September 2023

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(Judge Paez, September 18, 2023)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. POCAHONTAS COAL COMPANY LLC	Docket No. WEVA 2023-0092

ORDER

On June 16, 2023, the Commission directed review of the captioned matter and stayed briefing.

On August 31, 2023, the Commission issued its decision in *Consol Mining Co*., Docket No. WEVA 2023-0141, concluding that the Judge erred in denying a settlement motion because the Secretary relied on *Mechanicsville Concrete* and *American Aggregates of Michigan* to support her position.

Upon reconsideration of the Secretary's petition for discretionary review of the Judge's decision in this captioned matter, the direction for review is hereby VACATED.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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September 13, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. COOPER STONE	Docket No. CENT 2023-0057 A.C. No. 41-03401-552869

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

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On December 13, 2022, the Commission received from Cooper Stone ("Cooper") a motion to reopen a final order of the Commission pursuant to section 105(a) of the 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 to the operator on April 18, 2022, and became a final order of the Commission on May 18, 2022. On December 13, 2022, Cooper filed a motion to reopen, stating that its failure to timely file was the result of mistake or inadvertence. Cooper asserts that its standard practice is to file to contest proposed penalties

immediately upon receipt, however, staff illnesses during the COVID-19 pandemic impacted its ability to meet the filing deadline.

Having reviewed Cooper's request and the Secretary's response, we find that Cooper has demonstrated good cause for its failure to timely file to contest. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order.[1] *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

[1] On April 3, 2023, the Secretary filed a petition for assessment of penalty for the captioned matter. The issuance of the April 3, 2023 petition must have been due to an administrative mistake on the part of the Secretary, as the uncontested assessment become a final order of the Commission on May 18, 2022. Accordingly, the Secretary shall issue a new penalty petition pursuant to the terms of this order.

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September 13, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PRAIRIE STATE GENERATING COMPANY LLC,	Docket No. LAKE 2023-0038 A.C. No. 11-03193-559468

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

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 18, 2022, the Commission received from Prairie State Generating Company LLC ("Prairie") a motion to reopen a final order of the Commission pursuant to section 105(a) of the 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 to the operator on August 8, 2022, and became a final order of the Commission on September 7, 2022. On August 17, 2022, Prairie paid the proposed civil penalty for 19 of the 23 citations at issue in the assessment. Praire asserts that on that day it also mailed a notice of contest, reflecting its intent to contest the

remaining four citations and civil penalties. On October 24, 2022, MSHA sent the operator a delinquency notice after failing to receive Prairie's notice of contest. On November 18, 2022, Prairie filed a motion to reopen the four citations that it originally sought to contest, stating that it mailed the form to the wrong address or otherwise made a mistake in mailing it. The Secretary of Labor does not oppose the operator's motion, but reminds Prairie to ensure that future contests are timely mailed to MSHA's Civil Penalty Compliance Office in Arlington, Virginia.

Having reviewed Prairie's request and the Secretary's response, we find that the operator has demonstrated that its failure to timely file was the result of a mistake. In the interest of justice, we hereby reopen Citation Nos. 9199089, 9199090, 9196779, and 9199099 and remand the case to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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September 13, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LEHIGH CEMENT COMPANY, LLC	Docket No. PENN 2023-0021 A.C. No. 36-00190-564266

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

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 23, 2022, the Commission received from Lehigh Cement Company ("Lehigh") a motion to reopen a final order of the Commission pursuant to section 105(a) of the 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 to the operator on October 11, 2022, and became a final order of the Commission on November 10, 2022. The operator asserts that counsel unintentionaly failed to file to timely contest the assessment, in part because she mistakenly believed that all citations from the subject inspection had been contested in an earlier

separate assessment. Counsel recognized that she made a mistake on November 22, 2022, and on the next day filed a motion to reopen 13 of the citations at issue.[1]

Having reviewed Lehigh's request and the Secretary's response, we find that Lehigh has demonstrated that its failure to timely file to contest was the result of a mistake. We note that counsel and the operator recognized their error and promptly moved to reopen the citations. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

[1] Specifically, Lehigh requests to reopen Citation Nos. 9667174, 9667177, 9667178, 9667180, 9667183, 9667188, 9667189, 9667192, 9667193, 9667195, 9667197, 9713407, and 9713410.

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September 13, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. TERRA EXCAVATING, LLC	Docket No. SE 2023-0048 A.C. No. 09-01264-563564

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

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 29, 2022, the Commission received from Terra Excavating, LLC ("Terra") a motion to reopen a final order of the Commission pursuant to section 105(a) of the 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 to the operator on September 26, 2022, and became a final order of the Commission on October 26, 2022. On November 29, 2022, Terra filed a motion to reopen, stating that it failed to timely file contest because it never received the proposed assessment. The owner of the company states that counsel contacted MSHA on November 8, 2022 to inquire about the status of the assessment. He was provided a

duplicate copy of the assessment and promptly attempted to file to contest. On November 21, 2022, Terra received notice from MSHA that the contest was received out of time.

Having reviewed Terra's request and the Secretary's response, we find that Terra has demonstrated good cause by its good faith prompt filing after learning of the assessment. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
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September 14, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2023-0090 A.C. No. 45-03007-565979
TWO RIVERS SAND & GRAVEL, INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 28, 2022, the Commission received from Two Rivers Sand & Gravel, Inc. ("Two Rivers") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 10, 2022, and became a final order of the Commission on December 12, 2022. Two Rivers asserts that, due to a clerical error, the pages of the assessment were combined with another assessment which had a later due date. The paperwork for the two assessments was processed together, and as a result,

the notice of contest for the earlier assessment was untimely. Two Rivers filed its motion to reopen on December 28, 2022, approximately two weeks after the relevant assessment became final. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Two Rivers's request and the Secretary's response, we find that the untimely filing was the result of excusable mistake arising from a clerical error. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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September 14, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CRANESVILLE AGGREGATES	Docket No. YORK 2023-0032 A.C. No. 30-00983-564611[1]

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 28, 2022, the Commission received from Cranesville Aggregates ("Cranesville") 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 October 11, 2022, and

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[1] The Acknowledgement Letter previously issued in this docket incorrectly listed the assessment control number as 30-00983-546611.

became a final order of the Commission on November 10, 2022. Cranesville asserts that its Safety Department was undergoing a major personnel transition when the proposed assessment was received: the safety director had semi-retired and was working from home, a new safety director had not yet been hired, and the safety manager was on leave until mid-November. As a result, the assessment did not come to the attention of the safety department until the week of November 20, at which time it was promptly contested. MSHA received the notice of contest on November 28, 2022, 18 days after the assessment became final. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Cranesville's request and the Secretary's response, we find that the failure to timely contest the assessment was the result of a coincidental series of personnel issues, and therefore unlikely to recur. *See River View Coal, LLC*, 45 FMSHRC __ (June 2023). We also note that the operator has no history of untimely filing, filed its notice of contest promptly once it became aware of the proposed assessment, and filed its motion to reopen relatively promptly thereafter. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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September 20, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MULBERRY LIMESTONE QUARRY CO., INC	Docket No. CENT 2023-0190 A.C. No. 23-02543-570964

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On May 16, 2023, the Commission received from Mulberry Limestone Quarry, Co.. Inc. ("Mulberry") 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 February 13, 2023 and became a final order of the Commission on March 15, 2023. MSHA received partial payment of the assessment on March 14, 2023, a day before the assessment became a final order of the

Commission. A delinquency notification was mailed to the operator on May 1, 2023, and delivered on May 8, 2023. The Secretary does not oppose the request to reopen.

Payments for uncontested citations must be mailed to MSHA's Lock Box in St. Louis, Missouri. However, contests of proposed assessments must be mailed to a different MSHA address in Arlington, Virginia. On March 10, 2023, Mulberry correctly mailed its payment of the uncontested citations to St. Louis. However, Mulberry mistakenly mailed its contest along with its payment to the St. Louis address.[1] Mulberry did not become aware of its failure to timely contest the assessment until it received a delinquency notice on May 8, 2023. Upon receiving the delinquency notice, Mulberry promptly contacted MSHA, who informed them of their mistake.

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 16, 2023, within 30 days of the receipt of the delinquency notification on May 8, 2023. Therefore, the motion to reopen was filed within a reasonable amount of time.

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[1] In its motion to reopen, Mulberry implies that the same envelope which contained the check for the uncontested citations also included the form indicating that Mulberry wished to contest a portion of the assessment. Mulberry also asserts that MSHA was able to locate the contest of the assessment, but determined that the contest had been received at the St. Louis, Missouri address.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
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September 20, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. WESTMORELAND ABSALOKA MINING, LLC	Docket No. WEST 2023-0221 A.C. No. 24-00910-572821

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On May 9, 2023, the Commission received from Westmoreland Absaloka Mining, LLC ("Westmoreland") 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 23, 2023 and became a final order of the Commission on April 24, 2023. MSHA received partial payment of the

assessment on April 20, 2023, a few days before the assessment became a final order. The Secretary does not oppose the request to reopen.

Payments for uncontested citations must be mailed to MSHA's Lock Box in St. Louis, Missouri. However, contests of proposed assessments must be mailed to a different MSHA address in Arlington, Virginia. On April 13, 2023, Westmoreland correctly mailed its payment for the uncontested citations to St. Louis. However, on the same day, Westmoreland mistakenly mailed its contest along with its payment to the St. Louis address.

On April 24, the assessment became a final order. Two days later, Westmoreland was informed by MSHA that its first contest was sent to an incorrect address. Therefore, on April 26, Westmoreland sent a second contest, this time via email, to MSHA's email address. On April 28, MSHA informed the operator that its second contest was untimely filed.

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 9, 2023, within 30 days of the final order of April 24, 2023. Therefore, the motion to reopen was filed within a reasonable amount of time.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
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September 20, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. GREENBRIER MINERALS, LLC	Docket No. WEVA 2023-0191 A.C. No. 46-09319-569162

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 16, 2023, the Commission received from Greenbrier Minerals, LLC ("Greenbrier") 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 January 7, 2023, and became a final order of the Commission on February 6, 2023. The following day, Greenbrier filed its contest of the assessment. A few days later, Greenbrier received a letter from MSHA informing

Greenbrier that the contest for the assessment had been untimely filed. On February 16, 2023, MSHA received partial payment of the assessment.

Greenbrier seeks to reopen the assessment so that it may contest five citations—Citation Nos. 9590068, 9590072, 9590074, 9590087, and 9590088.[1] Greenbrier maintains that its safety specialist miscalculated the deadline to submit the contest of the assessment as February 7, 2023, resulting in the contest being filed one day after the deadline to contest the assessment. The Secretary of Labor does not oppose the request to reopen.

We note that the motion to reopen was timely filed. The Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed on February 16, 2023, within 30 days of the final order of February 6, 2023. Therefore, the motion to reopen was filed within a reasonable amount of time.

