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April 15, 2021

JONES BROTHERS INC., Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. SE 2016-0218-RM Citation No. 8817595; 04/06/2016 Docket No. SE 2016-0219-RM Citation No. 8817596; 04/06/2016 Mine: Jones Brothers Mine Mine ID: 40-03454
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. JONES BROTHERS INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2016-0246 A.C. No. 40-03454-410595 Mine: Jones Brothers Mine

DECISION AND ORDER

Appearances: Willow E. Fort, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner

Douglas R. Pierce, Esq. and Michael D. Oesterle, Esq., King & Ballow, Nashville, Tennessee, for the Respondent

Before: Judge Rae

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("Mine Act" or "Act"), 30 U.S.C. § 815(d). At issue are two orders under section 104(g) of the Mine Act and seven citations under section 104(a), issued to Respondent Jones Brothers, Inc. ("Respondent").

Respondent contested the citations and orders, arguing that the excavation site was not a "mine" subject to MSHA jurisdiction. Answer at 1. Previously, Federal Mine Safety and Health

Review Commission Administrative Law Judge Margaret Miller ruled that Respondent's operation was subject to the Mine Act. 39 FMSHRC 399 (Feb. 2017) (ALJ). On April 13, 2017, the Commission denied Respondent's Petition for Discretionary Review. Respondent then successfully appealed to the United States Court of Appeals for the Sixth Circuit. *Jones Bros. Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) (holding that ALJ Miller was not constitutionally appointed and that Respondent was entitled to a new hearing before a constitutionally appointed ALJ).

After this matter was remanded to me, a hearing was held via Zoom for Government videoconferencing on January 26 and 27, 2021, at which time testimony was taken and documentary evidence was submitted. Additionally, the parties submitted post-hearing briefs. Tr. II at 60.[1] I have reviewed all the evidence at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given.

After consideration of the evidence, and observation of the witnesses and assessment of their credibility, I find that I have jurisdiction over this matter because it involves a "mine" under the Mine Act, and I uphold the citations and orders for the reasons set forth below.

I. FINDINGS OF FACT

A. Background

This matter concerns Respondent's open-pit excavation site in DeKalb County, Tennessee. Tr. I at 84–85, 89–90. Respondent's employees worked at the site up to six days a week from August 2015 to August 2016. Tr. I at 94, 230, 291; Ex. S-25. Respondent was excavating at the site in support of its contract with the Tennessee Department of Transportation ("TDOT") to repair "slide" damage[2] to nearby State Route 141. Tr. I at 26; Ex. S-26; Ex. S-27. The contract required Respondent to obtain approximately 68,615 tons of "graded solid rock" to complete the road repair. Ex. S-26 at 59; Ex. S-27 at 4. TDOT's Standard Specifications for Road and Bridge Construction ("Standard Specifications") define graded solid rock as "sound, non-degradable rock having the following characteristics": (1) "[m]aximum particle size of 3 feet in any direction"; (2) "[p]article size distribution in which at least 50% of the rock is uniformly distributed between 1 foot and 3 feet in diameter, and no more than 10% is less than 2 inches in

[1] In this decision, "Tr. I" refers to the transcript from the first day of the hearing, and "Tr. II" refers to the transcript from the second day of the hearing. The Secretary's exhibits are numbered Ex. S-1 to S-31. The Respondent's exhibits are numbered Ex. R-2 to R-8. The Secretary's post-hearing brief is abbreviated as "Sec'y Br.," and the Respondent's post-hearing brief is abbreviated as "Resp't Br." The parties did not submit joint stipulations.

[2] TDOT employee Ken Flynn testified that the "slide" damage to State Route 141 involved the roadway "slipping and falling down." Tr. I at 26. Respondent's witness Stephen Wright testified that the steep, mountainous terrain of the area can cause water to seep out of the ground and undermine roadway foundations. Tr. II at 11–12.

diameter"; (3) "[r]oughly equi-dimensional in shape"; and (4) "[n]o thin, slabby material." Ex. S-28 at 10–11. Further, the Standard Specifications require that graded solid rock be processed "using an acceptable method that produces the required gradation" and that "the weighted percentage of loss shall not be more than 12" when "subjected to five alterations of the sodium sulfate soundness test." Ex. S-28 at 11. Finally, the Standard Specifications require "the [e]ngineer's approval before using the material." *Id.*

Respondent contracted with a nearby property owner to obtain graded solid rock by excavating on his property. Tr. I at 214; Ex. S-3 at 8–9. The property was less than one mile from the road repair site. Tr. I at 103–04, 220, 239, 258, 307, 366. Respondent used core drilling[3] to obtain a rock sample and then submitted the sample to TDOT, who confirmed that the sample qualified as graded solid rock. Tr. I at 227–28. After the rock sample was approved, Respondent began preparing the excavation site on or about August 10, 2015. Tr. I at 93–94, 279–80; Ex. S-3 at 14. Respondent cleared the overburden—the timber, dirt, and rock above the graded solid rock—and then created roadways and benches. Tr. I at 254–55, 281–84.

After preparation, Respondent started the extraction process by drilling blast holes and "shooting" the blast holes with explosives to expose the underlying material. Tr. I at 282–84. The underlying material consisted of limestone rock, as well as mud and dirt seams. Tr. I at 84, 108–09, 218, 225, 256, 302, 304–06, 310, 317; Tr. II at 50–52. During extraction, oversized rocks that were "as large as a pickup truck" were blasted loose. Tr. I at 260, 306; Tr. II at 54. After blasting, Respondent used an excavator-mounted piece of hydraulic equipment known as a hoe ram to break up some of the larger rocks. Tr. I at 100, 230, 241–42, 259. Respondent then used excavators to load the material onto dump trucks, using either a slotted[4] or standard (solid) excavator bucket. Tr. I at 185, 220, 264. The slotted bucket allowed undersized material to fall through the slots, leaving appropriately sized rocks and limiting the presence of dirt. Tr. I at 102–03, 117–18, 220–21, 229–30, 271–72, 308, 333; Tr. II at 16–17, 31–32, 37–40, 53–54. Respondent used the slotted bucket to remove dirt because TDOT did not permit the presence of dirt in graded solid rock. Tr. I at 225–26, 271–72, 304–06. After being loaded, the dump trucks transported the graded solid rock to the road repair site, where it was deposited and compacted by a bulldozer. Tr. I at 239–40, 258, 316, 319.

