

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

June 26, 2025

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

RAIN-FOR-RENT,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2022-0291
A.C. No. 48-00086-557425-VVG

Mine: Kemmerer Mine

DECISION AND ORDER

Appearances: Erik Vande Stouwe, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner

Byron J. Walker, Esq., and Ty R. Bordenkircher, Esq., Rose Law Firm, A Professional Association, Little Rock, Arkansas for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before the undersigned Administrative Law Judge (“ALJ”)¹ upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor through her Mine Safety and Health Administration (“MSHA”) against Rain-for-Rent (“Rain” or “Respondent”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“Mine Act”), 30 U.S.C. § 815(d). This docket involves two citations, Nos. 9656124 and 9656125. Citation No. 9656124 alleges that Respondent violated 30 C.F.R. § 77.1102 by failing to post on its truck “[s]igns warning against smoking and open flames ... so they can be readily seen in areas where fire or explosion hazards exist.” MSHA modified that citation to non-S&S and reduced the gravity from “reasonably likely” to “unlikely” to result in a fatal injury, with one person affected because of moderate negligence. Citation No. 9656125 alleges that Respondent violated 30 C.F.R. § 77.1110 because Respondent did not record the date of the last examination “on a permanent tag affixed to the [fire] extinguisher.” That citation was written as non-S&S, unlikely to result in a permanent disabling injury, with one person affected and resulting from moderate negligence.

¹ Throughout the transcript, the court reporter incorrectly refers to the undersigned as an “arbitrator.” This case was originally assigned to another ALJ who retired before reassignment to the undersigned.

Before the hearing, the parties filed a Joint Stipulation of Facts and two separate pre-hearing reports. On May 18, 2023, Respondent filed a Motion for Spoliation Sanctions alleging spoliation of photographic evidence. On May 23, 2023, Respondent filed a Renewed and Supplemented Motion for Spoliation Sanctions. On May 31, 2023, Petitioner filed a response to the Motion for Spoliation Sanctions and a Motion in Limine to exclude testimony related to the MSHA camera used during the inspection. At the outset of the hearing, the undersigned denied Petitioner's Motion in Limine. Respondent's Motion for Spoliation Sanctions is denied for the reasons set forth herein.

On June 6, 2023, a virtual hearing was held in this matter over the Zoom for Government secured video conference platform. Witnesses were sequestered throughout the hearing. Petitioner introduced testimony from Tim Cook, the former MSHA inspector who issued the contested citations, and Peter Del Duca, assistant district manager for MSHA's Denver office. At the close of Petitioner's case, Respondent moved for a directed verdict. That motion was denied because it appeared that Petitioner met its burden of proof through credible testimony and probative exhibits. Respondent presented no witnesses. The parties jointly admitted documentary evidence² and filed post-hearing briefs instead of closing arguments.

Based on a careful review of the record, including the parties' post-hearing briefs, Petitioner and Joint exhibits, and the testimony and demeanor of Petitioner's witnesses,³ the undersigned finds that Respondent violated 30 C.F.R. sections 77.1102 and 77.1110. Former MSHA inspector Cook presented credible, uncontroverted testimony as to the existence of factual circumstances, substantiated in part by photographs taken by Respondent, which establishes the violations of the cited regulations. Application of the plain language of these standards to the credited facts as established by inspector Cook further support the violations. Contrary to Respondent's arguments, the standards provided Respondent fair notice as to what they required and were not applied arbitrarily or contrary to the Federal Mine Safety and Health Review Commission ("Commission") precedent.

Accordingly, Citation No. 9656124 is affirmed following MSHA's modification of gravity from "reasonably likely" to "unlikely," and the proposed penalty of \$133.00 is assessed after consideration of the criteria set forth in section 110(i) of the Act. Citation No. 9656125 is modified to reduce the likelihood of occurrence from "unlikely" to "no likelihood." Based on

² In this decision, "Tr." refers to the hearing transcript and "Jt. Exs." refers to Joint Exhibits. Jt. Exs. A-H were received in evidence. A-H, "P. Ex. #" refers to the Petitioner's exhibits. P. Exs. A-H were received into evidence. Tr. 25.

³ In evaluating inspector Cook's and assistant district manager Del Duca's testimony, the undersigned has taken into consideration the following: the nature of the questioning and any testimony or lack thereof given in response; demeanor; experience and credentials; evasiveness or forthrightness; interest in this matter; the inherent probability of testimony in light of other events; corroboration or lack of corroboration from other witnesses; consistency or lack of consistency vis-à-vis testimony and that of others; and the absence of rebuttal or any testimony from any witness for Respondent.

consideration of the criteria in section 110(i) of the Mine Act, MSHA's proposed penalty of \$133.00 is assessed.

II. Stipulations

The parties agreed to the following stipulations prior to hearing:

1. Respondent is an independent contractor within the meaning of 30 C.F.R. § 45.2, in that it is "a person, partnership, corporation, subsidiary of a corporation, firm, association, or other organization that contracts to perform services of construction at a mine[.]"
2. As an independent contractor, Respondent is an operator within the meaning of Section 3(d) of the Federal Mine and Safety [*sic*] Act of 1977 ("the Mine Act") and 30 C.F.R. § 4.1.
3. As an operator within the meaning of the Mine Act, Respondent is subject to the Mine Act and the regulations promulgated thereunder.
4. MSHA inspector Tim Cook issued Citations No. 9656124 and 9656125 to Respondent at the Kemmerer Mine on March 4, 2022, following an inspection of Respondent's vehicle, No. 1757.
5. Inspector Cook served Citations Nos. 9656124 and 9656125 on Stanley Floyd, an employee of Respondent.
6. At the time of inspection, Respondent's vehicle No. 1757 contained at least one container used for the storage of oil.
7. At the time of the inspection, the only sign on vehicle No. 1757 related to fire hazards was a No Smoking decal on the driver's side window.
8. Rain for Rent had at all relevant times a policy relating to safety practices and procedures involving fire extinguishers.
9. Rain for Rent had at all relevant times a policy relating to safety practices and procedures involving flammable materials.
10. Timothy Cook did not take any General Field Notes pertaining to the violations at issue in this case.

