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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

October 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JOHN COLLINS	Docket No. SE 2023-0235
v.	
CRIMSON OAK GROVE RESOURCES, LLC	

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

DECISION

BY: Jordan, Chair; Rajkovich and Baker, Commissioners

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Secretary of Labor filed an Application for Temporary Reinstatement on behalf of John Collins against Crimson Oak Grove Resources, LLC, ("Crimson") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). On September 18, 2023, the Administrative Law Judge issued a Decision and Order Reinstating John Collins. 45 FMSHRC __, Docket No. SE 2023-0235 (Sept. 18, 2023) (ALJ). On September 22, 2023, Crimson filed a Petition for Review of Temporary Reinstatement Order in which it argued that the Judge erred in finding the miner's complaint was not frivolously brought. It further argued that the Mine Act's and Commission's procedures governing temporary reinstatement have deprived it of due process of law. On September 29, 2023, the Secretary filed a response. For the reasons which follow, we hereby affirm the Judge's decision.

I.

Factual and Procedural Background

A. Factual Background

Crimson operates the Oak Grove Mine, an underground coal mine near Adger Alabama, which mines coal through room-and-pillar-mining and longwall mining. At the time of his discharge John Collins worked as a mobile equipment operator at the surface yard. Collins had worked at this mine for 19 years, and as a mobile equipment operator since February 2023.

On July 27, 2023, Collins filed a discrimination complaint with MSHA alleging that he was unlawfully discharged from employment with the mine after complaining that it was not safe to operate a Komatsu 250 front-end loader for the task which he was assigned, and then allegedly failing to safely operate the equipment.

The relevant incident occurred on June 14, 2023. Crimson supervisor Paul "Jeff" Jamison assigned Collins to load pan line[1] onto a haul truck using a Komatsu front-end loader. Collins testified that he was concerned that the loads were too heavy for the Komatsu; the Cat loader, a larger loader, is normally used for this task. Tr. 28-29.

Collins informed Jamison that he was uncomfortable using the Komatsu loader to lift such a heavy load.[2] Jamison responded that the Komatsu is regularly used for this task. Collins responded, "I understand that, Jeff, but I'm not comfortable using it." Tr. 26. Jamison responded that the larger loader was not available. Collins then stated, "I'm going to tell you again, I don't feel comfortable doing it, but I will go ahead and do it." Tr. 26, 30. Collins testified that he reluctantly complied with his supervisor's directive despite his concerns because he was worried about losing his job.[3]

Collins successfully placed the first load onto the haul truck using the Komatsu. He testified the heavy pan line caused the loader to rock which was "kind of scary." Tr. 28, 30-31. Collins transported the second pan line across the yard. As Collins attempted to raise the load onto the truck, the back end of the Komatsu lifted from the ground. Tr. 31-32. The rear tires lifted more than five feet from the ground, as the front of the machine dipped lower. The load slid off and the rear of the Komatsu crashed back to earth. Collins injured his back. Tr. 36. Another miner finished loading the haul truck using the heavier Cat loader. Collins testified that about five minutes after the incident he told Jamison that he "knew it was going to happen." Tr. 35.

On June 23, Collins was called into a meeting with mine manager Jesse Avery, a representative from human resources, and an union representative. Together they jointly watched a security video of Collins attempting to load the haul truck on June 14, 2023. Jamison testified that the video depicted Collins using proper technique during his initial lift, but using improper technique on his second loading attempt. Specifically, Jamison believed that the video demonstrated that he failed to tip the forks back and that the load was not safely secured against the mast. Tr. 64. Collins was suspended after the meeting, pending an investigation into the June 14th incident.

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[1] The pan line appears to refer to a pan conveyor, which is "[a] conveyor comprising one or more endless chains or other linkage to which usually overlapping or interlocking pans are attached to form a series of shallow, open-topped containers." *See* Pan Conveyor, *Dictionary of Mining, Mineral, and Related Terms* (2d Ed. 1996).

[2] Collins testified that while he regularly operated the Komatsu 250, he had never before used it to load pan lines onto a haul truck. Tr. 21-22. He had previously loaded pan lines onto a haul truck approximately five or six times, each time using a heavier Cat loader. Tr. 22. Conversely, Jamison testified that the operator used the Komatsu 250 to load pan lines ever since Jamison started with them, and he had personally used it to load pan lines. Tr. 68.

[3] Collins had recently been suspended from employment for damaging the loader.

Avery testified that he learned from his investigation that after Collins' recent suspension he routinely told Jamison that he was uncomfortable with his assigned tasks. Tr. 92. Avery testified that Jamison believed that the loader could be safely used. Tr. 92.

Crimson General Manager Eric Koontz testified that Collins recently had two other incidents in which he damaged parts and equipment while operating mobile equipment. Koontz testified that he had offered Collins alternative work after becoming concerned that he was operating equipment carelessly. Tr. 93. In one instance, on March 23, 2023, Collins damaged a pump while unloading a truck. Tr. 61. In the other instance, on April 13, 2023, Collins damaged the Komatsu loader while operating it. Tr. 62.

Koontz determined that Collins operated the Komatsu loader dangerously on June 14, 2023. Koontz testified that the Komatsu loader was capable of lifting the assigned loads. Specifically, as configured, the Komatsu loader was capable of lifting 15,000 pounds. A scale ticket from August 9, 2023 demonstrated that a pan line weighed approximately 11,500 pounds. Tr. 68, 98; R. Exs. E, G. Koontz testified that he made the decision to discharge Collins based on these three incidents. Tr. 93.

On July 21, 2023, an arbitrator found that Crimson did not violate the collective bargaining agreement when it fired Collins. On July 27, 2023, Collins filed the subject discrimination complaint with MSHA. An inspector for the Secretary began his investigation and, thereafter, filed an application for Collins to be temporarily reinstated to his former position pending a decision on the merits of his complaint.

B. The Judge's Decision

On September 18, 2023, a Commission Administrative Law Judge concluded that Collins' repeated declarations that he was uncomfortable with his assigned task constituted protected activities sufficient to meet the Secretary's burden of proof in a temporary reinstatement proceeding.

In his written decision and order reinstating John Collins, the Judge noted that Crimson submitted evidence in an attempt to demonstrate that the pan lines were within a Komatsu loader's safe lifting capacity. The Judge found that without expert testimony he was unable to interpret the technical evidence relating to the machine's capabilities. Regardless, even if evidence demonstrated that the pan lines could be safely loaded with a Komatsu 250, so long as the miner has a good faith belief that there is a safety hazard, they are protected in bringing their concern to the operator. Slip op. at 14 (*citing Sec'y on behalf of Robinette*, 3 FMSHRC 803 (Apr. 1981); *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989)). The Judge further concluded that his discharge was an adverse employment action and that there was reasonable cause to believe that the operator was aware of Collins' protected activity, showed animus, and that there was a close connection in time between the protected exercise and the miner's discharge. For these reasons, the Judge granted the Secretary's application for the temporary reinstatement of Collins.

II.

Disposition

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The purpose of this protection is to encourage miners "to play an active part in the enforcement of the Act," in recognition of the fact that "if miners are to be encouraged to be active in matters of safety and health they must be protected against . . . discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, 95th Cong. 1st Sess. 35 (1977), *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623. Temporary reinstatement is "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id*. at 624-25 (1978).

An operator may request a hearing following receipt of the Secretary's application for temporary reinstatement pursuant to Commission Procedural Rule 45(c), 29 C.F.R. § 2700.45(c). Rule 45(d), 29 C.F.R. § 2700.45(d), provides that in such hearing "the Secretary may limit his presentation to the testimony of the complainant. The respondent [operator] shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought."

The "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y obo Price v. Jim Walter Res., Inc*., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990); *Sec'y obo Jones v. Kingston Mining, Inc.*, 37 FMSHRC 2519, 2522 (Nov. 2015). The "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res.*, 920 F.2d at 748, n.11.

Notably, at the hearing, the Judge must determine "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Id.* at 744. As the Commission has recognized, "[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y obo Albu v. Chicopee Coal C*o., 21 FMSHRC 717, 719 (July 1999).

The Commission then reviews a Judge's temporary reinstatement order to determine whether it is supported by substantial evidence. *See e.g.*, *Sec'y obo Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). "While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity." *Id*. at 1088 (citations omitted).

A. Substantial Evidence Supports the Judge's Determination that the Secretary Demonstrated a Non-Frivolous Case that Collins Engaged in Protected Activity.

On review, Crimson argues that the Judge erred by finding that Collins actions were protected by the Mine Act. The operator maintains that its undisputed evidence refutes Collins' belief that it was hazardous to load pan line with the Komatsu 250 loader.[4]

We disagree. Substantial evidence supports the Judge's finding that the Secretary demonstrated a non-frivolous case that Collins engaged in activity protected by the Mine Act. Additionally, there is evidence that the complaint was made in good faith. *See Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C. Cir. 1988) (the Mine Act protects the right to refuse work under conditions that a miner reasonably and in good faith believes to be hazardous).

Collins testified that while he regularly operated the Komatsu front-end loader, he had never before used it to load pan lines. Tr. 21-22. Collins believed that the pan line was too heavy to be safely lifted with the Komatsu, which is why the heavier Cat loader was regularly used to perform this task at the mine. Tr. 22, 28-29, 31. Collins testified that he told Jamison three times that he was not comfortable using the Komatsu loader for this assignment before eventually acquiescing. While Collins was attempting to load the second pan line onto the truck, the weight of the lifted load caused the back end of his machine to rise approximately five feet off of the ground and the pan line to slide from the loader's forks. Collins told Jamison that he "knew it was going to happen" directly thereafter. Tr. 35. Collins testified that he injured his back in the fall. Tr. 36.

Crimson argues that the Judge erred; it contends that it submitted evidence that demonstrates that the Komatsu can be safely used to lift pan lines. It further argues that its evidence demonstrates that Collins operated the equipment improperly.

A review of the record demonstrates that Crimson's evidence was in fact disputed. In particular, there was a conflict as to whether the Komatsu could be safely used. Collins testified that it was not possible to safely use the Komatsu to load pan line. When he performed the task the loader became unbalanced. In contrast, Crimson introduced evidence suggesting that a pan line was within a Komatsu 250's safe loading capacity. Specifically, it introduced evidence that the loader had the capacity to lift approximately 15,000 pounds, Tr. 98; R. Ex. G (Komatsu 250 specification sheet) and evidence that a pan line weighed 11,560 pounds.[5] R. Ex. E (August 9, 2023 scale ticket).

Additionally, there was a conflict as to whether Collins used proper procedures when attempting to load the haul truck. Collins testified that he used the same lifting procedure during

[4] Crimson also contends that Collins failed to make a safety complaint. Collins stated that he was uncomfortable using the Komatsu 250 to complete the assigned task. Tr. 28. Substantial evidence supports the Judge's finding of a safety complaint. The fact that the loader became unbalanced during an attempted lift demonstrates the plausible reasonableness of his stated concerns.

[5] We note that a scale ticket from August 9, 2023, is not dispositive proof of the weight of the load on June 14, 2023.

the first successful lift and the second unsuccessful attempt. Tr. 40-41. In contrast, Crimson argues that the video and testimony established that Collins used improper technique on his second loading attempt. Jamison testified that the video demonstrated that Collins failed to take adequate measures to straighten his load or to tip the load backwards to prevent it from sliding off of the forks.[6] Tr. 64-68.

