supra*. I have not found that Respondent was more concerned with resuming production. Though one might infer it from the failure to report both the August 20 and Mr. Adams incidents, and continued work in the area without an MSHA inspection, it is clear from the record that Respondent relied heavily on whether there was an assessed life-threatening injury to evaluate reportability.

Though the head laceration, signifying some blunt force trauma, was obvious, Mr. Adams' injuries and the cause were not as severe as the circumstances in *Signal Peak*. It took a significant time to evacuate Mr. Adams, both from under the coal, and from the mine, and Respondent did not notify MSHA until an inspector came and inquired about the incident.

Respondent also changed conditions at the accident scene by continuing to clean, inspect, and mitigate the area.[40] Operator managers investigated the incident themselves and installed mitigation, but there was never an MSHA investigation to assist in preventing recurrence. Finally, Mr. Cooper filed the report after being questioned by Mr. Madrigal.

I agree that the operator did not exhibit reckless disregard because there has been no demonstration that Respondent did not report specifically because of concern for continued

[40] Respondent demonstrated that Mr. Madrigal investigated the injury scene and other inspectors took three days to attempt to inspect. Resp't Br. 24. The circumstances surrounding the investigation are admittedly strange. The record shows that Mr. Madrigal went underground the day after the incident, measured the accident site rib deformation, and was informed about injuries, which he reported to Mr. Lyons. Tr. 126–27, 312. Operations continued, and the violative area had been mined past by the time Mr. Lyons went to the mine. *Id.* at 128. Neither inspector issued a K-Order. *Id.* at 130, 176. Mr. Lyons issued the citation based on Mr. Madrigal's information and mine employee interviews. Such actions likely caused confusion for Respondent as to whether it was in violation or could continue operation. It is not, however, inappropriate for an inspector to issue a citation based on information obtained without inspecting a site. It was not demonstrated that Respondent continued coal production between the incident and Mr. Madrigal's visit. Miners did, however, continue working to clean the area and install mitigation. This occurred without an MSHA inspection and validation of the area, *see* Section V.B.4.b., *supra*, posing the contemplated risk of similar incident for those still working in the area where there had been two recent falls.

production and a desire to avoid MSHA enforcement. The circumstances are, however, more severe than those demonstrating moderate negligence. Respondent demonstrated a serious lack of reasonable care in failing to enable MSHA to investigate an obvious injury. The Secretary therefore demonstrated that this violation was the result of the operator's high negligence.

D. Unwarrantable Failure

The Secretary argues that multiple managers knew of the incident and had sufficient information about the laceration and neck, back, and leg pain to prompt reporting. S. Br. 17. She claims the injuries were obvious, citing the deep laceration, blood through the gauze, and obvious pain. *Id.* at 17–18. The Secretary further asserted no management asked if the injuries were life threatening,[41] and the failure to report prevented MSHA investigation, creating significant danger for miners continuing to work. *Id.* at 18.

Respondent asserts reporting violations do not fit readily with an unwarrantable failure analysis. Resp't Br. 23–24. It emphasizes that the time the violation existed was until the next morning, and that it was not on notice that greater efforts were required. *Id.* at 24. It described its abatement as describing the injury to the inspector and field office supervisor and filing the 7000-1 form. *Id.*

Respondent claims there was no degree of danger because Mr. Madrigal investigated the injury scene and others neglected attempts to inspect for days. *Id.* Finally, it relies heavily on lack of operator knowledge, claiming direct observations did "not indicate a danger of death" and that nobody reported "life-threatening" injuries. *Id.*[42]

For the following reasons, I find the violation was the result of Respondent's unwarrantable failure to comply with a mandatory standard.

[41] This contention is only true to the extent that these inquiries were not made, or at least confirmed, until after the reporting window. The record demonstrates that each respondent-manager discussed whether Mr. Adams' injuries were life threatening with the person who notified them, or they came to that conclusion based on their own observations. Tr. 303, 318–19, 326, 338, 376, 439–40. I found management did not seek to assess the severity of Mr. Adams' injuries until Mr. Allred arrived on site 40 minutes later and as such, were inexcusably uninquisitive about the injuries during the reporting window. *See* Section V.D.1., *supra*.

[42] Respondent reiterates here that the only available information before medical evaluation at the hospital was the laceration, knee injury, and possible neck or back injury. *Id.* at 24–25.

1. Respondent should have known of the existence of the violation because of the nature of the incident and probable, yet unknown, injuries.

Both parties are incorrect in their use of Mr. Adams' determined injuries to claim knowledge or lack thereof. Respondent should have known[43] of the violation—that it was required to notify MSHA—within 15 minutes after the report to Mr. Allred because of the nature of the incident and its inability to know the attendant injuries. I have found that material falling from a rib and covering a miner are sufficient for a reasonably prudent, experienced miner to assess that an incident has a reasonable potential to cause death. *See* Section V.A.2., *supra*.

The existence of the skull fracture, vertebra fracture, and knee injury were not conclusively known until Mr. Adams' treatment at the hospital. At best, the Secretary may appropriately point to the existence of Mr. Adams' obvious head laceration to claim that blunt force trauma occurred, and immediate knowledge of that injury should be sufficient for notification.

I have found that such a head injury is reportable because of unknown, but probable, brain injury, and that Respondent was inexcusably uninquisitive about Mr. Adams' injuries between the first report and Mr. Allred's observation. *See* Section V.A.2.a., *supra*. Respondent's knowledge is therefore an aggravating factor in favor of unwarrantable failure.

2. The violation was sufficiently obvious for the same reasons as above.

Because Respondent should have known of the existence of the violation based on a rib burst's reasonable potential to cause death, and emphasizing the immediately apparent head injury, I find that the violative condition was obvious. The obviousness of the condition is an aggravating factor in favor of an unwarrantable failure finding.

3. The violation posed a high degree of danger because of the risk of injury to miners continuing to work in the area from a similar incident.

As with the S&S analysis, I find the danger associated with this reporting violation is that of a similar rib burst and injury to miners continuing to work in the area without MSHA investigation. *See* Section V.B.4.b., *supra*; *Signal Peak*, 37 FMSHRC at 480. This element does not include duration, only the degree of danger posed by any work conducted where the danger continues due to MSHA's inability to inspect. *See Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) ("The judge's reliance on the relatively brief duration of the violative conduct was misplaced, in view of the high degree of danger posed by the hazardous condition and its obvious nature.").

---

[43] "[T]he Commission . . . explicitly stated that aggravated conduct more than ordinary negligence can be demonstrated through a "knew or should have known standard." *The Am. Coal. Co.*, 38 FMSHRC 2062, 2081 n.27 (Aug. 2016) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2002–04 (Dec. 1987); *E. Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) ("A lack of actual knowledge by . . . management . . . does not necessarily bar an unwarrantable failure finding.")); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1699 (Aug. 2015).

Respondent incorrectly conflates its argument for this element with that relating to the length of time the condition existed. The fact that Mr. Madrigal investigated the injury scene the next morning does not effectively challenge the degree of danger. At best, its statement that others neglected to inspect for days after learning of the incident could be construed as an MSHA acknowledgement that the danger posed was not high. I do not accept that, as I have already found that serious injury is reasonably likely to result from this violation.

Managers went to the incident site to inspect and ensure mitigation, but they did not enable MSHA to do so. Mr. Allred testified he told miners to stay out of the area until Messrs. Gordon and Wilson—whom he knew were on the surface—could evaluate. Tr. 273. Messrs. Gordon and Wilson testified that they checked the site and found that a prop had been dislodged, and that much of the rib mesh was still attached. *Id.* at 346, 380–82. Mr. Gordon testified that they further inspected the area that evening. *Id.* at 347. This sufficiently demonstrates that miners were working in the area after the incident but before an MSHA investigation.

I have found that the lack of an MSHA investigation resulted in significant danger to miners continuing to work in an area with clearly inadequate rib support—demonstrated by two rib bursts in the previous five days and no MSHA investigation following either incident. This violation therefore posed a high degree of danger and is an aggravating factor in favor of an unwarrantable failure finding.

4. The extent of the violation was significant because it affected the safety of the entirety of the long wall.

The extent is the scope or magnitude of the violation. *See E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) (citing *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992)). A judge has found an extensive violation of a reporting violation, considering the abatement measures taken to terminate the relevant orders. *See Pine Ridge Coal Co.*, 33 FMSHRC 987, 1017 (Apr. 2011) (ALJ) (citing *E. Associated Coal Corp.*, 32 FMSHRC at 1196; *Peabody Coal Co.*, 14 FMSHRC at 1263) ("[T]he failure to report the "near miss" accident . . . extensively inhibited the use of MSHA expertise to timely investigate and institute critical, pro-active corrective actions through the [section] . . . .").

Having found that the danger of this violation is the occurrence of a similar event in a working area that has been demonstrated to be inadequately supported, I find that the extent of the violation includes the entire 8 Right Longwall. Ex. GX-1, 5. I further find the cited ALJ decision instructive, and I hold that the failure to report "extensively inhibited" MSHA's investigation and possible mitigation.[44] The extensiveness of this violation is therefore an aggravating factor in favor of an unwarrantable failure finding.

[44] Though I find it sufficient that the extent of the violation affected the entire longwall, and the failure to report extensively inhibited investigation, I note that another judge has found a violation extensive based on the number of mine management with knowledge. *See M-Class Mining, LLC*, 39 FMSHRC 1013, 1030 (May 2017) (ALJ) (noting that five management officials (continued…)

5. The length of time the violative condition existed was minimal because, though initiated by the inspector, Respondent informed MSHA the next morning.

The violation was marked "terminated" on the same day it was issued. *See* Ex. GX-1 ("This event has already occurred, discussions with the mine operator were held about this subject."). Mr. Madrigal visited the mine the next day—August 26—and the citing inspector visited the day after. Tr. 114–15.

The record demonstrates that Mr. Lyons did not go underground to inspect the area. Tr. 128. Mr. Lewis went underground on August 27. *Id.* at 166–67. At the latest, the condition was abated on August 27—approximately 36 hours after the incident—upon Mr. Lewis' inspection. I find it more likely, however, that the condition was abated following Mr. Madrigal's inspection on the morning of August 26. This is because Mr. Lyons testified that Mr. Madrigal informed him about the incident, his inspection, and Mr. Adams' injury, and Mr. Lyons did not conduct an inspection himself.

The length of time the violative condition existed was therefore approximately 14 hours. The Commission has found that the duration of a minimum of two shifts was an aggravating factor in favor of an unwarrantable failure finding. *See The Am. Coal Co.*, 39 FMSHRC 8, 22 (Jan. 2017). I find that the duration here is not an aggravating factor.

6. Respondent's efforts in abating the condition were sufficient because an MSHA representative was aware and able to inspect.

I have found that the condition was obvious, and Respondent clearly relied on the wrong standard—"life-threatening" injury—to conclude the incident was not reportable. Mr. Cooper intended to, and did, file a 7000-1 form. Even if prompted by questions at the presence of the stretcher, Tr. 118, he informed Mr. Madrigal about the incident, and Mr. Madrigal inspected. Likely believing this sufficient, Mr. Cooper still emailed other MSHA personnel.

I take the "discussions" cited for termination of the citation as those that occurred between Messrs. Madrigal and Cooper. First, there was no call to the hotline and no further

---

[44] (…continued)
had knowledge and neglected to comply, and that upon the inspector's instruction that it was reportable, delayed reporting and was evasive). Here, it is only determinative that Messrs. Allred and Cooper had knowledge within the first 15 minutes, but three other mine managers were informed in short order. Respondent never did notify MSHA via the provision's stated method. *See* Tr. 148 (receiving confirmation from Mr. Lyons that "telling Rudy [Madrigal]" is not "contacting MSHA at the . . . number within 15 minutes"); *id.* at 327 (receiving confirmation from Mr. Cooper that he only emailed MSHA representatives after seeing Mr. Madrigal). I acknowledge that there may have been confusion as to whether informing Mr. Madrigal, and his subsequent inspection, was sufficient, and I therefore find this is not comparable regarding not reporting.

notification to Mr. Lyons following Mr. Madrigal's inspection. Mr. Lyons did not inspect the site. The abatement—which would require such inspection—was therefore based on either Mr. Madrigal's inspection on August 26, or Mr. Lewis' on August 27, and the associated discussions. And since Mr. Cooper contacted MSHA officials on August 26, I take that as the abatement time recognized in Mr. Lyons' September 10 citation. Respondent's abatement efforts are therefore not an aggravating factor in favor of an unwarrantable failure finding.

7. Respondent had not been placed on notice that greater efforts were necessary for compliance because it had few similar citations, and MSHA provided no prior warnings in that regard.

An operator's history of similar violations puts the operator on notice that greater efforts are necessary. *See Brody Mining, LLC*, 37 FMSHRC at 1699; *Big Ridge, Inc.*, 35 FMSHRC 1525, 1530 (June 2013) (disagreeing with the contention that past violations can only provide notice if they are factually indistinguishable from the cited condition). The record demonstrates only one other reporting violation. Ex. GX-3. The Secretary did not demonstrate any communications wherein MSHA warned Respondent about failures to report.

The inspector noted prior injuries in the citation before assessing unwarrantable failure. *See* GX-1, DOL 0036 ("The mine operator has had two injuries on the Longwall face in the last 6 months, six in the last two years."). These injuries would likely be more appropriately cited in the rib control citation—even though I can only assume that they were the product of such a violation. No evidence was presented that Respondent failed to notify MSHA about any such injuries. They are therefore irrelevant. This element is therefore not an aggravating factor in favor or an unwarrantable failure finding.

8. Conclusion

The factors in favor of an unwarrantable failure finding include Respondent's knowledge, the obviousness of the violation, the high degree of danger, and the extent of the violation. The duration, abatement efforts, and whether Respondent was on notice that greater efforts were necessary, are not supportive of such a finding. I conclude that this violation was the result of Respondent's unwarrantable failure to comply with a mandatory standard. *See Peabody Midwest Mining, LLC*, 44 FMSHRC at 525 ("[T]he Commission has held that brief duration does not militate against a finding of unwarrantable failure where the condition is distinguishable by its high degree of danger and obvious nature . . . .").

E. Penalty

Respondent has been cited once in the last two years at this mine for violation of this regulation. Ex. GX-3. This is a low rate of repeat violations, but does reflect a misperception of the duty to report. I accept that the Secretary has properly evaluated the size of the mine. The parties have stipulated that payment of this penalty will not affect the Respondent's ability to continue in business. Stips. ¶ 7.

Respondent made efforts to achieve compliance through its verbal report to Mr. Madrigal and its 7000-1 report, though I have found such efforts prompted and lacking overall.

I have affirmed the Secretary's gravity, negligence, and unwarrantable failure determinations. While the failure to report was made by a lower-level manager, and ratified by the mine's safety director, I find that the violation results from a failure of mine management generally to consider the important purposes served by the immediate notification requirement and, flowing from that, a failure to ensure that responsible persons are properly trained to notify the agency immediately when an accident occurs.

I do not, however, find this to be willful or intentional misconduct. I consider this a serious lack of reasonable care due to the operator's improper reliance on a faulty assessment of the injury over an inappropriately protracted timeline.

MSHA proposed what is effectively a maximum penalty in this case. Yet there must be a difference in penalties between a failure such as the one here and a finding, for instance, of a purposeful failure to report, based on the chance that the injury will eventually not be assessed to have a reasonable potential to cause death, or directing that a known injury not be reported to avoid a halt to production. Considering the circumstances and all the factors in Section 110(i) of the Act, I therefore assess a penalty of $50,000.00.

VI. INDIVIDUAL LIABILITY FOR VIOLATION OF SECTION 50.10(B)[45]

A. Each Cited Respondent Was an Agent.

Each cited respondent here was an agent of Canyon Fuel Company, LLC. An agent is defined as "any person charged with responsibility for the operation of all or a part of a . . . mine or the supervision of the miners . . . ." 30 U.S.C. § 802(e).[46]

The Commission has held that an agent is one who "is authorized by another, the principal, to act on the other's behalf," having authority to represent the principal in "dealings that affect the principal's legal rights and obligations." *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 195 (Feb. 1991) (citing *Johnson v. Bechtel Assocs. Pro. Corp.*, 717 F.2d 574, 579 (D.C. Cir. 1983); *Agent*, BLACK'S LAW DICTIONARY (5th ed. 1979); RESTATEMENT (SECOND) OF AGENCY § 10 (AM. L. INST. 1958)). Messrs. Tanner, Allred, Wilson, Gordon, and Cooper were, at the time of citation, the general manager, shift foreman, superintendent, production manager, and safety manager, respectively. Stips. ¶ 9–13.

Mr. Allred was acknowledged to be the "responsible person" on the shift. *Id.* ¶ 29, 35; Tr. 258–59. Each of the others was also entrusted with some authority to control aspects of the mine's operations.

---

[45] Though not contested, I note that section 50.10 is a mandatory health or safety standard. *See Signal Peak Energy, LLC*, 37 FMSHRC 470, 479 (Mar. 2015). A violation of the requirement may therefore be the basis for section 110(c) liability.

[46] A "person" includes "individual[s]," *id.* § 802(f), and Skyline is a mine, Stips. ¶ 2.

B. Each Cited Respondent Was in a Position to Remedy the Condition.

In the context of a reporting violation, this element of individual liability means that the agent was in a position to notify MSHA upon learning about the incident. Because reporting does not, and cannot, require a designated miner, *see Signal Peak Energy, LLC*, 37 FMSHRC at 476, I address collectively whether the agents were positioned to remedy the condition.

Section 50.10 requires "an operator" to notify MSHA. As an agent of the operator, each respondent was authorized to act on behalf of the operator with respect to mining operations, and the actions of each affected the operator's legal rights and obligations.

Mr. Allred acknowledged that he was the "responsible person" on shift, that he was in a position to stop work and call MSHA, and that he had the ability to do so. Tr. 283, 285. Mr. Cooper testified that he had the ability to stop work in response to unsafe conditions. *Id.* at 329.

Though Messrs. Gordon, Wilson, and Tanner made no such acknowledgements, common sense informs me that their positions in mine management enabled them to make the decision to notify MSHA upon learning of the incident. All respondents were therefore in a position to remedy the condition.

C. Each Respondent Failed to Act on the Basis of Information That Gave Them Knowledge or Reason to Know of the Existence of the Violative Condition.

The "knowing" language of section 50.10 mirrors the Commission's requirement for knowledge under section 110(c). *Compare* 30 C.F.R. § 50.10 ("[O]nce the operator *knows or should know* that an accident has occurred . . . .") (emphasis added), *with Richardson*, 3 FMSHRC at 16 ("If a person in a position to protect employee safety and health fails to act on the basis of information that gives him *knowledge or reason to know* of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.") (emphasis added).

I have already found that the operator had reason to know that an accident had occurred with the reasonable potential to cause death. *See* Section V.A.2., *supra*. As discussed above, having knowledge that a rib burst occurred, covering a miner in coal, would give an experienced miner reason to know that an injury with the reasonable potential to cause death occurred, even if one did not know exactly what the injury was. *Id.*

The narrow issue is therefore whether and how this knowledge can be imputed to the individual Respondents.

For purposes of Section 110(c), the duty to report only arises when the officer or agent has knowledge or reason to know of the existence of the violative condition. Because these are individual charges, and because each of the individuals learned about the incident at a different time and in a different manner, it is important to consider carefully each person's liability.

Mr. Allred was the first of the individual respondents to be informed of the incident. He testified that he was informed at 5:08 p.m. by the production foreman, Charlie Wilson, that Mr. Adams had been "covered up with coal along the 8-Bay." Tr. 262–63; *see also* Stips. ¶ 20; JT-6.

Mr. Allred's first reference to Mr. Cooper was that he called him and gave an assessment of his injuries. Tr. 273–74. But that was about forty minutes after the report, when Mr. Allred was finally at the site and had seen Mr. Adams. *Id.* at 286.

Mr. Cooper testified, however, that he was notified by Conspec, and Mr. Allred testified that he had notified Conspec immediately upon receiving the call about the incident. Tr. 264, 301–02. I therefore find Mr. Cooper knew of the accident within minutes of Mr. Allred.

This is further supported by Mr. Gordon, who testified that Mr. Cooper called him between 5:20 and 5:25. Tr. 336. Mr. Gordon was therefore informed within 12–17 minutes about a miner being buried, though Mr. Cooper did not describe any of the injuries. *Id.* at 335–36. Mr. Cooper did testify that he later spoke with Mr. Gordon and told him the injuries were not life threatening. *Id.* at 326.

Mr. Wilson testified that Mr. Cooper called him at 5:30. Tr. 373. He later received a call from Mr. Allred informing him of what occurred. Mr. Wilson said he was told that they had to remove Mr. Adams from the coal, that the ambulance was on the way, and that there were possible injuries to his knee, neck and head. He also said he asked Mr. Allred if he thought it was immediately reportable, "if it was life-threatening," and Mr. Allred told him, "[N]o, I don't think it would be." *Id.* at 376.

Mr. Tanner testified that Mr. Cooper called him between 5:30 and 5:40. Tr. 435. He received a second call from Mr. Cooper that Mr. Adams was being brought up with a cut on his forehead and possible back injury resulting from a rib fall or roll. *Id.* at 437.

Mr. Cooper could not have known this until his conversation with Mr. Allred at 5:48, at the earliest. Further, he received a call from Mr. Wilson, who had arrived at the surface and seen Mr. Adams loaded into the county ambulance. Tr. 439. Mr. Wilson informed him that Mr. Adams was in good shape, that material had rolled out underneath the rib, and that the incident was not immediately reportable. *Id.* at 439–40.

Each respondent was therefore notified about a miner buried in coal within 32 minutes of the incident. Any one of them could have notified MSHA. *See* Section VI.B., *supra*.

Respondent cites *Freeman* extensively, arguing both that the agents did not have the required knowledge of the violative condition, and that they did not have an unwarrantable failure-level of culpability. Resp't Br. 29–30.

In *Freeman*, the D.C. Circuit reversed the judge, finding no individual liability. 108 F.3d at 364. It held that the record did not support that the agents had actual or constructive knowledge of the hazardous level of deterioration of the violative beam. *Id.* Importantly, the decision held that while the agents knew of the instability risk from corrosion, they were

addressing the condition responsibly through inspections and repairs, and numerous regulatory inspections never reported any concern with the condition. *Id.*[47]

I have already found that the agents had knowledge of the condition—a miner covered by coal from a rib burst being reasonably likely to cause death. *Freeman* does not preclude liability arising from this finding. The Commission's holding that the agents had neither actual nor constructive knowledge concerned knowledge of the "hazardous level of deterioration" of the specific beam that collapsed. *Id.*[48]

Respondents here had constructive knowledge of the specified hazard—the risk of similar injuries with the reasonable potential to cause death resulting from further rib bursts in an uninspected, and potentially inadequately supported, work area. Even if I were to find that *Freeman* controlled the outcome here (it does not), whether the agents were addressing the condition responsibly is the only relevant issue. But many of Respondents' arguments don't directly address the issue as it relates to the failure to report the accident.