On April 5, 2016, MSHA Inspector Danny Williams[5] inspected Respondent's excavation

[3] Core drilling allowed Respondent to take a subsurface rock sample—without drilling, blasting, and excavating—by using a hollow drill bit. Tr. I at 98–99.

[4] The slotted excavator bucket, also referred to as a "shaker bucket," had twenty-four slots that each measured eleven inches long and seven inches wide. Tr. I at 363–64.

[5] Danny Williams has been an MSHA inspector since July 15, 2012, and was trained at the Mine Safety and Health Academy in Beckley, West Virginia. Tr. I at 71, 78. Williams previously worked as a safety specialist at an underground zinc mine in Gordonsville, Tennessee, where he trained miners, responded to accidents, performed safety audits, served as a liaison with local first responders, and handled explosives. Tr. I at 72–73. Williams was also previously employed as a law enforcement officer. Tr. I at 76–77.

site after witnessing it from a nearby road. Tr. I at 88–89. During the inspection, Inspector Williams spoke with Respondent's employees. Tr. I at 121. One employee allegedly told Inspector Williams of a discussion the employee had with Respondent's management regarding the possibility that the operation would be subject to MSHA jurisdiction. Tr. I at 121–22. The employee also allegedly stated that Respondent's management dismissed the employee's concerns by stating something to the effect of "we're going to call it a borrow pit."[6] *Id.* After observing and photographing Respondent's operations, Inspector Williams returned on April 6, 2016 and issued the nine citations and orders at issue in this matter. *See infra* Section III.B; Ex. S-4, S-6, S-9, S-11, S-13, S-15, S-17, S-20, S-22.

B. Credibility Findings

Reviewing the record of these proceedings compels me to address and make findings on the credibility of certain witnesses. I find that the testimony of Kevin Hinson, Anthony Williams, Kevin Williams, and Jimmy Givens tended to be contradictory and not credible in several respects. Further, I credit the testimony of Inspector Williams and Stephen Wright.

i. Testimony of Kevin Hinson

On direct examination, project manager Kevin Hinson[7] stated that he picked up a piece of rock at the excavation site to have it tested by TDOT to determine whether it qualified as graded solid rock. Tr. I at 215, 217. Hinson also agreed with Respondent's counsel that every time Hinson was required to obtain rock at other job sites for TDOT to test, Hinson was able to find suitable rock. Tr. I at 217. However, Hinson also admitted on cross-examination that Respondent performed core drilling "to ensure that the rock would meet TDOT requirements," and that TDOT performed a visual test of the rock to ensure that it was not "thin or slabby" and "up to the inspector's preference." Tr. I at 227–29.

Regarding Respondent's use of the hoe ram, Hinson first agreed on cross-examination that Respondent used the hoe ram to break rock. Tr. I at 230. Then, on redirect, Hinson stated that Respondent used the hoe ram "to break the larger rock that we could not move . . . to get it out of the way and load the other material that we wanted." Tr. I at 232. Hinson later stated on recross-examination that if rock broken up by the hoe ram was "small enough, then yes, it could

[6] Although I find Inspector Williams' testimony to be credible, I discount the miner's alleged statement during the inspection. The statement by the employee was made in passing and without sufficient time for Inspector Williams to corroborate the statement or test the reliability of the employee who made the statement. Therefore, although the Commission's procedural rules permit hearsay evidence, the alleged statement to Inspector Williams does not have the necessary indicia of reliability, and I do not consider it when determining Respondent's level of negligence. 29 C.F.R. § 2700.63.

[7] Hinson has been employed by Respondent since 1990 and served as a project manager at the excavation site. Tr. I at 212, 213. Hinson was only at the job site "randomly," and was responsible for procuring materials and subcontractors. Tr. I at 213.

have been" loaded up and taken to the road site. Tr. I at 233. Hinson then contradicted himself again on redirect by stating that Respondent "couldn't afford to break rock with a hoe ram and make it cost efficient." Tr. I at 234. I find that Hinson's contradictions—coupled with his answers to Respondent's counsel's leading questions—make his testimony not credible.

ii. Testimony of Anthony Williams

The testimony of Foreman Anthony Williams[8] contained many contradictions. First, with respect to the hoe ram, Anthony Williams testified that Respondent used the hoe ram "just to break the bigger rocks that we couldn't handle to move them out of the way" and to break large rocks that were too big for the bulldozer to move. Tr. I at 259–61. This testimony conflicts with the testimony of bulldozer operator Jimmy Givens—who stated that he used the bulldozer to move large rocks—and excavator operator Kevin Williams—who stated that he pushed large rocks out of the way. Tr. I at 306, 317. Anthony Williams also stated "it would have to be me" when asked "who would be operating the hoe ram?" Tr. I at 261. However, Anthony Williams later agreed that "[a]t least one other person . . . did operate the hoe ram." Tr. I at 272.

Second, Anthony Williams testified that the only purpose of the slotted bucket was to remove dirt from the blasted material. *Id.* Several other witnesses testified that the slotted bucket not only removes dirt but is also a form of selecting appropriately sized material. Tr. I at 102–03, 117; Tr. II at 14–15, 53–54.

Third, Anthony Williams stated that despite the quality of the excavated material being "not good" and comparable to waste at a quarry, the excavated material was used as graded solid rock for the road repair project. Tr. I at 256–57. This testimony is in conflict with that of Hinson, who mentioned core drilling and TDOT's visual inspection to ensure that the material met the specifications of graded solid rock. Anthony Williams also admitted on cross-examination that employees of TDOT were on site "every day" to ensure that the material Respondent was using at for the road repair qualified as graded solid rock. Tr. I at 275.

Finally, Anthony Williams testified that Ben Coleman—who served as Respondent's superintendent of drilling and blasting—could not control whether the blasted material was too large or too small and that Coleman could not "help when a big rock falls off." Tr. I at 260. However, Coleman himself testified that "to some extent" he had "control over the size of the rock" that was blasted off and that, depending on the hardness of the rock and its intended application, the blaster typically develops a drilling pattern and uses a specific type of explosive charge. Tr. II at 48–50.

In additional to the factual contradictions above, Anthony Williams was evasive throughout cross-examination by the Secretary, further diminishing his credibility. *E.g.* Tr. I at

[8] Anthony Williams is employed as a superintendent for Respondent, and has been employed by Respondent for approximately 27 years. Tr. I at 246. Anthony Williams served as Respondent's foreman at the excavation site and was Respondent's highest ranking employee assigned to the road repair project. Tr. I at 247.