The Judge is simply not permitted to resolve these conflicts in the testimony and evidence in a temporary reinstatement decision. *Sec'y of Labor obo Albu*, 21 FMSHRC at 719 ("[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings."). At the hearing on the merits of the complaint, the operator will be provided with the opportunity to attempt to demonstrate the equipment could be safely used for the task and to attempt to demonstrate that Collins failed to follow correct procedures. The hearing will be conducted after the parties have had the opportunity to engage in appropriate discovery regarding these technical issues. Despite Crimson's arguments, the Judge was not permitted to weigh the evidence submitted by the parties. On review, the only inquiry is whether the Judge's conclusion is supported by substantial evidence. It is.[7]

B. The Commission's Procedures Provided Crimson with Due Process.

Crimson contends that the Commission's temporary reinstatement proceedings are constitutionally defective. It maintains that principles of due process require that an operator be permitted to challenge the complainant's credibility and for the fact-finder to be able to weigh the evidence before him.

Crimson's arguments have been addressed and refuted by the Supreme Court in *Brock v. Roadway Exp.*, 481 U.S. 252 (1987) and by the Court of Appeals for the Eleventh Circuit in *Jim Walter Res*., 920 F.2d 738 (11th Cir. 1990).

Due process requires fair notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Roadway Exp., Inc*., 481 U.S. at 261 (1987) (citing *Mathews v.*

[6] Even if the video undisputedly demonstrated improper technique (which it does not), it would not resolve whether the Komatsu became unbalanced solely because of operator error or because of the weight of the load. Any error on the part of Collins does not mean his safety concerns were not genuine.

[7] Commissioner Althen dissents, concluding that the Secretary failed to provide any evidence of a non-frivolous motivational nexus between the protected activity and the adverse action. That is incorrect. The Commission has held that the Secretary may establish a non-frivolous motivational nexus simply through the operator's knowledge of protected activity and temporal proximity between the protected activity and the adverse action. *Sec'y obo Roger Cook v. Rockwell Mining, LLC,* 43 FMSHRC 157, 162 (Apr. 2021) (*citing Sec'y of Labor on behalf of Stahl v. A&K Earth Movers Inc*., 22 FMSHRC 323, 325-26 (Mar. 2000)). Collins was suspended and then discharged less than two weeks after the occurrence of the event.

Eldridge, 424 U.S. 319, 333 (1976)[8]). In *Jim Walter Res*., the Eleventh Circuit found that the Mine Act and the Commission's Procedural Rules governing temporary reinstatement proceedings "far exceeded" the minimum constitutional requirements. The Eleventh Circuit also specifically rejected the operator's argument that the Commission's "not frivolously brought" standard in temporary reinstatement hearings was so easily met by a complaining miner that the operator was deprived of due process of law.

In so ruling the Eleventh Circuit relied upon *Roadway Express*, in which the Supreme Court determined that a similar temporary reinstatement provision in the Surface Transportation Assistance Act of 1982 provided the employer with due process of law. The Supreme Court held that the absence of a pre-deprivation hearing was not constitutionally defective, and that the statute's procedural protections met minimum standards of due process because the employer, prior to temporary reinstatement, was provided the following:

> Notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witness. The presentation of the employer's need not be formal, and cross-examination of employee's witnesses need not be afforded [prior to temporary reinstatement].

Id. at 264.

In *Jim Walters Res*., the Eleventh Circuit extrapolated the same principles and applied them to the temporary reinstatement procedures under the Mine Act, noting that the cases were "virtually indistinguishable." The Eleventh Circuit stated:

> Faced with virtually the same balance of competing government and private interests as in this case, the Supreme Court in *Roadway Express* held that due process does not require that an employer, who is challenging a temporary reinstatement of an employee, be provided with a pre-deprivation hearing. Due process is satisfied "[s]o long as the prereinstatement procedures establish a reliable

[8] In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court articulated a three-part test to determine what due process requires:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures use, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

> 'initial check against mistaken decisions' and complete and expeditious review is available." *Id*. (citation omitted).

920 F.2d at 746-747.

The Court concluded that the protections afforded by section 105(c)(2) of the Mine Act and the Commission's Procedural Rules "far exceeded" the minimum required. *Jim Walter Res*., 920 F.2d at 748. Notably, under the procedures upheld in *Roadway Express,* the Secretary had sole authority to determine whether the standard had been met and to issue the reinstatement order. The employer was provided with a post-deprivation hearing on the merits of the complaint.

Although in the case at hand Crimson argues that the limited nature of the Commission's due process hearings are constitutionally defective, it is clear that the Supreme Court in *Roadway Express* found that a pre-deprivation hearing was not even required in a temporary reinstatement case.

Crimson also claims that the Commission recently further narrowed the scope of temporary reinstatement hearings by removing a Judge's ability to make credibility determinations. R. Br. at 11 (citing *Sec'y obo Cook v. Rockwell Mining*, 43 FMSHRC 157, 165 (Apr. 2021). This is not true. The Commission has long held that under the "not frivolously brought test," a Judge is prohibited from making credibility determinations and weighing evidence. *See e.g., Sec'y obo Williamson*, 31 FMSHRC at 1089 (Oct. 2009) (finding that the Judge erred as he "resolved conflicts in the testimony, and made credibility determinations in evaluating the Secretary's prima facie case, which he clearly should not have done at this stage in the proceeding.").[9]

Crimson also argues that it lacks fair notice of the burden of proof. We disagree. In its majority decisions, the Commission has consistently continued to require that the Secretary's burden of proof is to demonstrate that the complaint has not been frivolously brought. *See Sec'y obo Roger Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157, 161 (Apr. 2021) (*citing Williamson*, 31 FMSHRC at 1089). It is well established that at a temporary reinstatement hearing, the Judge must determine "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Res.*, 920 F.2d at 744.

[9] As the Secretary identified in her brief, "[p]er *Roadway Express*, parties are not constitutionally entitled to "test the credibility of opposing witnesses" during an initial investigation because this added procedural protection "would not increase the reliability of the preliminary decision sufficiently to justify the additional delay." S. Br. at 12 (*citing* 481 U.S. at 266).

III.

Conclusion

In summary, substantial evidence supports the Judge's finding that the Secretary made a non-frivolous demonstration that the miner engaged in activities protected by the Mine Act. The operator's arguments that the Mine Act and the Commission's Procedural Rules governing temporary reinstatement are constitutionally defective are unavailing. Similar arguments have previously been addressed and dismissed by federal appellate courts including the Supreme Court. For these reasons, we affirm the Judge's order temporarily reinstating miner John Collins.

/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 dissenting,

The standard of proof for temporary reinstatement is very low—a nonfrivolous complaint. However, "low" does not mean nonexistent.[1] I respectfully dissent.

I. SUPPLEMENTAL FACTS

It is helpful to supplement and clarify the majority's statement of facts. Undisputed evidence demonstrates that Collins's employment was shaky before he failed to load the pan lines in June 2023. On March 23, 2023, Collins knocked a pump off a truck, damaging it. Tr. 61. On April 13, 2023, he severely damaged a loader. Tr. 62-63.

After the second incident, the operator considered discharging Collins. However, pursuant to negotiations with UMWA representatives, the operator and Collins agreed upon a 35-day suspension. Tr. 53, 86. Additionally, contrary to showing animus, the operator offered Collins other surface jobs at the mine, but he refused them even at that time. Tr. 85. Collins did a test for one surface job but failed the test. *Id*.

The third incident within three months occurred on June 14, 2023, when Collins dropped a pan line from the loader while attempting to load the pan line on the truck. After this third instance of damaging equipment, the operator discharged Collins. Collins' UMWA representative grieved the discharge, and it went to arbitration. Collins' basis for his claim in arbitration was that the operator fired him for filing an accident report. Operator's Exhibit F. (The Secretary does not pursue that theory here.) The Arbitrator upheld the discharge. *Id.* In doing so, the Arbitrator's decision finds that Union witness Eddie Pinegar, Safety Committeeman, "testified that he loaded three (3) pieces of pan line on a different truck that day without incident." Exhibit F, p. 11.[2] The Arbitrator further found as Collins agreed in this case, that the operator properly task-trained Collins for loading equipment using the Komatsu 250 front-end loader.

There is no actual dispute about whether the Komatsu loader could safely load the pan lines. We cannot shrug off official documents showing the Komatsu's capability as if they were a lay opinion unless a party presents a live "expert" witness at the hearing. Moreover, miners had safely used the Komatsu to load pan lines. To assert Collins's statement that he was uncomfortable created a genuine dispute regarding the capabilities of the Komatsu is analogous

[1] Or, maybe to the Commission, it does. A review of Commission records for fiscal years 2018 through 2022 shows 56 motions for temporary reinstatement: forty-six were granted seven were withdrawn, two settled, none were denied. Indeed, Administrative Law Judges wonder why they must go through hearings to reach a foregone conclusion as the Administrative Law Judge in this case demonstrates in a wonderfully ingenuous exclamation, "Well, that's why -- jeez, I've been here a long time. I've had very few temporary instatement hearings because the threshold was so low that the Secretary had to meet." Tr. 116.

[2] The Arbitrator does not expressly write that Pinegar used a Komatsu. However, there would be no relevance if he were not using a Komatsu. Moreover, Collins testified that on the day of the incident, Jamison reiterated that Crimson used Komatsu's for this purpose "all the time." Tr. 26. His response was, "I understand that, Jeff." *Id*. No one disputes the fact that Crimson regularly used the Komatsu to load pan liners.

to asserting that a nervous flier's fear creates a dispute about whether airplanes can fly. Regardless of an individual's subjective beliefs, objective evidence proves airplanes can fly and that the Komatsu can load pan lines.[3]

In response to Collins' statement that he was uncomfortable, Jamison, who had tasked trained Collins, first told him, "[W]e do it all the time," and Collins replied that he knew that. Tr. 26. So, Collins acknowledged that miners were using the Komatsu safely to load pan lines. Collins affirmed that he had bid for the loader operator job and was qualified. Tr. 47.

Nonetheless, Collins pressed his lack of comfort to which Jamison replied, "Well, everybody loads it with it; just -- you'll be all right; just be careful, watch what you do; take your time." Tr. 63. Thus, rather than showing animus towards Collins' statement, a busy supervisor who knew the capabilities and regular use of the Komatsu, including currently loading pan lines, instructed him to be careful and take his time.

After the failed load effort, Jamison asked Collins if he wished to file an accident report. At first, Collins declined but later changed his mind.

In summary, the evidence shows that the operator task-trained Collins on the use of the Komatsu loader. The Komatsu can objectively load pan lines on trucks. Another union miner that very day used the Komatsu to load pan lines. Collins agreed that the Komatsu was used to load pan lines. Rather than flaring at Collins' regular statements of uncomfortableness, Jamison offered him advice and reassurance. Collins failed to load the pan lines but dropped them short of the truck. After that failure, Jamison asked Collins if he wished to file an accident report.

Here, there is ***no evidence***—none—that the discharge was motivated in any part by Collins's expression of uncomfortableness. The majority incorrectly focuses upon purportedly disputed evidence regarding whether the Komatsu was strong enough to load the pan lines and whether Collins used proper procedures. Undisputed evidence and testimony demonstrated that the Komatsu could load pan lines. Even Collins agreed that the operator had used the Komatsu for that task "all the time." Tr. 26, 47.

However, more importantly, the claim of discrimination does not turn on the capabilities of a Komatsu loader or whether Collins used it correctly on the day he failed to load the pan line. The Secretary's complaint alleged that the operator discharged Collins for "reporting safety concerns."[4] Application for Temporary Reinstatement, p. 2. In other words, the issue is not the

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[3] The ALJ found that authoritative documents showing the strength of the Komatsu and prior uses of the Komatsu for that purpose were insufficient to prove it could handle pan lines. He needed an expert witness. Obviously, that is an error.