[1] The operator states that it is in the process of paying the full amount of the proposed assessment but maintains that any payment of these citations is made merely to avoid any potential delinquencies and does not waive its right to contest these five citations. Motion to Reopen, at 1 n.1. Commissioner Baker has previously stated that it is his position that the accidental payment of a civil penalty does not constitute excusable neglect. *See e.g. Omya, Inc.*, 45 FMSHRC 131 (Mar. 2023). However, in light of the operator's explanation for its payment of the civil penalty, Commissioner Baker would determine that in the instant case payment was not the result of an inadequate or unreliable internal processing system.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
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September 22, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. R.E. PIERSON MATERIALS CORP.	Docket No. PENN 2022-0105 A.C. No. 36-00111-552721 Docket No. PENN 2022-0106 A.C. No. 36-07480-551092

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 19, 2022, the Commission received from R.E. Pierson Materials Corp. ("R.E. Pierson") two motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] The operator submitted its motion to reopen in PENN 2022-0105 in response to the Commission's August 31, 2023 Order to Show Cause. For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers PENN 2022-0105 and PENN 2022-0106 because they involve similar factual and procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment for PENN 2022-0105 was delivered on April 13, 2022, and became a final order of the Commission on May 13, 2022. MSHA also issued a delinquency notice to the operator on June 28, 2022. Regarding PENN 2022-0106, MSHA records indicate that the proposed assessment was delivered on March 18, 2022, and became a final order of the Commission on April 18, 2022. MSHA issued a delinquency notice on June 2, 2022.

R.E. Pierson admits that it received the proposed assessments at issue. However, it asserts that the mine's administrative staff failed to forward the proposed assessments to the Mine Operations Manager for review and processing, due to clerical errors in processing the mail. According to R.E. Pierson's Mine Operations Manager, the operator discovered the errors only after receiving MSHA's delinquency notices. The operator then contacted its outside counsel to submit the motions to reopen. R.E. Pierson also asserts that it has taken corrective measures to prevent any future occurrence of this error. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed R.E. Pierson's requests and the Secretary's responses, we find that the operator inadvertently failed to forward the contest forms to the mine's management. In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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September 18, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) obo JOHN COLLINS, Complainant,	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2023-0235 MSHA No.: SE-MD-2023-09
v.	
CRIMSON OAK GROVE RESOURCES, LLC, Respondent	Mine: Oak Grove Mine Mine ID: 01-00851

DECISION AND ORDER REINSTATING JOHN COLLINS

Before: Judge Lewis

On August 25, 2023, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq*., and 29 C.F.R. § 2700.45, the Secretary of Labor (“Secretary”) filed an Application for Temporary Reinstatement of miner, John Collins (“Collins” or “Complainant”), to his former position with Crimson Oak Grove Resources, LLC (“Oak Grove” or “Respondent”), at Oak Grove Mine pending final hearing and disposition of the case.

That application followed a Discrimination Complaint timely filed by Collins on July 27, 2023, that alleged, in effect, that his termination was motivated by his protected activity. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Collins to his former position as a mobile equipment operator on the surface of the mine.

Respondent timely filed a motion requesting a hearing regarding this application on September 01, 2023. A remote hearing was held via Zoom on September 11, 2023, wherein the Secretary presented the testimony of the Complainant, and the Respondent had the opportunity to cross-examine the Secretary’s witness and present testimony and documentary evidence in support of its position. 29 C.F.R. § 2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of Collins.

Contentions of the Parties

On July 27, 2023, Collins filed a Discrimination Complaint with MSHA alleging that on June 14, 2023, he was:

> Ask[ed] to load [the] panline on a truck by my immediate supervisor, Jeff Jamsion [sic]. I told him that I don't feel comfortable loading the panline with my 250 Komatzu Loader. He told me we load pan all the time with the Loader and I said I doesn't [sic] feel comfortable loading with the Loader again. Then he say [sic] load the panline Collins[.] Mike is at the dump[,] The truck is waiting to be loaded. I proceeded to load[.] The panline loaded 1 piece of pan[.] The second piece[,] I went to approach the truck to load lift up [sic] and my Loader rock[ed] a little and then when I raise [sic] up my forks[,] went to the ground and the back end comes [sic] off the ground 6 feet and slams down[,] jarring my back. Jeff Jamsion [sic] fill[ed] out a[n] incident report that day[,] June 14th. [On] June 23[,] I was call[ed] to the office saying [sic] that they [were] investigating the incident and I was suspended pending investigation on the equipment to he [sic] find out what's wrong with the Loader. June 26th was a meeting [sic] suspension with intent to discharge [for failure] to care for myself and other's and company property [sic]. July 21st[,] I was discharged by the arbitrator. I want my job back with full backpay! [I] want this incident clear off my record!

Application for Temporary Reinstatement at Exhibit B, p. 2.

The Secretary also submitted the August 24, 2023, Affidavit of Michael LaRue, a special investigator employed by the Mine Safety and Health Administration with the Application. LaRue wrote that he investigated Collins' discrimination claim against Respondent. LaRue found and concluded the following:

2. a. At all relevant times, Respondent Crimson Oak Grove Resources, LLC ("Oak Grove") engaged in the operation of a coal or other mine and is, therefore, an "operator"within the meaning of Section 3(d) of the Act.

   b. Oak Grove Mine ("the mine"), Mine ID 01-00851, located in Jefferson County, Alabama, has products that enter commerce and is, therefore, a "mine" within the meaning of Sections 3(b), 3(h), and 4 of the Act. Oak Grove operates the mine.

   c. Collins worked for Oak Grove at the mine for the past nineteen (19) years. For fifteen (15) years he worked underground as a motor man. Collins was transferred to the surface and worked in the bathhouse since March of 2022. In February 2023 Collins began working as a mobile equipment operator on the surface of the mine. Collins is a "miner" within the meaning of Section 3(g) of the Act.

d. On Wednesday, June 14, 2023, Collins was told by his supervisor, Jeff Jamison ("Jamison"), to use a Komatsu 250 with fork attachments to load pan lines onto a haul truck.

e. Collins expressed concern to Jamison about the weight of the pan lines being too heavy for the Komatsu 250 – that the Komatsu 250 was not equipped to handle the load. Jamison told Collins they "do it all the time."

f. Collins again told Jamison he did not feel comfortable completing the task with the Komatsu 250. Jamison advised Collins the Cat loader, a larger piece of equipment, was not available for use for this task as it was being used by another miner elsewhere at the mine.

g. For a third time Collins told Jamison he did not feel comfortable using the Komatsu 250 for the task, as he felt it was an undersized piece of equipment. However, Collins also felt he could not further disagree with his supervisor. Jamison told Collins to "just go ahead and load" the pan lines. Collins reluctantly began the task.

h. As Collins loaded the first pan line, he noticed the Komatsu 250 was unsteady when the forks were raised.

i. As Collins loaded the second pan line, he felt the rear tires of the Komatsu 250 lift off of the ground. Collins stopped moving the Komatsu 250 in an effort to stabilize the equipment.

j. Collins then proceeded to lift up the forks carrying the second pan line. As the forks rose higher, the weight of the pan line caused the front-end loader to tip forward. This caused the back tires of the Komatsu 250 to come off of the ground approximately six (6) feet. The unsecured pan line slipped off of the forks and fell to the ground. The rear of the Komatsu 250 then slammed to the ground onto the rear tires.

k. Collins continued to work the rest of the day, while another miner finished the job of loading the pan lines with the Cat loader.

l. Collins filled out an accident report due to pain in his back as a result of the Komatsu 250 slamming to the ground.

m. On Friday, June 23, 2023, Collins was called to a meeting with the mine manager, Jesse Avery ("Avery"). Present with Avery were a union representative and a human resources representative. Collins was shown a video of the incident and advised he was suspended pending investigation, with the intent to discharge. During the meeting Avery acknowledged Collins told Jamison about his safety concerns with using the Komatsu 250 for the task. Avery also advised the

incident and video had just come across his desk, so while there was a delay in time since the incident, it was just brought to the attention of Avery.

n. On Monday, June 26, 2023, Collins was called to a meeting, this time with multiple representatives from the mine, the union and human resources. Collins was informed he would continue to be suspended with the intent to discharge or pending the outcome of arbitration.

o. On Friday, July 21, 2023, Collins and Oak Grove appeared before an arbitrator due to Collins filing a grievance with the United Mine Workers of America. During the arbitration Jamison admitted that Collins voiced safety concerns to Jamison about the task of loading the pan lines with the Komatsu 250. The arbiter ruled in favor of the mine and Collins was verbally terminated.

p. Collins timely filed a discrimination complaint with MSHA on Thursday, July 27, 2023 asserting his termination was motivated by his reports of unsafe working conditions.

3. Based upon my investigation of these matters, I have concluded that Collins' complaint of discrimination was not frivolously brought.

Id. at Exhibit A, p. 1-4. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Id.* at 1.

In its pre-hearing submission and during hearing, Respondent argued that Collins did not engage in protected activities, Tr. 107, and was instead discharged "because of the manner in which he negligently operated a loader on June 14, 2023." Resp. Req. for Hearing at 1. Respondent further argues that Collins had a documented history of conduct that led to equipment being damaged, and that an arbitrator had affirmed Collins' discharge, indicating that they had a legitimate reason to discharge him. *Id.*

The parties jointly stipulated at hearing that the Administrative Law Judge has jurisdiction over this proceeding. The Oak Grove Mine is a mine as defined by the Mine Act, that its products enter interstate commerce, and that at all relevant times, John Collins was a miner as contemplated by the Mine Act. Tr. 8.

Summary of Testimony

John Collins was a miner at the Oak Grove Mine, where he had worked for 19 years. Tr. 20. He became a mobile equipment operator in February of 2023 and worked six days per week. Tr. 21. Prior to working as a loader or mobile equipment operator, he had worked as an underground laborer, a motorman, and surface utility, which was in the bathhouse at the north portal. Tr. 21, 43. Collins described his work in the bathhouse as being janitorial, however he

also used a loader in this position.[1] Tr. 23. He worked in that position for three to four years. Tr. 23. At some point during his time at the bathhouse, Paul Jamison became Collins' direct supervisor.[2] Tr. 23. Jamison was Collins' direct supervisor for over a year in the bathhouse. Tr. 23.

In 2016, Collins (who is Black) had filed an EEOC complaint after Jamison spit on him. Tr. 23. As a result of the complaint, Collins believes that Jamison was terminated. Tr. 23-24. Collins described his relationship with Jamison in 2021 as "better," but said that he made complaints to the general manager stating that he was not comfortable having Jamison as a supervisor. Tr. 24. He was told in response that no changes would be made. Tr. 24. In 2022, Collins made further harassment and discrimination complaints against Jamison, alleging that Jamison was picking on him. Tr. 24. Collins testified that he tried to deal with the situation by simply following all orders that Jamison issued. Tr. 25.

As a mobile equipment operator, Collins routinely operated the Komatsu 250 front-end loader, a piece of machinery with which he was "very familiar," describing it as "pretty much my assigned equipment to run." Tr. 21-22, 27, 48-49. Collins' Certificate of Training was admitted as Respondent's Exhibit A. Tr. 49. Collins testified that it was issued after it was determined that he could operate the equipment listed.[3] Tr. 48. Based on his experience and expertise, Collins testified that for the task of loading the pan lines, the Komatsu 250 was not the proper equipment. Tr. 27.

In the middle of Collins' shift on June 14, 2023, at approximately 11:30 am, Jamison stopped Collins as he was coming from the bathhouse and ordered Collins to load the pan lines onto a truck. Tr. 25-26. Collins agreed to do so. Tr. 26. Jamison informed Collins that another employee was using the Cat loader, which is a larger loader, and Collins told Jamison that he did not feel comfortable loading the pan line with the 250 Komatsu loader. Tr. 26. Jamison replied that they "do it all the time." Tr. 26. Collins said that he understood, but repeated that he did not feel comfortable using the Komatsu loader for this task. Tr. 26. Jamison replied that the Cat loader was in use, "so I need you to go ahead and load the truck." Tr. 26. Collins told Jamison, "I'm going to tell you again, I don't feel comfortable doing it, but I will go ahead and do it." Tr.