269–74; Tr. I at 282 (Anthony Williams replied "[i]t drills" in response to counsel's question "[a]nd the drill does what?"). Consequently, I find Anthony Williams' testimony not credible.

iii. Testimony of Kevin Williams

Comparing the testimony of excavator operator Kevin Williams[9] with the testimony of other witnesses reveals contradictions in his testimony. For example, Kevin Williams stated that "[a]ll the rock was put on the truck if it fit on the truck." Tr. I at 309. Additionally, Kevin Williams stated that "if he couldn't load" the rocks that were "as big as a pickup truck," then he would "just push it to the side." Tr. I at 306. This contradicts the testimony of other witnesses who stated that equipment could not move the large rocks, that the hoe ram was necessary to break the rocks so that they could be moved, and that rocks broken up by the hoe ram were not loaded onto the trucks. Furthermore, Respondent's counsel's leading questions make Kevin Williams' testimony less credible. The following exchange is one example:

Counsel:	Okay. Did you ever use a hoe ram to break up those big rock[s] so that you could load the rock onto the trucks?
Kevin Williams:	No.
Counsel:	Did anybody at the S.R. 141 job use the hoe ram to break up the very big rock to load it onto the truck?
Kevin Williams:	No.
Counsel:	Now, when you work at the S.R 141 job, did you load up rock for any other purpose other than going down to the road that was next to the Caney Fork River?
Kevin Williams:	No.

Tr. I at 306–07.

iv. Testimony of Jimmy Givens

Bulldozer operator Jimmy Givens[10] agreed with counsel for Respondent's comparison that "what the quarries considered trash is what you guys were using . . . as the bulk fill

[9] Kevin Williams has been employed by Respondent for approximately 16 years, including at Respondent's road repair project. Tr. I at 301.

[10] Givens was a bulldozer operator for Respondent on the State Route 141 repair project and has been involved with the road building business since 1996. Tr. I at 314–16.

material." Tr. I at 318. However, on cross-examination, Givens stated that graded solid rock "is usually anything over [two feet] in diameter," which highlights his lack of knowledge regarding TDOT's requirements for graded solid rock. Tr. I at 321. Further, Givens agreed that he was "not someone who was spending much time" at the excavation site. Tr. I at 317.

v. Testimony of Stephen Wright

Further, the testimony of Givens and the testimony of Anthony Williams regarding the properties of graded solid rock are also at odds with Respondent's witness Stephen Wright.[11] Wright testified that TDOT developed the graded solid rock standard in response to a "massive failure" of Interstate 40 that was "caused by water seeping out of the ground and undermining the roadway foundation." Tr. II at 11. Wright further explained the importance of TDOT's graded solid rock specification:

> Tennessee developed this graded solid rock spec, which is why you have to take the fines out of it. They want a rock that is from a 3-foot in diameter maximum down to about a 6-inch rock is what they would consider perfect because that gives you—and you put that in and it's free draining. They basically, in areas where they believe there are potential for water to—the damage—the interface between the field material you place and the natural ground, they will put this product in. And to their credit, it's expensive, they do it more than most other states, but their roads stay there when they do that. They had a couple of high-profile failures and this was determined to be the best method. So when you take those big rocks and lay them down and they have a higher interlocking angle, a phi angle it's called, and it makes it much stronger and the water can free—flow freely . . . through it and that gives just a tremendously stable base for the rock.

Tr. II at 11–12. I find Wright's testimony regarding the properties of graded solid rock to be credible. Wright's testimony underscores the fact that Respondent was required to use graded solid rock for the road repair due to its intrinsic value—namely, for building a strong foundation and for allowing water to flow freely through it—which was important where the road had previously become unstable due to water damage. It is unlikely that the low quality material mentioned by Anthony Williams and Jimmy Givens would suffice for such a project.[12]

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[11] Wright is the president and CEO of Wright Brothers Construction Company ("Wright Brothers"), a company that is considered a competitor to Respondent and headquartered in Charleston, Tennessee. Tr. II at 5, 7. Wright has been working for Wright Brothers since 1978, and Wright Brothers engages in highway heavy civil contracting, earth work, bridge and road construction, paving, concrete, and other similar activities. Tr. II at 6–7.

[12] Anthony Williams and Jimmy Givens are either wrong in their characterization of the material Respondent used as graded solid rock on the State Route 141 project, or Respondent knowingly failed to meet the requirements for graded solid rock.

In sum, I find that the contradictions by several of Respondent's witnesses—within their own testimony and when compared to the testimony of other witnesses—makes them less credible. It is not credible that Respondent only used the hoe ram to break up rocks for the purpose of moving them out of the way. I find that the hoe ram was used to reduce excavated material in size for the purpose of using at least some of that material as graded solid rock. Despite Respondent's contentions and Hinson's testimony, it would *not* be profitable to *not* utilize the rocks crushed with the hoe ram as graded solid rock. Resp't Br. at 18, 21. This finding comports with the testimony of Inspector Williams, who stated that he observed Respondent's excavator "picking up rocks that looked like they had been crushed with a hoe ram[] . . . and . . . loading them onto the Mack dump truck." Tr. I at 108. The observations of Inspector Williams are entitled to significant weight. *Harlan Cumberland Coal Co*., 20 FMSHRC 1275, 1278-79 (Dec. 1998).

Further, I find that the slotted bucket was used not only to remove dirt and contaminants but also to select appropriately sized material. Although the slotted bucket may not be the most practical or efficient way to remove dirt and small rock from excavated material, Wright confirmed that it is possible to use a slotted bucket to create graded solid rock and that Wright Brothers had done so in the past. Tr. II at 15, 31–32, 42. Inspector Williams also testified that the slotted bucket is typically "used for screening and sizing rocks." Tr. I at 102–03.

II. LEGAL PRINCIPLES

A. Jurisdiction Under the Mine Act

Mine Act jurisdiction applies to "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine." 30 U.S.C. § 803. The term "coal or other mine" is defined as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

Id. § 802(h)(1). Although the Act does not define "extracted" or "milling" with respect to the term "minerals," the Commission has held that the former means "the separation of a mineral from its natural deposit in the earth," and the latter includes "processes by which minerals are made ready for use." *Drillex, Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994) (citations omitted)

(holding that separating rock from its deposit in the earth was mineral extraction and that the crushing and separation of rock constituted milling).