[4] In fact, Collins testified that his concern was that he was "uncomfortable" using the Komatsu to load pan lines. Of course, a lack of comfort could arise from safety concerns even though Collins knew the Komatsu had loaded pan lines. It might also have been an expression that he would be uncomfortable using it because he doubted his ability to use it properly. At the

(continued…)

Komatsu or Collins's operation of the Komatsu but rather whether the operator fired him after Collins's third mishap for his statements about uncomfortableness and not for his repetitive damaging negligence. The majority does not point to any evidence on that fundamental issue.

The Secretary must prove a nonfrivolous case that Collins's expression of uncomfortableness caused the operator to discharge him. Moreover, under *Pasula/Robinette*, if the operator was justified for discharged him for his third damage of equipment, the claim cannot stand. No evidence links Collins's expression of uncomfortableness to the discharge, and it is uncontested that he damaged equipment for a third time. The evidence shows only that Collins had a common human reaction when punished for a mistake—self-forgiveness and blame-shifting. We all may experience such feelings when called to task for a failing.

II. ANALYSIS

In the context of this proceeding, the Mine Act provides,

> No person shall discharge . . . any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because . . . of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter

30 U.S.C. § 815(c)(1). In turn, section 105(c)(2) provides for the temporary reinstatement of a complainant if the Secretary determines the miner's complaint was "not frivolously brought."

In *Jim Walter Res*., 920 F.2d 738 (11th Cir. 1990), cited approvingly by the majority, the Eleventh Circuit upheld the constitutionality of the nonfrivolous standard. It is analogous to the Supreme Court decision in *Brock v. Roadway Exp.*, 481 U.S. 252 (1987). In doing so, the circuit court synchronized the temporary reinstatement standard to the standard considered in *Brock*. Specifically, the circuit court found,

> We find that the "not frivolously brought" standard is not so low and easily met by a miner seeking temporary reinstatement as to violate due process. Indeed, there is virtually no rational basis for distinguishing between the stringency of this standard and the "reasonable cause to believe" standard that was implicitly upheld in *Roadway Express*.

[4] (…continued)
hearing, he naturally testified that he meant safety concerns. However, in recounting the events of the day, he testified that he said he was "uncomfortable" three times. However, even if he had a subjective fear the Komatsu could not do the job with him at the controls, that subjective feeling does not create protected activity.

920 F.2d at 747.

The circuit court's finding puts at least a scrap of meat on the bones of "nonfrivolous." In a temporary reinstatement hearing, the question is whether the Secretary has presented sufficient evidence so that there is reasonable cause to believe the operator discriminated against the complainant.

Traditionally, the Commission applies 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).[5] That test contains three elements. A miner or the Secretary must prove discrimination by showing that: (1) the miner engaged in protected activity, (2) was subject to an adverse action, and (3) that such adverse action was at least partially motivated by that protected activity. Operators may defend affirmatively by proving that the adverse action was also motivated by the miner's unprotected activity and that it would have taken the action for the unprotected activity alone. *Sec'y of Labor o/b/o Smitherman v. Warrior Met Coal Mining, LLC*, 45 FMSHRC ___, (June 20, 2023).

Here, Collins's discharge constitutes adverse action. However, insuperable problems arise for the Secretary's case on the issue of protected activity and from the absence of any evidence whatsoever that Collins' discharge after his severe third failure in four months was motivated in any way by an expression of discomfort especially when Jamison reassured Collins rather than rebuked him. Finally, in this unusual fact pattern, the operator undoubtedly would prevail with an affirmative defense. There is no reason to reinstate Collins briefly before the Secretary drops the action for Collins. If Collins wishes to pursue a hopeless case, he may do so on his own.

1. **Protected Activity**

Unquestionably, the Mine Act gives miners essential rights to protect their safety. A miner may refuse to work if he has a good faith belief that a hazard exists and communicates his belief to the operator. In *Simpson v. FMSHRC*, 842 F.2d 453 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia Circuit considered the issue of constructive discharge of a miner who refuses to work in intolerably dangerous conditions. The circuit adopted an objective test of whether "the conditions [were] so intolerable that a reasonable miner would have felt compelled to resign." *Id*. at 461. The circuit court cited *Clark v. Marsh,* 665 F.2d 1168 (D.C. Cir. 1981), in which the court characterized the standard test in discrimination cases as an "objective test."

National Cement Co. v. FMSHRC, 27 F.3d 526 (11th Cir. 1994) supports this objective test. In *National Cement*, the circuit court stated, "If the work refusal is not objectively

[5] In *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021), the Ninth Circuit rejected the *Pasula-Robinette* standard and held the plain meaning of section 105(c) requires a "but-for" causation standard for discrimination determinations under the Mine Act. Thus far, no other circuit has followed the ninth circuit's approach and the operator in this case did not challenge the standard. Therefore, although we may anticipate future successful challenges to *Pasula-Robinette*, no challenge exists here.

reasonable, there is no protected activity. [T]he [work] stoppage must be reasonable, as well as motivated by a genuine belief that it is necessary to protect safety or health." 27 F.3d at 533, (citing *Miller v. FMSHRC*, 687 F.2d 194, 195 (7th Cir.1982)). A good faith belief, standing alone, does not create protected activity. The stoppage must be "reasonable." This means the work stoppage must be a rational "reason" rather than a fear unsupported by any reasonable basis.

In this case, Collins cannot support a claim that feeling "uncomfortable" with using a Komatsu loader constituted an objectively reasonable belief that the Komatsu was unsafe. An unexplained and unfounded assertion of fright (even assuming that was the actual cause of any uncomfortableness) does not rise to the realm of protected action, especially considering other miners' regular safe use of the equipment and Collins also regularly used the Komatsu. Tr. 21-22. Indeed, Collins himself safely loaded a pan line with it, and, as the Arbitrator found, at least one other miner also performed such pan line loading work the same day Collins only said that he was "uncomfortable." Collins did not testify to any knowledge of the Komatsu that objectively would create fear; he did not testify to any experience with the Komatsu that would objectively create fear.

Collins expressly acknowledged that he knew miners used the Komatsu to load pan lines "all the time." Tr. 26. Regarding the reasonableness of his position, Collins never expressed to Jamison any reason for a lack of comfort. Indeed, in the face of vigorous cross-examination, Jamison testified that he did not interpret Collins's statements as exercising a right to express safety concerns. Tr. 73. Instead, Jamison testified that Collins' expression of being uncomfortable was a pattern of conduct that Collins used regularly. *Id*. The most Collins's supervisor understood was that Collins was again saying without explanation that he did not feel comfortable doing a job that other miners, with Collins's knowledge, performed "all the time" with the same equipment.

The absolute most that can be said is that, although Collins was an experienced machine operator who had used the Komatsu many times before, he personally and without any basis said he was "uncomfortable" about using it to perform a task that the Komatsu clearly could perform and had performed. He expressed only "uncomfortableness" and was reassured that he would be fine—just going ahead and taking his time.

In this case, we consider an unexplained assertion of uncomfortableness in performing an ordinary mining task. Collins was trained in using the Komatsu and loaded other equipment. An unexplained declaration of lack of comfort in using equipment on which the miner has been trained, has used to load other equipment, and was being used to perform the same task the same day by other miners is not a protected activity.

2. **Motivation**

In *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), the Commission identified several indicia of discriminatory intent, including (1) disparate treatment of the complainant (2) hostility or animus towards protected activity; (3) knowledge of the protected activity; and (4) coincidence in time between the protected activity and the adverse action. 3 FMSHRC at 2510.

Even were we to find that Collins's unreasoned and unexplained claim of uncomfortableness was protected activity, the Secretary presented no evidence that the operator greeted Collins's expression of such discomfort with hostility, animus, or other action indicative of discrimination. There is no evidence whatsoever that Collins's discharge occurred "because" of statements about being uncomfortable before destroying company property. Indeed, when an employer discharges an employee after three incidents of the negligent destruction of company property in four months, it is laughable to suggest the motivation was an unexplained expression of being uncomfortable with using a machine to perform an ordinary work task.

a. Disparate Treatment

There is no evidence of disparate treatment. There was no evidence that any other miner ever expressed discomfort in loading pan lines with the Komatsu. Contrary to disparate treatment, other classified employees used the Komatsu to load pan lines. Similarly, there was no evidence that the operator would not have discharged other miners who committed multiple performance errors, resulting in damage to company property.

b. Hostility/Animus

There is no evidence of hostility or animus. To the contrary, Jamison informed Collins that other miners were doing the work, which Collins acknowledged. Jamison reassured him to go slow and take his time. The record does not indicate disparagement, critical remarks, or hostility to Collins' comments. The response was simply a business-like reply that he would be okay performing the work.

c. Knowledge of Protected Activity.

As explained above, Collins did not engage in protected activity. He did not have a reasonable basis to think the Komatsu could not perform the task safely. Collins acknowledged that he routinely used the Komatsu and that the operator used it regularly to load pan lines. He did not express a safety concern but said he was "uncomfortable" doing the work.

While Collins expressed that he was not comfortable using the Komatsu to perform the task, it was not sufficiently clear—in the context of the facts of this case—for the operator to reasonably infer that his complaint was related to safety. Collins did not claim he lacked training or assert any problem with the Komatsu that would have contributed to a diminution of his safety or the safety of other miners on the site. Moreover, Jamison had little reason to think that the vague statement was safety-related when, according to Jamison, it was a pattern of conduct that Collins used regularly when assigned tasks. It is uncontested that, at the time, Jamison did not interpret Collins' statements as exercising a right to express a safety concern. *See Pendley v. Fed. Mine Safety & Health Review Comm'n*, 601 F.3d 417, 426–28 (6th Cir. 2010) (finding that the motivation inquiry turns "on what the operator actually believed at the time, not what the Commission later reasons the operator could have relied upon in making its disciplinary decision").

d. Timing of the Adverse Action

The operator discharged Collins soon after he committed a third error, destroying the operator's property. The discharge arose from a third and final act of destruction of property by mishandling operator equipment. When else would an employer discharge an employee for destroying property than soon after the destruction? It would be more suspicious if an operator took months to discharge an employee for repeated destruction of property; anyone, including the employee, would expect immediate action. Thus, from a timing perspective, the discipline makes complete sense for a third act of incompetently destroying company property rather than retribution for a statement about the miner's comfort.

The evidence at the hearing does not support any disparate treatment, the occurrence of protected activity, hostility toward Collins, a discriminatorily hasty discharge, or a reasonable belief of protected activity.[6]

3. Affirmative Defense

Suppose a complainant establishes a prima facie case of discrimination. In that case, the operator will nonetheless prevail if it demonstrates that it would have discharged the miner for unprotected activity without regard to the protected activity. *Pasula-Robinette*, *supra*.

In *Jim Walter Res*., *supra* at 747, the Eleventh Circuit stated that the employer has:

> The opportunity for a full evidentiary hearing *prior* to a temporary reinstatement. 29 C.F.R. § 2700.44(b). At this hearing, the employer can test the credibility of any witnesses supporting the miner's complaint through cross-examination and may present his own testimony and documentary evidence contesting the temporary reinstatement.

The right for an operator to have a full hearing at which it may present its evidence contesting temporary reinstatement must encompass a right to prove to a level of summary decision that it would have discharged the employee for unprotected actions. Such an occurrence at a temporary reinstatement hearing must be extremely rare because it ordinarily must be based upon undisputed evidence and must not require a meaningful credibility determination. However, suppose an operator conclusively establishes at a temporary reinstatement hearing that it will be entitled to summary judgment based upon an affirmative defense. In that case, the complainant's case is hopeless—frivolous. This unique case warrants such an outcome.

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[6] In affirming the temporary reinstatement, the majority relies almost wholly on the timing of the discharge. If discharging an employee quickly for damaging company when that employee is coming off a 35-days suspension for damaging company property is proof of discrimination meriting temporary reinstatement, there really is no standard for temporary reinstatement.