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[1] At the north portal, Collins operated a 380 loader and Cat loader. Tr. 44. He used these loaders to load pan lines onto supply cars. Tr. 44-45. The 250 Komatsu loader was not at the north portal. Tr. 44.

[2] Paul Jamison was the surface supply yard manager. Tr. 58. His duties were to supervise the loading, unloading, and storage of supplies at the mine. Tr. 58-59. For approximately two years, Jamison has been Collins' supervisor. Tr. 59. He testified at hearing.

[3] Jamison described the training documented in Exhibit B as being issued after "the other operator [went] over with him just to refresh him on going on the preoperational checks, and then I watched him operate." Tr. 60. Jamison testified that Collins had his load against the mast and forks tipped up when he watched him operate the loader. Tr. 60. Jamison described Collins as "an experienced operator." Tr. 61.

26, 30. Collins testified that his telling Jamison that he did not feel comfortable using the Komatsu 250 loader to load the pan lines was his attempt to express that it was dangerous.[4] Tr. 28.

On June 14, 2023, Collins had just come off a 35-day suspension for a fender on a loader that got bent. Tr. 30, 52, 56. Collins was concerned that he could get suspended or lose his job for "any little thing that happened," so he followed Jamison's orders despite feeling it was unsafe.[5] Tr. 30.

Prior to June 14, 2023, Collins had loaded pan lines five or six times and usually used the Cat loader to load them. Tr. 22. Collins described the Cat loader as "heavy equipment" that was "stronger than the 250 Komatsu." Tr. 22. Prior to June 14, Collins had never used the Komatsu 250 front-end loader to load pan lines onto a haul truck. Tr. 22.

On June 14, the Komatsu loader was configured with a fork system, as depicted on page 42 of the Komatsu loader spec sheet.[6] Tr. 96. According to the spec sheet, the max tipping load was approximately 15,000 pounds.[7] Tr. 98. The weight of the pan line was over 11,500 pounds.[8] Tr. 68; Resp. Ex. E.

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[4] Jamison testified that Collins regularly said he did not feel comfortable loading or unloading things as "his excuse to get out of trouble for – if he messes up or gets someone else to do it." Tr. 64. Jamison testified that he did not take these statements to be invocations of Collins' miner's rights because it was "his escape goat. [sic]" Tr. 73.

[5] Collins disputed causing $22,000 worth of damage in that incident. Tr. 52-53. He stated that the investigation into whether the pump was damaged was inadequate. Tr. 53. Collins disagreed with the 35-day suspension but agreed to come back because he needed the job. Tr. 53. Collins testified that he's the only person who has ever received a 35-day suspension. Tr. 56. Koontz testified that the reason the suspension lasted for that long was due to problem in finding an arbitrator. Tr. 86.

[6] The Komatsu loader spec sheet was admitted into evidence as Respondent's Exhibit G. Tr. 96-97.

[7] When asked whether there was a difference between a static load and a safe working load for the Komatsu 250 loader weight capacity, general manager Eric Koontz stated that "it's very opinionated when you read the documents." Tr. 101. When asked if the appropriate inquiry is the maximum payload or maximum tipping load, Koontz replied, "it all depends on how you're – what task you're performing…There's so many different parameters involved there." Tr. 101-102.

[8] A scale ticket that stated that the pan weighed 11,560 pounds on August 09, 2023, was admitted into evidence as Respondent's Exhibit E. Tr. 90-91. The testimony at hearing did not establish whether the pan line was empty when it was weighed on August 09.

Collins testified that Jamison was aware that Collins didn't use the 250 Komatsu loader to load pan lines because in the past when he had to do so, he would switch the Komatsu loader for a co-worker's Cat loader. Tr. 26. Collins explained that he did this because the Cat loader was a stronger loader than the Komatsu. Tr. 26-27. Collins testified that this was not the first time Jamison tried to get Collins to load something heavy with the Komatsu 250 loader, and that Collins had previously told him that it was not the right equipment. Tr. 27.

Collins testified that the pan line "can be loaded [with the Komatsu 250 loader], but it's dangerous." Tr. 28. He explained that the pan line is too heavy for the loader, causing the loader to rock. Tr. 28. He testified that he only used the Komatsu loader to dig out pan lines, but never to lift them above a low level. Tr. 28. Once he would dig out the pan lines, Collins' coworker would come with the Cat loader to load them onto the truck. Tr. 28. Jamison was aware that this was the normal way of loading the pan lines, which is why he informed Collins that the Cat was unavailable on June 14. Tr. 29.

Collins described lifting the pan lines on June 14. Tr. 30. Collins took his time and was able to lift the first pan line and get it "kind of level." Tr. 30. However, the loader struggled in trying to lift the pan line. Tr. 30-31. Collins testified that the "guy moving the wood" on the truck said "lift up." Tr. 31. Collins lifted it, but when he could not lift it any further, he "just set it down on there." Tr. 31. He was able to lift the first pan line onto the truck, but described it as "kind of scary."[9] Tr. 31. He testified that when he was lifting the first pan line, he knew that the Komatsu 250 "wasn't a piece of equipment that could handle it…That's why I said I didn't feel comfortable doing it." Tr. 31.

After Collins loaded the first piece, Jamison left the location and did not see Collins load the second pan. Tr. 63. Collins then went to get the second pan line and tried to load it. Tr. 31. He testified that he kept it low so it wouldn't drop and that he tilted the load back when he got to the truck. Tr. 31. He lifted the pan line slowly and then the heavy load "took me straight down, and that's when the back end come up." Tr. 31. The pan line came off the loader when the back end of the loader was lifted off the ground. Tr. 32. Collins testified that he could not have done anything differently once the load started to destabilize the loader. Tr. 31-32. "They said I could have did [sic] something different. But at the – in the time in the moment, you're off the ground, I mean, I just try [sic] not to make no sudden move [sic] to hurt anybody. I didn't want to hurt myself neither."[10] Tr. 31-32.

After the pan line fell off the Komatsu loader, Collins had no trouble driving it. Tr. 35. He did not notice any damage to the vehicle or tires. Tr. 35. He proceeded to drive toward the dump to get his coworker with the Cat loader to help load the pan line onto the truck. Tr. 35. The task of loading the pan line onto the truck was completed using the Cat loader. Tr. 36.

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[9] The bed of the haul truck was approximately five to five and a half feet off the ground. Tr. 102.

[10] A video of Collins hauling the second pan line was admitted as Secretary's Exhibit 1. Tr. 42.

Collins testified that he spoke to Jamison approximately 5 minutes after the pan line fell. Tr. 54. When Collins returned to the truck, Jamison had seen the pan line on the ground and asked Collins what had happened. Tr. 35. Collins responded, "I told you what was going to happen…I knew it was going to happen, Jeff."[11] Tr. 35. Jamison asked if Collins was okay and Collins responded, "Yeah, I think I'll be all right." Tr. 35. However, approximately five minutes later, Collins told Jamison to fill out an incident report because he felt he had injured his lower back. Tr. 36.

After watching the video, Jamison believed that Collins properly loaded the first pan, but that he could tell on the second pan that the pan line was not all the way against the mast on the forks and the forks were not tipped back.[12] Tr. 64. Jamison testified that as one watches the video one can see that the back tires come off the ground a little as Collins was approaching the truck, leading Collins to stop and level it out. Tr. 65. Jamison testified that because Collins did not straighten his load or tip it back more, the pan slid off the forks. Tr. 65.

Jamison testified that when the back wheels of the loader came off the ground, Collins "should have stopped, reevaluated his load and, if necessary, set it down and reposition[ed] it, and take[n] it back up and tilt[ed] it back." Tr. 67. Instead, he testified that Collins stopped, "sat there for a few seconds, and then he continued on toward the truck and raising the pan." Tr. 67. Jamison testified that the company felt that Collins "neglected to do it the right way. He endangered himself and the equipment and everybody around him." Tr. 67.

At some point after June 14, Eric Koontz was made aware by human resources that there was an incident involving Collins on the loader.[13] Tr. 89. He was shown a video and read the incident report and considered those actions as the start of the investigation. Tr. 89. Koontz spoke with Jamison and "other operators." Tr. 89. Koontz testified that he spoke with "every party involved," and decided to discharge Collins. Tr. 89-90.

Collins worked until June 23, when Jamison told Collins to see the mine manager, Jesse Avery, about his injury after completing several tasks. Tr. 36-37. Present in the June 23 meeting were Collins, Avery, the union representative Anthony Davis, and the human resources representative Chad McAtee. Tr. 37-38. During this meeting, Avery showed Collins the video of him loading the pan lines. Tr. 38-39. Avery told Collins that he "could have did this and did that," and Collins responded that "at the time in the moment…when it's in the air, ain't [sic] too much you can do." Tr. 39. Avery said Collins could have loaded from the cable side, but Collins explained that the loader can't pick up from that side. Tr. 39. Avery continued to tell Collins that he should have done something differently, but Collins responded that he was doing what his

[11] Paul Jamison also goes by Jeff Jamison. Tr. 72.

[12] Still frames of the video were admitted into the record as Respondent's Exhibit C. Tr. 66.

[13] Eric Koontz was the general manager of Crimson Oak Grove Resources. Tr. 80. Except for a few months in 2021, Koontz has served in this position since May 2019. Tr. 80. Koontz testified at hearing.

boss told him to do. Tr. 39. Collins told Avery that he had voiced concerns to Jamison that he felt uncomfortable using the Komatsu loader for the task. Tr. 39. Avery responded that it was not Jamison's job to know whether the load is appropriate for the loader and to stop blaming him. Tr. 39. Union representatives at the meeting also argued that Collins should not be discharged. Tr. 91-92. They viewed the video of the June 14 incident and did not see Collins acting recklessly in any way. Tr. 100. They argued that the blame should have been on Jamison, but Koontz dismissed this argument. Tr. 92.

Koontz asked Jamison about Collins' statements that he was not comfortable using the Komatsu loader to load the pan and Jamison stated that "post the suspension, once Mr. Collins returned, that he was using that phrase as, like, an insurance policy for everything, basically…every task he was assigned, 'I'm not – I'm not comfortable with that.'" Tr. 92.[14] Koontz believed that the Komatsu loader was appropriate to loan pans because Jamison has used it for that task. Tr. 92.

Collins asked Avery why so much time had passed between the accident and the meeting, and Avery said that it just came across his desk. Tr. 39-40. Jamison testified that he put the incident report in his truck and didn't turn it in to human resources until a few days later. Tr. 77. The human resources representative said that Collins could have hurt himself or someone else. Tr. 40. At the meeting, Avery suspended Collins pending an investigation. Tr. 40.

On June 26, Collins was called to a meeting with representatives from human resources present and Koontz on the phone. Tr. 40. Collins was told that he violated Rule Number 2 by being a danger to himself and others in the accident with the pan line.[15] Tr. 40. Collins does not believe that he had the second pan line loaded on the front-end forks in an unsafe manner. Tr. 40. He loaded it in the same manner that he had done previously. Tr. 41. Between June 26 and July 21, Collins remained on unpaid suspension. Tr. 41.

Two previous incidents were discussed at hearing. On March 23, 2023, Collins was unloading a truck with his coworker, and he hit it in some way leading to damage to the pump. Tr. 61. On April 13, 2023, the fender and steps of the Komatsu loader were damaged, and Jamison had not been informed about it. Tr. 62. Jamison testified that the evening shift operator pointed out the damage so Jamison asked Collins about it the following day. Tr. 62-63. Collins initially denied causing the damage, but later admitted to it. Tr. 63. Tr. 84. Koontz was involved in the March and April investigations involving Collins. Tr. 84. Koontz testified that he decided to pursue a discharge because of the two previous incidents and that he had offered Collins

[14] Koontz testified that if Collins had a safety complaint he could have told him directly. Tr. 103-104. Koontz did not believe that Collins "invoked his rights" to Jamison. Tr. 104.