Furthermore, the functional nature of the operator's activities is an important factor to consider when determining whether an operation is a "coal or other mine" under the Act. *Oliver M. Elam, Jr.*, 4 FMSHRC 5, 7 (1982). This functional analysis is a two-part inquiry that asks: (1) whether the party engaged in activities normally performed by a mine operator, and (2) whether the party performed these activities to make the extracted material suitable for a particular use or to meet market specifications. *Id.* at 8.

With respect to the "affect[ing] commerce" requirement, the Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof." 30 U.S.C. § 802(b). The Commission reads this provision broadly and has held that "any mining or milling that an entity engages in for its own use constitutes 'commerce' under . . . the Mine Act." *Alaska, Dep't of Trans.*, 36 FMSHRC 2642, 2645 (Oct. 2014) (discussing the Second Circuit's decision in *D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460 (2d Cir. 2004)).

An exception to MSHA jurisdiction exists if an operation is classified as a "borrow pit," which is subject to the sole jurisdiction of the Occupational Safety and Health Administration ("OSHA") per an interagency agreement between MSHA and OSHA. *See* MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22,827 (Apr. 17, 1979), *amended by* 48 Fed. Reg. 7521 (Feb. 22, 1983) ("Interagency Agreement"). According to the Interagency Agreement, a borrow pit is defined as:

> [A]n area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

Id. at 22,828. "Milling" is further defined by the Interagency Agreement as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives," and "the essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." *Id.* at 22,829. The Interagency Agreement provides examples of milling processes, including "crushing" and "sizing." *Id.* "Crushing" is defined in part as "the process used to reduce the size of mined materials into smaller, relatively coarse particles," and "sizing" is defined as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." *Id.* at 22,829–30.

When determining whether a facility is a "mine" under the Act, "Congress clearly intended that any jurisdictional doubts be resolved in favor of coverage by the Mine Act." *Watkins Eng'rs & Constructors,* 24 FMSHRC 669, 675–76 (July 2002) (citing S. Rep. No. 181, 95th Cong., 1st Sess. 14 (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 602 (1978)). The Interagency Agreement references this legislative history, and makes clear that questions of jurisdiction between MSHA and OSHA should be resolved in favor of coverage by the Mine Act. 44 Fed. Reg. at 22,828.

B. Gravity

The Commission generally expresses gravity as the degree of seriousness of the violation. *Hubb Corp*., 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co*., 18 FMSHRC 1541, 1549 (Sept. 1996). The Commission has pointed out that the focus of the gravity inquiry "is not necessarily on the reasonable likelihood of serious injury, which is the focus of the [significant and substantial] inquiry, but rather on the effect of the hazard if it occurs." *Consolidation*, 18 FMSHRC at 1550; *cf. Harlan Cumberland Coal Co*., 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood of injury, such as a violation of an important safety standard, a violation demonstrating recidivism or defiance by the operator, or a violation that could compound the effects of other conditions).

C. Negligence

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary's regulations, an operator is held to a high standard of care. 30 C.F.R. § 100.3(d). Operators must be wary of conditions and practices that could cause injuries, and are required to take the necessary precautions to prevent or correct those conditions or practices. *Id*. The Secretary defines moderate negligence as having occurred in connection with a violation when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* § 100.3(d), Table X. The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the circumstances. *Leeco, Inc*., 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (explaining that Commission ALJs "may evaluate negligence from the starting point of a traditional negligence analysis" rather than adhering to the Secretary's Part 100 definitions); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

III. ANALYSIS

Respondent is contesting MSHA's jurisdiction as well as Inspector Williams' negligence determinations with respect to each of the citations and orders. Resp't Br. at 8, 32. For the reasons set forth below, I conclude that Respondent's excavation site is a "mine" under the Mine Act and is subject to MSHA jurisdiction. My negligence determination for each citation and order is also set forth below.

A. Whether Jones Brothers Operates a "Mine" under the Mine Act

i. The Excavation Site is a "Coal or Other Mine" Affecting Commerce

The Secretary argued that Respondent's excavation site is a "coal or other mine" under the Mine Act because Respondent extracted, milled, and prepared graded solid rock—a mineral—and that Respondent's operations affected commerce. Sec'y Br. at 7–16. Respondent failed to offer any argument that the excavation site was not a "coal or other mine," or that Respondent's operations did not affect commerce, and instead, solely chose to argue that it was operating a borrow pit under the Interagency Agreement. Resp't Br. at 7 ("[T]he Interagency Agreement establishes the issues in this case.").

I find that Respondent's operation falls within the definition of a "coal or other mine" under the Mine Act and that Respondent's operation affected commerce. 30 U.S.C. § 803. The Mine Act defines "coal or other mine" as "an area of land from which minerals are extracted . . . and . . . lands, excavations, . . . facilities, [and] equipment . . . used in, or to be used in, the milling of such minerals, or the work of preparing . . . other minerals." 30 U.S.C. § 802(h)(1)(A), (C). Respondent separated minerals including limestone and rocks from the earth through drilling, blasting, and excavating, which constitutes mineral extraction and makes Respondent's operation a "coal or other mine" under the Act. 30 C.F.R. § 802(h)(1)(A); *Drillex, Inc.*, 16 FMSHRC at 2395.

Although Respondent's extraction of minerals is enough to make its operation a "coal or other mine" under the Act, I also find that Respondent engaged in milling and preparation of the extracted minerals. 30 C.F.R. § 802(h)(1)(C); *Drillex, Inc.*, 16 FMSHRC at 2395 (holding that the operator "engaged in both mineral extraction and milling, either of which independently qualifies its operation as a 'mine' within the meaning of the Act"). Respondent engaged in mineral milling and preparation by using the hoe ram and slotted bucket to size and remove dirt from the extracted material—processes by which Respondent made the extracted material "ready for use" as graded solid rock. *See Drillex, Inc.*, 16 FMSHRC at 2395; *see also Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3d Cir. 1979) (separation of gravel from dredged material was mineral preparation).

With respect to the requirement that Respondent's operation affect commerce, there is no dispute that Respondent operated the excavation site to fulfill its obligation to produce graded solid rock for the road repair. Because "any mining or milling that an entity engages in for its own use constitutes 'commerce' under . . . the Mine Act," and because Respondent extracted, milled, and prepared graded solid rock to fulfill a contractual obligation, Respondent's operation affected commerce. *See Alaska, Dep't of Trans.*, 36 FMSHRC at 2645.