The parties agreed to two additional stipulations at the hearing. First, Respondent's company engages in commerce within the United States (Tr. 13), and second, the ability of Respondent's company to remain in business would not be affected if the proposed penalties were imposed. (Tr. 14).

III. Factual Background

Former MSHA inspector Timothy Joe Cook began work for MSHA in Laramie, Wyoming on January 20, 2019. He received National Mine Academy training but eventually left MSHA near the end of July 2022. Tr. 36-39. In total, Cook had 20-plus years of mining experience. Tr. 38.

On March 4, 2022, Cook conducted a regular inspection at the Kemmerer Mine and inspected Respondent contractor's truck no. 1757, driven by Floyd. Tr. 39-40. During that inspection, Cook observed that the truck had no warning sign posted against smoking *and* against open flames. Cook found that several objects lying in the bed of the truck, including cans of penetrating fluid, starting fluid, and brake cleaner, could cause a fire hazard because of their flammability, and an explosion hazard because aerosolized compression cans, when exposed to fire or heat, could cause explosion of shrapnel and a permanently disabling injury. Tr. 42, 45-51. Cook did not physically examine or handle any of the pressurized containers and did not know whether they were empty or full, but he acknowledged on cross-examination that it would not be unusual for a truck driver to throw empty cans in the back of his truck. Tr. 131, 134. Several other cans of these fluids, which posed a fire or explosion hazard, were observed in separate drawers of the workbox on the side of the truck. Also, there was used and new motor oil (used for servicing pumps, light plants, and air compressors) in large containers in the truck bed. Tr. 43-44, 130.

After making the foregoing observations and conclusions, Cook spoke with driver Floyd, who told Cook that he had used the motor oil to service the generator for the light plant that was about 10 feet from the truck. Tr. 61-62.⁴ Cook and Floyd examined the truck. Tr. 53. Cook did not see any signs on the truck warning against no smoking and open flames so he wrote Citation No. 9656124 as "reasonably likely" that a fatal fire/explosion hazard would endanger the truck operator.⁵ Cook explained that he assessed moderate negligence because Floyd told him that he thought only DOT rules and not mining regulations applied to the subcontractor. Tr. 70-75. After a second conference between the parties, MSHA modified the citation to "unlikely." Ex. A at 51; Tr. 72.

During his inspection, Cook also examined the fire extinguisher in the truck. Although it was in good working order, it had a tag wired to it that was torn in half, and the tag did not show the date of the last inspection within the last six months, as required by 30 C.F.R. § 77.1110. Tr. 77-78, 82. Floyd told Cook that he had inspected the fire extinguisher at the beginning of his shift and the whole tag had been there. Tr. 78-79. Cook asked Floyd about the ripped tag and Floyd told Cook that he "didn't notice that it had been ripped off," and Floyd had just looked at the gauge, which indicated that it was in good working order. Tr. 81, 83, 86. Floyd told Cook that he did not know how the tag had been torn off. Tr. 166. Cook concluded that Floyd did not

⁴ On cross-examination, Cook testified about what servicing the light plant entailed, and Cook confirmed, after talking with Floyd, that changing the oil was part of the regular, full service of the light plant, which Floyd was providing. Tr. 117-119.

⁵ On cross-examination, Cook testified that he did not see a "no smoking" sign on the driver's side door during the inspection. He further testified that the requisite sign warning against smoking and open flames had to be readily visible from all approaches, i.e., from all four sides of the truck. Tr. 123. Cook further testified on cross examination, that the exhaust pipe from the light plant a few feet away from the truck was an ignition source, and the tools in the truck, including the diesel-powered welder were ignition sources. The light plant was not running while Cook was present. Cook did not see anyone smoking or any hot work being done in the area, and the buildings and fueling areas prohibited smoking. Tr. 127-28, 138-43.

know how to complete a full inspection of the extinguisher and therefore he had no way of knowing that the extinguisher was, in fact, in full working order. Tr. 87.

Cook then wrote Citation No. 9656125 alleging a violation of 30 C.F.R. § 77.1110 because at the time of the inspection, there had been no last examination date recorded “on a permanent tag affixed to the [fire] extinguisher.” As noted, that citation was written as non-S&S or unlikely to result in a permanent disabling injury (burns or smoke inhalation), with one person affected (Floyd) because of moderate negligence. Tr. 85-86; Ex. A. Tr. 90. Cook then told Floyd that he could drive the truck off the property, but he could not enter another mine site with the truck, until the cited items were fixed. Otherwise, he would risk a finding of higher than ordinary negligence during a subsequent inspection. Tr. 91.

Cook testified that he attempted to take photographs during his inspection using a digital camera provided by MSHA, and when he attempted that evening to pull them off the camera to do photo mounting, no pictures were there. Tr. 97-98; Ex. D at 59. Cook did not realize that there was a problem with the camera until he got back to his hotel that evening. Tr. 168, 172.

Cook testified that he attempted to take photos of the driver’s side of the truck, the inside of the truck bed, the passenger side of the truck, the truck location near the light plant, and the fire extinguisher. Tr. 100. When he attempted to take the pictures, he heard a noise (it beeped like it was taking a photograph), but Cook could not recall any images displayed on the camera. Tr. 101-102, 168. Cook did not review the attempted photographs while on site. Tr. 99.

Cook initially testified that it was cold that day, and he had frostnip on his ears. Tr. 103. On cross examination, Cook testified “that part of the inspection up there, I did get frostnip on my ears. It was very cold, maybe not on this day. I don’t remember for sure.” Tr. 176-77. Respondent introduced evidence from the National Weather Service that the temperature in Kemmerer, Wyoming on the day of the inspection (March 4) ranged from a low of 21 to a high of 51. Tr. 174; Ex. G.

Cook spoke with another inspector Corey Lynnstrom, who informed Cook that Lynnstrom had previously experienced a similar problem with a camera and “never could get to the bottom of it.” Tr. 98. Lynnstrom told Cook that cold temperature can affect the camera and that keeping the camera inside Cook’s safety vest pocket, as Cook had done, could also affect the camera. Tr. 103. Lynnstrom suggested that next time, Cook review any photos on site. Tr. 99.