[15] The list of Employee Conduct Rules at the mine were admitted into the Record as Respondent's Exhibit D. Tr. 87. Rule Number 2 formed the basis for the discipline for the March and April incidents. The rule states: "In order to minimize the occasions for discipline or discharge, each employee should avoid conduct which violates reasonable standards of an employer-employee relationship including: Neglect or carelessness in the performance of assigned duties or in care or use of company property." Tr. 88; Resp. Ex. D.

alternative work, and that Collins had become a risk to himself and others. Tr. 93. Koontz testified that he considered all aspects of the incident, including Collins' statements that he was uncomfortable, in making his discharge decision. Tr. 98.

On July 21, 2023, an arbitration was held and the arbitrator upheld Collins' termination.[16] Tr. 41. Collins filed a Charge of Discrimination with the EEOC on July 27, 2023, alleging discrimination based on race.[17] Tr. 51 In the section of the Charge titled, "The Particulars Are," was the EEOC representative's summary of what Collins told them. Tr. 50-51. Collins testified that he told the EEOC representative that he had voiced safety concerns to his supervisor. Tr. 57. Collins understood that the EEOC complaint focused on the treatment he received as a result of him being Black. Tr. 57.

Analysis

Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any protected right under the Act. The purpose of this protection is to encourage miners "to play an active part in the enforcement of the Act," in recognition of the fact that "if miners are to be encouraged to be active in matters of safety and health they must be protected against … discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, 95th Cong. 1st Sess. 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978). Congress created the temporary reinstatement as "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).

Section 105(c)(2) states in relevant part that any miner "who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination." 30 U.S.C. § 815(c)(2). Following an investigation, "if the Secretary finds that such 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." *Id.* The Commission has stated that the scope of a temporary reinstatement proceeding is therefore "narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also

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[16] The arbitration decision was admitted into evidence as Respondent's Exhibit F. Tr. 95.

[17] Collins' July 27, 2023, Charge of Discrimination to the Equal Employment Opportunity Commission was admitted into evidence as Respondent's Exhibit B. Tr. 51.

equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

As a result, temporary reinstatement hearings have traditionally been considered preliminary proceedings that were narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co*., 21 FMSHRC 717, 719 (July 1999).

In a temporary reinstatement hearing, a judge is tasked with evaluating the evidence of the Secretary's case and determining whether the miner's complaint appears to have merit. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Secretary must prove only a non-frivolous issue of discrimination and need not make a full showing of its prima facie case of discrimination. *Id*. at 1088. However, the Commission has stated that it may be "useful to review the elements of a discrimination claim" when gauging whether a claim is nonfrivolous.[18] *Id*. Those elements include (1) that the complainant was engaged in a protected activity and (2) that the adverse action complained of was motivated in part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803 (Apr. 1981). The Secretary may establish the motivational nexus between the protected activity and the adverse action with indirect or circumstantial evidence such as (i) the employer's knowledge of the protected activity, (ii) hostility or animus towards the protected activity, (iii) coincidence in time between the protected activity and the adverse action, and (iv) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (Nov. 1981).

More recently, in *MSHA on behalf of Roger Cook v. Rockwell Mining*, 43 FMSHRC 157 (Apr. 2021), Commissioner Rajkovich, writing for a two-Commissioner majority on evidentiary issues in temporary reinstatement proceedings, adopted what he termed, "the *Marion* approach."[19] 43 FMSHRC 157, 165-166 (Apr. 2021). As described by Commissioner Rajkovich, the Marion approach requires the judge to "consider any evidence which is both relevant to the adverse action and does not require any credibility or value determinations." *Id.* at 165. He explains that:

[18] Though this Court follows the Commission's lead, it wonders whether this practice is indeed useful or if it inadvertently leads parties to conclude that the law requires the Secretary to make a prima facie case of discrimination in a Temporary Reinstatement proceeding.

[19] This approach cited a brief section of a separate non-majority opinion written by two Commissioners in *MSHA on behalf of Kevin Shaffer v. The Marion County Coal Co.*, 40 FMSHRC 39 (Feb. 2018).

> The *Marion* approach also gives operators a meaningful opportunity to provide undisputed evidence (i.e., evidence which does not require any credibility or value determinations) that the complaint was frivolously brought… I hold that the Judge can consider evidence regarding allegations of a miner's unprotected misconduct to determine if the miner has a viable case. Such evidence may not serve as a basis for denial of reinstatement if it requires resolution of an actual credibility determination.

Id. at 165-166. As examples of such instances, Commissioner Rajkovich explained:

> Scenarios exist where there is no conflicting evidence regarding the miner's unprotected misconduct, i.e., a scenario where the Judge is not presented with any credibility or value determinations regarding the alleged misconduct. For example, a document, which both parties agree is genuine, may show that the operator's decision to fire the miner was made in response to the miner's unprotected misconduct and prior to any identified protected activity. Under these circumstances, the Judge would not need to make any credibility or value determinations regarding this document. And although the document would technically relate to an affirmative defense, it would strongly support a contention that there was no motivational nexus between the protected activity and the adverse action at issue. In this scenario I would find that the Judge cannot only consider the uncontroverted evidence regarding the miner's misconduct but is required to consider such evidence when making his temporary reinstatement determination.

Id. at 166. Notably, Commissioner Rajkovich did not adopt the confusing legal standard discussed in the separate opinion in *Marion County Coal Co*., which stated that "The burden of proof in a temporary reinstatement case, therefore, contains two legal standards: "preponderance of the evidence" and "non-frivolous."" 40 FMSHRC 39, 46 (Feb. 2018) (separate opinion of Commissioners Althen and Young).[20] This stacking of burdens is confusing,[21] without

[20] In his concurrence in part and dissent in part, Commissioner Althen asserts through an enumerated list what the majority holdings of the case are "to ensure our Judges do not miss the crucial rulings of law." 43 FMSHRC at 168 (Commissioner Althen, concurring in part and dissenting in part). However, Commissioner Althen's enumerated rulings of law go much further than what is stated in Commissioner Rajkovich's decision, such that substantial portions of them—including the preponderance of the evidence standard imported from merits discrimination cases—are not part of the majority holding. *See Marks v. U.S*., 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.")

[21] As defined in the separate decision, "preponderance of the evidence means the greater weight of the evidence." 40 FMSHRC at 46. Therefore, this Court could not determine whether the preponderance of the evidence standard raised or lowered the not-frivolously-brought burden.

precedent,[22] and unworkable at the trial level. When applying the preponderance of the evidence standard, it is required that there be meaningful discovery such that a trier of fact can truly weigh the totality of the evidence. However, a temporary reinstatement proceeding is so preliminary that there is usually little discovery or exchange of evidence.

Findings and conclusions

Protected Activity and Adverse Employment Action

As discussed *supra*, to obtain a temporary reinstatement a miner must raise a non-frivolous claim that he engaged in protected activity with an arguable connection, or nexus, to an adverse employment action. The initial issue here is whether Collins engaged in activity that triggered those protections.

On June 14, 2023, Collins was ordered to use a piece of machinery for a task which he in good faith believed was unsafe. He told his supervisor, Paul Jamison, that he did not feel comfortable loading the pan line with the Komatsu loader, and his supervisor was dismissive of his complaint. Tr. 26. Collins repeated his statement that he was uncomfortable using the Komatsu loader for the task, and his supervisor told him that the larger loader was in use, so he would have to do so. Tr. 26. Collins told his supervisor a third time that he did not feel comfortable using the Komatsu loader to load the pans, but that he would relent. Tr. 26, 30. Collins testified that he had previously told his supervisor that he did not feel comfortable using the Komatsu loader to load pan lines and that he always switched it out for the larger Cat loader when loading pan lines. Tr. 26.

These repeated statements in the context of the work that was being ordered and Collins' previous refusals to use the Komatsu loader to load pan lines constituted the protected activity of making safety complaints. Despite Jamison and Koontz's assertions at hearing that Collins did not invoke his miner's rights, a miner need not state explicitly that he is invoking his 105(c) rights under the Mine Act. It is enough that the miner reasonably intended for his statements to be safety related, which in this case Collins did. Tr. 30, 31. It is of no moment that Jamison and Koontz were dismissive of Collins' safety complaints as attempts to get out of work. If a miner tells his supervisor that he is not comfortable performing a task involving heavy machinery where someone could be injured—and in this case someone was—it is incumbent that management take those concerns seriously.

Respondent referred to evidence in the form of testimony, photos, a video, and machinery spec sheet that attempted to show that it was safe to use the Komatsu loader to lift the pan lines

[22] The separate opinion in *Marion County Coal* cited to a dissent by Commissioner Althen in *Sec'y of Labor on behalf of Pappas v. Calportland Co.*, 38 FMSHRC 137, 154 (Feb. 2016), for the proposition that the secretary has the burden of proving by a preponderance of the evidence only that the claim is not frivolous. However, the cited dissent in no way discusses the burdens of proof and the only mention of the preponderance of the evidence standard is in reference to a merits discrimination case.

and that the injury and termination were the result of Collins mishandling the equipment.[23] However, the evidence submitted proves no such thing. The video admitted into evidence showed the incident from an unhelpful angle and at a distance. See Sec. Ex. 1. Jamison testified that one can see in the video how the back tires of the loader come off the ground as the loader approached the truck, and that Collins did not tip the forks of the loader back. Tr. 64-65. However, this Court does not find that Jamison's testimony is an accurate description of what the video admitted into evidence shows. Without credible expert testimony interpreting the video in the context of the equipment used, the load handled, and the conditions on the ground, this Court is not in a position to attribute fault based on the video.

Respondent's attempts to prove that the pan lines were well within the weight range for the Komatsu loader were unconvincing. Respondent provided a scale ticket from almost two months after the incident to show that the pan line weighed 11,560 pounds. Resp. Ex-E. This is presumably the weight of an empty pan line. However, in the video, one can see that as the pan line fell, it was filled with coal or some similar material. See Ex. 1. Therefore, it is unclear if the pan line contained several hundred or several thousand pounds more than the 11,560 pounds weight of August 09. Respondent further submitted the Komatsu spec sheet to prove that the Komatsu loader could lift up to 15,000 pounds without tipping over. See Ex. G. However, without an expert witness that could provide evidence of what conditions the loader could haul and lift such weight, this Court is unable to appropriately interpret the spec sheet. Indeed, even Koontz could not interpret the documents in a clear way. ("it all depends on how you're – what task you're performing…There's so many different parameters involved there." Tr. 101-102.)[24]

However, even if Respondent could make a post-hoc showing that it was safe to haul the pan lines with the Komatsu loader, the relevant question under 105(c) is whether the miner made a good faith safety complaint.

> So long as a miner has a good faith belief that a safety hazard exists, they are protected in bringing their concern to the operator. *Robinette,* 3 FMSHRC 803; *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989). It is well established that a "good faith belief simply means [an] honest belief that a hazard exists." *Id.* Whether perceived hazards are *actually* unsafe is not determinative of the protected status of a complaint. *Sec'y of Labor obo McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986 (2001); *Consolidation Coal Co. v. Marshall*, 663 F.2d at 1215. Alleged hazards are considered to be "related to" the Act, and are therefore protected by 105(c)(1). *Cullinan v. Peabody Twentymile Mining LLC*, 36 FMSHRC 205, 207.