In this case, the Secretary claims the operator discharged Collins due to protected activity – namely, that the operator discharged Collins for his declaration of unexplained uncomfortableness in using a Komatsu. For this section of the dissent only, we assume that there is some way that an ALJ could find Collins's speculation could warrant a finding that his uncomfortableness was a reason for his discharge. However, we cannot neglect the operator's claim that it discharged Collins due to repetitive damaging negligence. If the operator establishes that claim to a level of summary decision, it negates any claim of entitlement to reinstatement.

The operator's affirmative defense would build upon the indisputable facts of Collins's repetitious negligence. Thus, the operator claims that it discharged Collins for severe repetitive negligence. Of course, discharge for repetitive asset-damaging negligence does not imply protected rights or activity. Therefore, given the burden-shifting under *Pasula-Robinette*, if the operator shows unprotected actions were a reason for the discharge, the Secretary must prove that the asserted reason for discharge was pretextual. In the *Pasula-Robinette* context, damaging negligence does not have to be "the" reason for discharge. It only needs to be "a" reason for discharge.

Rarely could summary judgment standards be met at a temporary reinstatement hearing. However, they are met in this case. The Secretary does not dispute the acts of negligence. The Secretary does not/cannot assert that damaging negligence is a protected activity. Thus, to prevail against the affirmative defense at a hearing, the Secretary must prove that the discharge for three undisputed acts of damaging negligence was pretextual. In other words, the Secretary must show the operator did not discharge Collins even partially for such damaging negligence but only for the complaint of uncomfortableness.

We suppose the Secretary could make the argument, although not with a straight face, that the operator's discharge of Collins for repetitive acts of negligence (upheld by an arbitrator) was a pretext for assertedly the operator's only genuine problem with Collins—a comfort complaint that preceded the last act of negligence. The Secretary must contend that the operator was not partially motivated by the repetitive negligent destruction of its property for which it had previously imposed a 35-day suspension—that is, that the discharge for the third negligent act damaging company property was pretextual. Presumably, to the Secretary, this third failure was not even part of the reason for the discharge; the discharge was solely because the operator could not abide a comfort complaint. Based on the evidence, such an argument is complete nonsense. The Commission does not have to, and should not, act upon nonsense.

It is undisputed that Collins twice negligently destroyed the operator's property before the third negligent act. It is undisputed that the operator attempted to discharge Collins for such negligence after the second instance and imposed a 35-day suspension. It is undisputed that Collins was again negligent and destroyed the operator's property only a few days after the suspension ended. It is undisputed that Collins knew the Komatsu had performed such loading work. An arbitrator upheld the discharge against a charge that the discharge occurred. Collins filed an accident report with the operator's assistance—a claim not even made in this case. For Collins to prevail, an ALJ would have to reject these facts and find the motivating reason for

discharge was an expression of uncomfortableness.[7] Neither the Mine Act nor our case law require us to reduce legal positions to absurdity.

Let us make it simple. The operator proves, and Collins agrees, that Collins committed three destructive acts of negligence in four months. It attempted to discharge Collins after the second act. The Secretary implicitly but not explicitly argues, "Collins's third act of destructive negligence was not any reason for the discharge; the only reason was his statement that he was uncomfortable. We do not have any evidence to support that claim, but because he was uncomfortable, he must get his job back." Stunningly, the majority agrees with the Secretary.

The majority requires the operator to restore a former employee to a position where he has repeatedly demonstrated that he will negligently destroy property and present a danger to himself and others. It does so because it says it cannot believe, at this stage, that the operator discharged Collins, at least in part for multiple acts of demonstrated destructive negligence after suspending him for such failures. Reduction of the Mine Act to an absurd credibility ruling trivializes the dignity and importance of the essential anti-discrimination provision of the Act.[8]

III. CONCLUSION

The evidence demonstrates that Collins only said he was "uncomfortable" performing work with a Komatsu loader. The evidence also demonstrates conclusively that the Komatsu loader could perform the work. Indeed, on the same day, another worker was using that type of

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[7] I note again that the operator did not react badly to Collins expression of uncomfortableness. Jamison assured Collins that the Komatsu had performed the work. Collins agreed with this assurance. Jamison then told Collins to be careful and take his time. Collins claim of animus, therefore, is not supported by any expression of animus to his uncomfortableness but by reassurances. Collins does not have any "evidence" to support his claim. His claim is purely an unsupported "I think" claim. Finally, it is absurd to assert the timing of a discharge immediately after an employee destroys property displays that the real and only reason for discharge was Collins's expression of uncomfortableness. Such a clam is a fanciful makeweight to support an unsupportable proposition—an irrational, willful decision rather than an objective adjudication.

[8] It is not entirely clear what the Commission has meant by not permitting "credibility" determinations. Surely, it must not mean the Commission must accept proven lies or that it must accept allegations not supported by evidence but only the imagination and desires of a witness. Does it mean that anything a claimant says must be believed but testimony of other witnesses must be disbelieved or neither believed nor disbelieved? If it is crucial to a claim whether a mine car broke loose and rolled downward and ten witnesses say it did not while one witness says it did, must the ALJ not make a finding on such critical factor? Does it depend upon who the one witness is—claimant or company representative? Does it mean that in a case such as this where there were uncontested acts of gross and harmful negligence by the complainant, we must not accept that such negligence was a reason for the discharge because complainant suggests an unexplained and unsupported suspicion without evidence that his negligence was not a reason for discharge? Surely, not.

loader for the very tasks asked of Collins. At the time of Collins's "uncomfortable" statement, the operator exhibited no hostility. Indeed, after Collins's prior costly failures, the operator attempted to find him another position. In discharging Collins, the operator dealt immediately with a severe third act of destruction of equipment by Collins in four months. The majority concedes there was not any disparate treatment.

There must be some minimal requirements for temporary reinstatement. This case does not meet those requirements. I respectfully dissent.

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

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COMMISSION ORDERS

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October 3, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2023-0173 A.C. No. 39-00022-571991
GCC DACOTAH, INC.	

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

ORDER

BY: Jordan, Chair; Althen and Rajkovich, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On May 2, 2023, the Commission received from GCC Dacotah, Inc. ("GCC Dacotah") 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 March 6, 2023, and became a final order of the Commission on April 5, 2023. The Secretary of Labor does not oppose the request to reopen.

GCC Dacotah contends that it timely contested the proposed assessment on March 24, 2023, but service to the Secretary was unsuccessful due to a typo in MSHA's email address. Payment for the uncontested citations was timely received on April 5, 2023. GCC Dacotah claims that its email system did not provide an error notification that the email containing the contest had not been delivered. On April 24, a few weeks after the penalties became a final order, GCC Dacotah contacted MSHA and learned that its contest had been sent to an incorrect email address. To prevent the error from recurring, GCC Dacotah circulated a memorandum identifying the error to its safety personnel.

We note that the motion to reopen was timely filed. The Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed on May 2, 2023, within 30 days of the operator learning that it had sent its contest to an incorrect address. Therefore, the motion to reopen was filed within a reasonable amount of time.

We recognize that the operator previously filed motions to reopen in May 2020. However, in those instances, the operator's failure to timely contest the assessments resulted from incorrect assumptions regarding who bore responsibility for mailing the contest forms to MSHA. In our prior Commission order disposing of these requests to reopen, we noted briefly that the operator claimed that two assessments had not been timely contested because of "an improper understanding and implementation of an internal procedure" regarding which employee bore responsibility for contesting assessments. *GCC Dacotah, Inc.,* 43 FMSHRC 61 (Jan. 2021).[1] In contrast, in this matter, the operator's failure to timely contest the assessment resulted from an error in entering an email address.

While multiple repeated processing errors of the same nature can reflect an inadequate internal processing system, *Lone Mountain,* 35 FMSHRC 3342 (Nov. 2013) (emphasizing the repeated misplacement of paperwork by the operator), a unique occurrence that results in an operator's failure to timely contest an assessment does not necessarily reflect that the internal processing system was ineffective. *Noranda,* 39 FMSHRC 441 (Mar. 2017). There is no evidence in the record of prior instances of GCC Dacotah failing to timely contest an assessment as a result of incorrectly entering MSHA's email address. Therefore, we find such an error to be a unique occurrence, rather than the result of an inadequate processing system. In addition, we note that the Secretary has not alleged that GCC Dacotah acted in bad faith. Furthermore, GCC Dacotah demonstrated its good faith by promptly filing the motion to reopen, and by taking precautions to prevent a recurrence of this error.

Having reviewed GCC Dacotah's request and the Secretary's response, we find that GCC Dacotah demonstrated good cause for its failure to timely respond, and acted in good faith. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law

[1] We decided to grant these requests to reopen. *Id.*

Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

Commissioner Baker, dissenting:

I would find that GCC Dacotah failed to establish good cause to reopen in this case.

A party seeking the reopening of an assessment bears the burden of establishing that the default was the result of more than mere carelessness. *Noranda Alumina, LLC*, 39 FMSHRC 441, 443 (Mar. 2017). The Commission has consistently held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening an assessment. *See Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Moose Lake Aggregates*, 34 FMSHRC 1 (Jan. 2012); *Kuhlman Constr.*, 34 FMSHRC 2894 (Nov. 2012); *Enviro Care, Inc.*, 39 FMSHRC 819 (Apr. 2017). When deciding whether an operator has made a showing of good cause to reopen, the Commission considers, "procedures to prevent, identify and correct such mistakes have been adopted or changed, as appropriate." *Noranda Alumina,* 39 FMSHRC at 443. In short, an operator can demonstrate that it is not careless by setting forth in its motion to reopen new or improved procedures that it will implement to ensure that its internal processing system is adequate and reliable in the future.

In May 2020, GCC Dacotah filed a motion to reopen after it had failed to timely contest a penalty. *GCC Dacotah, Inc.*, 43 FMSHRC 61 (Jan. 2021). According to the Commission at that time, "GCC Dacotah's motion says that the proposed assessments in these matters were not timely contested due to an *improper understanding and implementation of an internal procedure*." *Id*. at 62 (emphasis added).

In its motion to reopen in that case, GCC Dacotah asserted that it had made changes to its internal processing system to ensure that it did not miss deadlines in the future. Specifically, GCC Dacotah's motion included a declaration signed by its Corporate Safety Director setting forth changes the company made to ensure that assessments were properly processed. Paragraph 18 of that declaration, in relevant part, states:

> In response to its fact-finding investigation, GCC has taken steps to prevent a reoccurrence. Specifically, GCC is designating the plant safety manager as the company official responsible for executing and filing the contest form in a timely manner. On May 27, 2020, I sent out an email to all of the safety managers at GCC's MSHA-regulated facilities . . . providing instructions on contest procedures.

Based on this representation, the Commission granted the Motion to Reopen.

In its current motion, GCC Dacotah asserts that an administrative error prevented it from timely filing a contest to the assessment. However, this motion states that the mistake occurred when an employee—a "safety technician" rather than the Plant Manager—entered an incorrect email address for MSHA when sending in GCC Dacotah's contest. Once again, GCC Dacotah has made representations that it will take actions to prevent this administrative error from recurring. Specifically, GCC Dacotah states it forwarded a memo to safety personnel regarding the error.

The circumstances set forth in GCC Dacotah's filings demonstrate a lack of good cause to reopen. In 2020, GCC Dacotah was on notice that its processing system was not reliable and could result in mistakes. It promised to correct its processing system by ensuring that a plant safety manager would execute and file future contest forms in a timely manner. The Commission accepted that with the promised improvements, GCC Dacotah's internal processing system would be reliable and, therefore, found good cause to reopen.