When Cook was asked on cross examination whether there were any photographs in this case, he testified, “No sir. They did not take.” Tr. 114. Cook further testified, “I tried to take the pictures, and apparently they did not take on the camera or the camera lost them.” Tr. 114-115. Having carefully observed Cook during his testimony, I credit Cook and find that there were no photographs in this case that could be spoiled.

IV. Prehearing Motions

Prior to hearing, Respondent filed successive motions. In Respondent’s Motion for Spoliation Sanctions, and subsequent Renewed and Supplemented Motion for Spoliation

Sanctions, Respondent stitches together portions of former inspector Cook's deposition testimony to create a narrative of negligence at best and bad faith at worst. Spoliation in the context of evidence "refers to the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Secretary of Labor, MSHA v. N.J. Wilbanks Contractor, Inc.*, 39 FMSHRC 2069, 2070 n. 2 (Dec. 2017) (ALJ) (quoting *Oil Equipment Co. v. Modern Welding Co.*, 661 F. App'x 646, 652 (11th Cir. 2016) (internal quotation marks omitted). The Commission has recognized that:

if a party has control over a writing or other type of evidence, which is relevant to an issue, and fails to produce the evidence, an inference can be drawn that the evidence would be adverse to the party. *McCormick on Evidence* provides that '[w]hen it would be natural under the circumstances for a party to . . . produce documents or other objects in his or her possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference.' 2 *McCormick on Evidence* §264 (6th ed. 2006) at 220-21." *IO Coal Co.*, 31 FMSHRC 1346, 1359 n.11 (Dec. 2009).

As a remedy for the alleged spoliation, Respondent requests either full dismissal of the case, an adverse inference that the evidence allegedly lost would have been unfavorable to MSHA, or the exclusion of inspector Cook's testimony. For the reasons explained below, Respondent's motions and requests are **DENIED**.

A. Respondent's Motion was improperly filed under Commission Procedural Rule 59, making the motion untimely.

The primary grounds for denial of Respondent's Renewed and Supplemented Motion is that its filing was clearly not in compliance with the Commission's Procedural Rule 59 governing the sanctions which can be imposed when a party fails to produce requested evidence in discovery. That rule states:

Upon the failure of any person, including a party, to respond to a discovery request *or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery.* If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of the party seeking discovery. For good cause shown the Judge may excuse an objecting party from complying with the request.

29 C.F.R. §2700.59 (emphasis added). To secure sanctions against a party for failing to produce some requested form of evidence, the Commission's requirements are clear. A failure of a party to produce evidence, or a party's objection to producing requested evidence, must be addressed first and foremost by the filing of a motion to compel discovery with the judge. Only after a subsequently issued order to compel discovery of

the requested evidence is ignored or refused by the requested party, is a judge then empowered to apply sanctions which are deemed “just and appropriate” for the situation.

In this case, Respondent requested in discovery that the Acting Secretary (Petitioner) produce any of the alleged photographs in MSHA’s possession, an explanation for why the alleged photographs had not been “preserved” if unable to be produced, and the hard drive for inspector Cook’s camera. The Petitioner objected to each of these requests. A motion to compel the Petitioner to produce the requested material was never filed.

These grounds alone compel denial of Respondent’s motions. Without a proper motion and order to compel discovery, it would be improper and untimely under Commission Procedural Rule 59 to issue sanctions against a party for their refusal to produce evidence in discovery.⁶

⁶ The undersigned recognizes that there may be instances in which an ALJ may issue sanctions absent an order compelling discovery but ultimately concludes that is not the case here. The Commission Procedural Rules are silent on that question. Under Rule 1(b), “[o]n any procedural question not regulated by the Act, these procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. §§554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure). The D.C. Circuit explained that in the absence of a violation of an order compelling discovery, a court may not base a sanction on Rule 37(b) power. It may however impose a sanction based on its inherent power in extraordinary situations. But before doing so, the court must find by clear and convincing evidence that abusive litigation behavior occurred. *See e.g., Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1472, 1478 (D.C. Cir. 1995). The Second Circuit confirms this approach and has found that even absent a discovery order, a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs. *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002). The Tenth Circuit, which encompasses this Docket, has specifically recognized that spoliation sanctions may be appropriate under the Court’s inherent power. *Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., Inc.*, No. 97-5089, 1998 WL 68879 at * 3-4 (10th Cir. 1998).

It is important to note, however, that federal courts may have this inherent power as they originate from Article III of the United States Constitution, but the Commission was created by statute, so it is prudent to remain within the jurisdictional authority granted by Congress. Another ALJ expressed this same concern and noted that it is unwise to exercise any inherent powers absent controlling Commission precedent. *Productos De Agregados De Gurabo v. Sec’y of Labor*, 38 FMSHRC 1077, 1078 n.2 (May 2016) (ALJ). There have only been a handful of cases in which the Commission exercised its inherent power primarily in cases where the litigants or counsel “willfully abuse[d] judicial processes.” *See e.g., Local Union 2250, Dist. 12, UMWA v. Old Ben Coal Co.*, 3 FMSHRC 2793, 2796 (Dec. 1981). After extensive review of the Commission caselaw, there has been no exercise of inherent power to issue spoliation sanctions in the absence of an order compelling discovery. Therefore, the undersigned recognizes this potential power but declines to exercise it in the absence of direct Commission precedent.

B. The record evidence does not establish that any spoliation occurred. Respondent's burden of proof for the existence of the allegedly spoliated evidence in question has not been met.

While disposing of Respondent's motion on procedural grounds, I would be remiss to exclude other substantive grounds to deny Respondent's motions, even if it had been filed in a timely and procedurally correct manner.

As a general rule, the Tenth Circuit, has considered the evidentiary doctrine of spoliation and has held that the "bad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction." *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997). It has further explained that spoliation sanctions are proper when "(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent; and (2) the adverse party was prejudiced by the destruction of the evidence." *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1023 (10th Cir. 2007). A sister circuit has defined spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). The core premise underlying any allegation of spoliation is that the allegedly spoliated evidence existed at some point in time prior to being spoliated. As the First Circuit found, "[i]t is a proposition too elementary to require citation of authority that when there is no evidence to begin with, a claim of spoliation will not lie." *Gomez v. Stop & Shop Supermarket Co.*, 670 F.3d 395, 399 (1st Cir. 2012) (grocery store not subject to spoliation sanctions when no video of a person's fall in the store was saved/created in the first place, despite the store having an installed CC surveillance system); *see also Oldenkamp v. United American Ins. Co.*, 619 F.3d 1243, 1251 (10th Cir. 2010) (upholding a judge's finding that no spoliation sanctions were warranted when the party failed to produce evidence that any of the documents or recordings sought had ever existed).