Further, under the Commission's functional *Elam* test, *Oliver M. Elam, Jr.*, 4 FMSHRC at 7, Mine Act jurisdiction over Respondent is appropriate. With respect to the first prong, Respondent engaged in activities normally performed by a mine operator, such as: core drilling and sample testing; the creation of roads, benches, and a highwall; removal of overburden; drilling and blasting; excavating material using mechanized equipment; the processing of the excavated material using the hoe ram and slotted bucket; and loading the excavated material onto

trucks for transportation. Regarding the second prong, Respondent engaged in activities to make the extracted material suitable for a particular use or to meet market specifications by blasting in a pattern, using the hoe ram to break down large rocks, and using the slotted bucket to select clean rock that was within the size requirements and phi angle dimensions for graded solid rock.

Finally, although Respondent argued that subjecting its operation to Mine Act jurisdiction "would represent a drastic deviation from prior MSHA enforcement practices," this argument is not persuasive. Resp't Br. at 8. The Commission has found Mine Act jurisdiction over entities engaged in excavation for purposes of road construction, maintenance, and repair. *See Alaska, Dep't of Trans.*, 36 FMSHRC at 2642 (excavated material used to maintain road); *see also Drillex, Inc.*, 16 FMSHRC at 2396 ("extraction and processing of minerals were not merely incidental to road construction"); *Ammon Enter.*, 30 FMSHRC 799 (July 2008) (ALJ) (excavated material used for road construction); *N.Y. State Dep't of Transp.*, 2 FMSHRC 1749 (July 1980) (ALJ) (excavated material used for permanent repair of roads). Respondent's contention that MSHA has not treated similar operations as mines is irrelevant; "allegations of selective enforcement cannot provide a basis for exemptions from Mine Act coverage" because MSHA is statutorily required to exercise jurisdiction over all mines. *Kerr Enter., Inc.*, 26 FMSHRC 953, 957 (Dec. 2004) (ALJ) (citing *Air Prods. and Chems., Inc.*, 15 FMSHRC 2428, 2435 n.2 (Dec. 1993) (concurring opinion)); 30 U.S.C. § 813(a) ("[T]he Secretary shall make inspections of . . . each surface coal or other mine in its entirety at least two times a year."). Ultimately, Deference is owed to the Secretary's reasonable interpretation of the jurisdictional terms of the Mine Act. *Alaska, Dep't of Trans.*, 36 FMSHRC at 2648 (citing *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868–73 (2013)).

ii. The Excavation Site Fails to Meet the "Borrow Pit" Criteria

Respondent's primary contention is that the excavation site is a borrow pit under the Interagency Agreement. Respondent set forth a host of arguments in its post-hearing brief, including that: (1) Respondent only removed unconsolidated rock, not bedrock; (2) Respondent's extraction activities were "only on a one-time basis or intermittently as need occurred"; (3) the extracted material was "fill" that was used in the form in which it was extracted and used more for its bulk than its intrinsic qualities; (4) Respondent did not engage in milling; and (5) the extracted material was used on land relatively near the site of extraction. Resp't Br. at 8–25. The Secretary argued that Respondent's operation was not a borrow pit because: (1) Respondent was not extracting overburden; and (2) Respondent was not extracting material on a one-time or intermittent basis. Sec'y Br. at 16–18.

Respondent's operation fails to meet the borrow pit criteria set forth by the Interagency Agreement. Importantly, the Commission has treated the criteria for a borrow pit as necessary elements and not as factors to be considered. *Drillex, Inc.*, 16 FMSHRC at 2391 (material was used on land "relatively near" the extraction site, but operation failed to meet other borrow pit requirements); *Jermyn Supply Co., LLC*, 39 FMSHRC 1472 (July 2017) (ALJ) (extraction operation was active only "sporadically," but the operator milled the material and the material was not being used for bulk fill); *State of Alaska, Dep't of Trans.*, 33 FMSHRC 1550 (June 2011) (ALJ) (screening operation was active for three or four weeks per year, but the operation was "sizing" aggregate and used specific aggregate for its "intrinsic qualities"); *Island Constr.*

Co, Inc., 11 FMSHRC 2448 (Dec. 1989) (ALJ) (material was used "in the form in which it [wa]s extracted as fill," but operation failed to meet other borrow pit requirements).

I find that extraction—which occurred up to six days per week over a period of at least several months—was not "on a one-time basis or only intermittently as need occurred," as required by the Interagency Agreement. Further, Respondent engaged in "milling" by "sizing" and "crushing" through use of the calculated blasting pattern, hoe ram, and slotted bucket. Under the Interagency Agreement, MSHA exercises jurisdiction where there is milling, except for the use of a scalping screen—which Respondent did not utilize—"to remove large rocks, wood and trash." 44 Fed. Reg. at 22,828. Respondent argued that it could not have engaged in "sizing" because TDOT's graded solid rock specification imposes no minimum size requirement. Resp't Br. at 22. I find that argument to be unpersuasive. The Standard Specifications plainly state that graded solid rock must have a "[m]aximum particle size of 3 feet in any direction" and "[p]article size distribution in which at least 50% of the rock is uniformly distributed between 1 foot and 3 feet in diameter, and no more than 10% is less than 2 inches in diameter." Ex. S-28 at 10–11. Also, Wright's testimony made clear that graded solid rock should be composed of rocks between 3 feet and 6 inches in diameter to achieve the optimal phi angle and to achieve a free-draining and stable base for the roadway. Tr. II at 12. I find that in order to meet TDOT's graded solid rock specification, Respondent separated the extracted material into groups in which particles ranged between maximum and minimum sizes—i.e. rocks that were compliant with TDOT's size requirement and rocks that were noncompliant. Further, the graded solid rock was not used solely as bulk, but was instead used more for its intrinsic drainage properties—which were essential for the road repair project Respondent was engaged in. The free-draining and free-flowing nature of graded solid rock is why TDOT created the specification for that material. I find that although Respondent used the graded solid rock in bulk to fill in the roadway, it was selected and used more for its intrinsic properties than as plain bulk fill. It is true that Respondent used the graded solid rock "on land which [wa]s relatively near" the excavation site. However, Respondent's failure to meet the other borrow pit requirements is fatal to its argument.