However, GCC Dacotah's current motion to reopen shows that it failed to live up to its promise. A safety technician, rather than the Plant Manager, processed the company's contest documents.[2] As a result of GCC Dactoah's failure to follow the improvements outlined in its 2020 Motion to Reopen, its processing system remains evidently unreliable.[3] The fact that the

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[2] As the party seeking reopening and bearing the burden of demonstrating good cause, GCC Dacotah also bears of the burden of showing that it followed, or attempted to follow, the processing procedures it put in place. It has not done so here.

[3] I would find that GCC Dacotah's failure to timely file a contest in this instance clearly demonstrates an inadequate or unreliable processing system. This is true especially in light of the representations made in the company's May 2020 motion to reopen. However, I would also take judicial notice of two subsequent Motions to Reopen from GCC Dacotah (CENT 2023-0229 and CENT 2023-0230) which assert that the company committed the same mistake—an incorrect email address used on the contest form—and is entitled to reopening. These motions are still pending before the Commission. These motions provide additional support for the position that the mistake in this case was not isolated, but instead part of an unreliable system that did not

(continued…)

mistake alleged here is slightly different than previous mistakes is irrelevant: GCC Dacotah was on notice that it needed to ensure that its processing system was reliable, not that it needed to correct a single, discrete issue. Further, I do not believe their promises to correct the problem in the future to be persuasive, as they have already made similar promises and failed to keep them in the past. Therefore, I would find that GCC Dacotah has failed to establish that it is entitled to the "extraordinary" relief of reopening. *See Lone Mountain Processing, Inc.*, 35 FMSHRC 3342 (Nov. 2013) (characterizing reopening as extraordinary relief).

In light of these circumstances I, respectfully, dissent.

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

[3] (…continued)
ensure that contests were properly forwarded to MSHA. Repeated instances of the same clerical error do not warrant relief. *See Marfork Coal Co., LLC*, 2023 WL 4052208, at*2 (FMSHRC June 7, 2023).

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October 4, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of PHILLIP BOWMAN, Complainant, v. LEXINGTON COAL COMPANY, LLC, Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2023-0363 MSHA Case No. HOPE-CD-2023-4 Mine: Twilight Mtr Surface Mine Mine ID: 46-08645

ORDER GRANTING UNOPPOSED MOTION TO TOLL TEMPORARY ECONOMIC REINSTATEMENT

Before: Judge McCarthy

Procedural Background

This case is before the undersigned 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 June 12, 2023, the Secretary filed an application on behalf of miner Phillip Bowman ("Complainant") seeking his reinstatement to his former position as a rock truck driver at the Twilight Mtr Surface Mine operated by Lexington Coal Company, LLC.[1]

On June 29, 2023, the Secretary filed a Settlement Agreement and Joint Motion for Temporary Economic Reinstatement. The terms of the agreement provide for the Complainant to

[1] The following allegations are delineated within the Secretary's application and MSHA's special investigator's affidavit affixed as Exhibit A thereto:

1) Complainant began working as a truck driver at the Twilight Surface Mine in October 2021;
2) On or about April 3, 2023, Complainant informed his foreman that rock truck number 252 CAT 777 had no air conditioning and was releasing exhaust fumes into the cab of the truck;
3) On April 4, 2023, Complainant downed rock truck number 252 CAT 777 and informed his foreman that he would not drive the truck in its current condition;
4) On April 5, 2023, he was told to run rock truck number 252 CAT 777 in its then current condition or to go home. Complainant then contacted MSHA and reported his concerns with the truck;
5) On April 6, 2023, MSHA inspectors issued a citation which identified conditions consistent with those alleged by Complainant (Ex. C);
6) Complainant was "discriminatorily terminated" on April 19, 2023. App. at 8.

receive economic reinstatement with Lexington Coal Company in lieu of immediately returning to work. The undersigned approved this Settlement Agreement on July 10, 2023, and held that

> the parties were to comply with the terms and conditions in the Joint Motion," and "that this economic 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 Commission decision, approval of settlement, or other order of this tribunal or the Commission.

Order Granting Joint Motion for Economic Reinstatement at 2-3. The undersigned retained jurisdiction over this temporary reinstatement proceeding for such purposes as are necessary, as provided by 29 C.F.R. § 2700.45(e)(4).

On August 25, 2023, the Respondent filed a Motion to Toll [the] Economic Reinstatement Order, claiming that the Mine was idled on July 11, 2023 – the day after the temporary economic reinstatement was Ordered in this matter. The Motion further claimed that the mine had been idled due to "a downturn in the coal market resulting in all of its production coal miners being laid off by the Lexington [sic]." Mot. to Toll Economic Reinstatement Order at 2. In support of its assertions, the Respondent attached an Affidavit signed by mine superintendent Casey Miracle, which briefly describes the shutdown at Lexington's surface mine in Boone County, West Virginia. That affidavit avers, in part, that

1. Complainant was previously employed as rock truck operator at the Twilight Surface Mine in Boone County, West Virginia;
2. As of July 11, 2023, coal production at the Lexington's Twilight Surface Mine has been idled and all employees have either been laid off or transferred;
3. No person with the Complainant's specific skill set is currently working at the Twilight Surface Mine;
4. Complainant would have been laid off from working at the Twilight Surface Mine on July 11, 2023, along with the other coal miners with a similar skill set.

Aff. of Casey Miracle at ¶¶ 3-7.

On Thursday September 21, 2023, the undersigned held a conference call with the parties to discuss his concerns regarding the then-pending request to toll Complainant's temporary economic reinstatement. More specifically, the undersigned expressed concern that 1) the Mine was idled nearly contemporaneously with the issuance of my July 10, 2023 Order granting Complainant's temporary economic reinstatement; 2) while Respondent's counsel referenced a downturn in the metallurgical coal market in her motion, this downturn was not referenced in Mr. Miracle's affidavit or substantiated by any other evidence; 3) no explanation was provided for why Complainant was ineligible for transfer to another mine facility operated by Lexington Coal; and 4) there was no indication whether the layoff was temporary or permanent. During the call, counsel for the Respondent confirmed that on or about July 25, 2023, a single payment was remitted to Complainant under the terms of my Order. Counsel for the Secretary indicated that the Secretary

was pursuing the underlying discrimination case.[2] The undersigned requested that Respondent's counsel prepare a revised motion addressing my concerns.

On September 27, 2023, the Respondent filed a Revised Verified Motion to Toll Economic Reinstatement Order. The Revised Motion included a Revised Affidavit from Casey Miracle (Exhibit 1) and copies of 1) Commission case law, and 2) samples of non-precedential ALJ decisions resolving motions to toll temporary reinstatement (Exhibit 2). Mr. Miracle's revised affidavit states as follows:

1. I [Casey Miracle] am currently employed as a Superintendent of Lexington Coal Company, LLC ("Lexington") and have been employed in such a capacity since February 22, 2022.
2. I am therefore authorized and qualified to create this Affidavit and have personal knowledge of the facts contained therein.
3. I wish to clarify the statements made during my Affidavit dated August 25, 2023; I am the ***only*** employee of Lexington who was transferred from Twilight. Upon information and belief, I was transferred because I am the Superintendent of the operation and such a specific skillset was required at another of Lexington's operations, being one hour and forty-five minutes northwest.
4. On or about the first week of July, 2023, the Twilight layoff was coordinated by Lexington's management; upon information and belief, such decision was made as a result of its loss of a high price sales contract.
5. I was instructed by management at approximately ***8:00 a.m.*** on July 10, 2023 and it was necessary to lay off the employees on July 11, 2023.
6. The layoff was strictly due to the coal market decrease Lexington faced, beginning during the first week of July 2023. Specifically, there became low demand for Lexington's Metallurgical coal product mined from Twilight. Lexington could not afford to operate Twilight until and unless it secured another order to fill the void.
7. There are currently no individuals with [Complainant]'s skill set working for Lexington at the Twilight Surface Mine.
8. There were no transfers available for any other employees.
9. All employees with [Complainant]'s skill set were laid off on July 11, 2023.
10. [Complainant] would have been laid off on July 11, 2023 with the other coal miners with his skill set working for Lexington at the Twilight Surface Mine.

For the reasons that follow, the undersigned tolls Complainant's economic reinstatement as of the date of this Order.

Analysis

"The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation." *MSHA obo Robert Gatlin v. KenAmerican Resources, Inc*., 31 FMSHRC 1050, 1054 (Oct. 2009). This "limited inquiry to

[2] Upon questioning from the undersigned, counsel for the Secretary indicated that MSHA had confirmed that there was a layoff at the Mine, but had not investigated whether the layoff or partial closing itself was motivated by protected activity.

determine whether the obligation to reinstate a miner may be tolled even when it has been established that the miner's discrimination complaint is not frivolous," must be consistent with the "narrow scope of temporary reinstatement proceedings." *MSHA obo Dustin Rodriguez v. C.R. Meyer & Sons Co.*, 2013 WL 2146640, *3 (May, 2013). Accordingly,

> [a]n operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence. *Gatlin,* 31 FMSHRC at 1055. However, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the "not frivolously brought" standard contained in section 105(c)(2) of the Mine Act to the miner's claim.

MSHA obo Russell Ratliff v. Cobra Natural Resources, LLC, 2013 WL 865606, *4 (Feb. 2013). "In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the claim that the layoff arose at least in part from protected activity is frivolous." *C.R. Meyer & Sons*, 2013 WL 2146640, *3.

The Commission has found that tolling is an affirmative defense and an operator must make a showing by a preponderance of the evidence that no work was available for the miner. *KenAmerican Resources*, 31 FMSHRC at 1054-55; *Cf.*, *Chadrick Casebolt*, 6 FMSHRC 485, 499 (Feb. 1984) ("if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination.").

In this case, Respondent initially submitted limited evidence to carry its burden to prove, by a preponderance of the evidence, that layoffs at the Mine justify tolling Complainant's temporary economic reinstatement. *See Gatlin,* 31 FMSHRC at 1054. The only submission provided in support of the Motion to Toll Temporary Economic Reinstatement was Casey Miracle's affidavit. That affidavit makes a passing reference to a possible change in the economic conditions at the Mine, stating that, "as of July 11, 2023, Lexington's Twilight Surface Mine has been idled." Aff. of Casey Miracle at ¶ 5. Within the affidavit, Mr. Miracle states further that "there are currently no individuals with [Complainant's] skill set working for Lexington Coal Company, LLC at the Twilight Surface Mine," and "were it not for this honorable Court's Temporary Reinstatement Order, [Complainant] would have been laid off on July 11, 2023 with the other coal miners with his skill set working for Lexington Coal Company, LLC at the Twilight Surface Mine." *Id.* at ¶¶ 6-7. Mr. Miracle did not expound on the reasons for Respondent's decision to idle production at the Twilight Surface Mine, such as a market downturn or other externalities that might lawfully motivate that decision. *See Id.* at ¶ 5. Nor did he provide any justification at all for his employer's decision to either terminate or transfer every employee previously assigned to the Twilight Surface Mine. *See Id.* at ¶ 4. Furthermore, other than stating that Complainant "was previously employed as a rock truck operator," Mr. Miracle provided no details concerning Complainant's skill set or credentials. *See Id.* at ¶ 4. There was nothing provided in Miracle's initial affidavit explaining why Complainant would have been ineligible for transfer or reassignment rather than termination, except for the conclusory statement that "[Complainant] would have been laid off on July 11, 2023 with the other coal miners with his skill set." Aff. of Casey Miracle at ¶ 7.