Much Respondent-elicited testimony was dedicated to the efforts the operator took to address the roof control risk, noting that mesh and props had been installed as a precaution. The alleged 110(c) liability here, however, is based on the failure to report an incident in which those measures had proved inadequate, so efforts to mitigate the roof and rib conditions do not avert Respondents' culpability for not reporting the failure. Respondents therefore are not absolved under *Freeman*'s reasoning.

Respondents also cite *Target Industries, Inc.*, 23 FMSHRC 945 (Sept. 2001), to argue against a finding that they had knowledge. Resp't Br. 29. While the affirming decision laid out the standard description of requirements for knowledge, the facts of the case, when compared to those here, are damaging to Respondents.

The Commission affirmed the individual liability finding against one respondent who was notified, while at home, of dangerous conditions and failed to notify anyone at the mine or

---

[47] Though not directly pertinent here, other jurists, including the ALJ, the dissenting judge in *Freeman*, and the Court of Appeals for the Sixth Circuit, have been critical of the failure of MSHA to cite violations as excusing a breach of an operator's duty, and that of its agents and officers, to protect their miners under the Act. "MSHA inspectors do not undertake to perform a duty owed by the mine operator to its employees." 18 FMSHRC 483, 456 (Mar. 1996) (ALJ) (citing *Raymer v. United States*, 660 F.2d 1136, 1143 (6th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982)); *see also* 108 F.3d at 366 (Wald., J., dissenting) (asserting that other inspections are irrelevant because those inspectors do not have the information held by agents and "lack[] the expertise and intimate knowledge" of the facility and condition). The agency in the present case probably should have more thoroughly investigated the accident when it learned about it. The failure to do so has no impact on the duty owed by the Respondents.

[48] The Commission also reversed the ALJ for failing to find the agents knowingly violated the standard, rather finding high negligence. *Id.* The finding of violation here, however, is not based solely on a negligence finding.

take any action. 23 FMSHRC at 950, 963.[49] Similarly, all the agents here, whether at the mine or at home, were notified of a dangerous condition and failed to act.

Respondents might attempt to distinguish themselves from the respondent in *Target Industries* because he was part of the *formal* notification procedure—meaning that he was specifically responsible. *Id.* at 948. But each of the Respondents here had important duties and responsibilities in response to the rib burst and Mr. Adams' injuries. To their credit, each individual respondent acted promptly and conscientiously to attend to Mr. Adams. But that is irrelevant to whether they were in a position to report an accident, knew the facts giving rise to the duty to do so, and failed in that responsibility.

Mr. Allred is the direct comparison to the individual charge in *Target Industries*, as the responsible person. Each of the others, however, was subsequently in a position to protect miner safety and was notified. *Target Industries* provides no basis for excusing a failure to do so, because Respondents knew it was important to inform mine management of the status of events, yet none believed at any time that it was necessary to inform MSHA.

The Commission also found aggravated conduct in *Target Industries* because of blatant disregard for miner safety, rejecting the asserted justification that a false alarm must have occurred. *Id.* at 965. The Commission emphasized that it has rejected reliance on "'best-case scenario' assumptions as a basis for failing to take action despite evidence of a potentially dangerous condition." *Id.*

Mr. Allred, in contrast, assumed the worst here—an appropriate response when arranging a potential rescue and evacuation. That concern, though, did not extend fully to the implications raised by the incident, and the need to ensure miners would be protected, to the maximum extent possible, from a subsequent ground movement.

The notification requirement exists, in part, because of the tremendous operational pressures imposed on mine management. Miners and bills must be paid regardless of whether the mine produces coal, but revenue stops when production ceases. Involving the agency in the inspection and investigation of mines is intended to counter the tendency toward wishful thinking and best-case assumptions.

I have already found that the failure to report was the result of the operator's high negligence, *see* Section V.C., *supra*, and unwarrantable failure, and therefore "aggravated." *See* Section V.D., *supra*. The remaining issue is therefore whether the finding of aggravated conduct against the operator can be imputed to Respondents. I hold the reasonableness of imputing aggravated conduct to individuals depends on the attenuation from the action and reasonable expectation of response from each of them.

[49] The Commission found that respondent knew the production shift was currently in the mine, and that another was due in soon; that he chose not to ensure miners were removed or even knew of the fan stoppage; and that he did so despite instruction to go to the mine to check out the alarm in the event he could not contact someone over the phone. *Id.* at 964.

D. Messrs. Allred's and Cooper's Failure to Act was Aggravated Because of Time, Proximity to the Incident, and Expertise.

1. Shane Allred

Mr. Allred was the shift foreman and the mine had designated him as the "responsible person" for reporting accidents to MSHA. He was therefore in a position to protect employee safety and health, and he was informed of a serious incident for which he called Conspec to contact a known EMT-trained miner, Dayna Anderson, and the county ambulance. Tr. 264, 265. Based on his experience and information available, I find Mr. Allred had reason to know that MSHA notification was required—both to ensure all assets were properly mobilized to help an injured miner, and to inspect the incident area to ensure the safety of others.

The dispositive issues are therefore whether Mr. Allred's omission was "aggravated," and as a subsequent defense, whether he had a reasonable, good faith belief that he was not required to report it. Because of the finding of failure to report, I find Mr. Allred failed to act to correct the condition. His inaction was also a result of aggravated conduct more than ordinary negligence.

The following unwarrantable failure findings are imputed to Mr. Allred, as he was at the mine and was the first person notified. First, as found above, he had knowledge of the violation. Next, I consider the incident to be sufficiently obvious to require reporting. His violation posed a high degree of danger because MSHA was unable to assist in ensuring an optimal response to the accident, and miners continued to be present and work in the area without an MSHA inspection to validate the safety of the longwall for other miners. This danger is further demonstrated by the fact that there was a similar rib roll days earlier that, *luckily*, did not injure any miners. Finally, his violation was extensive in that it affected the entire working longwall.

I do not even consider this from the point of Mr. Allred actually observing Mr. Adams and his injuries. Messrs. Allred, Bonnanci, and Anderson all testified that Mr. Allred's travel time and the time required to uncover Mr. Adams took nearly or more than thirty minutes after notification. Tr. 92, 235, 266. There is testimony that Mr. Allred immediately called Conspec, and other testimony demonstrates that he could have inquired further into Mr. Adams' on the call with Charlie Wilson while he drove to the site. *See supra* note 36.

As in *Matney*, Mr. Allred should have known of the high degree of danger from the readily apparent nature of the incident. Further, Mr. Allred had the primary responsibility to gather information about incidents, assess the hazardous conditions, and take necessary steps to address it to protect miners. He was clearly in a position to protect miners by notifying MSHA of the accident, but failed to do so. The evidence indicates that Mr. Allred conducted minimal fact-finding regarding the accident and attendant injuries during the reporting period. Had Mr. Allred taken more careful and thorough action, he would have noted the obvious and highly dangerous nature of the accident and the potential for continuing danger. The record thus compels the conclusion that a foreman, exercising reasonable care, would have apprehended the full scope of the danger presented by the hazardous rib conditions and notified MSHA.

A good faith belief that an incident is not reportable based on remaining uninformed for the statutory fifteen-minute duration is unreasonable. *See Mainline Rock & Ballast, Inc*., 693 F.3d at 1189 (affirming a reporting violation because the superintendent was "remarkably non-inquisitive" about the injuries and holding that he did not "have the discretion to remain uninformed"). Mr. Allred's belief that he was not in violation of the reporting standard was not reasonable. He could have reported the accident based on the nature of the ground movement and the same concerns that prompted him to direct Conspec to call an ambulance and to send Mr. Anderson to the scene of the accident.

For at least thirty minutes, apparently with a working means of communication, Mr. Allred remained "remarkably uninquisitive" about Mr. Adams' possible injuries. He had fifteen minutes from notification at 5:08 to comply by notifying MSHA. He had sufficient information—based only on a miner covered in coal, and no further updates—to require a prudent miner of his experience to notify MSHA.

Even if he believed in good faith that he did not have enough information, there is no evidence in the record showing that he inquired in detail about Mr. Adams' condition. He could have done so while on the way to the scene, and certainly could have at the scene. While a late accident report might have been a violation, it would have enabled the agency to respond promptly, and the omission would not have been aggravated.

When asked why he requested an ambulance, Mr. Allred said, "I assumed the worst." Tr. 288. This was the appropriate response to a serious unplanned ground movement that covered a miner in coal. At the moment Mr. Allred learned of the incident, he knew enough to act quickly—immediately, at once, and without delay—to seek medical attention for Mr. Adams, based on the circumstances reported to him, but he did not call MSHA.

I therefore find Shane Allred individually liable under section 110(c). While I find that his good faith belief was unreasonable, it appears that Mr. Allred's understanding is consistent with that of upper mine management and that his failure to notify the agency was the result of improper training and a misapprehension of the law by his superiors.

I further note that at the hearing he was a forthright witness who did not try to avoid accountability for his actions, and that his response to ensure care and assistance for Mr. Adams was commendable. I therefore assess a penalty of $1,000.00.

2. Michael Cooper

Mr. Cooper was the safety manager and was immediately informed by Conspec about a miner being buried in coal. He was therefore in a position to protect employee safety and health, and he personally informed three of the other respondents about the incident. Based on his experience, information available, and the specialized nature of his position, I find Mr. Cooper had reason to know that MSHA notification was required.

The dispositive issues are therefore whether Mr. Cooper's omission was "aggravated," and as a subsequent defense, whether he had a reasonable, good faith belief that he was not

required to report it. Because of the finding of failure to report, I find Mr. Cooper failed to act to correct the condition. His inaction was also a result of aggravated conduct more than ordinary negligence.

The same unwarrantable failure findings attributed to Mr. Allred are similarly attributable to Mr. Cooper. At best, it is possible to assert that Mr. Cooper had little familiarity with the August 20 rib roll, because he was on vacation at the time. Tr. 320. It is likely, however, that as the safety manager, he would have reviewed the occurrence upon return; especially since mitigating actions were apparently taken—e.g., mesh and props were installed in the wake of the incident.

Mr. Cooper is particularly liable regarding the degree of danger because as a safety professional, he should have better understood the potential risks stemming from MSHA's inability to inspect safety for other miners before they continued operations in the area. Mr. Cooper, as the safety manager, should understand that requirement more than any other respondent. Finally, his violation was extensive because it affected the entire working longwall.

Mr. Cooper's belief that he complied with the standard in not reporting was not reasonable. He similarly remained "remarkably uninquisitive" about the possible injuries after he was informed of the burial by Conspec and notified each of the Respondent managers. At the same time, it is apparent that Mr. Cooper also was not properly trained by the mine to fully appreciate the duty to report immediately if there is any doubt about the seriousness of the injuries. As a safety professional, he should have known better than Mr. Allred, but I do find some mitigation for his failure.

I therefore find Michael Cooper individually liable under section 110(c) and assesses a penalty of $1,500.00.

3. The remaining respondents are not individually liable because of the notification time, lack of evidence of personal involvement in the violation, and attenuation.

It was not determinatively established at hearing that Messrs. Gordon, Wilson, or Tanner were notified within the reporting window. Technically and narrowly, then, the violation had already occurred before they were in a position to have done anything about it.

Nor was there any evidence that any of the three participated in, directed, or authorized the failure of Mr. Allred or Mr. Cooper to notify MSHA. While managers should be on notice that such an event has the reasonable potential to cause death and is immediately reportable, a finding that higher-level managers are liable for failure to report after the initial window would incentivize a policy of limiting access to possible reports to prevent liability.

Operators need to educate and empower first-line supervisors, or "responsible person(s)," to notify MSHA, and those persons are rightly responsible, especially when they are the first ones notified and closest to the accident site and thus most able to assess the situation. In this case, the decision-making authority was appropriately delegated to Mr. Allred, but it appears that

neither he nor Mr. Cooper was properly instructed on the requirements of the rule, as MSHA has explained them in its preamble and as the Commission has further elaborated in its decisions.

This is a failure of the mine management generally, but there is insufficient evidence to specifically hold that either Mr. Gordon, Mr. Wilson, or Mr. Tanner did anything to repress or discourage reporting to MSHA.

I am concerned that the same incuriosity exhibited by Messrs. Allred and Cooper could be attributed to the other three individual Respondents. But they appeared to be laboring under the same misapprehension of the law.

Further, Messrs. Gordon, Wilson, and Tanner were notified secondarily by Mr. Cooper, specifically a safety professional, and may have assumed he was getting direct information. They appropriately relied on his assessment of the severity, even if he, and they, misperceived the standard for reporting.

It might have been possible for the Secretary to argue, and show, that the failure to ask more probing questions about Mr. Adams' condition or how they occurred constituted a continuation of the violation that materially impeded MSHA's response. But I decline to extend the reporting requirement in this context. It might be wise for MSHA to incentivize corrections by upper-level management by providing a safe harbor for managers and operators who correctly determine that a duty to report exists after the 15 minute reporting limit has expired, but this is a policy question beyond the scope of my duties.

I therefore find that there is insufficient evidence to sustain individual Section 110(c) liability against Respondents Gordon, Tanner, and Wilson. However, I have taken into account the mine's failure to properly educate its personnel in the need to notify MSHA when in doubt in imposing a high penalty against the operator for this violation.

VII. CONCLUSION

It is **ORDERED** that Order No. 8541892 be **AFFIRMED** as assessed.

It is also **ORDERED** that for Order No. 8541891, the negligence be **MODIFIED** from "High" to "Moderate," and the "Unwarrantable Failure" designation be **REMOVED**.

It is also **ORDERED** that individual liability assessments against Shane Allred and Michael Cooper be **AFFIRMED**, and those against Jed Gordon, Jake Wilson, and Dewey Tanner be **VACATED**.

It is also **ORDERED** that Shane Allred and Michael Cooper pay the Secretary of Labor the assessed penalties of $1,000.00 and $1,500.00, respectively.

Finally, it is **ORDERED** that the Respondent pay the Secretary of Labor the assessed penalty of $75,000.00 within 30 days of the date of this decision.[50]

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

Distribution (First Class Mail and email):

Jason S. Grover, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22202, grover.jason@dol.gov

Rebecca Mullins, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22202, mullins.rebecca.w@dol.gov

R. Henry Moore, Fisher & Phillips LLP, Six PPG Place, Suite 830, Pittsburgh, PA 15222, hmoore@fisherphillips.com

[50] 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
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933
FAX: 202-434-9949

May 23, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. GREENBRIER MINERALS, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0166 A.C. No. 46-09514-569163 Mine: Muddy Bridge

AMENDED DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a Petition for Assessment of a Civil Penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The motion is brought by a non-attorney representative, known as "conference and litigation representative ("CLR"). The CLR has filed a motion to approve settlement of the violations involved in this matter. The parties have moved to approve the proposed settlement as follows:

Citation/Order No.	MSHA's Proposed Assessment	Settlement Amount	Modification
WEVA 2023-0166			
9568959	$1,069.00	$535.00	Modified from "Reasonably Likely" to "Unlikely", and consequentially removing the "Significant and Substantial" designation
TOTAL	**$1,069.00**	**$535.00**	**50% reduction in penalty from regular assessment figure**

Involved in this matter is a section 104(a) citation for a now-admitted violation of 30 C.F.R. §75.1725(a). That standard, titled "Machinery and equipment; operation and maintenance," provides at the cited subsection that "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

In issuing the citation, MSHA Inspector Emory Pack found that a Mac 12 emergency ride, company number 001, had a non-functioning parking brake. The inspector noted that the machine is used to transport miners from the end of the track to the No. 1 section. Petition for Civil Penalty at 17. As the inspector marked the violation as reasonably likely to result in an injury producing lost workdays or restricted duty, he properly designated it as significant and substantial. The negligence was listed as moderate. *Id.*

That the inspector properly so evaluated the non-functioning brake was borne out by the fact that the parking brake was replaced. *Id* at 18.

The Motion asserts the following in support of the modification and the 50% penalty reduction:

> Respondent disputes the level of likelihood of injury characterized by the citation. Respondent contends the ***service brakes***[1] on the personnel carrier were working properly when tested. **Respondent further contends the terrain the personnel carrier travels is slightly rolling and not very steep. When the personnel carrier is parked and unattended, the transmission is left in reverse, and the wheels are turned into the rib.** Respondent states this citation does not have a confluence of factors to support the S&S determination. The Secretary does not necessarily agree with Respondent's position but does recognize a legitimate factual and legal dispute and believes that settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act. Therefore, the Secretary agrees to modify the citation from "Reasonably Likely" to "Unlikely" and to delete the "Significant and Substantial" designation. The Secretary also agrees to accept a reduced penalty, which reflects the modification to the issuance.

Motion at 3 (emphasis added).

Analysis

The support offered is a display of irrelevant considerations, because it is entirely composed of factors that are not to be considered, per the clear directions from the United States Courts of Appeals. Those Courts have rejected the 'alternative safety measures' raised by the Respondent when analyzing the significant and substantial designation. Accordingly, redundant safety measures are not to be considered in evaluating a hazard.

For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

> "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only.

[1] The citation was for the non-functioning *parking brake*, <u>*not the service brake*</u>.

> It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' Cumberland Coal, 717 F.3d at 1029; see also Buck Creek, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Further regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

> interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"—that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id.* at 1028–1029.

Id. at 118-119.

Such irrelevancies do not acquire legitimacy in the context of settlements because to do so, would mean that a lesser standard is applied. It is disconcerting that the Secretary's non-attorney representatives continue to advance these rejected justifications[2] for penalty reductions, as it displays a lack of respect for the holdings of the Courts of Appeals and Congress' explicit direction that penalties must be sufficient to encourage operators to comply with safety and health standards, as opposed to noncompliance with the attendant benefit of paying greatly reduced penalties.

Despite the above observations, the Court is not permitted to make reasonable inquiry about settlement motions. With that restriction, the Court has considered the Secretary's Motion and approves it solely on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. The Court must and does fully adhere to all Commission precedent. Per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

[2] As the CLRs are not attorneys, the Court realizes they simply follow the orders from the Solicitor as to the claimed justifications, even if they are without merit.

Accordingly, the motion to approve settlement is **GRANTED**, the citation contained in this docket is **MODIFIED** as set forth above, and it is **ORDERED** that **Greenbrier Minerals, LLC** pay the Secretary of Labor the sum of **$535.00** within 30 days of this order.[3]

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

Distribution:

Ray A. Cartwright, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 100 YMCA Drive, Madisonville, KY 42431 cartwright.ray@dol.gov

Lorna Waddell, Legal Counsel, DINSMORE & SHOHL LLP, 215 Don Knotts Blvd., Suite 310, Morgantown, WV 26501 lorna.waddell@dinsmore.com

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

It is vital to include Docket and A.C. Numbers when remitting payments.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

May 24, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. CENT 2022-0010-M A.C. No. 41-00009-542457
v.	
CACTUS CANYON QUARRIES, INC., Respondent	Mine: Fairland Plant & Qys

DECISION

Appearances: Felix R. Marquez, Esq.,[1] Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Petitioner;
Andy Carson, Esq., Marble Falls, Texas for Respondent.

Before: Judge Manning

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 ("MSHA"), against Cactus Canyon Quarries Inc. ("Cactus Canyon") 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"). The parties presented testimony and documentary evidence at a hearing held via the Commission's secure video conferencing system and filed post-hearing briefs. Three section 104(a) citations with a total proposed penalty of $375.00 were adjudicated at the hearing. Although I have not included a detailed summary of all evidence or each argument raised, I have fully considered all the evidence and arguments. For reasons set forth below, I **MODIFY** Citation No. 9643094 and **AFFIRM** Citation Nos. 9643093 and 964395.

Cactus Canyon Quarries operates the Fairland Plant (the "facility"), a surface facility in Burnet County, Texas. The facility prepares rock for use in terrazzo flooring. Andy Carson[2] is the president of Cactus Canyon and is also an attorney. Carson represented Cactus Canyon at the

[1] Felix Marquez entered his appearance as counsel for the Secretary on December 13, 2022. Prior to that date, the case was handled by a different attorney in the Dallas Solicitor's office.

[2] Carson is a licensed attorney, geologist by training and practice, and the President and head of operations for Cactus Canyon. Ex. F. Carson assisted with initial construction of the Fairland Plant. Tr. 139. Carson and another individual handle all electrical installation repairs at the Fairland Plant. Tr. 139.

hearing and testified as its only witness. MSHA Inspector Ray Hurtado[3] was the Secretary's sole witness at the hearing.

I. BACKGROUND AND PRELIMINARY MATTERS

This case has a complicated history. On October 4, 2021, Cactus Canyon mailed its Notice of Contest for the three subject citations to MSHA. Subsequently, on November 26, 2021, i.e., more than 45 days after receipt of the Notice of Contest[4], the Secretary filed a Motion for Extension of Time to File Initial Pleading citing the need for "additional time to allow the parties to thoroughly explore settlement in this matter." The motion asked for a 60-day extension of time and did not provide any justification for the delay in filing the penalty petition other than saying that the time could be used to settle the case. November 26, 2021 was the Friday after Thanksgiving and the motion noted that the Secretary's counsel emailed the operator on that date to see if it objected to the motion but did not receive a response. On December 1, 2021, which was three workdays after the Secretary filed the motion for extension of time, the Commission's Chief Administrative Law Judge (the "Chief Judge") found that the Secretary had shown good cause and issued an order (the "Chief Judge's Order") granting the Secretary's motion and affording the Secretary until January 18, 2022, to file the initial pleading.[5]

After first asking the Chief Judge to reconsider the Chief Judge's Order, which was not granted, Cactus Canyon filed a petition for discretionary review ("PDR") with the Commission on December 23, 2021, challenging the validity of the Chief Judge's Order and asking that the

[3] Hurtado has been an MSHA inspector for 10 years. Tr. 7. As part of Hurtado's training to become an inspector he attended the National Mine Academy and was trained on electrical hazards. Tr. 9, 69-70. Hurtado conducts 60 to 80 inspections per year and estimates that 80 to 90 percent of the job sites he inspected had electrical hazards that he cited. Tr. 10-11. Prior to working for MSHA Hurtado worked for 10 years in the highway construction industry. Tr. 7-8, 68. During his time in the highway construction industry Hurtado worked as a job foreman at sites where electrical tools were used and inspected daily. Tr. 69. Although Hurtado is not a certified electrician, at hearing he demonstrated a reliable working knowledge of residential electrical wiring. Tr. 71-72.

[4] Commission Procedural Rule 28(a) requires the Secretary to file his petition for assessment of civil penalty ("penalty petition") within 45 days of receipt of an operator's notice of contest. 29 C.F.R. § 2700.28(a).