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[23] Respondent essentially argued that the video was the type of scenario described by Commissioner Rajkovich in his exposition of the *Marion* approach, but this Court disagrees. Though there was no dispute that the video was genuine, it simply showed the incident. On its own, it did not show in any way if the miner handled the equipment incorrectly or if he was correct in his assertion that the pan line was too heavy for the Komatsu loader.

[24] It is certainly relevant how weight that is being hauled is balanced on the forks and how the machinery was maintained. See Tr. 101-102.

Todd Descutner v. Nevada Gold Mines, LLC, 2023 WL 3790764 at *10 (May 25, 2023) (ALJ). *See also Patrick Shemwell v. KenAmerican Resources*, 2015 WL 9450196 at *9 (Dec. 16, 2015) (ALJ). In the instant case, whether the pan line (and any coal contained in it) was slightly below or slightly above the maximum allowable weight for the Komatsu loader is not dispositive. This Court finds that from Collins' perspective as an experienced operator, he reasonably believed and expressed that it was unsafe. Therefore, this Court finds that Collins' claim that he engaged in protected activity was not frivolously brought.

The next issue is whether Collins suffered an adverse action. According to the Act and well-settled Commission precedent, suffering a discharge is an adverse employment action. 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), aff'd, 770 F.2d 168 (6th Cir. 1985). It is uncontested that Collins was suspended on June 26 and that his termination was approved in arbitration on July 21. Tr.40, 41. Therefore, Collins' claim that he suffered an adverse employment action is not frivolous.

Nexus between the protected activity and the alleged discrimination

Having concluded that Collins engaged in protected activity and suffered an adverse employment action, the examination now turns to whether that activity has a connection, or nexus, to the termination. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence.[25] *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g.*, *CAM Mining, LLC,* 31 FMSHRC at 1089; *see also*, *Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

According to the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *CAM Mining, LLC,* 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. In fact, evidence is sufficient to support a finding of knowledge if an operator erroneously suspects a miner made safety complaints, even if no complaint was made. *See Moses v. Whitley*, 4 FMSHRC at 1478.

[25] However, in this case there was some direct evidence that Collins' protected activity played a role in his termination. Koontz, who made the ultimate decision to terminate Collins, was asked whether the "statements [Collins] made to Mr. Jamison [had] any impact on your decision to terminate him from his position." Tr. 98. Koontz responded: "I looked at all aspects of the investigation, *things that he had said and all relative points coming in from managers involved* and, ultimately based on this incident, previous incidents and entire body of work there, made a decision to move forward to discharge." Tr. 98-99 (emphasis added).

Here, Collins made his safety complaints directly to his supervisor, Paul Jamison. Tr. 26-28. Collins also reiterated those complaints to General Manager Eric Koontz. Tr. 39, 92. Additionally, Mine Manager Avery was told by Collins that he told his supervisor that he felt uncomfortable using the Komatsu loader to lift pan lines, and Avery's response indicates that he understood the statement as a safety concern. "It's your job to know whether or not it will be able to lift or not; you can't put this on the boss." Tr. 39. Here, Avery showed that Collins' statements about being uncomfortable with the task was a reference to safety and the ability of the Komatsu loader to lift pan lines. Therefore, I find that Collins has raised a non-frivolous issue as to whether Respondent had knowledge of his protected activity.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and adverse employment action. See e.g. *CAM Mining, LLC,* 31 FMSHRC at 1090 (three weeks) and *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miner's contact with MSHA and the operator's failure to recall miners from a layoff; however, only one month separated MSHA's issuance of a penalty resulting from the miner's notification of a violation and that recall failure). The Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

Here, Collins made his safety complaints on June 14 and was suspended pending an investigation on June 26. This represents less than a two-week period, which would likely have been even shorter had Koontz become aware of the incident sooner. Jamison testified that the incident report sat in his truck for a few days before he submitted it to human resources, and Koontz testified that the matter was delayed in reaching him, but that he acted on it as soon as he became aware. Tr. 39-40, 77. As a result, I find that the time span between the protected activities and the adverse action easily meets the threshold requirements for a temporary reinstatement proceeding and that the timing is sufficient to establish a nexus.

Hostility or animus towards the protected activity

The Commission has held, "[h]ostility towards protected activity--sometimes referred to as 'animus'--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

Here, the response to Collins' safety complaints was to dismiss them and find any reason not to treat them as safety related. Collins told his supervisor three times on June 14 that he did not feel comfortable using the Komatsu loader to load the pan lines, and in each instance, Jamison brushed aside his complaints. Similarly, Koontz accepted Jamison's assertion that Collins simply said that he was uncomfortable with every task he was assigned. Tr. 92. After

Collins' injury, when he tried to explain to Avery that the blame should have been on his supervisor who ordered him to use a loader that was too small for the task, Avery responded that it was not his supervisor's responsibility to know whether the load was safe. Tr. 39. This level of dismissiveness and disregard for repeated safety concerns constitutes animus sufficient to meet the evidentiary standards of a temporary reinstatement.

Respondent submitted an arbitrator's decision to try to show that the termination was for a legitimate reason. This Court admitted the decision into the record, but upon review, finds that it has no probative value. The arbitrator's decision concerns contractual provisions between the operator and the union and has no relevance to a Mine Act discrimination complaint.

Disparate Treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). The Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id*. at 2510-2513.

In the instant matter, insufficient evidence was presented to establish that Collins faced disparate treatment.

However, as has already been shown, there is sufficient evidence to conclude that this discrimination claim was not frivolously brought as it relates to animus, knowledge, and coincidence in time. Therefore, I find that the Secretary has established a nexus between Collins' protected activity and the Respondent's subsequent adverse action.

Conclusion

I find that there is reasonable cause to believe that Collins made safety complaints on June 14, 2023; that following such, Collins suffered an adverse employment action; that Respondent was aware of Collins' protected activity; that Respondent knew and showed animus toward the protected activity; and that there was a close connection in time between the alleged protected activity and Complainant's discharge. Therefore, given an arguable nexus between the Complainant's protected activity and Respondent's adverse employment action, the Secretary has carried its burden of proving the miner's complaint was not frivolously brought.

ORDER

For the reasons set forth above, it is **ORDERED** that Complainant John Collins be reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision.[26]

[26] If the parties mutually agree, Collins may be reinstated to a job on the surface that does not require him to operate the Komatsu loader.

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 28, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. KINGSTON MINING, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0129 A.C. No. 46-08932-568033 Mine: Kingston No. 2

DECISION

Before: Judge William B. Moran

Introduction:

This case is before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Respondent was charged with violating 30 C.F.R. §50.20(a), with its requirement that a mine operator is to file an *occupational injury* report within ten working after such event. A hearing was held on July 19, 2023, in Charleston, West Virginia. The underlying facts are simple and undisputed. As set forth in the Citation, on June 9, 2022, "an evening shift miner was walking across the parking area, to his personal vehicle after finishing his shift. Along the way, the miner was bitten by a copperhead snake and missed 9 days of work due to medical treatment." Citation No. 9550856. ("Citation"). There is also no dispute that the Respondent did not file an *occupational injury* report within ten days of the event. On the basis of that alleged failure to comply, the Citation was issued on June 27, 2022.

The Respondent challenged the alleged violation on two grounds: the assertion that the Secretary did not establish that the access road where the snake bite occurred was on mine property and its contention that the incident was not reportable under the cited provision. For the reasons which follow, the Court finds that the access road was part of the mine property, and further, because of clear precedent, the reporting provision applies to the snake bite incident. Accordingly, while the Court views this matter as on the fringes of legitimate jurisdiction and that the Secretary could've decided not to pursue this incident, and that the operator had a good faith basis to challenge it, in light of the clear precedent, the Court has no choice but to **AFFIRM** the Citation.

FINDINGS OF FACT

Beginning with the basics, involved is an alleged violation of 30 C.F.R. §50.20(a). The text of that provision, which is titled: "Preparation and submission of MSHA Report Form 7000–1—Mine Accident, Injury, and Illness Report," provides, in relevant part at subsection (a) that:

> Each operator shall report each accident, occupational injury, or occupational illness at the mine. … The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. When an accident specified in § 50.10 occurs, which does not involve an occupational injury, sections A, B, and items 5 through 12 of section C of Form 7000–1 shall be completed and mailed to MSHA in accordance with the instructions in § 50.20–1 and criteria contained in §§ 50.20–4 through 50.20–6.

30 C.F.R. §50.20(a)

The alleged violation of 30 C.F.R. §50.20(a), Citation No. 955085, states:

> The operator has failed to within ten days report an *occupational injury* that occurred to a miner, on mine property, that resulted in medical treatment and lost days of work. On June 9th, an evening shift miner was walking across the parking error, to his personal vehicle after finishing his shift. Along the way, the miner was bitten by a copperhead snake, and missed 9 days of work due to medical treatment. Standard 50.20(a) was cited 1 time in two years at mine 4608932 (1 to the operator, 0 to a contractor).

Citation No. 9550856, issued June 27, 2022 (emphasis added).

The Inspector listed the Gravity of the injury or illness as "No Likelihood," and the injury or illness as reasonably expected to result in "No Lost Workdays. The number of persons affected was zero. Consequently, he marked it as non-significant and substantial. The negligence was marked as "moderate." *Id*.

The lone factual dispute: The Respondent's assertion that the Secretary did not establish that the access road where the snake bite occurred was on mine property.

It is fair to state that, *factually*, there was only one issue in dispute – whether the access road to the mine was part of the mine. For the reasons which follow, the Secretary established that the access road was part of the mine.

There is no legitimate factual dispute about the location of the miner's truck at the time of the snake bite. The miner's truck was parked along the side of the mine's access road at the time of the incident. The Respondent's contention that the Secretary failed to establish that the access road was part of the mine is rejected as it is meritless.

In this regard, both at the hearing and in its post-hearing brief, Respondent contended that part of MSHA's burden of proof required it to "consult property records." Tr. 68. The Court does not agree. On the contrary, once the Secretary has presented substantial evidence, as she did here, that the truck was parked on the mine's access road, it was then incumbent upon the operator to present evidence that the access road was not Kingston's road. Nothing of the kind occurred here. Had there been any genuine substance to the veiled suggestion that the road was not Kingston's, the mine operator could then have presented county records to substantiate such a claim. Given the evidence the Secretary presented on the issue, the burden shifted to the Respondent to show otherwise. The Court finds there was no good faith basis to support the assertion that the access road was not part of the Kingston No. 2 mine.

Snake bite victim Miller's testimony was consistent with the Court's finding that the access road was Kingston's. Miller affirmed that he usually parks at the mine parking lot and, if that is full, he parks down along the side of the road. Tr. 114. Recognizing the security shack in the photos of the access road, Miller stated he calls in on the radio to identify his arrival at the mine. Tr. 115. The road is the only means of access to the mine. Tr. 116. He agreed there is a mine security camera on the road. *Id.* It is a fair observation that security cameras would not be placed on property which is not the mine's.