Determining whether spoliation occurred is secondary to determining whether the allegedly spoliated evidence first existed. Thus, for evidence to be destroyed, significantly altered, or lost, due to a failure of a party to preserve the evidence, it must be established as a factual matter that such evidence existed in the first place before spoliation sanctions may be invoked. *See, e.g., Mannina v. Dist. of Columbia*, 437 F.Supp.3d 1 (D.D.C. 2020) ("[T]estimony that a record *should* exist is not, in itself, sufficient for this Court to conclude such a record *did* exist [to be later spoliated]."). In short, if no evidence was created, regardless of whether it should have been, there are no sanctionable acts for destroying, altering, or failing to preserve it.

Having thoroughly reviewed the instant record, I find insufficient probative evidence that the allegedly spoliated photographs ever existed. Former inspector Cook's

admission that he believed at the time of inspection that he was taking photographs on his camera, and his testimony about the angles and frames he believed that he was capturing, is not sufficient to establish that the camera was working properly, or the photographs *were actually ever stored on the camera*. Cook testified as follows:

Q. There are no photographs in this case, are there, that were taken by you?

A. No sir. They did not take.

[Judge]. What do you mean by “they did not take”?

A. I tried to take the pictures, and apparently they did not take on the camera or the camera lost them.

Tr. 114-15. No response surpassing uncertainty about the existence of the photographs was ever provided in Cook’s testimony—only that at the time of the inspection, Cook believed that he was taking photographs. Yet, Respondent collapses that distinction within their Renewed and Supplemented Motion, mischaracterizing Cook’s answers as support that the photos were in fact taken rather than accounting accurately for his testimony in context. *See* Resp’t Br. at 21 (claiming Cook took photos, when the transcript page cited to at Tr. 169, only has Cook agreeing to the question “Did you *attempt to take* the photographs as part of your investigation?”).

Respondent questions the reasonableness of Cook’s uncertainty about whether the attempted photographs made it onto the camera, arguing that digital cameras show pictures on the screen facing the camera taker, supposedly easily accessible and reflective of what photos are taken by the camera. However, even this circumstantial claim is unpersuasive because Respondent failed to establish that Cook ever saw digital screen shots. In fact, as noted above, Cook testified that he did not check for photos on site. In short, Respondent has not met its burden of establishing that the allegedly spoiled evidence ever existed.

C. Respondent has not established that sanctions for spoliation of evidence are warranted under Federal Rules of Civil Procedure 37(e).

Alternatively, even if the photographs existed at some point, there is another avenue to deny Respondent’s motion. The Secretary argues that Federal Rule of Civil Procedure 37(e) is dispositive. Sec’y Resp. to Mot. at 2 (citing 30 C.F.R. § 2700.1 which incorporates the Federal Rules of Civil Procedure as guidance for the Commission). As support, she states that Cook had no reason to anticipate his photographs would be used in litigation since he had not been previously called to testify as a witness for MSHA and these dockets involve two routine citations pertaining to safety signage. *Id.* at 2-3. Additionally, the Secretary contends that MSHA did not fail to take reasonable steps to preserve the photographs and that Rain provides no

indication of what reasonable steps Cook could or should have taken. *Id.* at 3-4. Ultimately, she concludes that Respondent failed to meet its burden of proof.

Respondent argues that the prejudice it has suffered from the evidence disappearing cannot be cured so all it can do is dispute the course of events set forth by Cook. Resp't Br. in Support at 17. It takes issue with Cook's failure to preserve the photographs as it "compromises the ability to reach a fair determination of the case on the merits." *Id.* Respondent then emphasizes that exclusion of the evidence is appropriate in cases "when the spoliation deprives a party of an opportunity to inspect the evidence." *Id.* at 19, 20 (citing *State Farm Fire & Cas. Co. v. Broan Mfg. Co.*, 523 F. Supp. 2d 992, 998 (D. Ariz. 2007) (citation omitted)). Alternatively, Respondent argues that "if a party has control over a writing or other type of evidence, which is relevant to an issue, and fails to produce the evidence, an inference can be drawn that the evidence would be adverse to the party." *IO Coal Co., Inc.*, 31 FMSHRC1346, 1359 n.11 (Dec. 2009); Resp't Br. in Support at 10, 18. For the reasons below, I agree with the Secretary.

Rule 37(e) states:

If electronically stored information ["ESI"] that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e).⁷ The rule, under its plain language, creates a two-tiered sanctions regime. The first subsection provides for lesser sanctions while the second subsection involves more severe sanctions. *Compare* Fed. R. Civ. P. 37(e)(1) *with* 37(e)(2). Both subsections are governed by two preconditions: (1) "electronically stored information that should have been preserved in the anticipation or conduct of litigation" was "lost because a party failed to take reasonable steps to preserve it" and (2) that information "cannot be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e).

⁷ Regarding the Court's inherent authority as discussed briefly above in footnote 6, the Advisory Committee Notes for this Rule suggests that "[i]t...forecloses reliance on inherent authority or state law to determine when certain measures should be used." *See* Fed. R. Civ. P. 37(e), advisory committee's note to 2015 amendment.

Here, even assuming the two preconditions were met, neither subsection (1) nor (2) applies. First, there is no lasting prejudice caused by the loss of information in the photographs. Rain-for-Rent exercised control over the contents and condition of the truck in question. It could have easily taken its own photographs, which it later did and submitted into evidence as Exhibit H. All of which corroborate and support, in part, Cook's testimony and position that Respondent violated the cited regulations. *See* Ex. H (showing cans of flammable materials as discussed below, an illegible sign for "no smoking" with no sign regarding open flames, and a ripped tag on a fire extinguisher with no date of inspection).