[5] Commission Rules 8(a) and 10(d) allow a party eight days, excluding weekends and holidays, to file an opposition to a motion. 29 C.F.R. § 2700.8(a) and 10(d).

case be dismissed. On January 4, 2022, the Commission issued a notice stating that "after consideration by the Commissioners, no two Commissioners voted to grant the petition [for discretionary review] or to otherwise order review."[6]

On January 10, 2022, Cactus Canyon filed a petition for review of the Commission's order denying the PDR with the U.S. Court of Appeals for the Fifth Circuit. (Case No. 22-60030).

On January 18, 2022, the Secretary electronically filed the petition for assessment of penalty with the Commission and served the same upon Cactus Canyon via email. After Cactus Canyon filed its answer, the case was assigned to me on February 14, 2022.

On April 27, 2022, I granted the Secretary's motion to stay the case, over Cactus Canyon's objection, pending the outcome of the petition for review before the Fifth Circuit. I subsequently lifted the stay on July 20, 2022, two days after the Fifth Circuit dismissed the petition for review for lack of subject matter jurisdiction.[7]

A hearing in this case was held on February 28, 2023. Several motions were filed by the parties prior to the hearing, including a motion for summary decision filed by Cactus Canyon on May 9, 2022. Among other things, the motion raised the same arguments relating to the chain of events surrounding the Chief Judge's Order that were raised in both the motion to reconsider and PDR, asked that the citations be vacated, and the case dismissed. I denied the motion by order dated August 18, 2022. *Cactus Canyon Quarries Inc.*, 44 FMSHRC 609 (Aug 2022) (ALJ). In denying the motion for summary decision, I relied to a large extent on the fact that the Chief Judge determined that good cause had been shown for the Secretary's motion for an extension of time to file the penalty petition, that his determination was the law of the case, and that I was not in a position to overturn his determination.

II. JURISDICTION

One of the principal issues in this case is whether MSHA had jurisdiction to inspect Cactus Canyon's Fairland Plant on July 27, 2021, the date the subject citations were issued. The Secretary argues that the Fairland Plant is subject to Mine Act jurisdiction because mineral

[6] In its motion for reconsideration and the PDR, Cactus Canyon argued that the Commission's decision in *Salt Lake County Road Dep't.*, 3 FMSHRC 1714 (July 1981), as well as other Commission case law, provides that the Secretary must show good cause for its failure to timely file a penalty petition and that the Secretary failed to do so in this case.

[7] Through every stage of this litigation Cactus Canyon has maintained that the Chief Judge's order was invalidly issued. Cactus Canyon has argued the Secretary failed to timely file and serve the penalty petition or show good cause for why the late filing should be excused and has consequently asked that the case be dismissed.

milling takes place at the facility.[8] Cactus Canyon contends, among other things, that the nature of its operation has changed in recent years with the result that the facility no longer fits within the definition of "coal or other mine" in Section 3(h)(1) of the Mine Act. 30 U.S.C. § 802(h)(1).[9] For reasons set forth below, I find MSHA had jurisdiction to inspect Cactus Canyon's Fairland Plant and issue the subject citations.

a. Summary of Testimony on the Issue of Jurisdiction

Both Hurtado and Carson offered testimony relating to the issue of MSHA jurisdiction to inspect the Fairland Plant. Hurtado initially testified that rock or mineral was extracted at the Fairland Plant site, but later conceded no extraction occurred there and, instead, Cactus Canyon brought in all material from other locations, including Mexico, for processing at the Fairland Plant. Tr. 65-67, 75.

Hurtado testified that milling, in the form of crushing, screening, and sizing of material, did occur at the facility. Tr. 76-77. Specifically, Hurtado testified that he observed mobile equipment that loaded material into "two independent plants, both equipped with screens for sizing rock and crushers to make a certain size of product[,]" as well as dump trucks that moved material as needed. Tr. 77, 81.

Carson testified regarding the history of the Fairland Plant and its operation. While the facility previously produced material for architectural precast concrete projects, it currently produces material for terrazzo stone floors from dimension stone. Tr. 141, 144, 148.

According to Carson, no extraction occurs at the Fairland Plant and all dimension stone processed into terrazzo stone at the facility is bought from other sources.[10] Tr. 149. However,

[8] The Secretary spent much of his brief arguing that the Fairland Plant is not a "borrow pit" and, as a result, does not qualify for the "borrow pit exception" to Mine Act jurisdiction in the MSHA-OSHA Interagency Agreement. Sec'y Br. 5-10. However, I need not address that issue because Cactus Canyon did not argue at hearing, in its brief, or in its reply brief that the Fairland Plant is a borrow pit.

[9] In previous cases, Cactus Canyon stipulated to MSHA jurisdiction. *See Cactus Canyon Quarries*, 44 FMSHRC 289 (April 2022) (ALJ). Cactus Canyon now maintains that its operations have changed since that time so that the facility should be inspected by OSHA and not MSHA.

[10] Carson testified Cactus Canyon brings in rock from Mexico, a Vulcan Materials Mine, and a from "a Texas landowners' mine." Tr. 149-150. Although some of the rock that arrives at the facility is a minimum of five inches in diameter, other rock is a minimum of ten inches in diameter. Tr. 147.

Carson also acknowledged that 10 to 15 percent of Cactus Canyon's business comes from "something that we've mined ourselves."[11] Tr. 152.

Carson explained that dimension stone is delivered to the Fairland Plant via truck or rail. Following delivery, the stone may be laid out on concrete, washed/sprayed with water, and inspected to make sure it meets certain specifications, including proper color and size, before being sorted and stored in piles by color on the property. Tr. 148, 153. At current sales rates, the piles of dimension stone can remain on-site anywhere from 20-45 years. Tr. 147-148. According to Carson, on average, 20 years pass between when the dimension stone is placed into a pile and then processed into terrazzo stone at the Fairland Plant. Tr. 150. Carson intends to make all the dimension stone on site into terrazzo stone or find another market for the material in its current condition. Tr. 170.

According to Carson, to get the stone to the right size and shape for Cactus Canyon's terrazzo stone customers, the Fairland Plant utilizes a slow, deliberate, "closed circuit system" where the dimension stone is fed into a hopper, crushed, and then oversized material is screened out so it can be recirculated and "crushed down," or "size reduced," again. Tr. 146, 171, 175-176. On average, materials pass through the system five to six times before the correct size and shape is reached, with only 10-15 percent of the material lost to fines.[12] Tr. 145, 147, 152, 176. The same process is used for all rocks on the property. Tr. 177.

Carson testified that almost all material produced is bagged and sold. Tr. 176. He stated that "[t]oday we sell across North America and occasionally the Far East." Tr. 147.

b. Findings of Fact and Conclusion of Law on the Issue of Jurisdiction

Section 4 of the Mine Act states that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. Accordingly, for MSHA to have had jurisdiction to inspect the Fairland Plant, the evidence must establish, first, that the Fairland Plant was a "coal or other mine" under the Act

[11] Although Carson did not so state, Cactus Cayon may have mined this rock at the "Texas landowner's mine."

[12] Carson testified that the dimension stone is reduced to a size less than 3/8 of an inch, but greater than 1/16 of an inch, and "almost purely cubicle in shape." Tr. 145,151-152. In order to get the correct shape, the plant "can't run very fast at all[,]" and the material goes through "a lot smaller cone crushers" that are run "a lot wider" than the plant previously used. Tr. 145-146. Carson acknowledged some material brought to the Fairland Plant must be broken with a hammer attached to an excavator before it can be processed. Tr. 175. Carson testified that "[a]ll we're doing is size reducing[,]" and asserted that "none of the stone delivery is crude or ore. It's all finished. We don't separate minerals from the gangue or crude or ore. There is never any grind, concentration, washing, drying, roasting, pelletizing, centering, evaporating, calcining, kiln treatment, sawing, or cutting the stone, heat expansion, retorting, leaching, briquetting at this location." Tr. 150-151.

and, second, that the products of the Fairland Plant enter commerce or the operation or products of the Fairland Plant affect commerce.

Is the Fairland Plant a "coal or other mine" under the Mine Act?

In the case at hand, the Secretary seeks to establish Mine Act jurisdiction over the Fairland Plant via subsection (C) of section 3(h)(1) of the Act, which, in pertinent part, defines a "coal or other mine" to include "structures, facilities, equipment, machines, [and] tools . . . used in … the milling of … minerals." 30 U.S.C. § 802(h)(1).[13]

The Mine Act does not define the term "milling". When a statutory term is not expressly defined it should be accorded its commonly understood definition. *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). In *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 674-675 (July 2002) the Commission, when analyzing the commonly understood definition of "milling" and related terms, stated the following:

> Within the industry, milling is defined as: "The grinding or crushing of ore. The term *may* include the operation of removing valueless or harmful constituents … ," while mill is defined as a "mineral treatment plant in which crushing, wet grinding, and further treatment of ore is conducted." . . . [*Dictionary of Mining, Mineral, and Related Terms* 344 (2d ed. 1997) ("*DMMRT*")] (emphasis added); *see also Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914 (Sept. 2001) (using *DMMRT* to determine usage in mining

[13] The Mine Act defines "coal or other mine" as follows:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

30 U.S.C. § 802(h)(1).

> industry). The ordinary meaning of "to mill" is "to crush or grind (ore) in a mill," and the term "a mill" is defined as "a machine for crushing or comminuting some substance." *Webster's Third New Int'l Dictionary (Unabridged)* 1434 (1993); *see also Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1060 (Sept. 2000) ("Commission … look[s] to the ordinary meaning of terms not defined by statute").

Although the Mine Act does not expressly define the term "milling," it does grant the "Secretary discretion, within reason, to determine what constitutes mineral milling. . . [.]" *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984).[14] In 1979 the Secretary exercised that discretion when MSHA and OSHA entered into an interagency agreement to delineate certain areas of authority between the two agencies and set forth guidelines for resolving jurisdictional questions involving milling. MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (April 17, 1979) amended by 48 Fed. Reg. 7,521 (Feb. 22, 1983) ("Interagency Agreement" or "the Agreement"). Among other things, the Interagency Agreement clarifies the agencies' intent that the Mine Act, as opposed to the OSH Act, be applied to milling operations, and reiterates Congress's intent that jurisdictional doubts be resolved in favor of inclusion of a facility within coverage of the Mine Act.[15] *Id*.

Appendix A to the Agreement describes "milling" as a process "to effect a separation of the valuable minerals from the gangue constituents of the material mined" as well "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." 44 Fed. Reg. at 22829.

In addition, Appendix A also contains a list of "general definitions of milling processes for which MSHA has authority to regulate[,]" which includes the terms "crushing" and "sizing." "Crushing" is defined as "the process used to reduce the size of mined materials into smaller, relatively coarse particles[,]" and "may be done in one or more stages, usually preparatory for the sequential stage of grinding, when concentration of ore is involved." 44 Fed. Reg. at 22829. "Sizing" is defined as "[t]he process of separating particles of mixed sizes into groups of

---

[14] Section 3(h)(1) of the Act states that "[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment[.]" 30 U.S.C. § 802(h)(1).

[15] In *Donovan v. Carolina Stalite Co*. the D.C. Circuit Court of Appeals recognized "every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h). The jurisdictional line drawn by the statute rests upon the distinction, which is somewhat elusive, to say the least, between milling and preparation, on the one hand, and manufacturing, on the other. Classification as the former carries with it Mine Act coverage; classification as the latter results in Occupational Safety and Health Act regulation." 734 F.2d 1547, 1551 (D.C. Cir. 1984).

particles of all the same size, or into groups in which particles range between maximum and minimum sizes." 44 Fed. Reg. at 22829-22830.

Although the Interagency Agreement is not dispositive, it can assist in determining whether the Secretary's application of the term "milling" to a particular facility is reasonable. *See Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984).

I find that Cactus Canyon engaged in "milling" at the Fairland Plant by crushing the dimension stone to reduce the size of the material to a cubic shape that can be used in the construction of terrazzo flooring. Hurtado and Carson both testified to the presence of crushers at the Fairland Plant. Carson explained that, at the facility, dimension stone is taken from the on-site piles, broken up with a hammer attached to excavator if needed, dropped in a hopper, crushed, albeit slowly and deliberately, screened for a particular size, then recirculated through the same system as many times as necessary to achieve the correct size and shape for Cactus Canyon's terrazzo stone customers. Carson himself stated that "[a]ll we're doing is size reducing." Tr. 150.

As outlined in *Watkins Eng'rs & Constructors*, the mining industry's understanding of the terms "milling" and "mill," as well as the common dictionary definitions of "a mill" and "to mill" all contemplate the crushing of material. Here, Cactus Canyon was crushing dimension stone to produce stone used to construct terrazzo flooring. Moreover, Cactus Canyon's use of crushers to reduce the size of the dimension stone clearly amounted to "crushing" as that term is defined in the Interagency Agreement.[16]

Cactus Canyon engaged "milling" at the Fairland Plant by "sizing" the material it processed. In *State of AK Dept.of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014), the Commission cited the Interagency Agreement's inclusion of "sizing" in its list of milling processes and found that the operator "clearly engag[ed] in 'milling' under section (h)(1)" where it used a screen to separate material "based on size, with oversized rock separated out entirely." Here, like the operation at issue in *State of AK Dept.of Transp.,* the Fairland Plant screened material to separate that which was correctly sized from that which was still oversized. While the operation at issue in *State of AK Dept.of Transp*. screened out oversized rock, wood and trash from the material it was extracting, here, as discussed above, Cactus Canyon subjected

[16] The *DMMRT* 135 (2d ed. 1997), defines "crushing" as "size reduction into relatively course particles by stamps, crushers, or rolls." The Interagency Agreement's definition of the "crushing," *supra*, is almost identical to that of the DMMRT, but also includes a supplemental statement that "[c]rushing *may* be done in one or more stages, *usually* preparatory for the sequential stage of grinding, when concentration of ore is involved." Cactus Canyon, in its brief, seemingly argues that this supplemental statement changes the definition of "crushing" to *require* that the act be preparatory to the sequential stage of grinding and concentration of ore. CC Br. 3-4, 9-10. However, the supplemental statement says only that crushing "may" be done in one or more states and "usually" is preparatory for grinding when concentration of ore is involved. Given the use of the qualifying terms "may" and "usually," I decline to find that "crushing," as defined in the agreement, *requires* that the act be preparatory to the sequential stage of grinding and concentration of ore.

oversized material to further "milling" via additional crushing to further reduce the size and shape of the rock. Ultimately, the purpose of screening and crushing the material was to produce a product that, according to Carson, was less than 3/8 of an inch, but greater than 1/16 of an inch, and "almost purely cubicle in shape." Given that Cactus Canyon crushed and screened rocks of various size to produce a product between a maximum and minimum size, I find that it clearly engaged in "sizing" material as that term is defined in the Interagency Agreement.

Finally, I find that the processes described above and utilized at the Fairland Plant fit within the Interagency Agreement's description of "milling." Cactus Canyon utilized those processes to reduce the dimension stone to a certain specified size and shape so it could be sold for use in terrazzo stone flooring. At hearing, when responding to a question the court asked regarding the processes used at the facility, Carson stated that "when we're doing it right now, we lose 10 percent to fines. 15 percent to fines." Tr. 176. The materials lost to fines had to be removed from the terrazzo stone product Cactus Canyon produces and sells.[17] The separation of valuable terrazzo stone material from fines generated during crushing and sizing is the type of process contemplated by the Interagency Agreement's definition of milling, i.e., a separation of the valuable minerals from materials that cannot be used in terrazzo flooring.[18]

Based on the above analysis, I find that "milling," as that term is understood both in the mining industry and commonly, occurred at the Fairland Plant. Moreover, I find that the Fairland Plant's operation squarely fits within the Interagency Agreement's definitions of "crushing" and "sizing" and that the Secretary reasonably applied the term "milling" to the facility.

The Commission has explained that "milling" "independently qualifies . . . [an] operation as a 'mine' within the meaning of the Act." *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). Moreover, the legislative history of the Act makes clear Congress intended "that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and . . . that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., L*egislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("Legis. Hist"). Accordingly, I find that the Fairland Plant is a mine under the Act because "milling" occurred at the facility.

Before turning my attention to whether the products of the mine enter commerce or the operation or products of the mine affect commerce, I must first address one of Cactus Canyon's primary jurisdictional arguments, which merits further discussion.

---

[17] Carson explained that the terrazzo industry depends on good quality control. Tr. 144.

[18] I note that in *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 675 (July 2002) the Commission stated that "[i]n enacting the Mine Act, Congress did not impose upon the Secretary a technical definition of milling based on the separation of valuable from valueless materials, nor in the Act's legislative history did it intimate that separation was critical to the determination that 'milling' took place."

Cactus Canyon argues the Fairland Plant is not subject to MSHA jurisdiction because it is not a "mine" under the Act, nor is it at, adjacent to, appurtenant to, or connected to an area of land where minerals were extracted from their natural deposits. CC Br. 6-8. In support of its argument, Cactus Canyon cites the Commission's decision in *KC Transport, Inc.*, 44 FMSHRC 211 (Apr. 2022)[19], as well as two cases relied upon by the Commission in that decision, i.e., *Maxxim Rebuild Company LLC v. FMSHRC*, 848 F.3d 737 (6th Cir. 2017) ("*Maxxim*"), and *Dep't of Labor v. Ziegler Coal Co.*, 853 F.2d 529, 533-34 (7th Cir. 1988) ("*Ziegler*").

I disagree with Cactus Canyon's interpretation. None of the three cited cases involved milling,[20] and language in those decisions contradicts Cactus Canyon's asserted interpretation.[21] Moreover, Cactus Canyon's interpretation contradicts precedent of the Commission and courts that "milling" operations independently qualify as "mines" under the Act. *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994); *see Sec'y of Labor v. National Cement Co. of Cal. Inc.*, 573 F.3d 788, 795 (D.C. Cir 2009) (subsection (C) of the Act's definition of "mine" can reach facilities "not located within an extraction area."); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551-1552 (D.C. Cir. 1984) (the Act "does not require that . . . [structures and facilities used in milling] be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property where such extraction occurs.")

---

[19] The Commission's decision in *KC Transport* is currently on appeal to the D.C. Circuit Court of Appeals, Docket No. D.C. No. 22-1071.

[20] *KC Transport* involved the Secretary's attempt to exert jurisdiction over trucks parked at a maintenance facility, as well as the facility itself, which was operated by an independent trucking company that provided hauling services to multiple businesses, including coal operators. *Maxxim* involved the Secretary's attempt to exert jurisdiction over a shop that made and repaired mining equipment. *Ziegler* involved a question of jurisdiction over a repair shop. In each case, the facility, shop or equipment was not on, adjacent, or appurtenant to an extraction, milling, or preparation site.

[21] In *KC Transport* the Commission noted that the Coal Act, the predecessor to the Mine Act, included in its jurisdiction "'lands' where extractive mining, milling, or preparation occurs." 44 FMSHRC at 218. There, the Commission expressly acknowledged that in passing the Mine Act Congress did not intend to expand the scope of jurisdiction and stated that "MSHA must thoroughly inspect operations conducting mining, milling, and preparation activities and all instruments and instrumentalities used in such operations." 44 FMSHRC at 219-220. Similarly, in *Maxxim*, the Sixth Circuit Court of Appeals noted that the text and context of the Mine Act "limit the agency's jurisdiction to locations and equipment that are part of or adjacent to extraction, milling, and preparation sites." 848 F.3d at 744. Finally, the Commission in *KC Transport* cited *Ziegler's* recognition of the "'geographical component' of the situs of a facility [that] . . . '[t]he statutory definition of a coal mine plainly contemplates that the facilities used in the work of extracting coal must be located on or below the area of land where the coal is extracted, *milled*, or prepared.'" 44 FMSHRC at 223 (emphasis added).

The Commission in *KC Transport* found that there is "locational" element to the Mine Act's definition of "coal or other mine." My reading of that decision, in conjunction with other case law, is that the locational element limits jurisdiction under subsection (C)[22] to "lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds" used in, or to be used in, or resulting from the work of extracting minerals, *as well as* "lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds" where minerals are milled or prepared. Here, although there was no extraction at the Fairland Plant, there was "milling."

Based on the above analysis, I find that the lack of an extraction site, on, adjacent to, or appurtenant to the Fairland Plant is not fatal to MHSA's assertion of jurisdiction over the facility.

Do the products of the Fairland Plant enter commerce or the operation or products of the Fairland Plant affect commerce?

The Secretary asserts that the products of the Fairland Plant affect interstate commerce and beyond because, according to Carson, they are sold "across North America and occasionally the Far East." Sec'y Br. 10. Cactus Canyon argues that because the dimension stone delivered to, and processed at, the Fairland Plant already entered commerce, the facility cannot be subject to Mine Act jurisdiction. CC Br. 3

The Commission has recognized that "[b]ecause Congress, in the Mine Act, intended to exercise the full reach of its authority under the Commerce Clause, the Secretary has a minimal burden to show that . . .[a mine's] operations or products affect interstate commerce." *Jerry Ike Harless Towing, Inc. and Harless Inc.*, 16 FMSHRC 683 (Apr. 1994); *State of AK Dept.of Transp.*, 36 FMSHRC 2642, 2645 (Oct. 2014).

I find that the Fairland Plant's products affect "commerce" as that term is used in the Act.[23] Carson testified at hearing that Cactus Canyon sells terrazzo stone produced at the Fairland Plant "across North America and occasionally the Far East." Tr. 147. I have already found that Cactus Canyon engaged in "milling." In *State of AK Dept.of Transp.* the Commission stated that "any mining or milling that an entity engages in for its own use constitutes 'commerce' under section 4 of the Mine Act." 36 FMSHRC at 2645. Here, Cactus Canyon not only engaged in milling, but also sold milled products "across North America" and other places. The Act's definition of "commerce" includes "trade . . . between a place in a State and any place

[22] Neither subsection (A) or (B) are at issue in the instant proceeding. As a result, my analysis and consideration of any locational element is restricted to subsection (C).

[23] Section 3(b) of the Mine Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof[.]" 30 U.S.C. § 802(b).

outside thereof[.]" 30 U.S.C. § 802(b). I find that Cactus Canyon's sale of terrazzo stone produced at the Fairland Plant "affected commerce" under the Act.

Cactus Canyon's argument that the Fairland Plant cannot be subject to Mine Act jurisdiction because the dimension stone had already entered commerce is unavailing.[24] Mine Act jurisdiction covers not only mines' whose products enter commerce, but also mine operations or products of those operations that affect commerce. Here, I found that the Fairland Plant's products affected commerce. The fact that most of the stone used in the milling process was purchased on the open market does not negate MSHA jurisdiction.

Finally, although not critical to my analysis, I note that Carson testified that "[t]oday we've only - - 10 percent of business, 15 percent of our business is something that we've mined ourselves." Tr. 152. If Cactus Canyon is milling material that it mined, then it stands to reason that the material would not enter commerce until Cactus Canyon milled it and sold it as terrazzo stone.