The legislative history of the Mine Act is unequivocal that jurisdictional doubts should be resolved in favor of coverage by the Mine Act, and the Interagency Agreement makes this overtly clear. 44 Fed. Reg. at 22,828 (mentioning "Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act"). Whether a facility is subject to MSHA or OSHA jurisdiction is significant because of the different inspection practices between the agencies. Inspector Williams testified that MSHA inspects open-pit quarries twice per year in unannounced visits. Tr. I at 124–25; *see also* 30 U.S.C. § 813(a) ("Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year."). This is quite different than the circumstances under which OSHA conducts inspections, often after an accident occurs or a complaint is lodged. *Cf. Donovan v. Dewey*, 452 U.S. 594, 603–04 n.9 (1981) (contrasting the "certainty and regularity" of the Mine Act's inspection scheme with the discretionary inspection scheme of the Occupational Safety and Health Act).

Commission precedent supports the conclusion that Respondent's operation is not a borrow pit. The Commission's decision in *Drillex, Incorporated*, 16 FMSHRC 2391 (Dec. 1994), contains similar facts to the instant matter, and in that case, the Commission held that the

borrow pit exception did not apply. *Drillex* concerned a project where the operator was contracted to perform "drilling, blasting, rock excavation and crushing" of 20,000 cubic meters of stone "to be used as fill for embankment and road base." *Id.* at 2392. The operator excavated and processed material approximately three times per week and reduced the material in size using a hydraulic hammer. *Id.* at 2393, 2396. The Commission held that the operator did not qualify for the borrow pit exception because: (1) extraction did not occur on an intermittent basis; (2) the operator engaged in "milling" by crushing the excavated material into smaller particles; and (3) the material was sized for its intended use as fill, and was therefore not solely "bulk" in nature. *Id.* at 2396. Here, Respondent similarly drilled, blasted, and excavated material for the purpose of road construction, extracted the material more than intermittently, and milled the material by sizing it with the hoe ram and slotted bucket.

In *State of Alaska, Department of Transportation*, the Commission held that the Interagency Agreement classifies open pit mining of sand and gravel as an example of "unquestioned MSHA authority under the Mine Act." 36 FMSHRC at 2648 (citing 44 Fed. Reg. at 22,829). By separating excavated material by size and excluding oversized rock, the Commission found that the operator was engaging in "sizing" and "milling," and therefore was not covered by the Interagency Agreement's borrow pit exception. *Id.* at 2649. In the instant matter, Respondent was required to conform to TDOT's size requirements for graded solid rock, and achieved those requirements through the use of blasting, the hoe ram, and the slotted bucket. Respondent "did more than 'scalp' away large rocks" and debris from the blasted material by using the hoe ram and slotted bucket, and therefore *State of Alaska* instructs that Respondent's operation is not a borrow pit.

In its post-hearing brief, Respondent cited to *David Duquette Excavating*, 37 FMSHRC 744 (Apr. 2015) (ALJ) and *Kerr Enterprises, Inc.*, 26 FMSHRC 953 (Dec. 2004) (ALJ).[13] Resp't Br. at 10–11. In *Duquette*, the ALJ ruled that the earthen material extraction operation was a borrow pit and exempt from Mine Act jurisdiction because no milling was involved. *Duquette*, 37 FMSHRC at 751. The extracted material in *Duquette* was stipulated to be "generally clean fill" from an embankment, and the operator used a single scalping screen only to remove large rocks, wood, and trash on an as-needed basis. *Id.* The extracted material was then loaded onto a dump truck and taken offsite, where the material was used in the form it was extracted as bulk fill. *Id.* In *Kerr*, the operation involved the "full time continuous extraction" of earthen material from a pit over multiple years. 26 FMSHRC at 954, 957. The operator in *Kerr* then processed approximately 20 percent of the extracted material by using a scalping screen to remove debris. *Id.* at 954. The processed material was sold to more than fifty customers as far as twenty-five miles away from the extraction pit. *Id.* Although Respondent argues that its excavation site "is much closer to *Duquette* than *Kerr*," I find that neither case is a close comparison to the circumstances at Respondent's operation. Respondent extracted minerals far more frequently than the "three times in two years" in *Duquette*, and less frequently than the "full time continuous extraction" over multiple years in *Kerr*. Additionally, unlike the extracted "clean fill" material in *Duquette*, the material from Respondent's operation could not have been used in the form it was extracted because of the presence of dirt and mud seams. Finally, the

[13] Respondent failed to properly cite or refer to these cases as non-precedential ALJ decisions, and not Commission precedent.

material Respondent excavated was not used primarily as bulk fill but instead for its intrinsic value.

In sum, Respondent fails to meet all of the elements of a borrow pit, as set forth in the Interagency Agreement. Because Respondent's excavation site is not a borrow pit and because Respondent extracted, milled, and prepared minerals in an operation that affected commerce, Respondent's excavation site is a "mine" under the Act and is subject to MSHA jurisdiction.

B. Negligence Assessment for Citations and Orders

Respondent indicated that besides the issue of Mine Act jurisdiction, Respondent solely wished to contest the level of negligence assessed for each citation and order. Tr. I at 118–19. The Secretary argued that the negligence assessment issued by Inspector Williams for each citation and order was correct and should be upheld. Sec'y Br. at 20–25. The Respondent argued that the negligence assessment issued by Inspector Williams should be disregarded because Inspector Williams relied on the statement of one of Respondent's employees regarding management's knowledge of the potential for Mine Act jurisdiction over the excavation site, and the employee's statement was unreliable hearsay. Resp't Br. at 32–34. As I have noted above, I discount the alleged statement made to Inspector Williams due to reliability concerns. The following section contains an analysis of the level of negligence for each violation.

i. Citation No. 8817591

Citation No. 8817591 has a proposed penalty of $100.00 and was assessed as involving high negligence. Ex. S-4. Citation No. 8817591 alleges a violation of 30 C.F.R. § 56.1000, which requires the operator of any mine to "notify the nearest MSHA Metal and Nonmetal Mine Safety and Health district office before starting operations, of the approximate or actual date mine operation will commence." 30 C.F.R. § 56.1000. The narrative portion of the citation is as follows:

> The operator of the mine, Jones Bros., Inc., did not notify the local Mine Safety and Health Administration office before starting operations, of the approximate or actual date mine operations commenced. The notification shall include the mine name, location, company name, mailing address, person in charge, and whether the operation will be continuous or intermittent. Drilling, blasting, and sizing of the rock material was occurring in the open pit mine. The rock material was being sold to the State of Tennessee, on a nearby project. This action was affecting interstate commerce.