Respondent also declined to call Floyd as a witness, who was the driver of vehicle No. 1757. Tr. 8-11. Floyd could have provided some rebuttal testimony as to the contents and conditions of the vehicle during the date of the inspection, in turn, remedying any prejudice allegedly faced by Respondent. Another ALJ has taken a similar position in which she found that any prejudice inflicted on the Secretary could be cured since her own witness, an MSHA inspector, could testify to the content of his inspection logs. *N.J. Wilbanks Contractor, Inc.*, 39 FMSHRC 2069, 2070 n.2 (Dec. 2017); *see also 103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985, 989 (10th Cir. 2006) (upholding a district judge finding of prejudice by the destruction of evidence because there was no substitute). Similar to the inspector in *N.J. Wilbanks*, Floyd, who drove Rain-for-Rent's truck at issue, could easily testify to the contents of the truck, including the ripped tag on the fire extinguisher. In other words, Respondent had a readily accessible substitute for the allegedly spoliated evidence, unlike the *103 Investors I* case from the Tenth Circuit. Therefore, any alleged prejudice to Respondent could have been cured and there is no warrant for the severe sanctions requested.

Second, there is no reason to doubt Cook's credible testimony in which he asserts numerous times that he believed that he snapped photographs throughout his inspection. Tr. 97-98, 114-15, 169.; Ex. D, Dep. at 59, 85. His intent at the time he took the photographs was to support the citations with visuals. Tr. 169. Cook candidly acknowledged the importance of the photographs and that Respondent had a right to view them, if they had taken. Tr. 170-71.

Rain-for-Rent essentially is requesting that the undersigned find that since the photographs are missing, Cook must have intentionally deleted them to deprive Respondent of their use. The undersigned refuses that invitation especially when Rain-for-Rent provided no rebuttal testimony or contradictory evidence of its own. I find that Cook credibly testified about a potential reason that the photographs may not have been taken on the camera, i.e., because of the cold temperature on one of the days he inspected the mine, it "was very cold" and he "got frostnip." Tr. 176-77; Ex. D at 60. He further testified that Corey Lynnstrom, a fellow inspector, told him that the "cold does have an [effect] on the cameras." Tr. 103.

Respondent attempted to discredit Cook by submitting evidence of the climatological data as found in Exhibit G. However, that exhibit only shows the daily temperature of the highs and lows; Respondent does not even recognize that some of the data for that day is below freezing as the range is from around 20 degrees to 50 degrees Fahrenheit. *See* Ex. G. Just by submitting this exhibit to say that it was warmer than other days is not sufficient to rebut the possibility that the cold could have affected the photographs. Regardless, it is Respondent's burden of proof to show intent on the part of Cook. I find that Respondent has failed to do so.

Therefore, even if I found that the ESI should have been preserved in anticipation of litigation and that Cook failed to take reasonable steps to preserve the photographs, neither operative subsection of 37(e) applies.

For the three independent reasons above, Respondent's Renewed and Supplemented Motion for Spoliation Sanctions is **DENIED**.

V. Principles of Law

“The Mine Act imposes on the Secretary the burden of proving the violation the Secretary alleges by a preponderance of the evidence. *See Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989).” *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). In describing the preponderance of the evidence standard, the Commission has stated: “[t]he burden of showing something by a ‘preponderance of the evidence,’ the most common standard in civil law, simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

The Commission has recognized that the Secretary may establish a violation by inference. *Mid-Continent Resources*, 6 FMSHRC 1132 (May 1984). “Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Resources*, 6 FMSHRC at 1138.” *Garden Creek Pocahontas Co.*, 11 FMSHRC at 2152. The judge as primary fact-finder/trier of fact has “discretion to sift through the testimony presented and to base his decision on that [deemed] to be credible, relevant, and dispositive of the issues . . .” *Damron v. Reynolds Metal Co.*, 13 FMSHRC 535, 542 (Apr. 1991). “Because the judge ‘has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (*quoting Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Wolf Run Mining Co.*, 32 FMSHRC 1669, n.11 (Dec. 2010). Given that credibility determinations reside within in the unique province of the fact-finder, it is well-established that “a Judge’s credibility determination is entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981); *Consol Pennsylvania Coal Co., LLC*, 43 FMSHRC 145, 151 (Apr. 2021).” *Consol PA Coal Co.*, 44 FMSHRC ___, slip op. 4-5, n.8, No. PENN 2019-0094 (Dec. 20, 2022).

Congress has declared that “(a) the first priority and concern of all in the coal or other mining industry must be the safety and health of its most precious resource – the miner.” 30 U.S.C. § 801(a). The purpose of the Act is to “(1) . . . direct the . . . Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health or safety of the Nation’s coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards . . .” 30 U.S.C. §801(g). “A safety standard ‘must be interpreted so as to harmonize with and further . . . the objectives of’ the Mine Act. *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984).”

Dolese Bros. Co., 16 FMSHRC 689, 693 (Apr. 1994). “The ‘language of a regulation . . . is the starting point for its interpretation.’ *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). Where the language of a statutory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Dynamic Energy Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010).” *Peabody Midwest Mining, LLC*, 44 FMSHRC 515, 521 (Aug. 2022). When interpreting an administrative regulation, the Commission and federal courts apply the same rules used to statutes, “examining the plain language of the text, giving each word its ordinary and customary meaning. If, after engaging in this textual analysis, the meaning of the regulations is clear, [the] our analysis is at an end. *Mitchell v. Comm’r*, 775 F.3d 1243, 1249 (10th Cir. 2015) (citations omitted).” *Peabody Twentymile Mining, LLC v. SOL*, 931 F.3d 992 (10th Cir. 2019).

When the language of the regulation is plain, fair notice issues do not come into play. Rather, the Commission will affirm the judge’s plain language application of a standard. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997); *see also Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171-72 (Sept. 2010); *Cactus Canyon Quarries, Inc. v. FMSHRC*, 2023 WL 2401588 (5th Cir. 2023) (unpublished) (finding adequate notice provided by clear regulation), *aff’g* 44 FMSHRC 289 (Apr. 2022) (ALJ). In *Bluestone*, the Commission held that where the language of a standard is clear and unambiguous, that standard provides operators with fair and adequate notice. 19 FMSHRC at 1031.