It must be noted that whether a facility is subject to Mine Act jurisdiction is factually dependent. I relied exclusively on the evidence presented at the hearing in this case. A change in a facility's operations, or different evidence produced at a hearing, could alter the result.

Having determined that the Fairland Plant's products affect commerce, I find that the Secretary had jurisdiction to issue the citations discussed below, two which were issued for conditions observed in structures related to bagging the milled material, and one of which was issued for a condition observed in an onsite maintenance shop.[25]

---

[24] In support of its argument, Cactus Canyon cites *Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078 (8th Cir. 1998) for an apparent "bright line" rule for jurisdiction "based upon where the output of the mine was processed into a marketable form." CC Br. 12-13. There MSHA was found to not have jurisdiction over an electric utility plant that bought crushed coal, then further crushed the coal and removed debris before burning it in its generator. However, the facts of that case are distinguishable from the case at hand. Unlike the Fairland Plant, the utility plant in *Herman* was not "in the business of selling a raw or processed mineral product. An electric utility sells electricity. The coal was used as an end product at the plant, and hence the utility was the final consumer of the coal." *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 592–93 (5th Cir. 2000). Here, Cactus Canyon was "in the business of processing, or as MSHA claims, 'milling,' a mineral product for sale to others" in the form of terrazzo stone. *Id*. The final product in this case is not the terrazzo stone made at the facility but rather the terrazzo flooring is constructed elsewhere.

[25] Carson argues that the citations were issued in areas that have "no relationship in time, in function, or in location to any 'Working Place' or 'Mill.'" CC. Br. 14, 15, 17. However, both the Mine Act and Interagency Agreement state that the Secretary "shall give due consideration to the convenience of administration resulting from the delegation to on Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical

(continued…)

III. CITATIONS AT ISSUE

a. Citation No. 9643093

On July 27, 2021, MSHA Inspector Hurtado issued Citation No. 9643093 under section 104(a) of the Mine Act for an alleged violation of section 56.12004 of the Secretary's safety standards, which states, in pertinent part, that [e]lectrical conductors exposed to mechanical damage shall be protected." 30 C.F.R. § 56.12004. The citation alleges:

> The power cables for the Inside Bagging Belt reverse switch had cracks in the outer jacket. The inner conductors were visible and exposed to damage. The switch is located near the bagging station that is operated by miners. The switch is used as needed during normal operations. This exposed miners using the switch to an electrical hazard and electrocution injuries from damage to the conductors.

Hurtado determined that an injury or illness was unlikely to occur but any injury could reasonably be expected to be fatal. He designated the violation as not being significant and substantial ("S&S"), one person would be affected, and the violation was the result of Cactus Canyon's moderate negligence. The Secretary proposed a civil penalty in the amount of $125.00.

Summary of Evidence

Inspector Hurtado testified about the conditions he observed and the reason why he determined that an injury was unlikely. He said that although the outer jackets on the two power cables had cracks in them, the insulation surrounding the conductors inside the cables was not damaged with the result that the copper wires were not exposed. Tr. 27, 44. Nevertheless, he believed that the insulated conductors were exposed to mechanical damage because of the cracks he observed in the outer jackets for both cables. Tr. 27-28. He determined that the condition could result in a fatal accident as the current in the conductors was 220 volts. Tr. 28. The inspector testified that these cracks must have developed over time and were caused by vibration and the stress placed on the outer jacket at the cited location. Tr. 57-58, 91, 100-01. Any miner who operates the bagging machine was exposed to the hazard because the cracks in the outer jacket were near the operating controls for the bagging unit. Tr. 35. Inspector Hurtado took photos of the condition he observed, and the Secretary relied on these photos as part of his proof of a violation. Ex. 6.

Inspector Hurtado further testified that "mechanical damage" is any damage to which a cable could be exposed including environmental damage. Tr. 84. In the area where the cited

---

[25] (…continued)
establishment." 30 U.S.C. § 802(h)(1), 44 Fed. Reg. at 22828. Here, the bagging and maintenance structures where the citations were issued were at the same physical establishment as the crushing plants and screens that were used for milling, i.e., the Fairland Plant. The Fairland Plant is located on one integrated piece of property. Ex. G

cracks were present there was no protection for the insulated conductors. Tr. 90. In addition, the cracks in the outer jacket would likely get larger over time because of the stress on the cables. He said that it was a matter of time before the insulation surrounding the copper wires would also crack thereby exposing the copper wires. Tr. 93. If the cables vibrate when the bagging machine is operating, the cracks in the outer jacker could develop more quickly. Tr. 101. The cited condition was abated when Cactus Canyon installed new cables.

Carson testified that because no copper was showing, the Secretary failed to show that any hazard was present. Tr. 160. In addition, because it would be difficult for anyone to get their fingers inside the cracks, no hazard was present. *Id*.

Analysis

A "conductor" is defined as "a material, usually in the form of a wire, cable, or bus bar, capable of carrying an electric current." 30 C.F.R. § 56.2. The language of the safety standard was designed to ensure that mines protect electrical conductors in locations where they are exposed to mechanical damage. Installing an electrical cable with an outer jacket meets the requirements of this standard. In this instance, Cactus Canyon installed two electrical cables that included an outer jacket that protected the inner electrical conductors from mechanical damage. Thus, when the cables were installed, Cactus Canyon met the requirements of the safety standard. I find that the evidence establishes that the cracks in the outer jacket of two cables had developed over time and that, more than likely, the cracks were created because the cables were bent at very extreme angle at the location of the cracks.[26] The cables appear in the photos to be bent to an angle of about 90 degrees. Ex. 6. This put the cables under stress and subject to slowly developing damage.

The issue is whether the cracks in outer jackets of electrical cables violated the safety standard. The standard requires that electrical conductors that are "exposed to mechanical damage" be protected. As a consequence, in order to meet his burden of proof for section 56.12004, the Secretary must establish that the cited cables were exposed to mechanical damage. For the reasons set forth below, I find that the Secretary met this burden.

The cracks in the outer jackets developed as a result of the environment where the cables were installed. It is not clear how long the cables had been in use, but I find that the evidence establishes that the cracks in the outer jacket had been developing for some time rather than from a sudden event. Nothing in the safety standard suggests that the damage that a conductor could be exposed to must be the result of blunt force in order for the standard to apply. These cracks exposed the inner insulated conductors to further environmental damage. The bagging room can get dusty. Dust and dirt can cause further degradation to the outer jacket and the inner conductors. In addition, it is likely that, if the condition was not abated, the cracks would expand thereby increasing the exposure of the insulated conductors to damage.

[26] The Secretary argues that the cited condition could have been caused by vibrations, but it is not clear that the cables were, in fact, subject to vibrations. The inspector never observed the bagging unit in operation and when asked if either cable vibrates when the bagging unit was in use, he simply replied "[i]t could." Tr. 93-94.

In *Northern Illinois Service Co*., 36 FMSHRC 2811, 2818 (Nov. 2014) (ALJ), the outer jacket of an electrical cable was torn for about a half of an inch exposing the inner insulated conductors. The power cable was located in an outdoor area. The inspector determined that the "breach in the cable's outer jacket exposed the inner electrical conductors to possible mechanical damage such as 'equipment, material, weather, and UV radiation.'" *Id.* Based on this evidence, the administrative law judge affirmed the citation and determined that "[a]ssuming normal and continuing mining operations, even factoring in the twenty-five or less production days during a normal work year, it is reasonably likely the breach in the outer insulation would cause the insulation on the inner conductors to fail due to the effects of weathering and/or friction." *Id.* at 2819.

In *Knock's Building Supplies*, 20 FMSHRC 535, 546-47 (May 1998) (ALJ), the judge determined that a violation existed where the inner conductors of a power cord were exposed due to cracks in the cord's "mechanical protection." Although the operator argued that there was no violation because the inner wires were still insulated, the Judge determined that this argument may be relevant in evaluating whether a violation is S&S but not in determining whether there was a violation of the safety standard. [27]

Consistent with these decisions, I find that the Secretary established a non-S&S violation of section 56.12004. The violation was unlikely to result in an injury. Inspector Hurtado determined that if a miner was injured as a result of this violation, it could reasonably be expected to be fatal because the cables carried 220 volts. Tr. 111. I find his analysis on this issue to be superficial. Many factors must be considered when determining whether an electrical violation could reasonably be expected to cause a fatality, not just the voltage. Given that the cracks were quite narrow and difficult to reach, I find that the gravity of the violation was low. I affirm the inspector's determination that the violation was the result of Cactus Canyon's moderate negligence because the violative condition was in plain sight. A penalty of $125.00 is appropriate.

b. Citation No. 9643094

Citation No. 9643094, issued under section 104(a) of the Mine Act on July 27, 2021, also alleges a violation of Section 56.12004. The Condition or Practice section of the citation states, in pertinent part, as follows:

> The power cable for the 120 volt outlet in the Dust/ Fines Bagging Room was not attached to the fitting at the outlet box. This exposed the inner conductors to damage from not having protection from the outer jacket secured to the fitting. Damage to the conductors can cause an electrical hazard and expose a miner working in the

[27] In *Northern Aggregate Inc*., 37 FMSHRC 562, 574, 581-83 (March 2015) (ALJ), a judge vacated a citation alleging a violation of section 56.12004 on the basis that the conductor was not exposed to mechanical damage due to its location but affirmed a different citation alleging a violation of the standard on the basis that the conductor was exposed to damage.

> bagging room to electric shock or burn injuries. The bagging room outlet is used as needed.

Inspector Hurtado determined that an injury was unlikely to be sustained, but that if an injury were sustained it could reasonably be expected to result in lost workdays or restricted duty. He further determined that the condition was non-S&S, affected one person, and was the result of the operator's moderate negligence. The Secretary proposed a penalty of $125.00 for this alleged violation.

Summary of Evidence

Inspector Hurtado testified that he observed the condition when he examined the 110-volt outlet box. Tr. 41. He took photos which show the conditions he cited. Ex. 7. He testified that the power cable for the outlet was not properly attached to the fitting at the outlet, which exposed the inner conductors to mechanical damage. Tr. 37-39. He stated that this violation exposed anyone using the outlet to a hazard of electrical shock. Inspector Hurtado assumed that the condition had existed for "some time" after something pulled on the wire. Tr. 105. He admitted that no copper wires were exposed and that the gap from the fitting to where the outer jacket began was small. Tr. 103-04.

Carson testified that section 56.12008 should have been cited, which requires that "(p)ower wires and cables shall be insulated adequately where they pass into or out of electrical compartments." He also stated that the outlet was in an area that was rarely used and a long distance from active operations. Tr. 164. There was still fabric surrounding the insulated wires in the power cord. Tr. 163. He cannot recall anyone ever using the outlet. Finally, he testified that the electrical cables in the cited area would not be exposed to any mechanical damage.

Analysis

I find that the Secretary established a non-S&S violation. Only a small part of the jacket for the power cord was not under the clamp on the outlet. Ex. 7. The insulation on the conductors was still present. The condition may have existed when the outlet was initially installed or the power cord could have been pulled out of the clamp at some point. Whether the power cord was subject to mechanical damage is a close question. After exiting the outlet, the power cord ran inside a channel on what Carson called a "purlin." Tr. 107; Ex 7 p. 2. Given its location resting inside a channel it is hard to envision how anything could pull on the power cord to cause additional mechanical damage. Nevertheless, as with the previous citation, environmental conditions could further damage the exposed area of the power cord, thereby creating a hazard. If the insulation surrounding the individual wires were to degrade, someone could be exposed to an electric shock hazard when using the outlet. I find that this violation was not serious because the events necessary to actually expose anyone to a hazard were unlikely.[28]

I find that it was unlikely that the violation would result in an injury and that any injury would most likely not be serious. I credit the testimony of Carson that this outlet was rarely, if

[28] I agree with Carson that section 56.12008 is more applicable to the condition cited.

ever, used. I also find that the cited condition was not easy to see. As a consequence, I find that Cactus Canyon's negligence was low. A civil penalty of $125.00 is appropriate.

c. Citation No. 9643095

Citation No. 9643095, issued under section 104(a) of the Mine Act on July 27, 2021, alleges a violation of Section 56.12019 of the Secretary's safety standards, which requires that "[w]here access is necessary, suitable clearance shall be provided at stationary electrical equipment or switchgear." 30 C.F.R. § 56.12019. The Condition or Practice section of the citation states, in pertinent part, as follows:

> Suitable clearance to the breaker box located in the rear-left corner of the maintenance shop was not maintained. The access to the breaker box was blocked with welding machines, utility cart, and buckets. The breaker box provides power to the shop. This exposed a miner to electric short or burns should an electrical hazard occur and not being able to access the breaker box to de-energize power. The shop is used daily.

Inspector Hurtado determined that an injury was unlikely to be sustained, but that if an injury were sustained it could reasonably be expected to result in lost workdays or restricted duty. He further determined that the condition was non-S&S, affected one person, and was the result of the operator's moderate negligence. The Secretary proposed a penalty of $125.00 for this alleged violation.

Summary of Evidence

When Inspector Hurtado entered in the maintenance shop, he observed that there was "no suitable clearance to the breaker box . . . that's mounted on the wall in the rear left corner." Tr. 48. He testified that there were portable welder units, miscellaneous parts, boxes, buckets and carts blocking access to the breaker box. Tr. 48-49. He referenced the photograph he took in the maintenance shop to illustrate the conditions he observed. Ex. 8 p. 1. The photo clearly shows that an employee would have a difficult time reaching the cited breaker box.

On cross examination, the inspector testified that the breaker box was electrical equipment that was subject to the requirement of the safety standard. Tr. 116-17. He believed that the circuit breakers in the breaker box controlled power for lighting and outlets used for welders. Tr. 118. He stated that anyone operating a welder who encountered a problem would first attempt to switch it off and unplug it from the outlet, but that a situation could arise where the safest option would be to switch it off at the breaker box. Tr. 119-21, 131. He determined that an injury was unlikely because there were several ways to deenergize a welder in the shop.

Carson testified that a breaker box is not electrical equipment because it is not the end user of the power being supplied. Tr. 165-66. In its brief, Cactus Canyon argues that it is "unsupported nonsense to urge equivalence." CC. Br. 17. It also argues that the inspector "could not identify any reasonable circumstances where anyone using plugged-in equipment would not

first disengage (let go of the trigger), then unplug a welder instead of running across the room to throw a breaker." CC Br. 17-18.

Analysis

Although the Commission has not addressed section 56.12019, at least one Commission judge has done so. In *VT Unfading Green Slate Co. Inc*., 23 FMSHRC 310 (Mar. 2001) (ALJ) a judge affirmed a violation of 56.12019 where an inspector testified that a truck tire, cardboard boxes and pallets prevented access to electrical panel boxes in a storage shed.

I find that the Secretary established a non-S&S violation of section 56.12019. It would have been difficult to reach the breaker box without tripping or falling. Indeed, the evidence shows it would have been impossible to reach the breaker box without first moving pieces of equipment. Ex. 8 p. 1. Circuit breakers serve to stop the flow of electrical current in the event of an overload or short circuit. The Secretary's regulations do not define the term "switchgear." However, dictionaries, as well as other sources, make clear that "switchgear" includes circuit breakers and other types of electrical devices that serve to switch, interrupt, control, meter, protect, and regulate the flow of electricity. *See e.g. DMMRT* 557 (2d ed. 1997). Although the inspector apparently viewed the breaker box as a piece of stationary "electrical equipment," I need not determine whether that characterization was correct given that the breaker box was quite clearly "switchgear."

The fact that there were other means to deenergize electrical equipment in the shop relates to the gravity of the violation. Even assuming that gaining access to the breaker box would not typically be necessary in an emergency, having the area clear provided an extra measure of safety in the event that immediate access to the breaker box was necessary. It has long been held that safety standards should be interpreted to maximize the safety of miners. I also find that the violation was unlikely to result in an injury and that any injury would, at most, lead to lost workdays or restricted duty. I affirm the inspector's determination that the violation was the result of Cactus Canyon's moderate negligence because the violation was obvious. A penalty of $125.00 is appropriate.

IV. CIVIL PENALTIES

I determined an appropriate penalty for each violation taking into consideration the provisions of sections 110(i) and 110(k) of the Mine Act. My findings with respect to gravity and negligence are discussed above. Cactus Canyon has a history of six paid citations in the 18 months preceding the July 2021 inspection. Ex. 1. The parties did not present evidence as to Cactus Canyon's size but Exhibit A to the penalty petition indicates that it was assigned 3 penalty points for the size criterion, which correlates with a small metal/nonmetal mine operator. 30 C.F.R. § 100.3 Table III. The penalties I assess will not affect Cactus Canyon's ability to continue in business. Based on the penalty criteria I assess a total penalty of $375.00. The Secretary proposed the minimum penalty for each citation. *See* 30 C.F.R. § 100.3(g), Table XIV (2021) (Considering the 10% good faith abatement reduction). Given the low penalties, a penalty reduction for Citation No. 9643094 is not appropriate.

V. ORDER

For reasons set forth above, I find that milling occurs at the Fairland Plant with the result that it is subject to Mine Act jurisdiction. Citation No. 9643093 is **AFFIRMED** as issued. Citation No. 9643094 is **MODIFIED** to reduce the negligence but otherwise **AFFIRMED** as issued. Citation No. 9643095 is **AFFIRMED** as issued. Cactus Canyon is **ORDERED TO PAY** the Secretary of Labor the sum of $375.00 within 40 days of the date of this decision.[29]

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

Distribution:

Felix R. Marquez, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX., 75202, Email: (Marquez.Felix.R@Dol.gov)

Andy Carson, Esq., Cactus Canyon Quarries, 7232 CR 120, Marble Falls, TX 78654 (acarsonmarblefalls@aol.com)

[29] Payment (check or money orders) should be sent to U.S. Department of Labor, Mine Safety and Health Administration, Payment Office, P.O. Box 790390, St. Louis, MO. 63179-0390; Electronic payments can be applied via https://www.pay.gov/public/form/start/67564508

Please include Docket Number & A.C. Numbers with payment.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th ST. SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

May 25, 2023

TODD DESCUTNER, Complainant, v. NEVADA GOLD MINES LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2022-0201 MSHA Case No. WE-MD-2022-01 Mine: Leeville Mine ID: 26-02512

DECISION AND ORDER

Appearances: Larson A. Welsh, Law Office of Hayes & Welsh, 199 N. Arroyo Grande Boulevard, Suite 200, Henderson, NV 89074

Kristin R.B. White, Fisher & Phillips LLP, 1125 17th Street, Suite 2400, Denver, CO 80202

Before: Judge Simonton

This case is before me upon a complaint of discrimination filed by Todd Descutner ("Descutner") against Nevada Gold Mines ("NGM"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3).[1] Descutner contends that NGM terminated him for engaging in protected activity. NGM asserts that it properly terminated Descutner under the company's progressive discipline policy.

A hearing was held on December 6–7, 2022, in Salt Lake City, Utah. Based on my full consideration of the testimony and exhibits presented at hearing, the stipulations of the parties, my observations of the demeanor of the witnesses, and the parties' post-hearing briefs, I find that NGM did not violate the Mine Act when it terminated Descutner.

[1] In this decision, the joint stipulations, transcript, Complainant's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. C-#," and "Ex. R-#," respectively. References to the transcript include numerals I or II to denote the volume of the transcript referenced, since each day's transcript is independently paginated.

I. STIPULATIONS

In their prehearing submissions, the parties submitted the following joint stipulations:

1. Todd Descutner was employed by NGM until his termination date of November 2, 2021.

2. Descutner was a "miner" as defined in sections 3(g) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(g), 815(c).

3. NGM's Leeville Mine is a "coal or other mine" as defined in Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1).

4. The Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case pursuant to Section 105(c)(3), 30 U.S.C. § 815(c)(3) of the Mine Act.

II. FINDINGS OF FACT

A. Background

Nevada Gold Mines is a joint venture that formed in 2019 as a merger of two gold companies: Newmont Corp. and Barrick Gold Corp. Tr. I, 18; Respondent's Post-Hearing Brief ("Resp. Br.") at 2. The Leeville Mine ("Leeville" or "mine") is an underground gold mine operated by NGM and located in northern Nevada. Tr. I, 18–19; Resp. Br. at 2. At Leeville, hourly miners are required to take contracted buses to work at the mine site—they are not permitted to drive themselves to work. Tr. I, 23; Tr. II, 8–9. During each shift at the mine, the hourly workforce is divided into three groups: production, development, and compliance/paste. Tr. I, 156; Resp. Br. at 2. Each of these groups is supervised by a frontline supervisor, and each frontline supervisor reports to a general supervisor for that group. Tr. I, 155–56; Resp. Br. at 2. The general supervisors for each group report to the superintendent, who reports to the site-level mine manager. Resp. Br. at 2.

NGM utilizes a progressive discipline policy for its hourly employees. Tr. II, 52; Ex. R-C. The policy delineates three levels—or tiers—of disciplinary action that occur before an employee's termination. Tr. II, 52; Ex. R-C. The first is a documented verbal notice, the second is a written notice, and the third is a final notice, which may include a suspension from work. Tr. II, 52; Ex. R-C. Employees may be issued more than one level of discipline for a single incident. Tr. II, 83. Two separate, parallel discipline tracks are used at NGM—one for tardies, absences, and other attendance-related issues, and the other for behavioral issues and discipline relating to property damage. Tr. II, 56.

Descutner worked for NGM—and Newmont Corp. prior to the merger—from 2006 until his termination in November 2021. Tr. I, 17; Jt. Stip. 1. He started at Newmont's Deep Post Mine and began working at the Leeville Mine in 2010. As of 2019, Descutner was a tier 4 miner

in the development group at Leeville, regularly working four jobs in this role: shotcrete personnel, haul truck driver, loader operator, and utilities. Tr. I, 19.

To varying degrees, several management officials were involved in the events at issue in this case. Don Strong and Terry Krantz were Descutner's immediate frontline supervisors during the events described below. Tr. I, 40, 54–55. Derek Dominguez was a general supervisor over development at Leeville from December 2020 through September 2021, after which he became the interim superintendent. Tr. I, 157. Jeff Sorenson was a frontline supervisor for the maintenance shop. Tr. II, 148. Corey Myers was an interim general supervisor from August 2021 to February 2022, after which he became a general supervisor. Tr. II, 142–143. Amy Armstrong was the senior human resource business partner for NGM. Tr. II, 48.

B. COVID-19 Impacts on Descutner and NGM

After learning of the COVID-19 pandemic in early 2020, Descutner became concerned about contracting the virus because of his wife's health. Tr. I, 19–20. Descutner's wife has asthma and an autoimmune deficiency, and her physician contacted her early in the pandemic to tell her he was concerned that if she contracted COVID-19, she may not survive. Tr. I, 19–20. At that time, Descutner used approximately three months of FMLA leave to quarantine with his wife, during which time they decided that she should quarantine separately from him once he returned to work. Tr. I, 20. In May or early June 2020, Descutner purchased a trailer so that he could live apart from his wife. Tr. I, 20–21. He returned to work and began living in the trailer in June 2020. Tr. I, 21. Descutner lived in the trailer for approximately 300 days, until he and his wife were vaccinated and moved back in with one another. Tr. I, 21.