Wayne Persinger, a Kingston safety director, informed that the road, where the snake bite incident occurred, was initially just a haul road and then became an access road. Tr 134. He agreed that employees park their cars on the road depicted in Ex. P 1, P 2, and P 1 A and the video. P 4. Tr. 144-145. Persinger affirmed that management is aware that its employees park on that road. Tr. 145. He admitted that Kingston has a security camera on the road where the miner's truck was parked on June 24th. Tr. 147. Thus, he agreed that the video (Ex. 4) is a security footage video taken from the mine property of that road. Tr. 148- 152. The video, made on the security camera, was a brief recording of the actual event when Miller was bitten.[1]

As the Secretary accurately notes:

> Persinger testified that: (1) Kingston Mining, Inc. paid for the gravel for the road where the injury occurred, (2) those entering the mine must check in at the security shack before accessing the road at issue in the present matter, and (3) the road is mine property. Bane's testimony also confirmed that prior to the opening of Mine No. 2 there was no road at the location of the incident. Additionally, both Persinger and Bane confirm that the mining materials on both sides of the road near where the incident occurred are mine property, and that Respondent authorized miners to park there.

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[1] That a security camera was located on the access road and that the camera recorded the event of the miner being bite, is an amazing testament to the fact that nowadays so much is recorded in our daily lives, even on a remote access road.

Sec. PH Br. at 8.

The mine placed a security shack to limit who has access to the road, placed security cameras to film activities along the road, required its miners and mine employees to check in at the security shack, and required miners and other employees to park on the road. These facts were admitted consistently in the testimony of Bane, Persinger, and Miller. *Id*. at 9.

The legal dispute: Was Kingston obligated to file an MSHA Report Form 7000–1—Mine Accident, Injury, and Illness Report in this instance, and by such failure in violation of 30 C.F.R § 50.20(a)?

The undisputed factual circumstances of the *incident*.[2]

The MSHA inspector who issued Citation No. 9550856, William H. Bane II, was at the mine on June 27, 2022, performing an E01 inspection[3] Inspector Bane, while at the mine that day, was informed of a snake bite incident and the mine's safety representative took the inspector to the location where the event occurred. There is no dispute that the miner, Mr. Ronald Miller, the miner who incurred the bite, had completed his shift and was walking to his truck, his work day over. He was not wearing any mine equipment or mine clothing at that time. To the contrary, his shift completed, he was wearing shorts and casual shoes. Tr. 45. Miner Miller's testimony confirmed all of this. Tr. 106, 111-113.

The Inspector acknowledged that the miner was not engaged in mining activity at that time, stating "[t]o the best of my ability to investigate it, he was in the process of leaving the mine to go home." Tr. 73. He agreed about the non-work clothes that Miller was wearing at the time of the incident. Tr. 74. The truck was parked alongside the mine's access road, as clearly shown in Exs. P 1 and 2. Exhibit P 1 A, is a marked-up version of Ex. P 1. The inspector marked on that exhibit showing the access road portion of the road, and its demarcation from the county road. Tr. 61, 63-68. Miners park their vehicles along the access road when the mine's parking lot is full.

[2] The Court intentionally uses the term "incident" because the citation identifies the failure to report "an occupational injury." The MSHA inspector also described the matter as an "incident occurring on mine property." Tr. 58. If described as an occupational injury from the start, that would imply that there was a violation, ahead of any analysis.

[3] E01 inspections are referred to as "regular inspections" *See, for example*, *Alden Resources*, 37 FMSHRC 753, April 9, 2015 (ALJ) at n. 3 that "[a]n E01 is a regular, mandated quarterly inspection of an underground coal mine" and *Excel Mining*, 35 FMSHRC 2555, August 15, 2013, (ALJ) at n. 2, "an E01 inspection is performed four times a year [for underground mines] at a given mine and requires an inspection of everything in the mine, all the airways, all the equipment, all their records, everything at that mine."

DISCUSSION AND ANALYSIS

Was the snake bite incident, under the circumstances here, a reportable occupational injury, pursuant to 30 C.F.R.§50.20(a)?

The Secretary's post-hearing brief.

The Secretary contends that "there was a clear violation of the standard in that the operator did not report an occupational injury; i.e., that a miner was bitten by a snake (an injury) at a mine (the parking lot) that resulted in medical treatment and lost workdays afterwards." Sec. Br. at 8.

Referring to the definition of "occupational injury,"[4] the Secretary notes that it provides:

> (e) Occupational injury means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

Id. at 9-10 and 30 C.F.R. 50.2 Definitions: Occupational injury.

As discussed below, the Court finds that the D.C. Circuit's decision in *Energy West Mining Co. v. Federal Mine Safety & Health Review Comm'n*, 40 F.3d 457 (D.C. Cir.1994), requires affirming the citation here. Although that decision is, in the Court's estimation, conclusive of the issue, for the sake of completeness, the parties' contentions are set forth here.

Beyond the case law to be discussed below, the Secretary points to MSHA's "Yellow Jacket" document in support of her position for the contention that "for the purposes of Part 50, what matters is *where* the injury occurs, not its cause." Sec. Br. at 11-12, Ex. R-6, and pages 26, 33 of that document. (emphasis added). The Secretary claims that the Respondent, through Mr. Persinger "was *purposefully misreading* 'work environment' to come to the outcome that best served the operator rather than what the code and law require." *Id*. at 12 (emphasis added). The Court does not buy into that claim at all. Rather, the Court views the Respondent's contention as a good faith argument that the incident was not reportable, a contention that was supported by reasoned arguments.

Although the Secretary contends that the meaning of 30 C.F.R. §50.20(a) and (e) is "clear and unambiguous," in the alternative, she asserts that even if the Court were to find that the provision was not clear and unambiguous, the Secretary's interpretation is entitled to deference. *Id.* The Court agrees with the deference argument to a point, but the "clear and unambiguous" argument can support respondents, not just the Secretary. Undercutting the Secretary's argument, at least in this matter, is her reference "that a regulation must be interpreted in a manner that furthers the safety purpose of the statute" and that "a regulation must be interpreted in a manner

[4] The Secretary spends some time noting that the definition of a mine is to be broadly interpreted. Sec. Br. at 10. Having found that the access road was part of the mine, the Court's focus is on whether the snake bite incident was reportable under the cited provision: 30 C.F.R. §50.20(a).

that furthers the purpose of the regulation." *Id*. at 13. It is difficult to conclude that requiring a snake bite incident occurring on a mine access road is something that furthers the safety purpose of the statute because it has absolutely nothing to do with the activity of mining.

The Secretary sums up her position, asserting that the "totality of the circumstances clearly indicated that Miller was injured on mine property, and that Miller's injury was "an occupational injury as defined by guidance that Respondents reviewed." *Id*. at 14. While the Secretary contends that "[b]oth the nature and location of the injury gave the Respondent more than sufficient information to put it on notice that Miller's injury was required to be reported to MSHA under Sections 50.20(a) [the cited provision] and [50.2](e) [with its definition of "occupational injury,"] as set forth *infra*, the Court does not agree that the Respondent's contention was outlandish.

In line with her view, the Secretary contends that the negligence involved was at least "moderate," meaning there were some mitigating circumstances. *Id.* To get there, the Secretary looks to MSHA's contention that Kingston was advised by MSHA that the injury suffered by Miller was reportable and, despite that advice, it knowingly ignored MSHA's view and warning. *Id.* As the Secretary put it "[g]iven that warning and Respondent's deliberate inaction, this Court would be justified in finding that Respondent was highly negligent."[5]

The Court also rejects the Secretary's characterization. Further, if the mine were to have accepted MSHA's argument and delivered the Form 7000-1 within the time allowed, it would have foregone the opportunity to challenge MSHA's claim, as no citation would have been issued.

Respondent Kingston Mining's post-hearing brief.

The Respondent asserts that the Citation should be vacated for three reasons:

1) the alleged "occupational injury" was not an "occupational injury";

2) the incident did not occur "at a mine;" (However, as discussed above, the contention that the incident did not occur at a mine is rejected.)

3) the alleged "occupational injury" did not occur to a "miner." R's Br. at 1.

The contention that the injury to the miner was not an "occupational injury."

Respondent first points to the Mine Safety and Health Administration's ("MSHA") publicly available Program Information Bulletin ("PIB") No. 88-05, dated September 28, 1988. It notes that "[t]his PIB was written to clarify the Report on 30 C.F.R. Part 50, PC-7014 ("Yellow Jacket") on the subject. In the PIB, MSHA defines "occupational injury" as "a work accident …. or from an exposure involving a single instantaneous incident in the *work environment*." In making

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[5] To arrive at high negligence, the Secretary cites an obviously inapt decision, *Emerald Coal Resources, LP.*, 35 FMSHRC 1096, 1113. In that case, the administrative law judge determined that the operator ignored an obvious violation. The Court has determined that this matter was *not* an obvious violation. Beyond that, administrative law judges' decisions are not precedential.

this clarification, MSHA determined that this clarification "pos[es] no serious detriment to the integrity of our data collection system and would not seriously impact the current volume of incidents reported to us." *Id.* at 1-2 (emphasis in Respondent's brief).

Thus, Respondent literally places emphasis on the word "work" within the phrase "work environment" and, from that, its contention that, in no reasonable sense, was snake bite victim Mr. Miller, a miner at that moment. After all, there is no dispute that Miller's workday had ended; when the event occurred he was walking to his truck, parked on the access road, and about to head home. Therefore, he was not, Respondent contends, engaged in his occupation as a miner at that time.

The contention that the injury did not occur to a miner.

Augmenting its argument that Mr. Miller's injury was not an occupational one in any sense, Respondent asserts that "the Secretary has failed to establish that the injury occurred to a 'miner' as the word is defined when the event occurred. See 30 U.S.C. 802(g) ('miner' means any individual *working* in a coal or other mine"). … A "miner" is 'any individual *working* in a mine.'" *Id*. at 3 (emphasis in Respondent's Brief).

Respondent notes that:

> the word "working" is undefined and must be afforded its common meaning. Commission precedent, as well as public policy, mandates that a miner stops being a "miner" (in the regulatory context) at some point, despite continued employment status. Because the word "working" is critical to the definition of "miner," it naturally follows that an individual is not a "miner," as defined by the regulation, when he stops working on his shift. As noted, the PIB promulgated by the MSHA, that is designed for operators to rely upon, limits an "occupational injury" to only injuries occurring in a "working environment," thus supporting the interpretation that a miner is not a "miner" when he is not working.

Id.

Given that contention, Respondent asserts that the miner was not *working* at the time of the snake bite incident.

In further support of Respondent's conclusion that it did not have a duty to report the snake bite incident within ten working days of learning that Mr. Miller would be out of work beyond his next regularly scheduled shift because of his injury, Respondent asserts that the conclusion was based on several factors.

Revisiting PIB No.88-05, Respondent contends that "[a]lthough [MSHA Inspector] Bane was aware of PIB 88-05 when he issued the Citation, he did not rely on the 'work environment' language in (6)."[6] R's Br. at 5. That paragraph provides:

> (6) Injury vs Illness – The basic definition of an occupational injury includes those cases which result from a work accident or from an exposure involving a single instantaneous incident **in the work environment**. Contact with a hot surface or a caustic chemical which produces a burn in a single instantaneous moment of contact is an injury. Sunburn or welding flash burns which result from prolonged or repeated exposure to sunrays or welding flashes are considered illnesses. Similarly, a one-time blow which damages the tendons of the hand is considered an injury, while repeated trauma or repetitious movement which produces tenosynovitis is considered an illness.
>
> The basic determinant is the single-incident concept. If the case resulted from something that happened in one instant, it is classified as an injury. If the case resulted from something that was not instantaneous, such as prolonged exposure to hazardous substances or other environmental factors, it is considered an illness.

Program Information Bulletin No. 88-05. Review and Update of Program Circular (PC) 7014-Report on 30 CFR Part 50. R's Ex. 5 at page 2, paragraph 6. (emphasis added).