By contrast, if the regulation is ambiguous, courts have deferred to the Secretary’s reasonable interpretation of it. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’”) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945)). The Secretary’s interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation[s] and ... serves a permissible regulatory function.” *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (alteration in original) (quoting *Rollins Environmental Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991)). If issues of fair notice arise under an ambiguous regulation, the Commission applies a reasonable prudent person test, i.e., “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *see also Wolf Run Mining*, 32 FMSHRC 1669, 1682 (Dec. 2010). When deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors is relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency’s enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002); *see Island Creek*, 20 FMSHRC at 24-25; *Morton Int’l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *see also Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976); *United States v. Hoechst Celanese Corp.*, 128 F. 3d 216, 224 (4th Cir. 1997).

VI. Findings of Fact, Analysis, and Conclusions of Law

A. Citation No. 9656124

1. Findings of Fact

On March 4, 2022, MSHA inspector Cook traveled to the Kemmerer Mine to conduct a regular inspection. Tr. 39. Part of his inspection involved a Rain-for-Rent truck, no. 1757. Cook observed the truck and found no signs against smoking or open flames near various kinds of oil, penetrating fluid, starting fluid, and brake cleaners. Tr. 42; Ex. H. He determined that these objects posed a fire or explosion hazard. Tr. 42. Specifically, Cook testified that brake cleaner presented a fire and explosion hazard due to its chemical makeup being very flammable. Tr. 45-46. He cited his personal experience working with brake cleaner during brake and axle jobs, explaining that if used on a hot surface it can ignite and has done so in the past. Tr. 48. He also recalled reviewing the label on the can for CRC Brakleen, where he observed a fire and explosion hazard warning. Tr. 46; 51-52. Concerning the explosion hazard, he testified that the can itself is under pressure meaning that if it is introduced to a fire, it can overheat and explode causing shrapnel to release. Tr. 47.

Cook next testified that Mac's starting fluid qualifies as a fire hazard as it is used to start engines, meaning it is very flammable. Tr. 48. Like the CRC Brakleen, he explained that this is an explosive hazard because it is in a compressed container. Tr. 48. From personal experience, he has observed Mac's combust and ignite when sprayed against a hot exhaust. Tr. 48. For the penetrating fluid, Cook determined it to be WD-40, which is a fire hazard. Tr. 49. In the past, Cook has used it to start small diesel engines. Tr. 49.

Cook expressed concern with aerosolized cans. He testified that they are a fire and explosion hazard since the can is compressed with gas. Tr. 49-50. When the product exits the can through a nozzle, the product is in an atomized form, and this leaves the aerosolized agent sometimes flammable. Tr. 50.

Cook further testified Floyd, the driver of the truck, informed him of the presence of new oil in the container with the silver lid, and used or waste oil in another container in the bed of the truck. Tr. 61-62. Floyd also explained to Cook that he just finished servicing the generator on a nearby light plant. Tr. 62. Such service includes changing the oil and filters. Tr. 62. Cook explained that the truck was located around six to ten feet from the side of the serviced light plant. Tr. 62. He also expressed concern with a hot exhaust from the light plant that had the potential to heat up if oil is on it. Tr. 63. The exhaust could also smoke and eventually combust. Tr. 63. Cook warned that oil presents a fire hazard due to its inherent flammable nature. Tr. 58. He drew on personal knowledge from using oil as a source of heat, and from working on engines. Tr. 59-60.

The Exhibit H photographs that were jointly submitted by the parties, support Cook's recollection of the truck's contents. Ex. H, at 4-5; Tr. 43. In the fourth photograph, there is a can of Mac's and WD-40. Ex. H, at 5. Cook explained that the red can that is visible is the Brakleen or brake cleaner. Ex. H, at 5; Tr. 51-52. In the first and second photograph, there appears to be a

heavily worn decal that states “No Smoking.” Ex. H, at 2-3; Tr. 68-69. Cook explained that he had not noticed this small sign when conducting his inspection. The rest of the photographs reveal no sign warning against an open flame. Tr. 69-70; Ex. H, at 2-5.

After noticing the several cans of penetrating fluid, starting fluid, and brake cleaner inside the truck with no warning sign against smoking and open flames, Cook issued Citation No. 9656124 for a violation of section 77.1102. Tr. 70; Ex. A, at 2.

2. Finding of Violation

Citation No. 9656124 states that:

The Rain For Rent service truck (Ford F-550 Company number 1757) did not have signs warning no smoking or open flames. The service body contained several cans of starting fluid, [p]enetrating fluid, and different kinds of oil. This hazard exposes miners to burns, smoke inhalation, and explosion type hazards [that] would result in fatal type injuries.

Standard 77.1102 was cited 4 times in two years at mine 4800086 (0 to contractor VVG).

Ex. A, at 2. Based on his observations as memorialized in this Citation, inspector Cook concluded that Rain-for-Rent violated 30 C.F.R. § 77.1102. That regulation requires that, “[s]igns warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist.” 30 C.F.R. § 77.1102.

Regulatory Interpretation

The regulation’s language is clear enough to provide sufficient notice for what is necessary for its compliance, especially when taken in the context of the whole regulation. *See e.g., Bluestone Coal*, 19 FMSHRC at 1031. The following is required under 30 C.F.R. § 77.1102.

First, as a preliminary matter, to trigger the necessity of the signs, there must be an area or place where fire or explosion hazards exist. *Id.* The term “hazard” means a measure or danger to safety or health, a “possible source of peril, danger, duress, or difficulty,” or “a condition that tends to create or increase the possibility of loss.” *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997) (citing *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 827, n.7 (Apr. 1981)). Other sections of the C.F.R. shed further guidance on what “fire” and “explosion” hazards mean. The United States Supreme Court has made clear that “[s]tatutory construction...is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes it meaning clear...” *United Savings Ass’n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). *See also Pilot Life Ins. Co. v. Deadeaux*, 481 U.S. 41, 51 (1987) (“in expounding a statute, we [are] not...guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy[.]”).