Like many employers, NGM modified its policies and procedures in response to the COVID-19 pandemic. In March 2020, the company stopped busing employees to work and instead used smaller light vehicles to transport them. Tr. II, 9. In June 2020, around the time Descutner resumed working after his FMLA leave, NGM resumed busing employees to work with its contracted bus operator, Coach. Tr. I, 26; Tr. II, 10. When these bus operations resumed, Coach implemented and enforced COVID-19 mitigation measures on the buses pursuant to state requirements. Tr. II, 11–12. The bus routes were changed so that they made fewer stops, and the number of buses was increased to accommodate a lower maximum number of passengers on each bus. Tr. I, 27; Tr. II, 10–12; Exs. R-BB, -CC. Additionally, miners were required to wear masks on the bus and sit in certain seats to allow for social distancing. Tr. I, 27–28, 134; Tr. II, 11, 21, 33–34; Ex. R-EE. At the mine site, miners were required to wear masks unless they were alone or could maintain six feet of distance between themselves and others. Tr. I, 196. The maximum number of miners allowed on the "cage," which is "a big elevator that takes [miners] underground," was reduced from 30 to 15, and the miners on the cage were required to wear respirators. Tr. I, 23, 196. Miners were provided with unlimited masks and respirator cartridges, as well as infrared thermometers to take their temperatures before coming in to work. Tr. I, 196–197. NGM also extended miners' short term disability allowance and gave employees their full years' worth of paid time off ("PTO") up front so they could take the necessary time off if they got sick. Tr. I, 197. If miners contracted COVID-19, they were required to obtain a doctor's release to return to work. Tr. I, 133.

C. Descutner's Complaints

1. December 2020/January 2021 Complaints about the Buses

Descutner felt that, to his coworkers and generally in the area he lived, COVID-19 "was considered kind of a hoax, a joke, [and] not taken very seriously." Tr. I, 22. He was particularly concerned about contracting COVID-19 on the bus contracted by NGM, which he was required to take to get to work. Tr. I, 22–23.

Chantelle Carter, NGM's transportation and logistics specialist, credibly testified that when busing resumed in June 2020, the bus contractor added buses to the schedule so that each bus no longer stopped at two pickup sites and two mine sites, but rather would stop at each pickup and mine site separately. Tr. II, 8, 10–11. From June through December 2020, there were seven buses taking miners to and from work at the two mine sites. Tr. II, 10, 18–19. Prior to the pandemic, there were three. Tr. II, 8–9. In December 2020, the total number of buses was reduced from seven to six, but service to Descutner's bus stop at Spring Creek was not impacted by this change. Tr. II, 18–19. Carter recalled receiving occasional complaints about bus protocols that she passed along to the bus operator, but could not recall at the hearing if she ever received any complaints from Descutner. Tr. II, 31–32.

Descutner testified about his belief that, beginning in June 2020, NGM was providing two buses instead of one to transport miners from the Spring Creek stop to the Leeville Mine. Tr. I, 26–27. He became frustrated when only one bus would arrive, which was common in the winter of 2020. Tr. I, 27. He also testified that few miners were abiding by the mask requirements. Tr. I, 27–28. When only one bus arrived, all the miners at the stop had to board the single bus, and, because "he had to get to work and that was the only way to get there," Descutner felt forced into an uncomfortable situation. Tr. I, 27.

In mid- or late December 2020, Descutner was involved in an incident involving a bus driver on his way in to work. Descutner had boarded the first bus at his bus stop when a second bus arrived. He got off the first bus before it departed and boarded the second. Tr. I, 28–29. He was the only miner who rode on the second bus, and he was frustrated and upset that the bus was late. Tr. I, 29, 128. He asked the driver why she could not be on time, but testified that he did not yell or raise his voice at her. Tr. I, 29–31. The bus driver responded that it wasn't her fault. Tr. I, 30. After he asked why she could not be on time, Descutner stopped talking to the bus driver and sat down. Tr. I, 29–30. Descutner testified that she "kept asking me where I was going," which he interpreted as "digging at me a little," because she did not like his question about being on time. Tr. I, 30–31.

Derek Dominguez, then a general supervisor over development at Leeville, testified that he and another general supervisor on site that morning, Zach Wright, were notified by a dispatcher that an employee on the bus inbound from Spring Creek was being "belligerent to the bus driver." Tr. I, 155, 185–86. He and Wright asked the dispatcher to call the bus operator and find out the bus number, and they then went to meet the bus in the area where employees offload. Tr. I, 186. When it arrived, they saw that Descutner was the only miner on board. Tr. I, 186. They had a conversation with Descutner about his interaction with the driver, and Descutner told

them they were in a position to do something about the bus situation. Tr. I, 31–32. Descutner talked to them about his wife's health and testified that it seemed like Dominguez had no empathy for him. Tr. I, 32–34. Descutner further testified that he referenced the "Labor Department" when telling Dominguez where else he might complain. Tr. I, 34–35.

After the conversation with Dominguez and Wright, Descutner went to work; he was not disciplined for his interaction with the bus driver. Tr. I, 38–39. According to Descutner, nothing was done to address his concerns regarding the frequent shortage of buses and the routine lack of masks on the bus. Tr. I, 39.

Shortly after the incident with the bus driver, Descutner also complained about the buses to his supervisor, Don Strong, in either late December 2020 or early January 2021. Tr. I, 40–41. Strong did not respond to the complaint verbally, but gave him a look that Descutner interpreted to mean, "give it a rest." Tr. I, 41.

2. Complaints to MSHA and Other Agencies

Between December 2020 and March 2021, Descutner and his wife made numerous calls to outside organizations to complain about NGM's lax enforcement of COVID-19 mitigation measures and what they believed to be unsafe working conditions. Tr. I, 35–38, 138–143; Ex. C-18. They called Nevada's Labor Commission, the Occupational Safety and Health Administration, MSHA, Nevada's Governor, and the American Civil Liberties Union. Ex. C-18.

3. June or July 2021 Complaint Regarding Low Morale and Promotions

In late June or early July 2021, Descutner also raised a concern unrelated to COVID-19 protocols at a crew meeting. Tr. I, 51. He felt that people should be "signed off" on the Tech 4 jobs they were doing but not being paid for. Tr. I, 51–52. Descutner believed this was a safety concern because people who were in this situation had bad attitudes. Tr. I, 51-52.

D. Descutner's Conduct and Resulting Disciplinary Actions

Descutner received discipline on multiple occasions before his termination:

1. January 2021 Unexcused Absence

In early January 2021, Descutner received discipline in the form of a Tier 1 documented verbal notice for an unexcused absence. Tr. I, 41; Ex. R-D. The night before his absence, Descutner experienced numerous unfortunate events related to a bad snowstorm. First, the bus taking him to his bus stop after work got to the Spring Creek stop around 9:30 p.m., more than an hour later than usual due to the snow. Tr. I, 42. Then, when driving home from the bus stop, Descutner's truck got stuck in the middle of the road and he had to wait for a tow truck. Tr. I, 42. He finally arrived home around midnight to discover that the power to his trailer had gone out, so he worked on that until going to sleep around 2:00 a.m. Tr. I, 42–43. In order to make it to work on time, he would have had to wake up at about 4:00 a.m. and be at the bus stop around 5:00

a.m. Tr. I, 43. Descutner woke up around 5:30 a.m. and called his supervisor, Don Strong, to request the day off work. Tr. I, 43. Descutner felt that he needed the day off because, given how little sleep he had gotten, he was not fit for duty and could not do his job safely. Tr. I, 44. Strong told Descutner that he did not have any PTO and had to come in to work. Tr. I, 44. Descutner did not go in and received a notice of discipline the next day called a Tier 1 documented verbal notice. Tr. I, 45–46; Ex. R-D. This discipline did not affect NGM's later decision to terminate Descutner because it was attendance-related, and that type of discipline accrues separately from behavioral and property damage-related discipline. Tr. II, 56, 58–59.

2. July 2021 Interaction with Supervisor Krantz

In July 2021, Descutner received another Tier 1 documented verbal notice for an inappropriate interaction with his supervisor at the time, Terry Krantz. Ex. R-E. The incident arose out of a disagreement between Descutner and another hourly miner, Dave Young, both of whom were assigned to apply shotcrete that day with a third hourly miner, Jesus Cabrera. Tr. I, 49–50. When applying shotcrete, two miners drive batch trucks that supply the material and a third operates the sprayer that applies the material to the roof and ribs of the underground mine. Tr. I, 49; Tr. II, 61. Initially, Cabrera had agreed to spray that day, but when the miners got underground, the sprayer they had planned to use was inoperable, and he was not authorized to use the one that was functioning. Tr. II, 62. Descutner and Young were both signed off on the functioning sprayer but got into a disagreement about who would spray that day. Tr. I, 49; Tr. II, 62. Young called Krantz over to determine who should spray that day. Tr. I, 50; Tr. II, 62. Descutner complained to Krantz about what he believed to be the real issue: "miners being asked to complete tasks they were not technically authorized to complete because they had not received the promotions they had earned." Tr. I, 51. Krantz became frustrated with Descutner's comments and raised his voice, leading Descutner to raise his voice as well. Tr. I, 52, Tr. II, 63. After some back and forth, Krantz told Descutner he was taking him to the surface, but Descutner refused to get in the vehicle with him. Tr. I, 53; Tr. II, 63. Krantz then called Don Strong, who took Descutner up to the surface. Tr. I, 53; Tr. II, 63.

Once they were on the surface, Descutner attended a due-diligence meeting and Amy Armstrong, senior human resources business partner at NGM, got involved. Tr. II, 60. Armstrong took ample notes during the meeting with Descutner and the interviews she conducted with the other miners involved. Tr. II, 65; Ex. R-K. She credibly, in a straightforward, consistent and unequivocal fashion, testified that Descutner agreed his interaction with Krantz was inappropriate. Armstrong's contemporaneous notes support her testimony. Tr. II, 69; Ex. R-K at 18. Descutner, Young, Cabrera, and Krantz each provided statements concerning the incident. Exs. R-G, R-H, R-I, R-J. Krantz was also disciplined for his behavior relating to this incident. Tr. II, 70; Ex. R-F.

3. October 2021 Loader Incident

On October 19, 2021, Descutner was involved in an incident at the mine. Tr. I, 63. On that day, he was assigned to repair a vent bag with co-worker Garrett DeSart in the maintenance shop. Tr. I, 64, 225–226; Ex. R-P. Before the repair could be made, a loader that was blocking access to the area needed to be moved. Tr. I, 64, 227.

Descutner spoke to the shop supervisor, Jeff Sorenson, about moving the loader and told him, "if it's a 9-yarder I could move it." Tr. I, 65. He testified Sorenson told him it was a "loader 80, it's a 9 yarder, move it." Tr. I, 64. Descutner was signed off to operate 9-yard loaders and asserts he did a complete equipment inspection prior to moving the loader. Tr. I, 66, 83–84. While in the shop area he did not utilize a spotter to help guide his movement of the loader. Tr. I, 68. In the process of moving the loader approximately a hundred feet, he struck and damaged a trash dumpster. Tr. I, 66–68. After the incident occurred, Descutner was required to take a drug and alcohol test, which yielded a positive result due to a prescription medication he was taking. Tr. I, 69. The issue of his positive drug and alcohol test was later cleared up. Tr. I, 69. Descutner was sent home after the test and never returned to work at NGM. Tr. I, 70.

Interim general supervisor Cory Myers conducted an initial investigation into the October 19 incident by first gathering information from frontline supervisor Orry Stevens, who provided pictures of the incident scene as well as a statement from Descutner. Tr. II, 144. Myers obtained statements from other people who were in the area of the incident when it occurred and looked into Descutner's training records to see if he was signed off on the loader involved in the incident. Tr. II, 144. After Stevens told Myers which loader was involved, Myers could tell it was an 11-yard loader, not a 9-yard loader as Descutner believed. Tr. II, 144.

A due-diligence or fact-finding meeting was conducted to get Descutner's input as to what happened. Present at the meeting were Descutner, Myers, interim superintendent Derek Dominguez, human resource partner Hailey Cavaness and union representative Josh Jauer. Tr. I, 70–71, 166–167; Tr. II, 73, 145; Ex. R-W. Myers conducted additional investigation into the incident that occurred on October 21, 2021. After concluding his investigation and consulting with senior human resource partner Amy Armstrong, both Myers and Armstrong concluded that Descutner's incident with the loader constituted four separate infractions of NGM's employee standards. Tr. I, 165, 176–177; Tr. II, 85–86, 120–121, 151.

The first infraction charged to Descutner was that he failed to conduct a pre-operational check on the loader. Tr. I, 178; Tr. II, 86, 94–95, 119–120. Descutner asserts that he did, in fact, conduct a complete equipment check prior to operating the loader and completed a pre-operational checklist card. Tr. I, 66, 83–84. He does not recall whether he ever turned in the card after the October 19 loader incident. Tr. I, 84, 113. No pre-operational check card could be found to confirm his assertion that he completed a pre-operational inspection. Tr. I, 11, 84–86, 110, 174, 178; Tr. II, 74. NGM asserted at hearing that, had Descutner actually conducted a pre-operational inspection, he would have noticed that the loader was not one he was authorized to operate. Tr. I, 11, 174. Second, Descutner was not signed off to operate the 11-yard #80 loader involved in the incident. Tr. I, 105, 165, 180–181; Ex. R-U. Descutner testified he relied on shop supervisor Sorenson's representation that the loader in question was a 9-yarder and that he could move it. Tr. I, 65. Descutner's testimony is in conflict with a statement Sorenson provided to Myers during NGM's investigation of the event, in which Sorenson indicated he told Descutner the loader was a 1700 series loader before he moved it. [2] Tr. II, 148; Ex. R-PP. Third, Descutner

[2] The 1700 series breaks down into sub models. Tr. II, 148–149. The 9-yard loader and the 11-yard loader are both in the 1700 series. Tr. II, 158.

failed to use a spotter when moving the loader. Tr. I, 105, 165, 178. Descutner acknowledged this infraction. Tr. I, 68, 91–92. Fourth, Descutner caused damage to NGM equipment when the loader hit and damaged a company owned dumpster. Tr. I, 165, 177; Ex. R-T. Descutner acknowledged this infraction as well. Tr. I, 67–68, 92.

With a documented verbal discipline notice in his personnel file for an inappropriate interaction with a supervisor in July 2021, Descutner was already at Tier 1 of NGM's progressive discipline policy. Tr. I, 177; Tr. II, 68,151–152; Exs. R-C, -E. Based on this one prior active discipline and the four infractions related to the loader incident, Armstrong, Myers and Dominguez collectively met and made the decision to recommend to the mine manager that Descutner should be terminated pursuant to NGM's progressive discipline policy. Tr. I, 158–159, 175; Tr. II, 81–82, 84–87, 150–152; Ex. R-C.[3] Both the mine and human resource managers for NGM agreed and Descutner was terminated from NGM effective November 17, 2021. Tr. I, 218; Tr. II, 87; Ex. R-V. The decision was communicated to Descutner in a meeting with Dominguez, Myers and Armstrong, followed by a written termination letter dated November 17, 2021. Tr. I, 72; Tr. II, 153; Ex-R-V. The specific reasons for termination were communicated to Descutner at a union grievance meeting prior to November 17. Tr. I, 72, 74. Descutner's union grievance challenging his termination stopped at the step two level with a board consisting of two members of NGM management and two union members. Tr. II, 93.

E. MSHA's October 2021 Investigation

On October 14, 2021—three days before Descutner's incident involving the 11-yard #80 loader—MSHA Inspector Charlie Snare came to Leeville to investigate an anonymous hazard complaint that NGM was not enforcing COVID-19 pandemic guidelines. Tr. I, 190–191; Ex. C-4. Descutner testified he does not remember making this complaint to MSHA. Tr. I, 59. Dominguez met with the inspector to discuss the reason for his visit to the mine. Tr. I, 191. The inspector explained that they had received an anonymous complaint that NGM was not following their COVID-19 policies. Tr. I, 191. The inspector informed Dominguez that MSHA does not enforce NGM's COVID-19 policies and stated that he wanted to explain this to all of the miner's representatives in a meeting at the mine. Tr. I, 191. Dominguez proceeded to pull twelve underground miners off of their equipment for a meeting in the mine conference room. Tr. I, 192. Inspector Snare explained to the miner's representatives that MSHA is not responsible for enforcing any state or company COVID-19 policies and they were getting tired of getting "Johnny miner" calls related to COVID-19.[4] Tr. I, 192. Snare warned the miner's representatives that if the calls continued, he would shut the mine down until he was able to have the same conversation with each individual miner. Tr. I, 192. Snare also conveyed to Dominguez that he thought NGM was doing everything it could with regard to COVID-19. Tr. I, 195.

---

[3] NGM's employee standards policy lists "operating or driving equipment without authorization or outside its design criteria" as a first-time violation that may result in termination. This is one of the four infractions Descutner was charged with as a result of the loader incident. While the policy states one could be terminated for a single violation of this type, there is no indication that NGM ever considered removing Descutner for this reason alone. Ex. R-C.

[4] "Johnny miner" is a nickname used to refer to a miner's rights call. Tr. I, 191.

Descutner contends that NGM had reason to believe that he called in the anonymous complaint to MSHA and that this belief, though mistaken, factored into NGM's decision to terminate him after the loader incident. Complainant's Post-Hearing Brief ("Comp. Br.") at 17. Dominguez, Armstrong and Myers denied having any belief or suspicion that Descutner called in the hazard complaint that prompted MSHA's October 2021 appearance at the mine site. Tr. I, 193–194; Tr. II, 87–88, 97, 100, 101–102, 152–153. Dominguez confirmed that Descutner was the first miner who complained to him personally about COVID-19 protocol enforcement issues in December 2020, when the two men discussed Descutner's comments to the bus driver about being late. Tr. I, 216–217. However, Dominguez was aware there was at least one other COVID-19 protocol enforcement related complaint regarding the lack of social distancing on the cage that took miners down into the mine. Tr. I, 219–220. As a result of that complaint, NGM began requiring miners to wear respirators while riding in the cage. Tr. I, 196, 219–220. Armstrong testified that she personally investigated COVID-19 protocol enforcement complaints made by miners other than Descutner. Tr. II, 97–100.

Dominguez, Armstrong and Myers, the three individuals involved in the investigation and recommendation to terminate Descutner, testified that Descutner's December 2020 and January 2021 COVID-19 protocol enforcement complaints played no role in their October 2021 investigation or November 2021 unanimous recommendation. Tr. I, 218–219; Tr. II, 100, 152–153. Armstrong and Myers testified they were not aware, at the time of the investigation or termination recommendation, that Descutner had previously made COVID-19 protocol enforcement complaints to Dominguez or supervisor Strong, respectively. Tr. II, 100, 152–153.

III. DISPOSITION

Section 105(c)(1) of the Mine Act provides that a miner shall not be discharged or otherwise discriminated against because they have made a complaint regarding an alleged safety or health violation. 30 U.S.C. § 815(c)(1). It specifically states: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . . of an alleged danger or safety or health violation in a coal or other mine."

For more than forty years, the Commission has utilized the *Pasula-Robinette* framework to adjudicate claims of discrimination brought under section 105(c) of the Mine Act. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799–2800 (Oct. 1980), *rev'd on other grounds sub nom*; *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817–18 (Apr. 1981). Under the traditional *Pasula-Robinette* framework, a miner alleging discrimination established a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that (1) the complainant engaged in protected activity, and (2) the adverse action complained of was motivated in any part by the protected activity. *Jayson Turner v. Nat'l Cement Co.*, 33 FMSHRC 1059, 1064 (May 2011); *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at

817–18. If a miner established a *prima facie* case, the operator could then rebut the case "by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSHRC at 1064. If the operator could not rebut the *prima facie* case, it could nevertheless defend affirmatively by proving that although part of its motivation was unlawful, the adverse action was also motivated by the miner's unprotected activity, *and* it would have taken the adverse action against the miner for the unprotected activity alone. *Id*.; *Pasula*, 2 FMSHRC at 2799–2800.

The Ninth Circuit recently abrogated this longstanding framework in *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021) (remanding 105(c)(3) case for Commission to apply "but-for standard"). Looking to recent Supreme Court precedent, the Ninth Circuit noted that section 105(c) of the Mine Act uses the term "because of" four times—each time without any modifiers—and concluded that it thus plainly incorporates a "but-for" causation standard. *Id.* at 1210. Accordingly, "[s]ection 105(c)'s unambiguous text requires a miner asserting a discrimination claim under Section 105(c) to prove but-for causation." *Id.* at 1211.

In a recent FMSHRC ALJ case, *Walker v. Capurro Trucking*, 44 FMSHRC 1, (January 7, 2022), Judge Sullivan articulated the "but for" causation standard well. A discrimination complainant must show that (1) he engaged in what is known as "protected activity" (i.e., "the exercise of statutory rights"); and (2) that the adverse action complained of (here the Complainant's discipline and termination) was "because" of that protected activity. In other words, at least in cases ultimately subject to Ninth Circuit review as this present case is, a Complainant must show that his employer would not have taken the adverse action against him, "but for" the protected activity he engaged in. *Thomas v. CalPortland Co.*, 43 FMSHRC 314 (June 2021) (ALJ) (decision on remand applying but-for standard), pet. for rev. filed Dec. 29, 2021; *see also Sec'y of Labor on behalf of Saldivar v. Grimes Rock*, *Inc.*, 43 FMSHRC 299, 302–303 (June 2021).

A. Protected Activity

A miner has engaged in protected activity if they (1) have "filed or made a complaint under or *related to* this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) are "the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) have "instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) have "exercised on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1) (emphasis added).

Unquestionably, raising safety concerns at work constitutes "protected activity" within the ambit of section 105(c). *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1922 (2016) ("Raising safety concerns is paradigmatic 'protected activity' within the meaning of section 105(c)(2).").

1. December 2020 – January 2021 COVID Protocol Related Complaints

It is undisputed that Descutner raised concerns to then General Supervisor Dominguez in December 2020 relating to COVID-19 protocols on the buses that transported miners to the mine site. Descutner also complained about the buses to his supervisor, Don Strong, in either late December 2020 or early January 2021. Tr. I, 40–41. Specifically, he was concerned about the lack of mask-wearing and that, at times, only one bus would show up when there should have been two to insure proper social distancing. Tr. I, 22–23.

Between December 2020 and March 2021, Descutner and his wife made numerous calls to outside organizations to complain about NGM's failure to enforce COVID-19 mitigation measures and what they believed to be unsafe working conditions. Tr. I, 35–38, 138–143; Ex. C-18. They called Nevada's Labor Commission, the Occupational Safety and Health Administration, MSHA, Nevada's Governor, and the American Civil Liberties Union. Ex. C-18.