Ex. S-4 at 1. Respondent terminated the citation by "notif[ying] MSHA in the Southeast District Office of their work in the open pit mine." *Id.* at 2.

Inspector Williams testified that he assessed Citation No. 8817591 as involving high negligence because Respondent was previously a contractor at other mines and was therefore familiar with MSHA's regulations. Tr. I at 120–21. I agree with Inspector Williams' negligence

assessment. I find the gravity of this violation to be serious because without notification of the commencement of operations, MSHA has no reliable way to ensure the health and safety of miners through inspections and enforcement of the Act.

ii. Citation No. 8817592

Citation No. 8817592 has a proposed penalty of $100.00 and was assessed as involving moderate negligence. Ex. S-17. Citation No. 8817592 alleges a violation of 30 C.F.R. § 56.4402, which provides that "[s]mall quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents." 30 C.F.R. § 56.4402. The narrative portion of the citation is as follows:

> A red Eagle brand 5 gallon safety can was filled almost full with an unknown liquid. The portable temporary container was not labeled nor with any markings to indicate its contents. The can had been in the present condition for approximately a week, and was located on the Mack fuel truck #13606. This created a hazard to an unbeknownst miner being exposed to flammable characteristics and physical conditions without HazCom warnings.

Ex. S-17 at 1. Respondent terminated the citation by labeling "the safety can . . . to identify the contents, 'GAS.'" *Id*. Inspector Williams took photographs of the safety can before and after it was labeled. Ex. S-3 at 16, 19; Ex. S-19.

Inspector Williams testified that he assessed Citation No. 8817592 as involving moderate negligence because Inspector Williams "was told[] management . . . did not know that the can needed to be labelled," and Inspector Williams credited that statement. Tr. I at 141. I agree with Inspector Williams' negligence assessment. I find the gravity of this violation to be reasonably serious because the risk that a miner might mistake the contents of the safety can for a different liquid is somewhat mitigated by the red color and warnings on the can. Ex. S-3 at 16, 19.

iii. Citation No. 8817593

Citation No. 8817593 has a proposed penalty of $243.00 and was assessed as involving moderate negligence. Ex. S-20. Citation No. 8817593 alleges a violation of 30 C.F.R. § 56.14132(a), which provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." 30 C.F.R. § 56.14132(a). The narrative portion of the citation is as follows:

> The Mack dump truck #16334 did not have a maintained back up alarm while being operated on the mine site. The driver has an obstructed view to the rear and could not see other miners who were on foot in the common area of the mine, i.e. restrooms, parking lot and ingress/egress roadway. This created a hazard to any miner being backed over when no advance warning was heard of any sudden movement. The heavy equipment could cause crushing

injuries, leading up to death, being sustained if struck with the truck.

Ex. S-20 at 1. Respondent terminated the citation by replacing "the backup alarm . . . with a new unit." *Id.* at 2.

Inspector Williams testified that he assessed Citation No. 8817593 as involving moderate negligence because Respondent was not aware of the hazardous condition, and because Inspector Williams thought that the truck had a back-up alarm, "but it just wasn't working." Tr. I at 145. I agree with Inspector Williams' negligence assessment. I find the gravity of this violation to be reasonably serious because Respondent had less than ten employees working at the project, and few employees were outside of equipment while trucks were being loaded—thereby somewhat mitigating the risk of a vehicle strike.

iv. Citation No. 8817594

Citation No. 8817594 has a proposed penalty of $243.00 and was assessed as involving moderate negligence. Ex. S-22. Citation No. 8817594 alleges a violation of 30 C.F.R. § 56.14104(b)(2), which requires the use of "a stand-off inflation device which permits persons to stand outside of the potential trajectory of wheel components" during tire inflation. 30 C.F.R. § 56.14104(b)(2). The narrative portion of the citation is as follows:

> The mine had access to various air compressors on the site. These units were being used to inflate tires on the heavy equipment, as needed. The mine operator did not have a stand-off inflation device to limit a miner's exposure to exploding tires. Injuries of lacerations, contusions, fractures, impalement and/or leading up to death could be sustained from flying debris when near the potential trajectory of wheel components.

Ex. S-22 at 1. Respondent terminated the citation by "purchas[ing] a stand-off devise [sic] to be used on the mine site." *Id.* at 2. Inspector Williams took photographs of an air compressor and the stand-off device. Ex. S-3 at 17, 18, 25; Ex. S-24.

Inspector Williams testified that he assessed Citation No. 8817594 as involving moderate negligence because "management was not aware that they needed a stand-off device," and Inspector Williams credited that statement by management. Tr. I at 147. I agree with Inspector Williams' negligence assessment. I find the gravity of this violation to be serious because of the risk of fatal injury, and the fact that there were multiple air-compressors on site, as well as multiple vehicles and pieces of equipment that used rubber tires.

v. Order No. 8817595

Order No. 8817595 has a proposed penalty of $1,842.00 and was assessed as involving high negligence. Ex. S-9. Order No. 8817595 alleges a violation of 30 C.F.R. § 46.5(a), which requires that each new miner receive no less than 24 hours of new miner training. 30 C.F.R. § 46.5(a). The narrative portion of the citation is as follows:

> The mine operator had failed to train six (6) of their employees. They had not received the MSHA-required 24 Hour New Miner training within the 90 days after beginning work at the mine. These six employees could not provide documentation of any previous mining experience. The mine operator was aware of the Part 46 training requirements. The mine operator must withdraw the . . . miners from the mine until they receive the required 24 hours of training.

Ex. S-9 at 1. Respondent terminated the order by delivering "24 hours of New Miner training to the 6 miners" on April 7, 2016. *Id.* at 3.

Inspector Williams testified that he assessed Order No. 8817595 as involving high negligence because Respondent was previously a contractor at other mines and was therefore familiar with MSHA's regulations. Tr. I at 130–31. I agree with Inspector Williams' negligence assessment. I find the gravity of this violation to be serious because an untrained miner is a hazard to himself and other miners.

vi. Order No. 8817596

Order No. 8817596 has a proposed penalty of $112.00 and was assessed as involving moderate negligence. Ex. S-11. Order No. 8817596 alleges a violation of 30 C.F.R. § 46.8(a)(1), which requires that each miner be provided with "no less than 8 hours of annual refresher training" within "12 months after the miner begins work at the mine." 30 C.F.R. § 46.8(a)(1). The narrative portion of the citation is as follows:

> Kevin Williams, excavator operator, had not received Annual Refresher Training within the last twelve (12) months. Refresher training was last given to this miner, February 2015. [T]he mine operator was aware of the training requirements. The operator is hereby ordered to withdraw Kevin Williams from the mine until he has received the 8 hours of required training.