Under 30 C.F.R. § 77.2(r), flash point refers to the “minimum temperature at which sufficient vapor is released by a liquid or solid to form a *flammable vapor-air mixture* at atmospheric pressure.” Elsewhere in the regulations for Surface Metal and Nonmetal Mines, flammable liquid means a liquid that has a flash point below 100-degree Fahrenheit, a vapor pressure not exceeding forty pounds per square inch at 100 degrees Fahrenheit. 30 C.F.R. § 56.2.⁸ In *Pennsylvania Glass Sand Corp.*, 2 FMSHRC 2930, 2939 (Oct. 1980) (ALJ), the administrative law judge considered evidence that the lubricating oil at issue had a flashpoint of 605 degrees Fahrenheit. The judge found that such a high flashpoint does not present a fire or explosion hazard. *Id.* For explosion hazards, the regulations define “explosive” as “any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion. Explosives include, but are not limited to black powder, dynamite, nitroglycerin, fulminate, ammonium nitrate when mixed with a hydrocarbon, and other blasting agents.” 30 C.F.R. § 77.2(q). These regulatory sections and Commission case law provides some guidance on “fire and explosion” hazards.

Second, the use of the conjunction “and” between “smoking and open flames” clearly requires both types of signs, one against smoking, and another against open flames. 30 C.F.R. § 77.1102. The ordinary definition of “and” is “[t]ogether with or along with; in addition to; as well as.” The Am. Heritage, *Dictionary of the English Language* (4th ed. 2009).⁹ This interpretation of the regulation is not novel. In *Summit Anthracite, Inc.*, 29 FMSHRC 1062, 1081 (Nov. 2007) (ALJ), the judge found a violation of section 77.1102 after determining that “in addition to warning against smoking, the standard requires warning against exposure to open flames.” In another case, an inspector issued a notice citing a violation of this standard after observing a service truck with a sign warning against smoking, but not with one warning against an open flame. *Texas Utilities Generating Co.*, 1 FMSHRC 185, 205 (Apr. 1979) (ALJ). At the time of the inspection, the truck contained oil and diesel fuel. *Id.* Even though the parties ended up settling the matter, they both agreed that there was a violation. *Id.* Both cases stand for the proposition that the standard requires both warnings to satisfy the regulation.

Third, the signs must be “readily seen” when posted. 30 C.F.R. § 77.1102. Under the plain language, this requirement would necessitate that the signs be within view of where the defined or recognized hazards exist. As further guidance, the dictionary definition of “readily” includes a characterization of promptness and ease. *See* The Am. Heritage, *Dictionary of the*

⁸ I recognize that this specific regulation focuses on flammable liquids rather than aerosols, like at issue in this case. I further recognize that this regulation involves a different part of the C.F.R. However, the regulation does provide a relevant baseline for what flashpoint is considered flammable by the Secretary and MSHA. Additionally, the part 56 regulations define “flash point,” the exact same, and flammable as “capable of being easily ignited and of burning rapidly.” 30 C.F.R. § 56.2.

⁹ In the absence of a regulatory definition, it is appropriate to consult a dictionary to assist in uncovering the ordinary meaning of operative terms. *See e.g., Am. Coal Co.*, 38 FMSHRC 2062, 2073-74 (2016); *Island Creek Coal Co.*, 20 FMSHRC 14 (1998); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996); *Nat’l Muffler Dealers Ass’n, Inc. v. United States*, 440 U.S. 472, 480 n. 10 (1979); *see also Peabody Twentymile Mining, LLC v. Sec’y of Labor*, 931 F.3d 992, 997 (10th Cir. 2019).

English Language (4th ed. 2009). A past ALJ case sheds additional guidance. *Rivco Dredging Corp.*, 10 FMSHRC 1195, 1197 (Sept. 1988) (ALJ). In that case, the judge found a violation when the operator stated that the sign was “not very legible” and that some of the diesel fuel storage tanks at issue were well-marked while others were not. *Id.* The sign in that case was “so weathered as to be illegible.” *Id.* This case shows that “readily seen” should also be legible and not so worn out that a person would have to take time to try and read or understand. *Id.*

The three requirements are therefore: (1) an area or place must exist with fire or explosion hazards; (2) if those hazards exist a sign against smoking and open flames must be posted; and (3) that sign must be readily seen, promptly legible, and not worn out. These will be analyzed after careful consideration and review of the parties’ arguments.

Parties’ Arguments

Rain-for-Rent makes a few key arguments challenging this Citation. First, it argues that the citation should be vacated because the Secretary failed to meet its burden of proving by a preponderance of evidence that a violation of 30 C.F.R. § 77.1102 occurred, specifically because there was no evidence of a fire or explosion hazard. Resp’t Br. at 8. Rain-for-Rent points out that Cook never tested the contents, looked at the safety data sheets, nor verified that there were flammable liquids in the truck. Tr. 87. As explained above, an inference may be drawn if it is inherently reasonable with a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res.*, 6 FMSHRC at 1138. Here, Cook’s testimony was uncontroverted and buttressed by the jointly admitted photographs showing cans containing various types of brake fluids, penetrating oils, and starting fluid. Ex. H at 3-4. Under the inference doctrine, inspector Cook did not have to pick up every single can and inspect it, particularly when such familiar items as Mac’s, Brakleener, and WD-40 could allow for an inference based on his personal experience and knowledge. I ultimately find Respondent’s argument unpersuasive.

Second, Rain-for-Rent suggests that the application of the regulation and issuance of this citation by the inspector was arbitrary and capricious. However, there is no abuse of discretion to accept the conclusions and testimony that the inspector offered. *Pero v. Cyprus Mining Corp.*, makes clear that, “[a]buse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” 22 FMSHRC 1361, 1366 (Dec. 2000). That principle is inapposite here. To the extent that Rain-for-Rent is challenging the standard itself, by alleging that MSHA’s current enforcement is too vague or inconsistent to know what it requires,¹⁰ my conclusion and references to other administrative law

¹⁰ Even under the “arbitrary and capricious” standard itself Rain-for-Rent’s position fails. Under that narrow standard, the court must not substitute its judgment for that of the agency. However, it must examine the relevant data and articulate a satisfactory explanation for its action including “a rational connection between the facts found and the choice made.” Additionally, the court “consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Twentymile Coal*, 30 FMSHRC 736, 755 (Aug. 2008) (quoting *Motor Vehicle Mfr’s Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Here, the action is the citation, and the Secretary provides sufficient relevant facts,

judges' cases establishing that the language is indeed clear and plain, disposes of that allegation. Resp't. Br. at 16.