NGM asserts that Descutner's expressed concerns over COVID-19 related protocols are beyond the purview of MSHA and therefore are not protected by the Mine Act. Resp. Br. at 15. Specifically, NGM argues there is no provision under the Mine Act or any MSHA mandatory standard that specifically addresses exposure to COVID-19. Resp. Br. at 16. They go on to argue that MSHA's actions on October 21, 2021—whereby an inspector, as an authorized representative of MSHA, informed both NGM management and designated miners' representatives that MSHA is not responsible for enforcing company or state COVID-19 policy—supports the conclusion that Descutner's protocol-related complaints do not constitute protected activity under the Mine Act. Resp. Br. at 17. I disagree.

The legislative history of the Mine Act states that Congress intended the scope of protected activity to be broadly interpreted. In enacting section 105(c) of the Act, Congress specifically noted that: "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S.Rep. No. 95–181 at 35. Congress further stated that the Act is "illustrative and not exclusive," and should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id*. at 36.

So long as a miner has a good faith belief that a safety hazard exists, they are protected in bringing their concern to the operator. *Robinette,* 3 FMSHRC 803; *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989). It is well established that a "good faith belief simply means [an] honest belief that a hazard exists." *Id.* Whether perceived hazards are *actually* unsafe is not determinative of the protected status of a complaint. *Sec'y of Labor obo McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986 (2001); *Consolidation Coal Co. v. Marshall*, 663 F.2d at 1215. Alleged hazards are considered to be "related to" the Act, and are therefore protected by 105(c)(1). *Cullinan v. Peabody Twentymile Mining LLC*, 36 FMSHRC 205, 207.

First, it is important to note that Descutner's complaints to NGM management and outside agencies regarding the failure of miners to follow state-mandated and company-established COVID -19 protocols occurred as early as December 2020—well before MSHA appeared at the mine in October 2021 to announce to the miners' representatives that they would

not enforce COVID-19 protocols. Tr. I, 28–37, 40–41, Tr. I, 190–191; Exs. C-4, -18; Ex. R-DD. Second, it is undisputed Descutner had well-founded safety related reasons for lodging his complaints—especially given that his spouse was immunocompromised. Tr. I, 19–38. Without question, I find Descutner acted reasonably and with the good faith (albeit mistaken) belief that the failure to follow COVID-19 protocols was a health and issue under MSHA's Mine Act purview. NGM has presented no evidence supporting its argument that Descutner had any reason to believe otherwise. I find that Descutner engaged in protected activity as it relates to his complaints to Dominguez and Strong from December 2020 extending into early 2021. This activity included complaints regarding the number of buses available for transportation to maintain social distancing, the failure of miners to maintain that distancing and the failure to abide by mask protocols mandated by the state and company.

2. June or July 2021 Complaint Regarding Low Morale and Promotions

In late June or early July 2021, Descutner raised a concern unrelated to COVID-19 protocols at a crew meeting. Tr. I, 51. He felt that people should be "signed off" on the Tech 4 jobs they were doing but not being paid for. Tr. I, 51–52. Descutner believed this was a safety concern because people who were in this situation had bad attitudes. Tr. I, 51–52.

Despite the broad scope cited above regarding Descutner's complaints related to COVID-19 protocols, I cannot agree that his complaints regarding failure to promote miners and resulting morale issues meet the broad standard of protected activity in this case. These complaints are simply too tangential to rise to the level of a protected activity under the Mine Act. Other than his own declarations at hearing, Descutner has failed to proffer any connection between low employee morale and a real or perceived risk to the health and safety of miners.

Accordingly, I find insufficient evidence to conclude that Descutner's expressed concerns in June or July 2021 about low morale and inadequate promotions was protected activity under the Mine Act.

B. Adverse Action Motivated by Protected Activity

The Commission has defined "adverse action" as "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship. *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). The question of whether an employer's action qualifies as "adverse" is thus decided on a case-by-case basis. *Sec'y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2 (Aug. 1984).

"Discharge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act." *Driessen*, 20 FMSHRC at 329. It is undisputed that after he first complained about the lack of COVID-19 protocol enforcement by NGM in December 2020, Descutner was subject to discipline beginning in January 2021. On January 6, 2021, Descutner was issued a Tier 1 documented verbal notice for an unexcused absence. Tr. I, Ex. R-D. On July 20, 2021, Descutner was issued a Tier 1 documented verbal notice for an inappropriate interaction with a supervisor. Tr. I, Ex. R-E. On November 2, 2021, Descutner was ultimately

terminated from employment with NGM for violating NGM employee standards related to the October 19, 2021, loader incident. Tr. I, Ex. R-V. Descutner has clearly been subjected to adverse actions dating as far back as January 6, 2021.

Having established both protected activity and adverse actions related to discipline and discharge, Descutner must now demonstrate by a preponderance of evidence that "but for" his protected activity he would not have been disciplined or terminated from employment with NGM.

In evaluating whether a causal connection exists between the protected activity and the adverse action, the Commission looks to four factors: "(1) the mine operator's knowledge of the protected activity; (2) the mine operator's hostility or 'animus' toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner." *Cumberland River Coal Co.*, 712 F.3d 311, 318 (6th Cir. 2013); *see also Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–2512 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I will examine these factors in turn.

1. Knowledge of Protected Activity

NGM does not dispute that Descutner expressed concerns to management officials about miners failing to follow state and company established COVID-19 protocols on the buses. Tr. I, 28–37, 40–41, 190–191. As discussed above, I find that Descutner's expressed concerns related to COVID-19 protocol constitute protected activity and that NGM had knowledge of Descutner's protected activity.

2. Animus or Hostility Toward the Protected Activity

Descutner argues that every time he engaged in protected activity, he was soon thereafter subject to discipline which ultimately led to the termination of his employment. In essence, Descutner asserts that the discipline he received and his resulting termination would not have occurred had he not engaged in protected activity.[5] Tr. I, 92; Comp. Br. at 2.

After considering all of the evidence and testimony, I do not agree with Descutner's assertions. As noted above, I found that Descutner did engage in protected activity in December 2020 and January 2021 when he complained to Dominguez and Strong, respectively, about the failure of NGM to enforce state and company-mandated COVID-19 protocols. At each instance, Descutner was met with, at most, indifference or lack of motivation by Dominguez and Strong to address his complaints. Tr. I, 33–34, 39–41, 47–48. In other words, Descutner failed to proffer any evidence beyond his own bare assertions of any animus on the part of NGM toward his protected activity as it relates to any of the discipline he received.

[5] Descutner may not have necessarily raised each point explicitly as stand-alone evidence of animus, but I include them here to exhaustively analyze his claim of discrimination. I do not find any evidence proffered by Descutner to be preponderant evidence of discriminatory motive or animus.

The first noted discipline issued to Descutner after he expressed concerns related to COVID-19 protocol was a Tier 1 documented verbal notice on January 6, 2021, for an unexcused absence. Tr. I, 41–46. Ex. R-D. While Descutner provided a reasonable explanation at hearing for his unexcused absence, the fact remains he had exhausted his PTO. Thus, his supervisor Strong would not approve Descutner's absence. Tr. I, 42–44. It is undisputed that NGM supervisors have the discretion to approve or disapprove absences. Tr. II, 56–57. Descutner testified Strong had previously allowed him days off even though he had exhausted his PTO. Tr. I, 44–45. Yet later, on cross examination, Descutner stated he did have PTO prior to this incident when he previously asked for and was granted days off. Tr. I, 137–138. Descutner's supervisor Strong did not testify, nor were any leave record exhibits proffered on this issue. The record is left unclear as to whether Strong approved some absences after Descutner exhausted his PTO and, if so, whether specific circumstances justified the approval of those absences. Whether the approved absences in question occurred prior to or after Descutner engaged in protected activity is also an unresolved question.

Descutner invites the Court to draw, from these indeterminate facts, an inference that Strong's actions were marked by hostility. I decline the invitation. The burden of proof is on Descutner to demonstrate by a preponderance of evidence, not an inference, that he was denied time off because of his protected activity. Descutner has simply failed to meet his burden here as it relates to the unexcused absence he received on January 6, 2021.

On July 20, 2021, Descutner was issued a Tier 1 documented verbal notice for an inappropriate interaction with a supervisor, Terry Krantz. Ex. R-E; Tr. I, 54. Descutner does not dispute that the event took place related to his above-referenced concerns regarding the morale of workers not being promoted or compensated for getting certified to operate equipment. Tr. I, 51–52. In addition, he acknowledged that he engaged in the verbal altercation with supervisor Krantz. Tr. I, 49–52. However, his testimony expresses a belief that he was provoked into the altercation by Krantz and so should not have been disciplined. Tr. I, 53–54. Krantz was also disciplined for the altercation with a July 21, 2021, letter of concern. Ex. R-F. Even if provoked there are no indicia this event or resulting discipline was in any way related to Descutner's COVID-19-related protocol complaints to Dominguez and Strong from December 2020 or January 2021. Descutner has failed to meet his burden of proof that but for his protected activity, he would not have been issued this documented verbal notice.

Finally, on November 2, 2021, Descutner was ultimately terminated from employment for violating NGM employee standards related to both his July 20, 2021, discipline as well the October 19, 2021, loader incident. Specifically, with regard to his loader incident he was cited with four separate and specific infractions: (1) Unauthorized operation of equipment; (2) Failure to use a spotter; (3) Failure to conduct a pre-operations check; and (4) Damaging company property. Tr. I, 165, 176–177; Tr. II, 85–86, 120–121, 151. Ex. R-V. Descutner admitted that he failed to use a spotter and damaged company property. Tr. I, 67–68, 91–92. However, he disputes the other two infractions, testifying that he relied on Sorenson's statement that the loader was a 9-yard loader and that he did, in fact, conduct a pre-operations check of the equipment before moving the loader. Tr. I, 64–66, 83–84. The statement Sorenson allegedly made to Descutner that the loader was a 9-yarder is disputed by NGM. Sorenson did not testify.

However, supervisor Myers, who conducted the loader incident investigation, testified that when interviewed, Sorenson stated he told Descutner only that it was a 1700 series loader. Tr. II, 148–149; Ex. R-PP. Dominguez convincingly testified that, "regardless of what someone tells you, it is the miner's responsibility to know what kind of equipment they are getting on to operate and to insure they are signed off or authorized to operate the machinery." Tr. I, 176. Descutner's co-worker who was present during the loader incident, Garrett DeSart, corroborated Dominguez by testifying that a supervisor is not authorized to allow a miner to operate a piece of equipment they are not signed off on or certified to operate. Tr. I, 180–181, 230–231. Both DeSart and Armstrong testified that if a miner has any question or concern about whether they are authorized to operate a piece of equipment, they can simply contact dispatch to confirm their status on the piece of equipment they intend to operate. Tr. I, 231; Tr. II, 85. DeSart further testified that if he is ever asked by management to operate a piece of equipment he is not authorized to operate, he merely explains that to the manager and they find someone else who is signed off on the equipment to operate it. Tr. I, 231. I find that even if Sorenson did mistakenly tell Descutner the loader in question was a 9-yard loader, it was Descutner's responsibility to ensure he was authorized or signed off on the loader to operate it. This leads to the critical importance of the pre-operational examination infraction.

During the hearing, NGM presented comparison photos showing the differences between a 9-yard loader and the 11-yard #80 loader involved in the incident to support their conclusion that Descutner did not do a pre-operational inspection of the loader before operating it. Ex. R-S. NGM maintains that had he conducted a pre-operational inspection he would have noticed the obvious differences between the 11-yard #80 loader and a 9-yard loader he was authorized to operate. Tr. I, 11, 174. I find that the photos illustrate no less than seven differences that a casual observer could detect in examining both pieces of equipment. Ex. R-S. Four of the differences are especially compelling: (1) the difference in the number of steps used to access the loader cabs; (2) the control panel or dashboards in each loader; (3) the number of pedals used to operate the loaders (11-yard loader #80 has two pedals while 9-yard loaders have three); and (4) the width of the buckets on the front of loaders. Ex. R-S. Armstrong testified that during the due-diligence meeting with Descutner, when asked if he noticed anything specific about the #80 11-yard loader, he responded, "I thought it was pretty big, thought the bucket volume was different." Tr. II, 94–95; Ex. R-W.

At hearing, when asked about how he failed to observe the differences between the loaders during his pre-operational inspection, Descutner's responses were unconvincing given the number of obvious differences between the loaders, especially if he had conducted a thorough pre-operational inspection as he asserts. Tr. I, 79–83. Specifically, he testified once Sorenson confirmed for him it was a 9-yard loader (a point of contention discussed above), he was looking for safety defects—not differences. He stated he looked at the tires, but failed to see the three-inch tire height difference. Tr. I, 79, 81. Further, "When I was in the cab, I was basically doing a brake test and I was, you know, these fuel - - they say check your gauge, but your gauges work. Sometimes you just look at them and see if there's anything reading bad. The backup camera was the same, you know, the controls and everything that I used were all in the same place." Tr. I, 80–81. With regard to his failure to notice the different number of pedals and the difference in steps leading up into the cab he stated:

> The thing is I was not operating this piece of equipment for work and that third pedal is a D brake. So, what a D brake is if you go into a pile and you want to still use your accelerator power you can use that so you don't – you're not pushing forward on your brakes, you don't have to kick it in neutral where, you know, that's an extra step. I was only moving it a hundred feet. I had no need for that third pedal. All I needed was the brake and the accelerator to move it and get it out of the way, and that's all. And when you're sitting in those, you can't really just look down and see that pedal. And when you're climbing in those, you gotta focus on 3-pont contact because they're very tight, there's not a lot of room, there's a lot of metal. So, you gotta just – you're focusing on getting in, you're not focused – you're not standing there or looking down and looking at it.

Tr. I, 81–82.

The different-sized buckets, the different number of steps, the different number of operational pedals, the different control panels between the 11-yard #80 loader and 9-yard loader can clearly be observed in the record comparison photos proffered by NGM. Ex. R-S. Of particular note with regard to the pedals, and in direct conflict with Descutner's above testimony on this issue, Dominguez in a straightforward, unequivocal and credible fashion testified:

> So, between the 9-yard and the 11-yard I guess it would be - - to explain it, it's kind of the difference between a manual versus an automatic. The 9-yard loader has three pedals. It's got a gas pedal, a brake pedal, and a declutch brake pedal, and the 11-yard just has the throttle pedal and the declutch brake pedal. So, the proper procedure for starting the 9-yard loader is putting your feet on the brake and the declutch brake pedal to keep the machine from potentially lurching when you start it.

Tr. I, 172.

I also credit Dominguez's testimony specifically describing the control panel differences between the two loaders:

> A. . . . the 11-yard loader has a digital control spring for the gauges and systems in the machine and it also has a back-up camera and back-up screen in it.
>
> Q. What about the 9-yard? What does it have?
>
> A. The 9-yard's got analogue gauges, the switches for the lights and various functions are in different spots, and that machine did not have a - - backup camera in it.
>
> Q. When a - - miner goes to move, like the miner goes to move the loader, let's say loader 80 here, the 11-yard, and turns it on, do the gauges come on?

A. Yes. So on loader - - on loader – the 9-yard loaders, the gauges do what's called a sweep. The needles will move back and forth. And the 11-yard loader is the screen physically comes on like you turn on a television and then it shows you your gauges.

Tr. I, 170–171.

I credit the photos as well as the supporting testimony of Myers, Dominguez and Armstrong over Descutner's attempted explanation of overlooked differences, and I find that it was reasonable for NGM to conclude Descutner failed to do a pre-operational examination. Tr. I, 169–174; Tr. II, 74–77, 149–150. At a minimum, if he did in fact conduct an examination, it was cursory and ineffective.

Descutner asserts that because he made COVID-19 protocol-related complaints in December 2020 and January 2021, management had reason to suspect he was the one who complained to MSHA, prompting them to visit the mine in October 2021 and threaten to shut the mine down if further complaints were submitted. Comp. Br. at 16. This undisputed and unfortunate threat by MSHA to shut down the mine just two weeks prior to Descutner's termination certainly created a scenario of *potential* animus or hostility toward Descutner. However, there is absolutely no indicia management believed it was Descutner who made the anonymous complaint that prompted the MSHA site inspection.

Indeed, both Dominguez and Armstrong—who, along with Myers, recommended that Descutner be terminated—credibly testified in a consistent and straightforward fashion that other miners had complained about the lack of mask-wearing and social distancing. Tr. I, 219–220. Dominguez stated he had no reason to think Descutner called in the October 2021 hazard complaint because there was a percentage of, "people on site that were strong about COVID-19 policies. So, it could have been somebody off our site, it could have been a spouse. It doesn't have to just be the miner." Tr. I, 193–194. Armstrong testified that NGM received several complaints from miners other than Descutner that COVID-19 protocols were not being followed. She specifically testified about two different instances between January and October 2021 when she investigated complaints that miners were not wearing masks or social distancing as required. These were not at the Leeville mine site. Tr. II, 97–100, 126. Further, Armstrong testified on cross examination that she heard grumblings at the Leeville mine site regarding masks and social distancing during the time NGM made use of light vehicles to transport miners to the mine site. Tr. II, 127–128.

Neither Armstrong nor Myers, who conducted the investigation of Descutner's loader incident and recommended to Dominguez that Descutner be terminated from employment, were aware of Descutner's December 2020 or January 2021 bus-related COVID-19 protocol complaints to Dominguez and Strong. Tr. II, 100, 126, 152–153. Dominguez, for his part, credibly testified convincingly, unequivocally and without reservation that Descutner's COVID-19 protocol complaints had no bearing on the decision to recommend his removal from employment. Tr. I, 218. I find no evidence to support Descutner's suspicions that his December 2020 and January 2021 complaints some eight to nine months prior had anything to do with MSHA's October 2021 site inspection, threat to shut the mine down or that NGM management

officials Armstrong and Myers involved in recommending his termination had any awareness of his prior complaints or, in Dominguez's case, used those complaints as motivation to terminate Descutner.

Even recognizing MSHA's inflammatory threats as fodder for potential protected activity animus or hostility by NGM, other than through inference, I find no evidence Descutner's protected activity directly or indirectly led to either his discipline or termination from employment. Descutner has simply failed to prove by a preponderance of evidence that but for his protected activity he would not have been disciplined or terminated. In fact, the preponderance of the evidence demonstrates but for his own actions of an inappropriate interaction with a supervisor and the loader incident he would still be an NGM employee.

3. Timing

Descutner was first disciplined on January 6, 2021, for an unexcused absence within weeks of complaining to Dominguez about the lack of mask-wearing and social distancing on the transportation buses. Tr. I, 41–45, 58; Ex. R-D. Descutner continued to complain to his supervisor Strong in January 2021 and was next disciplined on July 20, 2021, for an inappropriate interaction with supervisor Krantz. Tr. I, 48–55, 59–69; Exs. R-E, -G, -H, -I, -J, -K. Finally, Descutner was terminated from employment on November 17, 2021, some eight to nine months after his last recognized protected activity and within weeks of MSHA threatening to shut down the mine if they received anymore COVID-19 protocol related complaints. Given that it is undisputed Descutner complained in December 2020 and was first disciplined on January 6, 2021, I find sufficient evidence to determine via temporal proximity that it was certainly possible Descutner's protected activity played a role in the three documented disciplinary events presented in this case. The Commission does not apply "hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Accordingly, I acknowledge and find that a coincidence in time exists in this case.

4. Disparate Treatment

Descutner has proffered alleged instances of disparate treatment. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Chacon*, 3 FMSHRC at 2512. At hearing, comparator evidence was presented with a focus on Descutner's coworkers Steve Mann and Rowan Gardner. Tr. I, 183–184, 210–212; Tr. II, 102–104, 123.

Mann, in the process of moving a haul truck out of the tire shop, did not conduct a pre-operational inspection of the vehicle, failed to obtain a spotter and while operating the truck damaged a portable toilet. Tr. I, 183. NGM cited him for three infractions putting him at a Tier 3 final written notice. Tr. I, 183; Ex. R-Z. Mann's notice of discipline also stated he altered the scene of an incident by driving away after making contact with the portable toilet. Ex. R-Z. Both Dominguez and Armstrong testified this was not counted as a separate infraction because he stopped the haul truck as soon as he realized that he hit the portable toilet. Tr. I, 184; Tr. II, 131–

133. Mann had no other active discipline in his employment record. Thus, NGM determined the single incident with the haul truck did not merit termination. Tr. I, 138; Tr. II, 131, 133. Descutner argues Mann should have received a fourth infraction for altering the scene of an incident. Comp. Br. at 21.

Gardner, while operating a haul truck, pulled into and out of a shop without using a spotter. While exiting the shop, the truck made contact with the fire door frame causing property damage to the door frame. Ex. R-Y. Gardner received a Tier 2 written notice of discipline. Ex. R-Y. Descutner argues Gardner should have received a Tier 3 final written notice because pulling into and out of the shop without a spotter should have been considered two separate infractions. Comp. Br. at 22. Armstrong testified that they decided the failure to use a spotter was one infraction. Tr. II, 105.

I credit the testimony of both Dominguez and Armstrong regarding the distinctions in discipline for Mann and Armstrong's comparator testimony regarding Gardner. Their testimony was straightforward, consistent and unequivocal. It is important to first note that Descutner had prior active discipline in his record while these comparators did not. Second, Descutner's four loader incident infractions were each defined elements or separate and distinct violations of NGM's policies. Exs. R-C, R-L. Descutner, to his credit, admitted to two of the infractions – failure to obtain a spotter and that his actions caused property damage. Tr. I, 67–68, 91–92.

The other two infractions, unauthorized operation of equipment and failure to conduct a pre-operations check, are contested here. For the reasons previously stated, I find that it was Descutner's responsibility to ensure he was authorized to move the loader at issue in this case and that he failed to conduct an effective or adequate pre-operations check on it. I further find that if Descutner, a well-experienced miner, had in fact conducted a viable pre-operation inspection of the 11-yard #80 loader he would have recognized it was not a 9-yard loader and concluded he could not operate the loader, even for a brief time, to move it out of the way.

Descutner raises numerous other comparators in his post-hearing brief not referenced or presented during the evidentiary presentation of his case. Employee # 73710 is one of those comparators. *See* Comp. Br. at 22. The only reference to employee #73710 during the hearing is through Respondent's exhibit HH which is a chart that lists employees disciplined for not being signed off to operate particular equipment. Tr. II, 106; Ex. R-HH. Descutner argues in his brief that employee #73710 was issued a Tier 2 written notice even though four separate NGM policies were violated. Comp. Br. at 22. Specifically, employee #73710 was written up for: (1) directing an employee, "to complete a task on a powder truck that he knew the employee was not signed off on or trained on", (2) directing an employee to operate a truck without clear guidance; (3) a lapse in communication; and (4) a "broken window." The exact description listed in exhibit HH follows:

> When acting as a lead man on 6/7/22 (redacted name) directed an employee to complete a task on a powder truck that he knew the employee was not signed off on or trained on. (Redacted name) directed the employee to operate the powder truck without clear guidance and proper documentation needed to operate that

> piece of equipment. Lapse in communication that occurred on the transfer raise near miss that resulted in a broken window.