Mr. Miracle's revised affidavit ameliorates many of the foregoing concerns. First, he describes how the decision to idle production at the Mine was motivated by "low demand for Lexington's Metallurgical coal" following the "loss of a high price sales contract." Rev. Aff. of Casey Miracle at ¶¶ 4, 6.[3] Mr. Miracle further averred that "Lexington could not afford to operate Twilight until and unless it secured another order to fill the void." *Id.* at ¶ 6. In addition, Miracle now avers that after the decision to idle the Twilight Surface Mine was made, only Mr. Miracle – as the mine superintendent – was transferred to another mine facility operated by the Respondent. *See id.* at ¶ 3. No other employees at the Twilight Surface Mine were eligible for transfer, and all other employees, including those individuals with a skill set similar to Complainant's, were laid off. *See id.* at ¶¶ 7-9.

The Secretary has not filed an opposition to the motion to toll or otherwise submitted any evidence to rebut Respondent's evidence. Thus, the only evidence that may be considered at this time are the Respondent's evidentiary submissions, as well as any relevant evidence from the original application for temporary reinstatement. Considering the totality of the Respondent's evidence and the lack of any evidence from the Secretary to the contrary, the undersigned finds that the Respondent has met its burden. As a result, my July 10, 2023 Order Granting Joint Motion for Economic Reinstatement shall be tolled.

The undersigned must next consider the effective date of tolling and whether the Respondent maintains any obligation to remit additional payments to Complainant. In its initial motion Respondent argued that tolling should be effective on July 11, 2023, the date production was idled at the Mine. The Respondent cites *Wiggins v. E. Assoc. Coal Corp.* and *Casebolt v. Falcon Coal Co., Inc*. in support of the proposition that "a back pay award ends upon the date of a layoff." *See* 7 FMSHRC 1766, 1772-73 (Nov. 1985); 6 FMSHRC 485, 486 (Feb. 1984). This case law is inapposite. In the former case, the Commission reviewed an ALJ Decision following a discrimination hearing on the merits, a hearing that Wiggins had requested pursuant to 30 U.S.C. § 815(c)(3) after the Secretary declined to prosecute a case on his behalf. *See Wiggins*, 7 FMSHRC at 1768. In the latter case, Casebolt did not seek economic reinstatement and conceded that he suffered no loss of pay from any alleged discrimination, instead seeking broader "make whole" remedies. *See Casebolt*, 6 FMSHRC at 486. Neither case involved the approval of a temporary reinstatement order at any stage of the proceedings, and calculation of any 'back pay' occurred only after the complainants were afforded the opportunity to present a full case on the merits.

The Respondent also relies on *MSHA o/b/o Clinton Ray Ward v. Argus Energy WV, Inc*., a non-precedential ALJ decision attached as Exhibit 2 to the Respondent's initial Motion to Toll Economic Reinstatement Order. The Respondent contends that "the present situation is very similar to the one reviewed by ALJ Steele while rendering [that] decision." Mot. to Toll Economic Reinstatement Order at 2. However, unlike the present situation, Judge Steele's decision resolved a motion to dissolve temporary reinstatement *after* the Judge had already denied the Discrimination Complaint on the merits. Moreover, the motion to dissolve the temporary reinstatement order was filed in that case on December 12, 2023, which was more than two weeks before the mine was set to idle on December 25, 2023. By contrast, the idling of the Mine and layoff in this case was not raised until well after my July 10, 2023 Order Granting Joint Motion for Economic Reinstatement. Indeed, more than six weeks passed before Respondent filed its initial August 25, 2023 motion

[3] No other documentation establishing loss of this contract was provided.

alleging that the idling of production and layoff constituted sufficient changed circumstances to justify tolling of my Order. *See Gatlin,* 31 FMSHRC at 1054. This delay occurred despite the fact that the mine was idled the day after issuance of my Order and a mere twelve days after the parties agreed to a potential settlement regarding the then-outstanding reinstatement request. The Respondent cannot now claim that its payment obligations should be tolled retroactively to July 11, 2023, when Respondent was responsible for the 45-day delay between the July 11 layoff and the August 25, 2023 filing of its initial motion to toll my July 10, 2023 Order Granting Joint Motion for Economic Reinstatement.

As noted above, during the September 21, 2023 conference call, counsel for the Respondent confirmed that a single payment was remitted to Complainant on or about July 25, 2023. The Respondent, however, was obligated to continue to comply with the terms and conditions of my economic reinstatement Order which "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 Commission decision, approval of settlement, or other order of this tribunal or the Commission." Order Granting Joint Motion for Economic Reinstatement at 2-3. Rather than complying with that Order, Respondent apparently unilaterally ceased payments to Complainant after July 25, 2023, without leave of this tribunal and a full month before filing its initial motion to toll. In previous cases, the Commission has rebuked a mine operator for unilaterally cutting off payments to an alleged discriminatee on the date of a reduction-in-force rather than on the date of modification of an order. *Gatlin*, 31 FMSHRC 1050, n. 2. In *Gatlin*, the Commission stated that "[r]ather than determining unilaterally that the workforce reduction justified terminating Mr. Gatlin's reinstatement, [the Respondent] should have moved the Judge to modify the … Order." *Id.*, citing *Consolidation Coal Co.*, 14 FMSHRC 956, 970 (June 1992) ("[N]o operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied."). If the Respondent here had continued payment to the miner pursuant to the temporary economic reinstatement Order, that money would not be recoverable by the Respondent even though its July 11, 20223 layoff warranted tolling the temporary economic reinstatement. *See Sec'y of Labor obo Dustin Rodriguez v. C.R. Meyer and Sons Co*., 35 FMSHRC 811, 813-814 (Apr. 2013) ("[T]here is nothing in the Mine Act which contemplates that the miner would be expected to repay the amounts paid pursuant to the reinstatement order. Indeed, that would run counter to the intent of the provision, which is to provide immediate relief to a complaining miner while he or she waits for the case to be decided.")

Consistent with the reasoning in *Gatlin,* because the terms of my July 10, 2023 Order remained in effect until such time as the period of reinstatement is modified, Complainant Bowman should have continued to receive economic reinstatement until the date of this Order granting tolling. *Gatlin*, 31 FMSHRC at 1055 ("Thus, KenAmerican must continue to comply with the terms of the August 31 Order and pay Mr. Gatlin until the matter is resolved by the Judge.").

Order

It is **ORDERED** that Complainant's temporary economic reinstatement is **TOLLED** as of October 4, 2023, the date of this Order.

It is **ORDERED** that Respondent remit to Complainant any payments that are still due under the terms of my July 10, 2023 Order Granting Joint Motion for Economic Reinstatement from July 25 until October 4, 2023.

It is further **ORDERED** that the Respondent shall inform the Secretary, Complainant, and this tribunal if the Twilight Mtr Surface Mine is brought back into production, or any employees are recalled from layoff.

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

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October 19, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2022-0221-M A.C. No. 41-05471-559982
v.	Docket No. CENT 2022-0249-M A.C. No. 41-05471-561967
AREPET INDUSTRIES, LLC, Respondent	Arepet Industries

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION ON JURISDICTION AND ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY DECISION ON JURISDICTION

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Arepet Industries, LLC ("Arepet") 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").

In June 2022 MSHA conducted an inspection of Arepet's Von Ormy plant ("the plant") and issued the four citations that are the subject of these proceedings. During conference calls with the court, the parties represented that there is a question whether the Von Ormy plant is subject to MSHA's jurisdiction. As a result, and at the request of the parties, the court ordered the parties to file joint stipulations and simultaneous cross-motions for summary decision on the issue of jurisdiction. On September 7, 2023, the parties filed joint stipulations of fact, cross-motions for summary decision on jurisdiction, and other documents. Subsequently, each party filed an opposition to the other party's motion for summary decision.

The singular topic at issue in this order is whether summary decision can be granted for either party on the question of jurisdiction. For reasons set forth below, the Secretary's Motion for Summary Decision on Jurisdiction is **GRANTED** and Respondent's Motion for Summary Decision on Jurisdiction is **DENIED**.

STIPULATED FACTS

The parties submitted the following joint stipulations of fact:

1. Arepet Industries, LLC owns and operates the Von Ormy plant which is the subject of the citations at issue in this case.
2. The Von Ormy plant is the only operation owned and operated by Arepet Industries, LLC.

3. Arepet Industries, LLC is owned by partners Cesar Saenz and Ruben Garza.
4. Arepet Industries, LLC does not own or operate any mine pits or excavations.
5. Arepet Industries, LLC currently purchases wet sand from an unrelated company.
6. Arepet Industries' current supplier of wet sand is Madden Materials.
7. Arepet Industries purchases sand that is commercially available to buyers of sand. Sand is delivered to Arepet Industries by end dump trailer.
8. Sand brought to Arepet Industries is initially stockpiled to reduce moisture content before processing.
9. From stockpiles, sand is carried to and loaded into a hopper then conveyed to a Starkaire gas heated fluid air bed dryer.
10. The air dryer reduces the moisture content of the sand.
11. Drying the sand assists in the process of shipping sand to oil and gas drilling sites and makes the sand more usable as an ingredient in the fracking process.
12. From the dryer, sand is carried by conveyor to a mineral separator, manufactured by Rotex.
13. The purpose of the mineral separator, manufactured by Rotex, is to remove any remaining waste material from the sand.
14. The mineral separator, manufactured by Rotex, does not separate sand into different sizes of sand.
15. The removal of any waste material is done to protect equipment at the oil and gas drilling sites which receive sand from Arepet Industries.
16. Any waste material removed by the Rotex is put in piles and periodically removed from the Von Ormy plant by a third party.
17. Arepet Industries has an arrangement with Cuatro-T that periodically hauls off the waste material at no charge. Sand is carried by conveyor belt from the Rotex into the warehouse.
18. The sand is then picked up from the warehouse floor by a front-end loader and placed into the loadout hopper.
19. The Pneumatic trucks mount on to a weight scale and are loaded with the sand via conveyor and through a spout.
20. Arepet Industries currently sells its sand to EOG Resources, Inc., which uses the sand at oil and gas drilling sites.
21. From June 2, 2021, to June 2, 2022, Arepet Industries also sold sand to Halliburton Energy Services, Inc., Liberty Oilfield Services, Marathon Oil EF, LLC, Nextier Completion Solutions, and Laredo Energy Operating, LLC.
22. Arepet Industries began operations in 2008.
23. Before 2019, Arepet Industries operated under OSHA's jurisdiction, and trained its employees according to OSHA's standards and regulations.
24. The Von Ormy plant was inspected by OSHA two times in 2016.
25. The Von Ormy plant was inspected by OSHA in 2018.
26. As a result of OSHA's three inspections of the Von Ormy plant, Arepet Industries received a total of seven (7) citations.
27. Arepet Industries and OSHA entered informal settlement agreements regarding the seven citations, pursuant to which Arepet Industries paid penalties to OSHA totaling $12,580.
28. MSHA did not conduct any inspections of the Von Ormy plant any time between the time the Von Ormy plant began operations and 2019.

29. The Von Ormy plant did not change its operations or process after 2013.
30. Since 2019, MSHA has conducted 22 inspections of Arepet's Von Ormy plant, including follow-up inspections.
31. In June 2022, MSHA conducted an "E01" inspection of the Von Ormy plant. MSHA issued Arepet Industries, LLC seven citations as a result of MSHA's inspection.
32. Arepet Industries, LLC timely contested the June 2022 MSHA citations.
33. Arepet Industries, LLC has asserted that MSHA does not have jurisdiction of the Von Ormy plant.
34. Exhibit 1 is an accurate drawing of the process that Arepet Industries operates at the Von Ormy plant.
35. Exhibit 2 is an accurate copy of the deposition of Cesar Saenz, partner and co-owner of Arepet Industries.
36. Exhibit 3 is an accurate copy of the deposition of Fabien Crossland.
37. Exhibit 4 is an accurate copy of the deposition of Thomas Balch.
38. Exhibit 5 is an accurate copy of the deposition of William Clark.
39. Exhibit 6 includes accurate copies Arepet Industries, LLC's sand sieve tests.