Ex. S-11 at 1. Respondent terminated the order by delivering "8 hours of Annual Refresher Training to the miner" on April 8, 2016. *Id.* at 2.

Inspector Williams testified that he assessed Order No. 8817596 as involving moderate negligence because Kevin Williams "was somewhat trained . . . and he was an experienced miner." Tr. I at 132. Therefore, Inspector Williams credited Respondent "for at least having him trained once a long time ago." *Id.* I agree with Inspector Williams' negligence assessment. I find the gravity of this violation to be reasonably serious because the risk of an untrained miner was somewhat mitigated by Kevin Williams having worked for Respondent for many years and having some training as a miner.

vii. Citation No. 8817597

Citation No. 8817597 has a proposed penalty of $100.00 and was assessed as involving high negligence. Ex. S-6. Citation No. 8817597 alleges a violation of 30 C.F.R. § 41.11, which requires the mine operator to notify MSHA of the operator's legal identity within 30 days of commencing operations at the mine. 30 C.F.R. § 41.11. The narrative portion of the citation is as follows:

> The operator of the mine failed to notify the appropriate district manager of the Mine Safety and Health Administration in the Southeast district in which the mine is located of the legal identity of the operator. This mine had been in production since 28 August 2015, with numerous miners performing drilling, blasting, and sizing of rock material.

Ex. S-6 at 1. Respondent terminated the citation by filing "the required Legal Identity Report (2000-7 form) [sic] with MSHA" on April 18, 2016. *Id.* at 2.

Inspector Williams testified that he assessed Citation No. 8817597 as involving high negligence because Respondent was previously a contractor at other mines and was therefore familiar with MSHA's regulations. Tr. I at 126. I agree with Inspector Williams' negligence assessment. I find the gravity of this violation to be moderate because Respondent's failure to submit the legal identity report was a recordkeeping violation.

viii. Citation No. 8817598

Citation No. 8817598 has a proposed penalty of $100.00 and was assessed as involving moderate negligence. Ex. S-13. Citation No. 8817598 alleges a violation of 30 C.F.R. § 50.30(a), which requires mine operators to complete and submit a MSHA Form 7000-2 within 15 days after the end of each calendar quarter. 30 C.F.R. § 50.30(a). The narrative portion of the citation states that "[a]n MSHA #7000-2 (Quarterly Employment Report) for the 3rd Quarter 2015 (July, August, September) was not completed nor mailed to MSHA's Health and Safety Analysis Center prior to the required 15 days after the end of each calendar quarter, October 15, 2015." Ex. S-13 at 1. Respondent terminated the citation by filing "the Q3 Mine Employment and Production Report." *Id.* at 2.

Inspector Williams testified that he assessed Citation No. 8817598 as involving moderate negligence because Respondent previously submitted information while serving as a contractor at other mines and was therefore familiar with the reporting requirement. Tr. I at 135. I agree with Inspector Williams' negligence assessment. I find the gravity of this violation to be moderate because Respondent's failure to submit the quarterly employment form was a recordkeeping violation.

ix. Citation No. 8817599

Citation No. 8817599 has a proposed penalty of $100.00 and was assessed as involving moderate negligence. Ex. S-15. Citation No. 8817599 alleges a violation of 30 C.F.R. § 50.30(a), which requires mine operators to complete and submit a MSHA Form 7000-2 within

15 days after the end of each calendar quarter. 30 C.F.R. § 50.30(a). The narrative portion of the citation states that "[a]n MSHA #7000-2 (Quarterly Employment Report) for the 4th Quarter 2015 (October, November, December) was not completed nor mailed to MSHA's Health and Safety Analysis Center prior to the required 15 days after the end of each calendar quarter, January 15, 2016." Ex. S-15 at 1. Respondent terminated the citation by filing "the Q4 Mine Employment and Production Report." *Id.* at 2.

Inspector Williams testified that he assessed Citation No. 8817599 as involving moderate negligence for the same reason as the violation in Citation No. 8817598—because Respondent previously submitted information while serving as a contractor and was therefore familiar with the reporting requirement. Tr. I at 135. I agree with Inspector Williams' negligence assessment. I find the gravity of this violation to be moderate because Respondent's failure to submit the quarterly employment form was a recordkeeping violation.

IV. PENALTY

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided for by the Act. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763 (Aug. 2012) (citing 30 U.S.C. § 820(i)). In determining penalty amounts, Section 110(i) directs the Commission to consider:

> [T]he 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.

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although ALJ penalty assessments "must reflect proper consideration" of the Section 110(i) criteria. *Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016) (citations omitted). In addition to considering the Section 110(i) criteria, the judge must provide a factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 265-66 (May 2006) (citing *Sellersburg*, 5 FMSHRC 287, 292-93 (Mar. 1983)). My analysis of the Section 110(i) factors is set forth below.

A. Violation History; Size of Operator; Ability to Continue in Business

Respondent previously received two section 104(a) citations while serving as a contractor, and paid the $343.00 proposed penalty. Ex. S-8 at 2. Additionally, Anthony Williams testified that he supervised seven of Respondent's employees at the road repair project. Tr. I at 247. I find that Respondent is a small-sized operator with a minimal history of violations. Additionally, there is no evidence that the proposed penalty would directly impact

Respondent's ability to continue in business, and Respondent did not raise such a claim. "The Commission has held that '[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur.'" *John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (quoting *Sellersburg Co.*, 5 FMSHRC 287, 294 (Mar. 1983)).

B. Negligence and Gravity

My analysis of the negligence and gravity of the violations is set forth in section III.B.i–ix.

C. Good Faith

Good faith is reflected in the actions taken to abate the violations and in the testimony regarding Respondent's abatement efforts, as described in section III.B.i–ix.

D. Conclusion

After considering the six statutory penalty criteria, I assess a penalty of $2,940.00 for the violation at issue in this case.

ORDER

Respondent is hereby **ORDERED** to pay a total penalty of $2,940.00 for the violation at issue in this docket within thirty (30) days of the date of this Decision and Order.[14]

Priscilla M. Rae
Administrative Law Judge

Distribution:

[14] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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