Ex. R-HH.

There are several critical points to make about this comparison. First and foremost, there is no testimony by any witness to explain the number of infractions counted by NGM for purposes of issuing the Tier 2 written notice. The written description referenced above could easily be interpreted to count "without clear guidance" and a "lapse in communication" as one infraction or step instead of two as Descutner argues. Without testimony to address this discipline, the Court has no way of assessing how NGM viewed this event or determined the number of infractions or steps to assess. Nor can the Court assess any level of credibility to the testimony when the testimony does not exist.

Second, the Court notes that employee #73710 worked at the Meikle mine site not Leeville thus Armstrong, who was the lead NGM management official in charge of Descutner's loader incident discipline determination process, was not involved in employee #73710's discipline. Tr. II, 106–107; Ex. R-HH. In fact, Armstrong testified Descutner's loader incident was the only investigation she had personal experience with that involved the issue of operating equipment without being signed off. Ex. R-HH. In that light, Descutner argues the miner who actually was directed to drive the powder truck without being signed off as authorized to drive the vehicle was not disciplined. Comp. Br. at 26. This is yet another assertion made in Descutner's post-hearing brief without any testimony or evidence in the hearing record for the Court to properly weigh the reasons for the actions or lack of disciplinary action on the part of NGM. I am confined to weighing the evidence and testimony presented during the evidentiary hearing rather than making an inference based on an unexplained outcome raised in a post-hearing brief. I cannot and will not infer disparate treatment under such circumstances.

Third, it bears repeating that Descutner had not only four infractions related to the loader incident but prior active discipline in his record for an inappropriate interaction with a supervisor. There are no indicia employee #73710 or any of the other comparators to whom Descutner points had prior active discipline in their record. Again, Descutner has the burden of proof by a preponderance of evidence. The preponderance of evidence in no way demonstrates that employee #73710 was treated more favorably under similar circumstances than was Descutner.

Specifically, with regard to Descutner's admitted failure to utilize a spotter during the October 2021 loader incident, he asserts he was treated less favorably than his co-worker Desart who was working with him at the time of the loader incident. Comp. Br. at 22–23. Desart testified he could not recall a specific instance in the six years he has worked at NGM where he ever used a spotter but that he may have once or twice. Tr. I, 236. At the time of the loader incident, he was operating a scissor lift, a large piece of equipment, without a spotter but was not disciplined. Tr. I, 228. However, Descutner, in his own due-diligence meeting about the loader incident, when asked whether Desart had a spotter responded: "I don't think so I think Jeff pulled right up in the bay. He was not really in the shop area, he was in the wash bay. A lot of the time you do not need one there – he was in [the] entrance of [the] shop." Ex. R-W. Descutner, by his

own words, makes the distinction between his own circumstance and Desart's, making his post-hearing argument on this point misleading and disingenuous.

Another comparator Descutner raises with regard to the spotter infraction is employee #104914. Comp. Br. at 23. This employee was given a Tier I documented verbal notice for causing damage to a fire door while attempting to pull into the shop. Ex. R-II; Tr. II, 125. The referenced exhibit states the employee failed to use a spotter. Ex. R-II. However, Armstrong testified: . . . [T]echnically he wasn't going into the shop yet, he was trying to get lined up so that then he could call a spotter to get him in, and he ended up doing damage while trying to get lined up." Tr. II, 108. Descutner argues likewise he did not move loader 80 into the shop yet he was still disciplined for not having a spotter. Comp. Br. at 23. However, Descutner admitted he did not get a spotter and fully believed and understood that NGM's policy required a spotter while moving the Loader 80 within the shop itself. In regard to this issue, he testified at hearing about his admission, referring to a written statement he wrote on the loader incident statement form:

> Q. There's a description, it looks like, that you wrote of the events. Will you read the last two lines, please?
>
> A. Sure. "Did not have a spotter, did not ask for one. My bad."
>
> Q. Can you explain to me, please?
>
> A. Well, I mean, if you screw up, you gotta own it. I mean, you gotta be - - and I didn't have a spotter, so it was my bad. I mean, I do believe that a lot of things could have been different, but the thought of mine is that I didn't make sure I had a spotter, so yeah.
>
> Q. So you accept responsibility for it?
>
> A. I do.

Tr. I, 87; Exs. R-O, R-W.

The bottom line is employee #104914 is not a similarly situated comparator because Descutner was moving a loader already within the shop itself while #104914 had not yet pulled into the shop where a spotter was required. In addition, as noted above, both during the investigation of the loader incident as well as at the hearing, Descutner freely admitted he was wrong for not engaging a spotter when moving the loader within the shop. Tr. I, 87; Ex. R-W. Now, in his post-hearing brief, I am being asked to ignore that admission and determine instead that the failure to utilize a spotter should not have been one of the charged infractions that NGM found and relied upon to terminate his employment. This I will not do.

Descutner's post-hearing brief goes into great detail about various other comparators related to each of the four infractions or steps he was charged with in regard to the loader incident. Comp. Br. at 22–27. Post-hearing briefs are for summation and argument only and are not considered part of the record as evidence. Just as noted above with employee #73710 there is

no record testimony from any witness which addresses any of these additional comparators. Accordingly, I find the very limited comparator evidence in the record to be unpersuasive.

In sum, Complainant has failed to show by a preponderance of the evidence that he was treated less favorably than similarly situated individuals who had not engaged in protected activity. Descutner is the only miner who had prior active discipline in his record and was issued a Tier 3 level final notice based on four separate and distinct infractions or violations of NGM's employee policies. Interim superintendent Dominguez testified that with Descutner's prior active discipline he could have been terminated with just three additional infractions or violations related to the loader incident rather than four that NGM ultimately charged him with. Tr. I, 181–182. I find not one comparator proffered by Descutner had the same or similar record as his.

For the reasons noted above, Descutner has failed by a preponderance of evidence to demonstrate he was treated less favorably under similar circumstances than his co-workers who did not engage in protected activity. I find that he was not subject to disparate treatment.

C. Conclusion

Despite valiant efforts, Descutner has failed to show that his protected activity played any part in NGM's decision to discipline and ultimately terminate him, let alone that but-for his protected activity, he would not have been disciplined or removed from employment.

ORDER

Accordingly, it is **ORDERED** that the complaint of discrimination brought by Todd Descutner is hereby **DISMISSED**.

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

Distribution: (Electronic and Certified Mail)

Kristin R.B. White, Fisher & Phillips LLP, 1125 17th Street, Suite 2400, Denver, CO 80202
kwhite@fisherphillips.com

Larson A. Welsh, Law Office of Hayes & Welsh, 199 N. Arroyo Grande Boulevard, Suite 200, Henderson, NV 89074, lwelsh@lvlaw.com

Debra M. Amens, Amens Law, 432 S. Broad Street, Battle Mountain, NV 89820,
debra@amenslawfirm.com

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 8, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL MINING COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0035 A.C. No. 46-09569-564845 Mine: Itmann No. 5

ORDER GRANTING THE SECRETARY OF LABOR'S MOTION TO AMEND PETITION

This case is before me upon the filing of the Secretary of Labor's Petition for the Assessment of Civil Penalty under section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. On March 15, 2023, the parties notified my Law Clerk that they settled all but one citation in this docket, leaving only Citation No. 9568130 at issue.

On March 30, 2023, the Secretary of Labor ("Secretary") filed a Motion to Amend Petition. In the motion, the Secretary requests that I grant her request to modify the negligence for Citation No. 9568130. (Mot. at 1.) The citation's negligence was originally designated as "moderate," and the proposed penalty assessment is $2,194.00. In Citation No. 9568130, Inspector Nicholas Christian wrote the following verbatim—

> The roof and ribs where miners are required to work and travel are not being maintained on the A-Mains section. When observed multiple ribs were found to be broken loose from the mine roof and along both sides. These were found at the following locations:
>
> 1) #5 Entry 2 Crosscuts inby Feeder, measured 60" long x 8" wide and 12" thick
>
> 2) #4 Entry 2 Crosscuts inby Feeder, measured 60" long x 30" wide and 18" thick
>
> 3) 3) #5 Entry 2 Crosscuts inby Feeder, measured 24' long x 18" wide and 24" thick
>
> 4) 4) #4 Entry Feeder Line, measured 8' long x 29" wide and 14" thick

> All of these ribs were in areas where miners are required to work and travel throughout their work shift, therefore exposing them to hazards related to falling rock and materials.
>
> Standard 75.202(a) was cited 7 times in two years at mine 4609569 (7 to the operator, 0 to a contractor).

(Mot. at 1–2.)

On April 7, 2023, Respondent filed a Response opposing the Secretary's Motion to Amend Petition.

I. PARTIES' ARGUMENTS

In the motion, the Secretary seeks to modify the negligence finding from "moderate" to "high." (Mot. at 2.) In support, the Secretary points to the citation which alleges "obvious and extensive cracked and broken ribs in four areas where miners frequently travel and work." (Mot. at 2.) The Secretary also notes that CONSOL has been cited seven times in the previous two years under this same standard, including four citations in the month prior to the issuance of the current citation, which should have put "the operator on heightened notice to be aware of and correct hazardous rib conditions." (Mot. at 2.) The Secretary asserts that she "does not seek in this motion a determination of an appropriate penalty amount." (Mot. at 3–4.) Rather, via the motion, the Secretary seeks to give CONSOL adequate notice of the Secretary's intent to seek a higher civil penalty than initially proposed, so CONSOL will have the "full opportunity to develop its case and prepare for hearing." (*Id.*)

CONSOL opposes the Secretary's motion. (Mot. at 4; Resp. at 1.) CONSOL counters that Inspector Christian, who issued the citation in this case, also issued three of the recent citations relied upon by the Secretary, and thus, CONSOL asserts, Inspector Christian was aware of the previous citations when he originally determined the level of negligence. (Resp. at 2–3.) CONSOL notes that counsel for the Secretary has not yet answered written discovery nor taken depositions, and thus CONSOL believes the Secretary is filing this motion without all necessary information. (Resp. at 2.) CONSOL argues, "it would be unnecessary, inappropriate, and premature to overrule the negligence designation of the Inspector at this early state." *Id.* Further, CONSOL states that no evidence suggests the Secretary interviewed the Inspector or that the Inspector altered his opinion as to the level of negligence he originally designated. (Resp. at 3.) CONSOL posits that, because the court analyzes negligence *de novo* after hearing the evidence and may modify the Secretary's citation, the Secretary's motion is "unnecessary." *Id.*

Lastly, CONSOL argues that the Secretary's proposed amendment "prejudices the Respondent, since it represents a willingness on the part of the Secretary to overrule its Inspector, early in the process, without completing written discovery, depositions or considering the mitigating factors to be identified by the Respondent." (Resp. at 4.) CONSOL attaches the Secretary's Interrogatories and Requests for Production of Documents and First Request for Admissions to Respondent to its response. (Resp. at 6–10.) CONSOL hypothesizes that the

Secretary's motion is "merely being utilized to exert inappropriate pressure on Respondent for exercising rights of discovery and a hearing." (Resp. at 4.)

II. PRINCIPLES OF LAW AND ANALYSIS

The Commission has no specific rule regarding the amendment of pleadings, yet Commission Procedural Rule 1(b) states "[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . . the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure." 29 C.F.R § 2700.1(b). Federal Rule of Civil Procedure 15(a)(2) states that after more than 21 days after filing initial pleadings, a party may amend its pleading "only with the opposing party's written consent, or the court's leave," but that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

The Supreme Court has interpreted Rule 15 liberally to allow amendments to pleadings unless one of the following factors is present that justifies denial—(a) undue delay; (b) bad faith by movant; (c) repeated failure to cure deficiencies by previous amendments; (d) undue prejudice to the opposing party; or (e) futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Commission takes a similar view when it comes to amending petitions, especially when the amendment does not prejudice the non-moving party in preparing its defenses. *See Cyprus Empire Corp.*, 12 FMSHRC 911, 914–16 (May 1990) (finding no abuse of discretion by ALJ who permitted Secretary's prehearing amendment to the citation where the non-moving party was not prejudiced by the amendment); *see also Wyo. Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) ("amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed"); *CDK Contracting Co.*, 23 FMSHRC 783, 784 (July 2001) (ALJ) ("It is well settled that administrative pleadings are liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party" in granting Secretary's motion to amend to allege violations of two alternative safety standards).

First, in applying the Supreme Court's test for Rule 15(a), I note that the Secretary's amendment causes no undue delay, because no hearing date had yet been set at the time the motion was filed and discovery was not yet complete. Second, CONSOL posits the Secretary filed its motion in bad faith "to exert inappropriate pressure on Respondent for exercising rights of discovery and a hearing." (Resp. at 4.) However, I find no indication of bad faith because an objective reading of the alleged violation in Citation No. 9568130 could justify a high negligence determination. Third, given this is the Secretary's first proposed amendment in this case, the repeated failure to cure deficiencies by previous amendments is inapplicable. Fourth, the amendment is not futile because the Secretary could reasonably prove high negligence at trial.

Fifth, I must determine if granting the motion to amend unduly prejudices Respondent. The Commission has held that "[m]ere allegations of potential prejudice or inherent prejudice should be rejected," and the non-moving party must demonstrate more than a danger of prejudice to show actual prejudice. *Long Branch Energy*, 34 FMSHRC 1984, 1992–93 (Aug. 2012). While CONSOL argues the proposed amendment would prejudice CONSOL since it is still "early in the process," CONSOL's argument is exactly contrary to Commission case law. (Resp. at 4.)

Here, the Secretary filed her motion to amend on March 30, 2023, before the hearing was scheduled. Thereafter, on April 14, 2023, I scheduled this case in consultation with the parties to be heard—more than four months later—on August 23, 2023. In determining undue prejudice, Commission Administrative Law Judges have found no prejudice for amendments made with significantly less time before hearing, including amendments made at hearing. *See Higman Sand & Gravel, Inc.*, 18 FMSHRC 951, 958–59 (June 1996) (ALJ) (granting Secretary's amendment and finding no prejudice where amendment was made for the first time at the hearing); *Bob Bak Constr.*, 28 FMSHRC 817, 822–23 (Sept. 2006) (ALJ) (granting Secretary's motion to amend pleading to add an alternative standard and finding no prejudice where amendment was first made at hearing). Early notice here weighs in favor of finding the amendment nonprejudicial.

Respondent also argues "it is premature to overrule the negligence designation of the Inspector." (Resp. at 2.) Yet this argument is inapposite. The Secretary is allowed to conform her pleadings to the evidence. *See Cyprus Empire Corp.*, 12 FMSHRC at 916 (finding that changes in the nature of the petitioner's claims or legal theories are permissible purposes for amendment). Further, the parties have just begun to actively engage in discovery. (Resp. at 2.) The Secretary's amendment—a change in the degree of negligence alleged in the pleadings— does not change the underlying facts and would not appear to require additional discovery. *See New NGC, Inc.*, 35 FMSHRC 3225 (Sept. 2013) (ALJ) (finding no prejudice in case not yet scheduled for hearing and granting motion to amend to allege violations of two alternative safety standards where the Secretary relied on facts already stated in the citation). Although the amendment gives notice of the intent to argue high negligence, regardless of what the Secretary pleads she must still educe evidence at hearing to prove the allegation.

Under Federal Rule of Civil Procedure 15(a) and Commission case law, Commission Judges may liberally grant amendments to petitions when justice requires. Given the lack of prejudice to Respondent, as well as the lengthy notice provided in advance of the hearing date, I conclude that allowing the Secretary to amend the pleading is appropriate.

III. ORDER

WHEREFORE, it is hereby **ORDERED** that the Secretary's Motion to Amend Petition is **GRANTED**.

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

Distribution: (Via Electronic Mail Only)

J. Matthew McCracken, Esq., U.S. Department of Labor, Office of the Solicitor, Division of Mine Safety and Health, 201 12th Street South, Suite 401, Arlington, VA 22202-5450 (mccracken.john.m@dol.gov)

James P. McHugh, Esq., Hardy Pence PLLC, P.O. Box 2548, Charleston, WV 25329-2548 (jmchugh@hardypence.com)

/gw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

May 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0141 A.C. No. 46-09569-568207
v.	
CONSOL MINING COMPANY LLC, Respondent	Mine: Itmann No. 5

ORDER DENYING MOTION TO APPROVE SETTLEMENT AND STRIKING MATERIAL FROM MOTION

On April 25, 2023, a Commission ALJ issued an order noting with disapproval the Secretary's ongoing citation to *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 880, 882 (June 1996), as authority for her removal of the significant and substantial designations from citations during the settlement process. *See* Decision Approving Settlement with Significant Reservations, Docket no. PENN 2022-0129, at 4–6 (Apr. 25, 2023) (ALJ) ("Reservations"). Commission judges have routinely observed that *Mechanicsville*, and the also oft-cited *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576 (Aug. 2020), cannot support the premise for which they have been cited.[1]

In this instance, though, the Judge correctly pointed out that parties have a duty not to misstate case law and that such misconduct has been affirmed as sanctionable under Rule 11 of the Federal Rules of Civil Procedure. *See* Reservations at 6 (citing *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 280 (7th Cir. 1989)).

Following this, I issued an order on May 3 denying a motion to approve settlement, in which I said that the continued citation to these cases as authority for the removal of S&S designations falls below the minimum standards of practice before the Commission. *See* Order Accepting Appearance and Denying Motion to Approve Settlement, Docket No. WEVA 2023-0071, at 7 (May 3, 2023) (ALJ). I said that a conference and litigation representative who submitted a motion with such citations would be barred from practice before me. *Id.*

[1] *See* Decision Approving Settlement, Docket No. SE 2023-0046, at 2 (Apr. 24, 2023); Order Denying Settlement, Docket No. WEST 2022-0249, at 5 (Nov. 2, 2022) (ALJ); Order Denying Settlement, Docket No. WEST 2022-0267 & WEST 2022-0268, at 11 (Oct. 18, 2022) (ALJ).

I also said that there might be other consequences. I noted that an attorney should know better, and that such misstatements of the law by an attorney would be even more egregious. *Id.* at 7 n.5. The supervising attorney for the Labor Department's CLR's was included in the distribution for the order.

On May 9, the Secretary filed with the Commission a Motion to Approve Partial Settlement, which again included the offending citations to *Mechanicsville* and *American Aggregates*. *See* S. Mot. to Approve Partial Settlement, Docket No. WEVA 2023-0141, at 3 (May 9, 2023). Not only is the recitation of these cases obviously inappropriate; it is impertinent. To my knowledge, no Commission judge has agreed with this mischaracterization of the law, and I have approved dozens of S&S removals without ever considering either case as authority for the removal. Rather than adhering to the clearly-expressed expectations of the Commission's judges, the Secretary has continued to recite this non-sequitur any time an S&S designation is proposed for removal in a settlement.

An attorney for a government agency who misstates the law arrogates the properly conferred constitutional authority of others to determine what the law *is.* Like bridge scour, this subtle corrosion wears on the foundation of the rule of law and threatens the integrity of a structure upon which the public depends.

While the full array of sanctions under Rule 11 may not be available as a corrective, I have made clear that misleading use of precedent fails to meet the minimum standards of practice before the Commission. Its redress begins with a refusal to accept the unacceptable. By this order, I therefore **STRIKE** the reference to the cited cases and the assertions they purportedly support.[2]

Striking material, and even professional sanctions, are appropriate responses to bad faith employment of case law. *See Collar v. Abalux, Inc.*, 806 Fed. Appx. 860, 864 (11th Cir. 2020) (affirming sanctions where an attorney continually misstated the import of case law); *Kamdem-Ouaffo v. Huczko*, 810 Fed. Appx. 82, 83 (3d Cir. 2020) (citing Fed. R. Civ. P. 12(f)) (noting that impertinent analysis of law is "plainly vulnerable to [] remedial strike"). Striking the impertinent matter from the motion is the least severe sanction I could impose in these circumstances. As with the Mine Act, those who persist in the discredited and misleading use of precedent should reasonably anticipate that their conduct will be deemed knowing or intentional and will be addressed with progressive severity until the practice is discontinued.

[2] The language to be stricken from the motion reads: "Taking into account the uncertainty of the outcome of these issues at trial, the Secretary has decided to exercise her discretion to modify the gravity to unlikely and not S&S as recognized in *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996))." Mot. at 3.

The motion to approve settlement is **DENIED** without reaching the merits. This denial will be reconsidered if the parties refile the motion without the noted language, *see supra* note 2. The parties should anticipate that the matters addressed by the motion will be resolved at hearing unless and until a motion that meets the standards of practice before the Commission has been filed.

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

Distribution:

Robert S. Wilson, Office of the Solicitor, U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202-5450, wilson.robert.s@dol.gov

D. Cass Trent, CLR, U.S. Department of Labor, MSHA, 4499 Appalachian Hwy, Pineville, WV 24874, trent.david@dol.gov

Jim McHugh, Hardy Pence LLC, 10 Hale Street, 4th Floor, P.O. Box 2548, Charleston, WV 25329, jmchugh@hardypence.com

Craig Aaron, CONSOL Energy Inc., 275 Technology Drive, Suite 101, Canonsburg, PA 15317, craigaaron@consolenergy.com

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 15, 2023

DAVID A. ROSE FARM & AG SERVICES, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. SE 2023-0159-RM Order No. 9707523; 04/26/2023 Docket No. SE 2023-0160-RM Citation No. 9707524; 04/26/2023 Docket No. SE 2023-0161-RM Citation No. 9707525; 04/26/2023 Docket No. SE 2023-0162-RM Citation No. 9707526; 04/26/2023 Ortona Mine Mine ID 08-01452
GARCIA MINING, LLC, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. SE 2023-0165-RM Citation No. 9707527; 04/26/2023 Docket No. SE 2023-0166-RM Citation No. 9707528; 04/26/2023 Docket No. SE 2023-0167-RM Citation No. 9707529; 04/26/2023 Caloosahatchee Mine Mine ID 08-01453

ORDER DENYING MOTION FOR EXPEDITED HEARING
AND
ORDER GRANTING MOTION TO CONSOLIDATE

The above-docketed contest cases are before me upon the four notices of contest filed by David A. Rose Farm & AG Services on April 28, 2023, and three notices of contest filed by Garcia Mining, LLC, on May 1, 2023, under section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. On May 2, 2023, counsel for Contestants filed a Motion for Consolidation and Expedited Proceedings. Thereafter, on May 8, 2023, the Secretary of Labor filed her Opposition to Motion for Expedited Hearing but did not address the motion to consolidate. Before me is one significant and substantial ("S&S") section 104(g)(1) order for

miner training and three non-S&S section 104(a) citations issued to David A. Rose Farm & AG Services, as well as three non-S&S section 104(a) citations issued to Garcia Mining, LLC, all of which were issued by the same MSHA inspector on April 26, 2023.