SUMMARY OF THE PARTIES' ARGUMENTS

Arepet's Motion for Summary Decision on Jurisdiction

Arepet, in its motion, argues the Von Ormy plant is not subject to MSHA jurisdiction. Specifically, Arepet argues the plant is not a "coal or other mine" under the Act because neither mineral extraction nor the milling of minerals in the form of "sizing" or "drying" occurs there.

Arepet asserts, and the MSHA inspectors' depositions confirm, that no mineral extraction occurs at the plant. The plant is "not located on mine property nor adjacent to land where extraction takes place" and all sand processed at the plant is "delivered . . . from third party mines that are geographically separated (by many miles) from . . . [the] plant." Arepet Mot. 7. Although one of Arepet's two owners also owns a sand mine, the operations are separate businesses and Arepet has not purchased sand from that sand mine in years.

Arepet argues the plant does not engage in the milling of minerals via "sizing" as that term is used in the Interagency Agreement. The sand purchased by Arepet has already been screened and sized before being delivered to the plant. All sand purchased and sold by Arepet is "100 mesh" sand and "only oversized material (typically less than 2 percent of the wet sand purchased based on quality control data) is removed and it is regarded as trash material and it is not sold by Arepet to any customers." Arepet Mot. 10. Arepet, citing the Commission's decision in *State of Alaska, Dept. of Transp.*, 36 FMSHRC 2642, 2649 (2014), argues that "'scalping' to remove unwanted waste from the mineral material is not 'milling.'" Arepet Mot. 10. Here, Arepet uses the Rotex mineral separator to "scalp" waste stones and rock from the sand. Arepet Mot. 10-11. The waste scalped from the sand is not commercially valuable and, after stockpiled, is removed by a third party at no cost to Arepet and, possibly, used as fill material by that third party. Arepet Mot. 11. Moreover, Arepet asserts that one MSHA inspector acknowledged during his deposition that "this type of borrow pit providing scalped fill material falls under OSHA, rather than MSHA." Arepet Mot. 11.

Arepet argues that the plant does not engage in the milling of minerals via "drying" as that term is defined in the Interagency Agreement. In support of its argument, Arepet cites the U.S. Court of Appeals for the Second Circuit ("Court of Appeals") decision in *Sec'y of Labor v. Cranesville Aggregate Companies, Inc., dba Scotia Bag Plant*, 878 F.3d 25 (2d Cir. 2017) ("*Cranesville*") and argues that the Department of Labor has declined to apply a literal reading of the Agreement's definition of "drying" and has instead said that two additional considerations are necessary to determine whether drying sand is considered "milling." First, "drying is a milling activity if the drying is performed to render sand a marketable commodity." Arepet Mot. 12 (internal quotations and citations omitted). Second, "any subsequent drying of marketable sand that is done to produce a specialty product or to make the sand suitable for a particular purpose is not 'milling.'" Arepet Mot. 13. Here, the commercially available sand purchased by Arepet is already "milled and marketable" and the subsequent drying at the plant is only to "make the sand suitable for a particular and specialty purpose, to transport the sand to the oil and gas well drilling sites and to use in the fracking process." Arepet Mot. 14.

Arepet argues that the history of enforcement at the plant does not support Mine Act jurisdiction. Arepet notes that for approximately 80% of the plant's operational history it has been under OSHA jurisdiction and Arepet has based its compliance efforts and employee training on OSHA standards. Nevertheless, despite no change in the activities performed at the plant, MSHA started inspecting the plant in 2019 in place of OSHA. At that time, Arepet was not represented by counsel and was unaware of the 2017 *Cranesville* decision. Further, Arepet asserts that it is not clear whether the process outlined in the Interagency Agreement for addressing questions of jurisdiction between MSHA and OSHA was followed.[1] Had that process been followed and the *Cranesville* decision taken into consideration, "it is likely that the U.S. Department of Labor officials . . . would have determined that the process at the Von Ormy plant . . . should remain under OSHA jurisdiction." Arepet Mot. 16.

Finally, Arepet argues OSHA's regulations "are more applicable to, and protective of, the safety and health of workers at the . . . plant than are those of MSHA[.]" Arepet Mot. 17. Specifically, Arepet argues OSHA's respirable silica and equipment standards are more protective of employees at the plant, and that Arepet has geared its programs and training toward compliance with OSHA standards.

Accordingly, Arepet requests that the court grant its Motion for Summary Decision on Jurisdiction and determine that MSHA does not have jurisdiction over the Von Ormy plant.

The Secretary's Opposition to Arepet's Motion for Summary Decision on Jurisdiction

The Secretary, in her opposition to Arepet's motion, makes three primary points. First, the Secretary asserts Arepet mischaracterized the court's holding in *Cranesville*. In *Cranesville*, the

[1] Section (B)(8) of the Interagency Agreement provides, in part: "When any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator or OSHA State Designee in those States with approved plans shall attempt to resolve it at the local level in accordance with this Memorandum and existing law and policy."

sand delivered to the plant required no additional processing to be marketable, whereas here the sand had to be "upgraded" via drying and sizing so that the oil and gas companies could use it without fear of damaging machinery used in the fracking process.

Second, the Secretary argues Arepet overstates the importance of discussions between OSHA and MSHA. Even if there was a failure to follow a jurisdictional decision process, it is not fatal to any jurisdictional determination. Moreover, the Court of Appeals in *Cranesville* held that the Secretary's jurisdictional determination is entitled to substantial deference.

Third, the Secretary avers that Arepet's suggestion that OSHA standards are more protective than MSHA standards is not relevant to the question of jurisdiction. Arepet is free to enact more stringent safety standards than either OSHA or MSHA mandate, both of which "provide a minimal safety standard." Sec'y Opp'n. 4.

The Secretary's Motion for Summary Decision on Jurisdiction

The Secretary argues that Arepet's Von Ormy plant is a "mine" under Section 3(h)(1) of the Mine Act and, therefore, subject to MSHA jurisdiction. Under the Mine Act, "lands, structures, facilities, equipment, machines, tools, etc. used in the work of extracting *or* milling minerals are considered a 'mine,' and there is no requirement that milling facilities and equipment be in proximity to, or affiliated with an extraction operation." Sec'y Mot. 7 (emphasis in original).[2] Here, although Arepet did not extract the mineral it processed, it did engage in "milling" as that term is understood in the MSHA-OSHA Interagency Agreement ("Interagency Agreement") and case law.

According to the Interagency Agreement, "milling is the process of separating valuable minerals from worthless material or 'treating the crude crust of the earth to produce the primary consumer derivatives[,]'" and includes the processes of "sizing" and "drying." Sec'y Mot. 8. (citing 44 Fed. Reg. at 22829).

Arepet engaged in "drying" as that term is defined by the Interagency Agreement when it used a "Starkaire gas heated fluid air bed dryer . . . [to] reduce[] the moisture content of the sand." Sec'y Mot. 9. Although Arepet cites *Cranesville* for its argument that it did not engage in "drying," that reliance is misplaced. Unlike the facility at issue in *Cranesville*, "drying" is essential to how Arepet processes the sand and is not the only activity performed at the plant.[3] Sec'y Mot. 9-10.

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[2] The Secretary cites this court's recent decision in Cactus Canyon Quarries Inc., 2023 WL 3790763 ("Cactus Canyon").

[3] The Secretary argues that in Cranesville the court held that "the Secretary's decision over jurisdiction was entitled to Chevron deference, that the Mine Act did not unambiguously speak to the issue of whether the Cranesville Bag Plant was under MSHA or OSHA jurisdiction, and that the Secretary's determination that the Bag Plant was under OSHA jurisdiction was reasonable." Sec'y Mot. 13. Moreover, the Secretary asserts that the decision "reiterates the

(continued…)

In addition to "drying", Arepet engaged in "sizing" as that term is defined by the Interagency Agreement by "running the sand through a Rotex mineral separator to 'separate usable from unusable sand,' and remove waste material described as 'oversize' by one of Arepet's owners." Sec'y Mot. 10 (Internal citations omitted). Arepet's attempt to characterize this process as "scalping," an activity associated with "borrow pits," is also misplaced because there are other "aspects of milling in Arepet's sand process." Sec'y Mot. 11.

Based on the above arguments, the Secretary asserts that there is no genuine issue of material fact and her "interpretation . . . of the term 'milling' is proper[ ]and clearly within the bounds of her discretion." Sec'y Mot. 14. Accordingly, the Secretary requests that the court grant her Motion for Summary Decision on Jurisdiction.

Arepet's Opposition to the Secretary's Motion for Summary Decision on Jurisdiction

Arepet, in its opposition, argues that the plant is not a "sand mill," as alleged by the Secretary, and that it does not engage in extraction or milling at the location. Despite a history of OSHA jurisdiction at the plant, and no change in the operations or processes, MSHA took over jurisdiction without "any official consideration of the issue or the participation by any person within MSHA knowledgeable of the Department of Labor's application of the Interagency Agreement." Arepet Opp'n. 3.

Although the Secretary's motion cites this court's decision in *Cactus Canyon* as support for her argument, Arepet argues that the facts and factors of this case are clearly different and distinguishable. Unlike the plant at issue in *Cactus Canyon*, Arepet's plant does not engage in crushing or sizing. There is no crusher at Arepet's plant and the sand purchased by Arepet has already been screened and sized. The sand sold by Arepet is the same size as that purchased by Arepet, i.e., "100 mesh." Arepet "uses the Rotex to remove harmful oversize or trash materials prior to sale" in order to "ensure that as pure sand as possible is shipped" to its customers "for the specialty use of oil and gas fracking." Arepet Opp'n. 5-6. The waste materials removed from the sand are set aside and ultimately removed from the plant by a third-party contractor "apparently to use as fill material." Arepet Opp'n. 6.

In addition, Arepet argues that its plant does not engage in "drying" as the Department of Labor interpreted that term in the *Cranesville* case. In *Cranesville* the Court of Appeals found that the Mine Act was ambiguous with regard where the milling cycle ends and the manufacturing cycle begins and determined that the Secretary's distinction between "'drying' which is 'milling' and covered by the Interagency Agreement and 'drying' which is not 'milling' under the Interagency Agreement, was reasonable." Arepet Opp'n. 9. There, the Secretary asserted that "drying" is not milling under the Interagency Agreement when the "drying is not necessary to make the mineral a marketable commodity" and is done "to make the sand more suitable for a particular purpose or use[.]" Arepet Opp'n. 7. Although the Secretary, in her motion, asserts that Court of Appeals based its decision on the "substantial deference" it gave to

[3] (…continued)
longstanding principle that the Secretary of Labor is entitled to substantial deference regarding OSHA and MSHA jurisdiction. Sec'y Mot. 13.

the Department of Labor regarding OSHA and MSHA jurisdiction, she ignores that what the court actually gave deference to was the Secretary's definition of the term "drying." Ignoring the definition of "drying" the Secretary advocated before the Court of Appeals is not "reasonable."

Finally, Arepet argues that, contrary to the Secretary's assertion, the history of enforcement at the plant supports a finding that OSHA has jurisdiction. Failure to object to MSHA jurisdiction when Arepet was not aware of the *Cranesville* decision does not give MSHA jurisdiction. Rather, any jurisdictional determination must be decided based on the facts of this case.