It is the Respondent's contention that the incident, occurring after the miner had completed his work shift that evening, and was returning to his vehicle, parked as it was on the side of the access road, to go home, he was no longer in the work environment. R's Br. at 5.

Kingston also "determined this injury was not an 'occupational injury' based upon a review of a 2017 Chargeability Decision. Ex. R-7." *Id*. Kingston accurately relates that "[t]he Chargeability Decision dealt with the chargeability committee's determination in a fatal vehicle accident on a mine access road. In that accident, a shuttle car operator was fatally injured in a car accident after the conclusion of his shift, changed clothes and exited the parking lot. Based upon a review of these facts, the chargeability committee found that the death was accidental and 'unrelated to mine related work activities, mining activities or mining equipment.' [Kingston notes that] [t]his is consistent with the fatality matrix, which Kingston consulted as well." *Id.* at 6, citing Ex. R-6; and testimony of Mr. Persinger, pg. 135:19-24; 136:1-20. Kingston continues that "[b]ased upon th[ose] [additional] factors, [it] determined, along with the information contained in the PIB, that this was not an 'occupational injury' … [and therefore] [b]ecause it was not an 'occupational injury,' it did not need to be reported to MSHA." *Id.*

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[6] The Court asked for clarification, via an email to the Respondent on September 18, 2023, about the reference in its brief to, "the 'work environment' language in (6)." The Secretary was copied when the Court made the inquiry about the requested clarification. The Respondent informed that it was referring solely to "enumerated paragraph (6) ("Injury vs Illness") of the PIB (Ex. R-5)." The Court's clarification request and the Respondent's response was included in eCMS via a motion from the Secretary. The Motion was granted.

The Court does not consider these references to be outlandish. After all, the Chargeability Decision regarding the fatality accident on a mine access road concluded that it was unrelated to mine work activities, mining activities or mining equipment. The same is true writ large for this snake bite matter. Similarly, the "Fatal Injury Guideline Matrix," a flowchart, ultimately asks whether "the deceased [was] performing mine related work activities or [whether] death was caused by mining activities or equipment." R's Ex. 6. If the answer is "No," the Matrix directs it is "Not Chargeable." *Id.* The Court finds that these were reasonable considerations in the Respondent's deliberations as to whether it had a duty to report the snake bite as an *occupational* injury.

Analysis

As alluded to at the start of this decision, the Court finds that clear precedent is determinative of the outcome in this matter. In particular, the Court looks to *Energy West Mining*, 40 F.3d 457 (D.C. Cir. 1994). Involved was a

> failure to report an employee's injury suffered when his vehicle rolled into a ditch near a mine parking lot. An MSHA inspector cited Energy West for violating MSHA regulations which require mine operators to report all "occupational injur[ies]" at the mine site. 30 C.F.R. § 50.20 (1993). Both an FMSHRC Administrative Law Judge ("ALJ") and the full Commission affirmed the citation.

Id. at 459.

There, as in this matter, the mine contended that

> MSHA's definition of "occupational injury" in 30 C.F.R. § 50.2(e) is unreasonable and inconsistent with the statute's purpose because it does not require a causal nexus between reportable injuries and work activity at the mine. In support, petitioner notes that both the Mine Act and related Part 50 regulations define "miner" as "any individual working in a coal or other mine."

Id. at 461.

The D.C. Circuit related Energy West's contention that "that reportable events are limited to those which the mine operator or the Secretary of Labor are capable of preventing," but it responded that

> the statute expresses no such limitation. The Mine Act grants a broad delegation to the Secretary to require mine operators to provide information necessary to enable the Secretary "to perform his functions under this chapter." 30 U.S.C. § 813(h). [and] [t]hat section contains little limitation on the type of information to be provided. The statute's statement of purpose is not to be read as the strict limiting principle petitioner asserts. In fact, the Mine Act is silent as to the type of occupational injury information which should be reported in order to assist the Secretary in carrying out his duties under the Act. Obedient to *Chevron*, when "the

> statute before us is 'silent or ambiguous with respect to the specific issue,' before us, we proceed to the second step" of the *Chevron* analysis.

Id.

Finding the Secretary's definition of "occupational injury" in 30 C.F.R. § 50.2(e) reasonable, the Court observed that the

> provision focuses on the location of the injury, not the cause. Similarly, the regulation challenged here defines reportable injuries with an emphasis on *situs of the injury*[7] rather than the causal nexus, requiring reporting of 'any injury to a miner which *occurs at a mine*'... [i]t is not unreasonable for the Secretary to require reporting of all non-trivial injuries to miners which occur at the mine site in order to gather information necessary to carry out his rulemaking function under the Act [and the Court] therefore find[s] that 30 C.F.R. § 50.2(e) is a permissible construction of the Secretary's authority under the Mine Act.

Id. (emphasis added).

The Court added that

> [o]n the question of regulatory interpretation, [it] accord[s] great deference to interpretations such as this one advanced by the Secretary and accepted by the Commission. … [The Court's] task is not to determine whether the Secretary's interpretation of the regulation charged to his administration is the one we would reach if deciding the question as a matter of first impression. Rather, we will defer to the Secretary's interpretation of his regulations unless it is clearly erroneous.

Id. at 462.

Accordingly, the D.C. Circuit held that "[b]ecause [it] find[s] these reporting requirements to be a reasonable interpretation of Mine Act provisions, [it] affirm[s] under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Id.* at 459.[8]

The same result is required here. Consequently, the snake bite incident was reportable; Kingston violated 30 C.F.R. §50.20(a).

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[7] The Court of Appeals determination that the *situs* of the injury is the key factor explains the Respondent's extended effort to show that the Secretary failed to demonstrate that the access road was Kingston's. As noted, that effort failed.

[8] The Court finds that *National Cement*, 573 F.3d 788, 795 (D.C. Cir. 2009), does not aid Kingston, concluding as it does that the Secretary provided a reasonable interpretation of subsection (B) of the Mine Act's definition of a mine as it pertains to "private ways and roads appurtenant to such area" and therefore that it is entitled to *Chevron* deference.

Civil Penalty Determination

Per 30 U.S. Code § 820(i),

> t]he Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation**.**

The Court here considers each of the statutory penalty criteria.

From the parties' stipulations, the following is noted. Payment of the total proposed penalty of $133.00 in this matter will not affect the Respondent's ability to continue in business; Exhibit "A" attached to the Acting Secretary's Petition in Docket No. WEVA 2023-0129 contains true and authentic copies of Citation No. 9550856 with all modifications or abatements, if any; the R-17 Certified Assessed Violation History Report is an authentic copy and may be admitted as a certified business record of the Mine Safety and Health Administration.

From Exhibit "A" the mine tonnage is 485,171 and the controller tonnage is 37,719,872; the mine size points is 11 and the controller size points is 10.[9] Negligence points were listed as 20 and the 10% good faith amount was applied.

Given the information above, with but one prior violation of the cited standard in the past two years, the operator's history of violations is negligible. The size of the mine is on the high side. Regarding negligence, as Kingston notes, "even the issuing Inspector consulted with his supervisor, before issuing the citation. As a result, because it cannot be negligent to rely upon valid guidance from MSHA, the negligence of this purported violation must be reduced to none." R's Br. at 4. The Court takes issue in particular with the Secretary's idea that the negligence was at least moderately negligent. Sec. Br. at 14. To the contrary, the Court finds, based on the entire record, the operator was not negligent under these circumstances. Kingston had a good faith basis to believe that the snake bite incident under the particular undisputed circumstances here was not reportable, and therefore was not negligent. The parties have stipulated that MSHA's proposed penalty of $133.00 will not have an adverse effect on Kingston's ability to continue in business; the gravity, per the issuing inspector's evaluation was marked at the lowest category possible: no likelihood and no lost workdays with the number of persons affected as zero. As noted, good faith was applied.

Upon consideration of each of the statutory criteria, the Court assesses a civil penalty in the sum of $66.00.

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[9] The Court is not engaging in analyzing the penalty based on points, à la 30 C.F.R. Part 100; it is merely referencing points in determining the mine's size.

ORDER

For the reasons set forth above, Citation No. 9550856 is **AFFIRMED**, with a finding of no negligence. Kingston Mining is **ORDERED TO PAY** the Secretary of Labor the sum of $66.00 (sixty-six dollars) for the violation within 40 days of the date of this decision.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 21, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner and JAMES LOUIS GROVES, Complainant, v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent	DISCRIMINATION PROCEEDING Docket No. PENN 2023-0049 MSHA No. PITT-CD-2023-01 Mine ID: 36-07230 Mine: Bailey Mine

ORDER ON SECRETARY'S MOTION FOR DEFAULT

Before: Administrative Law Judge William B. Moran

The Secretary of Labor has filed a Motion for Default Judgment. In the Motion, filed on April 10, 2023, and served solely via electronic mail on Attorney Albert S. Lee, the Secretary, through Attorney Alexandra Gilewicz, has moved

> for an order to show cause and default judgment because Consol *decided*[1] not to answer this whistleblower complaint. The Secretary filed her complaint in this matter on behalf of Complainant on February 27, 2023. The Commission confirmed receipt of the complaint that same day. Consol was notified that its answer must be filed within 30 days, by March 29, 2023. Consol has yet to file an answer, and any answer filed at this time will be untimely. The Secretary requests the Commission to issue a show cause order. If Consol's response to the show cause order is insufficient, the Secretary requests that the Commission grant this motion for default judgment and order all the relief requested in the complaint. (emphasis added).

[1] To be clear, as explained *infra*, the Court does not subscribe to the Secretary's assertion that Consol *decided* not to answer the Complaint.

Motion at 1.

According to the Commission's electronic case management system ("eCMS"), Attorney Albert S. Lee, with Tucker Arensberg, P.C., who was initially Counsel for the Respondent, was sent notice of this proceeding on February 27, 2023, at the same email address listed in the distribution, below. The notice was sent solely via electronic mail. That filing informed that an Answer was required to be filed within 30 days after service of the Complaint to the operator. *Id*.

Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires, in relevant part, that "[w]hen a party fails to comply with . . . these rules . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal." Accordingly, on August 16, 2023, the Court issued an Order to Show Cause in which the Respondent was ordered to respond on or before August 23, 2023, setting forth why it should not be held in default.

However, there had been a significant development subsequent to the Secretary's Motion for Default Judgment. The initial attorney, Mr. Lee, was replaced by new legal counsel, Attorney Christopher D. Pence. Attorney Pence filed a notice of appearance in this matter on August 14, 2023. Attorney Lee is no longer counsel for the Respondent in this matter. Attorney Pence and his law firm are not associated with Attorney Lee or his law firm. Thereafter, the Commission's eCMS record reflects that Attorney Pence filed an Answer on August 23, 2023.

The Respondent also answered the Court's show cause order on August 23, 2023, setting forth that it should not be held in default as the mine's former attorney, Mr. Lee, stated that he never received the complaint. Mr. Lee filed an affidavit, affirming that the complaint was never received.

> Mr. Lee is adamant that he did not receive the Discrimination Complaint, Motion for Default Judgment and email from the Solicitor's Office to the Court in his inbox. No one disputes the Solicitor's Office hit 'send' on the email, but for reasons unknown to Mr. Lee and CONSOL PA those documents were never delivered to Mr. Lee's inbox. Mr. Lee has searched his inbox and his spam filter to no avail. Mr. Lee's Firm has a particularly robust computer and email security system in place because of their work in banking matters. There have been previous occasions where email has been stuck in filters but they have always been located. This situation is unique in that the emails from the Solicitor's office have not been located. Mr. Lee unequivocally stated that he did not ignore multiple emails from the Solicitor's Office.