I. MOTION FOR EXPEDITED HEARING

In the motion, Contestants "request that their cases be consolidated, that all citations and orders listed above be vacated based on MSHA's lack of jurisdiction, or in the alternative, that an expedited hearing be granted." (Mot. at 3.) Contestants assert that an expedited hearing is appropriate because they will "suffer irreparable harm" from "financial costs[] and disruption of their work activities." (Mot. at 2–3.) Contestants argue that "expedited proceedings are warranted because these employers will continue to be inspected and unduly subject to onerous MSHA requirements while performing work that is not under that agency's jurisdiction and which is not performed on a permitted mine site, but at the dredging operation of the Corps." (Mot. at 2.)

Commission Rules do not provide any guidance on prerequisites for granting a request for expedited hearing. *See* 29 C.F.R. § 2700.52. Under Commission case law, Commission Judges are tasked with using "informed discretion" considering all the facts when determining if an expedited hearing is appropriate. *Wyo. Fuel Co.*, 14 FMSHRC 1282, 1287 (Aug. 1992). I find persuasive cases where Commission Judges have held that to prevail on a request for expedited hearing, the moving party bears the "burden of showing extraordinary or unique circumstances resulting in continuing harm or hardship." *Consolidation Coal Co.*, 16 FMSHRC 495, 496 (Feb. 1994) (ALJ).

The Commission suggests that a mine currently closed or under a withdrawal order due to MSHA action may warrant an expedited hearing. *See Wyo Fuel Co.,* 14 FMSHRC 1282, 1287 (Aug. 1992) (reversing ALJ's finding that he did not have discretion to grant an expedited hearing on a closure order). Commission Judges have determined that simply the mere threat of mine closure or the need for miner training is not an extraordinary or unique circumstance warranting an expedited hearing, and I find these cases persuasive. *See Pennyrile Energy, LLC*, 38 FMSHRC 1886 (July 2016) (ALJ) (denying contestant's motion for expedited hearing on an order issued for an alleged training violation, because "[m]iner training is not a hardship that necessitates an expedited hearing."); *Energy W. Mine Co.*, 15 FMSHRC 2223, 2223–25 (Oct. 1993) (ALJ) (continuing threat of closure and the possibility of subsequent withdrawal order resulting from a section 104(d)(1) order is insufficient to warrant an expedited hearing). Here, Contestants are neither subject to a withdrawal order nor the threat of mine closure. Given the facts provided, I determine that the order issued to David A. Rose Farm & AG Services to train miners under section 104(g)(1) is not a hardship that necessitates an expedited hearing. And the issuance of the other six non-S&S section 104(a) citations is likewise insufficient.

Other than broad allegations of financial harm and disruption of work, Contestants fail to allege specific facts showing extraordinary or unique circumstances resulting in continuing harm or hardship if denied an expedited hearing. Contestants allege they were not engaged in mining activities or working upon a mine site but rather were working on river-widening and dredging which do not come under MSHA jurisdiction, based on an interagency memorandum. (Mot. at 2.) In essence, Contestants argue that they should be inspected by another federal agency—the Occupational Safety and Health Administration ("OSHA")—rather than MSHA. However, I determine that such a jurisdictional issue is not an extraordinary or unique circumstance resulting in continuing harm or hardship that warrants an expedited hearing.

Consequently, upon considering all the facts in exercising my informed discretion, I determine that Contestants allege no extraordinary or unique circumstances that will result in continuing harm or hardship. Therefore, I conclude an expedited hearing is not warranted.

II. MOTION FOR CONSOLIDATION

Commission Procedural Rule 12 allows Commission Judges to consolidate cases involving similar issues. 29 C.F.R. § 2700.12. Commission Procedural Rule 55, 29 C.F.R. § 2700.55, also grants Commission Judges broad powers to issue orders and procedurally manage the cases before them. Contestants were issued several citations and an order by the same MSHA inspector on the same date, are alleging the same jurisdictional arguments involving the same work being done in proximate locations, and share the same counsel. The Secretary has not objected to consolidation of these dockets. Given the overlap of these matters and in the interest of judicial economy, I conclude that consolidating these dockets is appropriate.

III. ORDER

WHEREFORE, it is hereby **ORDERED** that the motion for an expedited hearing in the above-captioned dockets is **DENIED**.

It is further **ORDERED** that Contestants' Motion for Consolidation is **GRANTED**. The parties are further **ORDERED** to notify my Law Clerk when they file their respective pleadings (petition and answer) in the penalty proceeding, so I may then seek to consolidate the contest and penalty cases for hearing and disposition.

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

Distribution: (Via Electronic Mail & U.S. Mail)

Kristin R. Murphy, Esq. & Kathryn C. Hagerman, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, SW, Room 7T10, Atlanta, GA 30303-8931
(murphy.kristin.r@dol.gov)
(hagerman.kathryn.c@dol.gov)
(atl.fedcourt@dol.gov)

Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD 20705-3332
(safetylawyer@gmail.com)

/gw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 17, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of PAUL KIRK, Complainant,	DISCRIMINATION PROCEEDING Docket No. SE 2023-0007-DM MSHA No. SE MD 2022-06
v.	
CEMEX CONSTRUCTION MATERIALS FLORIDA, LLC, Respondent.	Brooksville South Cement Plant Mine ID 08-01287

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This discrimination proceeding is before me pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2). The case is currently set for hearing on May 23–24, 2023, in Tampa, Florida. On April 28, 2023, Respondent filed a Motion for Summary Decision. Thereafter, on May 3, 2023, the Secretary filed a Motion to Extend Deadline to Respond to Respondent's Motion for Summary Decision, which I granted, briefly extending the deadline to file a response to May 15, 2023. On May 12, 2023, Respondent filed a Supplement to Respondent's Motion for Summary Decision stating that Paul Kirk voluntarily resigned his employment from CEMEX that same day due to his disability retirement through the U.S. Department of Veterans Affairs. (Suppl. at 1.) CEMEX asserts that the requested relief in this matter is now moot. (*Id.*) The Secretary timely filed a response—which she entitles Response in Opposition to Respondent's Motion for Partial Summary Decision—on May 15, 2023.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Kirk's Complaint

Respondent Cemex Construction Materials Florida, LLC operates the Brooksville South Cement Plant, an aboveground mine in Hernando County, Florida that mines materials to produce cement which uses a kiln in the process. (Compl. at 2.) On October 12, 2022, the Secretary of Labor on behalf of Paul Kirk filed a complaint alleging CEMEX Construction engaged in discrimination and interference in violation of 105(c)(1) of the Mine Act. (Compl. at 1.) On May 25, 2022, Kirk voiced concerns to his supervisors that hot dust was spilling from the "dog box" associated with the kiln. (Compl. at 2–3.) First, Kirk texted David Singer with his concerns, followed by Marcello Leal, Chris Walls, and Carlos Uruchurtu. (Compl. at 3.) Kirk and Carlos Uruchurtu exchanged text messages about the kiln, and Kirk understood from the messages that the kiln would be shut down. (Compl. at 3.) The Secretary alleges that Kirk was informed that the kiln was still operating at the morning meeting the next day. (Compl. at 3.) Kirk expressed his concerns about the kiln at a meeting between Uruchurtu and two contractors. (Compl. at 3.) Uruchurtu told Kirk to leave the meeting, but Kirk did not do so due to the

"urgency of the issue." (Compl. at 3.) The kiln was shut down later in the morning on May 26, 2022, and restarted on Saturday, May 28, 2022. (Compl. at 3.)

During the night of May 26, 2022, MSHA received a complaint about hot dust leaking from the kiln and the safety hazards posed by hot dust spilling out while a miner is operating the loader. (Compl. at 4.) MSHA visited the plant on May 29, 2022, and issued two citations for the "excessive hot dust filling the dog box and miners being subjected to injury while attempting to remove the dust using the front-end loader" and because "barricades were not used to warn of the high temperature dust, subjecting miners accessing the area to severe burn injuries." (Compl. at 4.) MSHA received two additional complaints regarding the kiln on the early morning of May 30, 2022. The MSHA inspector viewed the kiln and observed "excessive hot dust in the dog box being removed by workers using the front-end loader, exposing them to hazardous conditions," which resulted in an additional citation. (Compl. at 4.) The Secretary alleges that CEMEX management "suspected that Kirk was involved with the MSHA complaints." (Compl. at 4.)

The Secretary alleges that CEMEX discriminated against Kirk in violation of 30 U.S.C. Section 815(c) "for his protected activity of raising safety concerns to Uruchurtu by issuing a verbal warning regarding alleged insubordination," "based on its beliefs he engaged in the protected activity of making safety complaints to MSHA by issuing a verbal warning regarding alleged insubordination," and "interfered with Kirk's statutorily protected right to raise safety concerns with MSHA and Plant management by issuing a verbal warning regarding alleged insubordination." (Compl. at 5.) Therefore, the Secretary requests declaratory judgements that CEMEX unlawfully discriminated against Kirk and interfered with his statutorily protected rights. (Compl. at 5.) The Secretary also requests orders requiring all members of CEMEX's management team to participate in a training course on protected rights and an order assessing an appropriate civil monetary penalty. (Compl. at 6.)

B. Respondent's Motion for Summary Decision and the Secretary's Response

In its Motion for Summary Decision CEMEX argues, among other things, primarily: (1) Complainant did not engage in good faith protected activity, but even if he did, (2) the adverse action imposed by CEMEX was not motivated in any part by Kirk's engagement in protected activity. (Mot. Mem. at 5.) CEMEX attaches several documents including portions of deposition testimony from Kirk, as well as Uruchurtu. The Secretary in her Response in Opposition to Respondent's Motion for Partial Summary Decision argues many disputed material facts exist and that Respondent's motion should be construed as a partial motion for summary decision because Respondent failed to move for a decision on, or even meaningfully address, the interference claim. (Sec'y Resp. at 1–2.) The Secretary further asserts many of CEMEX's factual assertions lack any citation to supporting record evidence in violation of 29 C.F.R. § 2700.67(c). The Secretary attaches several documents including the deposition of Carlos Uruchurtu, the deposition of Kirk, Respondent's answers to Interrogatories, and copies of the original citations.

II. PRINCIPLES OF LAW

A. Summary Decision

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981).

The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id*. at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences to be drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Commission Judges should not grant motions for summary decision "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

B. Protections under Section 105(c) of the Mine Act

Section 105(c)(1) of the Mine Act[1] bars discrimination against or interference with miners asserting a protected right. For discrimination claims, the Commission applies the *Pasula-Robinette* framework in which a complainant must establish a prima facie case showing the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by the protected activity. *Driessen v. Nev. Goldfields*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817–18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799–2800 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

The Commission has no settled legal test for claims of interference. *See Monongalia Cty. Coal Co.*, 40 FMSHRC 679, 680–81 (June 2017). Several Commission Judges have applied the Secretary's two-prong test, which asks first whether the alleged interfering actions reasonably can be viewed as "tending to interfere with the exercise of protected rights," and, second, whether the interfering person can "justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." *See, e.g.*,

[1] "No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by [this Act]." 30 U.S.C. § 815(c)(1).

Armstrong Coal Co., 39 FMSHRC 1072, 1089 (May 2017) (ALJ) (applying Secretary's proposed test for interference), *appeal dismissed per settlement stipulation*, 40 FMSHRC 973, 974 (July 2018). Some Commissioners, however, would replace the second prong of the test with a requirement that the complainant demonstrate the interfering actions were motivated by animus to the exercise of protected rights. *Monongalia Cty. Coal Co.*, 40 FMSHRC at 708–29.

III. DISCUSSION AND ANALYSIS

A. Disputed Facts for Protected Activity Under Section 105(c)

The parties dispute material facts related to Kirk's discrimination claim. In particular, the parties dispute facts related to the condition of the kiln, notification of the shutdown of the kiln, and Kirk's knowledge of the kiln's condition and purported shutdown. Respondent CEMEX asserts that on May 26, 2023, the kiln's "condition[] vastly improved that morning." (Mot. Mem. at 11.) Yet other evidence, including Uruchurtu's deposition, suggest part of the kiln failed that morning causing dust to leak from the dog box. (Mot. Mem. at 3; Sec'y Ex. A Uruchurtu Dep. 54:20–23; Sec'y Ex. B Kirk Dep. 62:21–63:7.) Therefore, the condition of the kiln on the morning of May 26, 2023, is disputed. This is material because the kiln's condition may have affected Kirk's understanding of the urgency and degree of the alleged safety hazard.

In its motion CEMEX also argues that plant management was aware of the issues with the kiln and actively addressed the issue. (Mot. Mem. at 11.) Yet the Secretary points to Kirk's deposition testimony that suggests Ekstrom was trying to avoid shutting down the kiln. (Sec'y Resp. at 5; Sec'y Ex. B Kirk Dep. 64:14–18.) Therefore, material facts surrounding CEMEX management's attitude toward the kiln's shut-down and the steps management was taking to shut down the kiln are in dispute.

CEMEX argues that "Uruchurtu instructed the production manager, Marcelo Leal, to direct Jacob Ekstrom, the Superintendent of the K-1 kiln, to begin the shut-down process" at 6:42 a.m. on May 26. (Mot. Mem. at 6; Mot. Ex. 3 at CEMEX000497.) Yet, the Secretary points to a text message that states, "stop the kiln as soon as you are ready," and notes the lack of evidence that notification to shut down the kiln was given at this time. (Sec'y Resp. at 3.) Therefore, the timing, manner, and occurrence of the instruction to shut down the kiln are in dispute, which are material facts in this case.

CEMEX claims that Kirk made the complaints after being told by Ekstrom that the order to shut down the kiln had been given. (Mot. Mem. at 5–7; Sec'y Resp. at 5–6; *see* Mot. Ex. 4 Kirk Dep. 62:14–18.) Yet the Secretary alleges and points to evidence suggesting Kirk did not know the order to shut down the kiln had been given. (Sec'y Resp. at 5–6; Sec'y Ex. B Kirk Dep. 62:14–18.) Therefore, Kirk's knowledge regarding the kiln's shut down is in dispute, which is material in this case.

CEMEX alleges Uruchurtu explained to Kirk in their meeting after the safety complaints were made, that Uruchurtu was working to troubleshoot the issue with the kiln and the specific steps Uruchurtu had taken to resolve the issue; yet, the Secretary disputes this fact, and Uruchurtu, in his deposition, could not remember saying this and did not understand what Kirk

was saying when Kirk interrupted his meeting. (Mot. Ex. 3 at CEMEX000579–580; Mot. Mem. at 7; Sec'y Ex. A Uruchurtu Dep. 82:15–16, 98:13–18; Sec'y Resp. at 6.)

CEMEX also argues that Kirk did not raise the "issue of an immediate danger to the employees of the plant" due to the kiln at the shift-change meeting. (Mot. Mem. at 5.) However, Kirk indicates in his deposition testimony "we talked about the kiln and the dusting" and "[t]hat they were still running, dusting and all that stuff" and further stated "[y]ou know, there's a lot of huge safety concerns." Therefore, whether and to what extent the safety of the kiln may have been discussed at the shift-change meeting is a material fact in dispute. (Sec'y Ex. B Kirk Dep. 62:13–24, 63:1–7; Sec'y Resp. at 5.)

B. Kirk's Claim is not Moot

CEMEX filed a Supplement to Respondent's Motion for Summary Decision reporting that Kirk voluntarily resigned his employment with CEMEX, effective May 12, 2023. CEMEX asserts that due to Kirk's resignation, he "no longer [has] a legally cognizable interest in the outcome," making this matter moot. (Suppl. at 1); *Mid-Continent Res., Inc.*, 12 FMSHRC 949 (May 1990). However, the Secretary notes, "[s]hould Kirk's disability status change or he seek further employment for any reason, removal of the discipline from his file and/or a neutral employment reference would provide a benefit for future job applications." (Sec'y Resp. at 16–17.) CEMEX's citation to the Administrative Law Judge case *Sonney v. Alamo Cement Company* is misplaced because the miner there **"**ha[d] already received assurances that his personnel record ha[d] been cleansed and that Alamo [would] not provide negative employment recommendations"). *Sonney v. Alamo Cement Co., Ltd.,* 29 FMSHRC 310, 315 (2007) (ALJ). That is not the case here with Kirk and CEMEX.

C. Interference Claim

The Secretary notes that CEMEX does not meaningfully address Complainant's interference claim in its motion. Thus, the Secretary argues that, if I were to grant CEMEX's motion, I should construe it only as a motion for partial summary decision because the interference claim still survives. (Sec'y Resp. at 16–17.) Because Respondent bears the burden of proving there are no material facts in dispute, I cannot rule in favor of CEMEX on the interference claim, given that it did not argue explicitly regarding the interference claim. Moreover, I determine many of the disputed material facts discussed above are also relevant to the interference claim and, therefore, summary decision on this issue is not appropriate.

D. Conclusion

When viewed in the light most favorable to the Secretary, I therefore determine that several genuine issues of material fact exist in this section 105(c) proceeding. Given this determination, I conclude that CEMEX is not entitled to summary decision as a matter of law under Commission Procedural Rule 67(b). 29 C.F.R. § 2700.67(b).

IV. ORDER

Respondent's Motion for Summary Decision is **DENIED**. The hearing will be held as previously scheduled on May 23–24, 2023, in Tampa, Florida.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge
(202) 233-3889

Distribution: (Via U.S. Mail and Electronic Mail)

Rachel M. Bishop, Esq., U.S. Department of Labor, Office of the Regional Solicitor,
61 Forsyth Street S.W. Room 7T10, Atlanta, GA 30303-8816
(bishop.rachel.m@dol.gov)
(abreu.jean.c@dol.gov)
(atl.fedcourt@dol.gov)

Michael T. Cimino, Esq. & Benjamin J. Wilson, Esq., Jackson Kelly PLLC, P.O. Box 553,
Charleston, WV 25322-0553
(mcimino@jacksonkelly.com)
(benjamin.wilson@jacksonkelly.com)

/gw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Ave. NW, Suite 520N
TELEPHONE: (202)434-9958 / FAX: (202)434-9949

May 31, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LARRY ANDERSON, Complainant, v. KALAMAZOO MATERIALS, INC., and ROCK PROS USA LLC, and any and all successors in interest, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEST 2023-0238 MSHA Case No. RM-MD-2023-05 Mine: Silver Bell Mine ID: 02-02848

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Sullivan

This case is before me upon an Application for Temporary Reinstatement filed by the Secretary of Labor pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act"), and 29 C.F.R. § 2700.45. On May 15, 2023, the Secretary filed the application on behalf of miner Larry Anderson ("Complainant") seeking his reinstatement to his former position of Safety and Compliance Manager at the Silver Bell mine and other mines operated by Kalamazoo Materials, Inc., Rock Pros USA LLC, and any successors in interest. The certificate of service states that the application was served on Respondents by e-mail that same day. The application also satisfies the other procedural requirements of Commission Rule 45(b) in that, among other things, it timely "states the Secretary's finding that the miner's discrimination complaint was not frivolously brought[,] accompanied by an affidavit setting forth the Secretary's reasons supporting his finding[,] and includes a copy of the miner's complaint to the Secretary . . . ." 29 C.F.R. § 2700.45(b).[1]

On May 25, 2023, the Respondents made a timely request for hearing in accordance with Commission Rule 45(c). Upon filing this request, the Respondents conveyed to the Court that the parties were engaged in good faith efforts to settle the temporary reinstatement matter. On May 26, 2023, the Secretary filed a Settlement Agreement and Joint Motion for Temporary Reinstatement. The terms of the agreement provide for the Complainant to receive economic reinstatement with Kalamazoo in lieu of immediately returning to work for Respondents.

[1] The Discrimination Complaint ("Complaint") filed with the Secretary's Mine Safety and Health Administration by the Complainant is dated February 1, 2023, thus well within 60 days of the Complainant's January 23 termination of employment. *See* 30 U.S.C. § 815(c)(2).

Section 105(c)(1) of the Mine Act provides that "[n]o person shall discharge . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a . . . mine . . . ." 30 U.S.C. § 815(c)(1). In the application, as supported by his investigator's affidavit (Exhibit B thereto), the following allegations of the Secretary establish the Complaint as having been not frivolously brought under sections 105(c)(1) and (2):

(1) Complainant began work as a safety and compliance official for Kalamazoo Materials in June 2022.

(2) In January 2023, Complainant made safety complaints to Respondents' management. The Complaint references several emails with safety complaints that were sent to a Safety Manager, who was listed in the Complaint as responsible for discriminatory action.

(3) Complainant also notified management of his selection to serve as a miners' representative at several of the Respondents' mines. The Complaint alleges that management told Complainant to "not speak with miners about their rights." Application for Temporary Reinstatement ("App."), Ex. A at 3.

(4) Complainant was "discriminatorily terminated" on January 23, 2023. App. at 4.

I agree with the Secretary that the Complaint was "not frivolously brought" in this instance. *See Jim Walters Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) (relying upon Mine Act legislative history and the Supreme Court's treatment of a similar whistleblower protection provision to conclude that the "not frivolously brought" standard is the equivalent of a "reasonable cause to believe" standard and is met when a miner's "complaint appears to have merit").

In addition, I have reviewed the terms of the Agreement and find that they do not appear to reduce Complainant's rights under section 105(c)(2). The Agreement shall remain on file in this proceeding. I reach no conclusion beyond that regarding the merits of the Complaint.

Finally, Section 105(c)(3) of the Act directs the Secretary to notify a complainant whether a section 105(c) violation occurred within 90 days of the filing of a complaint, which in this instance would have been no later than Tuesday, May 2, 2023. *See* 30 U.S.C. § 815(c)(3). The Secretary shall provide an update regarding the status of the Secretary's investigation of the Complaint within seven days.

WHEREFORE, the Application is **GRANTED**, and it is **ORDERED** that reinstatement shall remain in effect until such time that the Secretary provides notification that he will not be bringing a discrimination case in chief on behalf of the Complainant, or such a case is brought and there is a final determination on it by decision, approval of settlement, or other order of this court or the Commission. I retain jurisdiction over this temporary reinstatement proceeding for such purposes as are necessary, as provided by 29 C.F.R. § 2700.45(e)(4).

WHEREFORE, the Secretary is further **ORDERED** to provide an update regarding the status of the Secretary's investigation of the Complaint no later than seven days from the date of this Order.

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

Distribution (Electronic Mail):

Andrew M. Katz, U.S. Department of Labor, Office of the Solicitor, 350 South Figueroa Street, Suite 370, Los Angeles, CA 90071-1202, Katz.Andrew.M@dol.gov

Dana M. Svendsen, Perkins Coie LLP, 1900 Sixteenth Street, Suite 1400, Denver, CO 80202, (dsvendsen@perkinscoie.com)