DISCUSSION AND ANALYSIS

Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

> 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) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission has long recognized that "summary decision is an extraordinary procedure." *Energy West Mining Co.,* 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.,* 3 FMSHRC 2470, 2471(Nov.1981)). The Commission has analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)). When the Commission reviews a summary decision under Rule 67, it looks "'at the record on summary judgment in the light most favorable to . . . the party opposing the motion,' and that 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Hanson Aggregates New York Inc.*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The singular issue in this order is whether MSHA had jurisdiction to inspect Arepet's Von Ormy plant on the date the subject citations were issued. The Secretary argues that the plant is subject to Mine Act jurisdiction because mineral milling takes place at the facility. Arepet contends, among other things, that it is not a "coal or other mine" under Section 3(h)(1)

of the Mine Act because it does not extract minerals or engage in the milling of minerals at the plant. 30 U.S.C. § 802(h)(1).[4]

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 Von Ormy plant, the evidence must establish, first, that the plant was a "coal or other mine" under the Act and, second, that the products of the plant enter commerce, or the operation or products of the plant affect commerce.

Preliminary Considerations

Some preliminary matters are worth noting. First, an operator is permitted to raise jurisdictional issues at any time. It is immaterial that Arepet did not raise the issue of MSHA jurisdiction following the first MSHA inspection at the plant. Second, as set forth in Arepet's brief, Section (B)(8) of the Interagency Agreement provides a mechanism for resolving questions surrounding MSHA vs. OSHA jurisdiction. I find it troubling that this procedure was apparently not followed when jurisdiction over the plant was transferred from OSHA to MSHA in 2019. Indeed, although there may have been behind the scenes discussions between MSHA representatives and OSHA representatives when this decision was made, it would appear that the decision was based primarily on the inclination of one MSHA inspector. Nevertheless, the only question before me is whether MSHA had jurisdiction to inspect the plant at the time the citations were issued. Finally, I acknowledge that the facts put forth by the parties present a close jurisdictional issue. As discussed below, I find that the jointly stipulated facts establish that MSHA had jurisdiction to inspect the plant.

Is the 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 Von Ormy 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).

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:

[4] The parties agree that no extraction occurs at the Von Ormy plant. Accordingly, I have limited my analysis to whether milling occurred at the site such that it is subject to Mine Act jurisdiction.

> 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 industry).

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).[5] 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. *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 "drying" and "sizing." 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).

For purposes of this analysis, it is helpful to first determine whether Arepet engaged in "sizing" as that term is defined in the Interagency Agreement. "Sizing" is defined as "[t]he process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." 44 Fed. Reg. at 22829-22830. In *State of Alaska, Dept.of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014), the

[5] 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).

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, the Von Ormy plant used the Rotex "to remove any remaining waste material from the sand." Jt. Stip. 12. Although the Rotex "does not separate *sand* into different sizes of sand," it does remove "oversize" waste material, i.e., rocks, pebbles, and a small amount of oversized sand, from the sand Arepet purchases. Jt. Stip. 14, Ex. A-2 pp. 16-17. In doing so, it separated material of all the same size, i.e., the 100 mesh sand, from material which was not of the same size. I find that this amounted to "sizing" as that term is defined in the Interagency Agreement.

I note that Arepet asserts the material it purchases is "all 100 mesh size when it is purchased and is sold as 100 mesh sand." Arepet Mot. 10. However, it is quite clear that the product delivered to the Von Ormy plant is not the same as the product sold by Arepet, even if they share the same description as 100 mesh sand.[6] While Arepet attempts to explain away the "oversize material" which, according to it, typically accounts for less than 2% of the purchased product, as de minimis waste, it is clear that removal of that material was critical to the oil and gas companies who purchased the sand from Arepet.

I find Arepet's argument that it engaged in "scalping," and that scalping is not milling, to be unavailing. Arepet cites the Commission's decision in *State of Alaska, Dept. of Transp.*, 36 FMSHRC 2642 (2014) ("*Alaska DOT*"), for the position that "'scalping' to remove unwanted waste from the mineral material is not 'milling.'" However, Arepet's argument lacks context and is an incorrect reading of that decision.

In *Alaska DOT* the Commission considered whether the Interagency Agreement's "borrow pit" exception to MSHA jurisdiction applied to an operation. While the Commission cited the Agreement's language regarding "scalping" as it relates to "borrow pits" it did not hold that "scalping," as a general matter, is not "milling." Rather, the Commission, at most, simply recognized that the language of the Interagency Agreement allows limited milling in the form of a scalping screen to remove large rocks, wood and trash from the material extracted *from a borrow pit*. *Id*.

The Interagency Agreement makes clear that an operation must meet certain criteria to be considered a "borrow pit" subject to OSHA, and not MSHA, jurisdiction.[7] Then, and only then,

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[6] Many of Arepet's arguments are based upon a "fact" that is not included in the parties' agreed-upon stipulations. The parties stipulated that Arepet purchases commercially available wet sand that it initially stockpiles and did not agree upon the mesh size of the sand. Jt. Stips. 7 & 8. Nevertheless, for purposes of this order, I assume that Arepet contracted with Madden Materials, its sand supplier, to purchase a product described as 100 mesh sand.

[7] Section (B)(7) of the Interagency Agreement states that "'[b]orrow pit' means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the

(continued…)

is "scalping" the single excepted form of milling that will not bring the operation within MSHA's jurisdiction. *See also Kerr Enterprises, Inc.*, 26 FMSHRC 953, 956-957 (Dec. 2004) (ALJ).[8] Here, Arepet does not argue, and the stipulated facts do not establish, that the Von Ormy plant is a borrow pit. Even so, as discussed above, I have already determined that the plant's use of the Rotex amounted to "sizing."

Having found that Arepet engaged in milling via use of the Rotex, I now consider the second alleged milling process, i.e., drying. "Drying" is defined as "the process of removing uncombined water from mineral products, ores, or concentrates, for example, by application of heat, in air-actuated vacuum type filters, or by pressure type equipment." 44 Fed. Reg. at 22830. I find that Arepet engaged in "milling," as that term is defined in the Interagency Agreement, by "drying" the sand. The parties stipulated that the sand at the plant was conveyed to a "gas heated fluid air bed dryer" for the purpose of reducing the moisture content of the sand. Jt. Stip. 8-10. Unquestionably, the application of heat via the gas heated dryer removed uncombined water from the sand and satisfied the Interagency Agreement's definition of "drying." However, further discussion is warranted.

Much of Arepet's Motion and Opposition is spent arguing that the Secretary is bound by an interpretation of the term "drying" advanced in the *Cranesville* case. In *Cranesville*, the Court of Appeals found that the Secretary reasonably determined that operations at a bag plant fell under OSH Act and not the Mine Act. There, operations at the bag plant consisted of drying sand, sometimes mixing the sand with other minerals to create a concrete pre-mix, and bagging the material that had already been "fully milled." The court noted that the sand had been "crushed, washed, and screened" at another plant and was "fully milled" prior to arrival at the bag plant.[9] 878 F.3d. at 34. In finding that the Secretary reasonably concluded that the bag plant was not a mineral processing operation, but rather a manufacturing facility using milled materials delivered from the other plant, the court stated that "drying is merely one factor to consider in the functional analysis" and "the Secretary may consider all processes conducted at the facility and their relation to each other." *Id*. at 35.

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[7] (…continued)
form in which it is extracted. *No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash*. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit." 44 Fed. Reg. at 22828. (emphasis added)

[8] In *Kerr*, the ALJ stated that "scalping would ordinarily give rise to Mine Act jurisdiction. However, the Interagency Agreement exempts a 'borrow pit' from the broad reach of the Mine Act if certain conditions are met."

[9] Notably, the *Cranesville* court stated that the operator of Plant 5, where the sand was processed prior to its arrival at the bag plant, had "unquestionably performed milling operations . . . where [the excavated materials] . . . were crushed, *sized,* and washed." 878 F.3d. at 35 (emphasis added).

Here, unlike in *Cranesville*, the sand had not been "fully milled" upon arrival at the Von Ormy plant. Rather, and as discussed above, the Rotex machine milled the sand and separated the oversize waste material from the sand. Critically, the milling of the sand by the Rotex occurred *after* the sand had been dried. Because the milling process was not yet complete at the Von Ormy plant at the time the sand was dried, the facts in the *Cranesville* case are substantially different.[10]

The Interagency Agreement states "there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle."[11] 44 Fed. Reg. at 22828. However, common sense dictates that the manufacturing cycle involves the "making" of something, whereas both the Interagency Agreement and the Commission have recognized that "milling," as a general matter, often involves the removal of waste or impurities from a valuable mineral. 44 Fed. Reg. at 22829; *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 674-675 (July 2002). Here, I find the Secretary reasonably concluded that Arepet's "drying" and "sizing" processes were part of the mineral milling cycle, and not the manufacturing cycle given that they involved removing moisture and oversized waste material from the valuable sand.[12]

Based on the above analysis, I find that "milling," as that term is understood in the mining industry and defined in the Interagency Agreement occurred at the Von Ormy plant. I further find that "sizing" and "drying," as those terms are defined in the Interagency Agreement, occurred at the Von Ormy plant. Based on these findings, the Secretary reasonably determined that Arepet's operation engaged in "milling" as that term is used in the Mine Act.

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[10] It is important to recognize that the court in *Cranesville* did not consider the jurisdiction issue de novo. Rather it concluded that "because the Secretary has authority to distinguish between mining and non-mining activities for purposes of enforcement, when the Secretary reasonably applies a functional analysis, the Secretary's determination as to which act governs is entitled to substantial deference." 878 F.3d. at 35. As a consequence, Arepet's considerable reliance on this case is misplaced. Indeed, the Secretary's reasonable interpretation of Mine Act jurisdiction in this case is also entitled to deference.

[11] 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).

[12] The milling processes utilized at the Von Ormy plant can be distinguished from the manufacturing processes used at the bag plant in *Cranesville*. In *Cranesville*, the sand was already fully milled and was only being "dried as part of the manufacturing process" which included, at times, mixing the sand with other minerals, i.e., adding material to make a new product, and then bagging. 878 F.3d at 35 (2d Cir. 2017). In contrast, the processes at the Von Ormy plant involved removing unvaluable waste from the valuable sand.

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 Von Ormy plant is a mine under the Act because "milling" occurred at the facility.

Do the products of the Von Ormy plant enter commerce or the operation or products of the plant affect commerce?

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 Alaska Dept. of Transp.*, 36 FMSHRC 2642, 2645 (Oct. 2014).

I find that the Von Ormy plant's products affect "commerce" as that term is used in the Act.[13] The joint stipulations make clear that Arepet currently sells its sand to EOG Resources, which uses the sand at oil and gas drilling sites. Jt. Stip. 20. Moreover, Arepet has in the past sold sand to other customers, including Halliburton Energy Services, Inc., Liberty Oilfield Services, Marathon Oil EF, LLC, Nextier Completion Solutions and Laredo Energy Operating, LLC. Jt. Stip. 21. The Secretary asserts, and Arepet does not dispute, that EOG Resources has operations in several other states. Moreover, Arepet's past customers include multinational corporations with oil and gas related operations throughout the world. *See* 29 C.F.R. § 2700.67(a). Accordingly, I find that the sand produced at the Von Ormy plant both enters and affects commerce.

Having determined that the Von Ormy plant is a "coal or other mine" and that its products affect commerce, I find that the plant is subject to Mine Act jurisdiction.

[13] 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).

ORDER

For reasons set forth above, the Secretary's Motion for Summary Decision on Jurisdiction is **GRANTED** and Respondent's Motion for Summary Decision on Jurisdiction is **DENIED**. The parties are **ORDERED** to confer and, by November 7, 2023, suggest multiple potential hearing dates in the months of December 2023 and February 2024.

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

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