Respondent's Response to Order to Show Cause at 3.

The Court is guided by the Commission's observation "that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc*., 17 FMSHRC 1529, 1530 (Sept. 1995)." *See, for example, Benton County Stone*, 2023 WL 4404507, (June 2023).

Commission case law holds that there is an exception to the requirement for timely filing of pleadings, where adequate cause has been shown for the belated filing, and there is no evidence to suggest that bad faith was present in causing the delay, and where there is no prejudice present as a result of the delay. *See Kaiser Aluminum and Chemical Corporation v. Secretary of Labor*, 3 FMSHRC 2296, 2297 (Oct. 1981) (denying a motion for default where the Secretary claimed that due to issues in their office procedures, they did not receive the actual notice on their desk). *See also Secretary of Labor v. Valley Camp Coal Company*, 1 FMSHRC 791 (Jul. 1979) (holding that the mistake or neglect of an attorney and the breakdown of internal office procedures were found to be adequate cause to justify late filing).

In this instance, the points made in Respondent's Sur-Reply are well-taken, incorporated by reference, and the text of the Sur-response has been included in the Appendix to this decision as a useful exposition on motions for default. Consistent with that determination, there is simply no legitimate basis for the Court to conclude that Attorney Lee has been untruthful in his representations to the Court. Even if the Court were suspicious of the attorney's representations, which it is *not*, suspicions are insufficient to conclude that the attorney was being disingenuous. Further, the Secretary has not suffered prejudice by the delay. It is noted that this case has been set for a hearing commencing on Wednesday, November 14, 2023, less than eight weeks from now.

Accordingly, it would be fundamentally unfair and unduly harsh to deny the Respondent the opportunity to defend under these circumstances. This is in large part because there is no evidence to suggest that the Respondent's initial attorney, Mr. Lee, ignored the various emails regarding the initial complaint and motion for default or is being dishonest regarding his affidavit.

The Court has considered each party's arguments and for the foregoing reasons, the Secretary's Motion is **DENIED** and the Court orders that CONSOL PA's Answer to Discrimination Complaint be accepted.

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

APPENDIX

RESPONDENT CONSOL PENNSYLVANIA COAL COMPANY, LLC'S SUR-RESPONSE TO REPLY TO RESPONSE TO ORDER TO SHOW CAUSE AND MOTION FOR DEFAULT JUDGMENT

Pending before the Court is the Secretary's Motion for Default Judgment which seeks an Order to Show Cause as to why CONSOL Pennsylvania Coal Company, LLC ("CONSOL PA") should not be held in default for failing to timely respond to the Secretary's Discrimination Complaint filed pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"). The Secretary's Motion was filed April 10, 2023. The Court issued the requested Order to Show on August 16, 2023 and directed CONSOL PA to show cause as to why it should not be held in default. CONSOL PA filed its response to the Motion for Default and the Order to Show Cause. On August 23, 2023. The Secretary filed a Reply to this Response on August 30, 2023 and continues to insist that the Court order CONSOL PA is in default and prevent it from defending this case on the merits. However, the arguments advanced in the Secretary's Reply simply do not overcome the Commission's strong preference that cases be decided on their merits.

I. **CONSOL PA Was Not Properly Served** In its initial Response, CONSOL PA fully set forth the law which governs whether emailing the Complaint to Mr. Lee constituted adequate service. In Reply, without citing any cases, the Secretary disputes CONSOL PA's interpretation of Rule 7 of the Commission's Procedural Rules and argues that Mr. Lee was the agent in fact authorized to accept service of the Complaint. CONSOL PA believes the law is clear and that service on a party is only perfected by emailing an attorney when that attorney is specifically authorized to accept service for the party. Attached as Exhibit 1 is a second affidavit from Mr. Lee affirmatively stating that he was not authorized to accept service of the Complaint on behalf of CONSOL PA and his representation was limited to the investigation. Moreover, there is no indication he "entered an appearance on behalf of such party [CONSOL] pursuant to Rule §2700.3(c)", as required by Rule §2700.7(d), which entry of appearance requires that: documents that may serve as an entry of appearance shall be only those filed with the Commission or Commission judge in a proceeding under the Mine Act or the Commission's procedural rules, rather than documents filed with MSHA. 64 FR 48707, 48709 (emphasis added). The Secretary seizes on Mr. Lee's statement to MSHA's special investigator that he represented CONSOL PA "in connection with" Mr. Groves' complaint. This statement was made on November 1, 2022, at the beginning of MSHA's investigation. As no Complaint with the Commission had been filed, this was not an "appearance" as contemplated by Commission Procedural Rules 7(d) and 3(c), 29 C.F.R. §2700.7(d) and §2700.3(c), or an agreement accept service for any future complaint. Mr. Lee's second affidavit is clear on this point. Of course, had Mr. Lee received the email, he could have accepted service on behalf of CONSOL PA (with its permission). But in this case he did not and, without a specific acceptance, the Secretary was bound to follow the applicable Rules to ensure proper service. CONSOL PA believes the analysis it provided in its original Response clearly demonstrates that service of the Complaint was improper.

CONSOL PA urges the Court to adopt that analysis and find that the Complaint was not properly served in February. CONSOL PA's Answer filed on August 23, 2023 should be accepted as timely.

II. Mr. Lee Did Not Lie to the Court

During the Secretary's investigation of Mr. Groves' Complaint, CONSOL PA was represented by Attorney Albert Lee. Mr. Lee participated in a conference call with the Court on August 24, 2023 and explained his efforts to search for previous emails from the Solicitor's Office forwarding the Complaint and Motion for Default Judgment when the Complaint was not answered in what the Secretary contends was the responsive pleading deadline. Mr. Lee explained his efforts to locate the Complaint and the Motion. Although Mr. Lee has not discovered the technical reason the emails did not appear in his inbox, he offered an explanation as to how that could occur. Mr. Lee later affirmed the veracity of the statements he made to the Court. Mr. Lee has stated to the Court, both in an email and verbally, and affirmed by affidavit, that the first notice he received that a Complaint was filed was the July 25, 2023 email from Judge Moran. The Secretary has characterized Mr. Lee's affirmed statements to the Court as "inherently incredible" (p.2 and 11), and that they "strain credulity" (p. 11) and has characterized Mr. Lee's efforts to locate the missing email as "vague" (p.12). The essence of the Secretary's position is that Mr. Lee lied about receiving emails from the Solicitor's Office and made little effort to locate the emails when he discovered a Complaint was filed and allegedly emailed to him. CONSOL PA asserts that there is no basis for the Court to find Mr. Lee, an officer of the Court who has affirmed statements made to the Court, is a liar. While Mr. Lee cannot state with certainty why the emails did not appear in his inbox, there is no incentive for Mr. Lee to ignore the emails, fail to advise CONSOL PA of the Complaint and fail to ensure a timely response is filed. The only conclusion that should be reached is that Mr. Lee did not receive the emails related to this matter until he received the email from Judge Moran. The Secretary suggests that Mr. Lee should have discovered the "problem" with his Firm's email system between the filing of the Complaint and the email from Judge Moran. Inasmuch as the reason Mr. Lee did not receive the emails prior to Judge Moran's email is unknown, it cannot be stated with certainty that his Firm's email system is the problem. Neither the undersigned nor Mr. Lee are computer scientists or qualified to explain all the technical reasons multiple emails may not be delivered to an inbox. While it stands to reason that a spam or security filter may be to blame, there are certainly other possibilities, including an issue with the sender's email system. Notably, the Secretary has not produced any read receipts from the email forwarding the Complaint or any subsequent email.1 Mr. Lee's affirmed statement that he did not receive the Complaint or the subsequent emails should be sufficient. Mr. Lee is an attorney with decades of experience and practices at a well-respected Pittsburgh law firm. He serves on his Firm's board of directors and risk management committee and certainly understands the importance of deadlines in a litigation setting. Mr. Lee has produced yet another affidavit indicating that he represented CONSOL PA in connection with the investigation and represents the company in other employment related matters. He has affirmed that simply would

not ignore any CONSOL-related email and there is simply no reason to disbelieve him. N. 1: The emails referenced by the Secretary prior to the filing of the Complaint do contain read receipts but are not relevant to the analysis. At that time, no Complaint had been filed and no deadline established by any applicable Rule had passed.

III. There is no Prejudice

The Secretary strains to convince the Court that she has suffered prejudice as a result of the delay in this case. This assertion is unpersuasive. As pointed out in the Response, no representative of the Secretary telephoned Mr. Lee or anyone employed by CONSOL PA to ask about the status of the Complaint. According to the Secretary, the deadline to answer passed in late March and the Secretary filed the Motion in April. If delay was harmful to the Secretary, why did she engage in motion practice (which takes time) rather than telephoning Mr. Lee and inquiring about the status of the Complaint? After filing the Motion on April 10, 2023, why did she wait the remainder of April and all of May 2023 without inquiring or telephoning Mr. Lee? The obvious answer to this question is that, while the matter is no doubt consequential, it was not so urgent that traditional Commission litigation timelines were inadequate. That is, until the Secretary saw an opportunity to gain a litigation advantage by now arguing urgency. It is noteworthy that there are numerous reported decisions wherein the Secretary or a complaining miner failed to meet the timeliness requirements in filing a discrimination complaint or a complaint for compensation. Of course, the Secretary's position in those cases is the exact opposite of her litigating position in this case. For example, in permitting a late filing as advocated by the Secretary, the Commission stated: [T]he pertinent legislative history nevertheless indicates that these timeframes are not jurisdictional . . . 'The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meets its time obligations.' Plainly, Congress clearly intended to protect innocent miners from losing their causes of actions of delay by the Secretary. (Internal citations omitted). *Secretary of Labor v. 4-A Coal Co., Inc*., 8 FMSHRC 905, 908 (June 1986). In order for an untimely complaint to be dismissed, "material delay" must result and the operator must demonstrate that a "serious" delay significantly impaired a "meaningful opportunity to defend." *Farmer v. Island Creek Coal Co*., 13 FMSHRC 1226, 1231 (May 1991), *quoting Secretary v. 4- A Coal Co., Inc*., 8 FMSHRC 905, 908 (June 1986). Impairment of a meaningful opportunity to defend includes "tangible evidence that has since disappeared, faded memories, or missing witnesses*." See Walter A. Schulte v. Lizza Industries, Inc*., 6 FMSHRC 8, 13 (1984). *See also David Hollis v. Consolidation Coal Co*., 6 FMSHRC 21, 23-25 (January 1984), aff'd. mem.,750 F.2d 1093 (D.C. Cir. 1984) (table). There is no indication of lost or missing witnesses here. The Secretary has a long, consistent history of opposing an operator's attempt to dismiss a discrimination complaint because the Secretary missed the filing deadline. When the Secretary is late in filing a complaint, justice requires that matter be decided on its merits and the complaining miner have his day in Court. When an operator allegedly misses a deadline to respond, does the same notion of justice preclude a hearing on the merits and mandate default, even when an officer of the Court has sworn he did not receive the Complaint?

> Does justice require that the Court ignore the service requirements of the Rules and deem a Complaint properly served when the receiving lawyer was not authorized to accept service and has sworn he did not receive the Complaint? The inconsistency of the Secretary's litigating position in this case is, to borrow from the Secretary, obvious to the most casual observer.
>
> Respondent's Sur-Reply at 1-6.

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