Third, similarly, there is no fair notice issue when the language is plain. Resp't Br. at 12-15; *see e.g., Bluestone Coal*, 19 FMSHRC at 1031. Rain-for-Rent attempts to argue that there is no fair notice because of Cook's interpretation that any pressurized container, like Coca Cola or Axe Body Spray would need signage, and that Cook could not agree on a consistent and objective criterion for compliance. Resp't Br. at 14-15. Ex. D, 76-77, 82. However, Cook's interpretation is not necessarily that of the Secretary and Rain-for-Rent misstates or mischaracterizes Cook's testimony. Cook does not suggest that all pressurized containers pose such a hazard. In fact, he states, "[a]nd *sometimes* the aerosolized agent – the *compressed gas used, in itself*, is flammable." Tr. 50. Under his testimony, it depends on the compressed gas and chemical makeup used in the can itself. Elsewhere in the record, he explains that cited cans were flammable in nature based on their chemicals and intended purpose. Tr. 45-46, 47, 48, 49, 58. Thus, Respondent's fair notice argument also fails.

Fourth, Rain-for-Rent challenges the credibility of Cook. However, at hearing, I determined that he was an "extremely credible witness." Tr. 209. Another ALJ has explained that "credibility" means "the quality that makes something (as a witness or some evidence) worthy of belief." *Sec'y of Labor v. KenAmerican Res. Inc.*, 40 FMSHRC 1544, 1545 (Dec. 2018) (ALJ) (quoting *Credibility*, Black's Law Dictionary 448 (10th ed. 2014)). Here, his testimony regarding the cans and the signage is supported by Exhibit H. Such corroboration heightens his worthiness of belief. Cook also testified as to his personal experience, knowledge in the mining industry, and years of experience. Most damaging to Respondent's position is that it failed to present any witness to oppose or rebut Cook's testimony; it merely hopes that Cook's character would be doubted on some instances of potentially conflicting testimony. I decline that invitation and conclude that he provided strong testimony, he was mostly consistent in his responses, and he appeared to be honest and candid by admitting mistakes and acknowledging when he was not able to fully answer a question or remember a small detail. Tr. 209; Tr. 52, 54, 95, 119, 201,

The Secretary ultimately counters Rain-for-Rent's position by asserting that Citation No. 9656124 was properly issued as there is no dispute that there was no sign warning against open flames present anywhere on or near the truck. Sec'y Br. at 7-8. For the reasons below, I agree with the Secretary and find that she carried her burden of proving a violation.

Analysis of the Three Requirements

In this case, the Secretary established the requirements to prove a violation of section 77.1102. First, Cook provided extensive testimony as to the fire and explosion hazards that the aerosol cans and oil presented. In terms of explosiveness, he explained that aerosol or compressed cans place the liquid-vapor material under pressure, so if it is introduced to fire, any of the specified cans could overheat and explode. Tr. 47. The explosive hazard is the shrapnel from the combustible aerosol can that could cause injury. Tr. 47. Cook further stated that when the product is broken down to a smaller atomized structure, the aerosolized agent can become

especially the absence of a no open flames sign, to satisfy a rational connection between the facts recited above and its choice to issue the citation.

flammable. Tr. 50. For each one of the products, penetrating fluid, starter fluid, and brake cleaner, he goes on to explain that they pose a fire hazard, drawing from personal experience and reading some of the labels. Tr. 46-48. Starting fluid is used to start engines and is very flammable. Tr. 48. Specifically, Cook picked up the Brakleen and noticed that there was a fire and explosion hazard symbol on the label. Tr. 46-47. For the oil, Cook testified that it presents a fire hazard because of its inherent flammable nature and use as a heat source. Tr. 59-60. Cook also explained that the cans that were stored on their side in confined spaces, could leak flammable vapors, which also presents a fire and explosion risk. Tr. 149. His testimony provides a sufficient basis for a concern that any number of these cans could pose a fire or explosive hazard. Also, Rain-for-Rent presented no evidence to contradict this testimony as it declined to call a witness, notably Floyd, who had been present during the inspection. Tr. 8-11.

Alternatively, as Rain-for-Rent suggests, the next consideration is whether the flashpoint of the materials is sufficient to qualify as “flammable.” This case is ultimately distinguishable from *Penn. Glass*, as the materials in Citation No. 9656124 all have flashpoints much lower than the lubricating oil’s 605-degree Fahrenheit threshold. As Rain-for-Rent points out, the Secretary failed to present any evidence as to the flashpoint of these materials. However, this is not dispositive in this matter. Past ALJs have taken judicial notice of safety manuals. *Petro Chemical Insulation Inc.*, 37 FMSHRC 2826, 2832 n.2 (Dec. 2015) (ALJ) (taking judicial notice of the publicly available service manual for the Genie S-60 manlift); *see also Consol Penn. Coal Co.*, 44 FMSHRC 182 (Mar. 2022) (ALJ) (explaining what types of facts can be judicially noticed). In *Consol Penn. Coal*, the ALJ cited to Federal Rules of Evidence 201 and explained that a Commission ALJ “may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and reasonably [be] determined from sources whose accuracy cannot reasonably be questioned.” *Id.* at 190-91; *see also Union Oil Co. of Cali.*, 11 FMSHRC 289, 300 n.8 (Mar. 1989). Here, the flashpoints are readily available in the safety manuals or product data sheets for each of the products at issue, except for the cited oil.

Accordingly, I take judicial notice of the following flashpoint measurements. For the CRC Brakleen Non-Chlorinated Brake Parts Cleaner, the product data sheet makes clear that the material is highly flammable and has a flashpoint of 0 degrees Fahrenheit.¹¹ The Mac’s starting fluid has a flashpoint of -19.2 degrees Fahrenheit, and the WD-40 penetrating liquid has a flashpoint of 147 degrees Fahrenheit.¹² It is clear that these flashpoints are much lower than the 605 degree Fahrenheit benchmark in *Penn. Glass*, so it would be imprudent to find that case dispositive. 2 FMSHRC at 2939. If the regulatory definition’s measurement is considered, the Mac’s starting fluid and the CRC Brakleen are flammable as they are below 100 degrees Fahrenheit. *See* 30 C.F.R. § 56.2. The record suggests that new diesel was present in the bed of

¹¹ *See* CRC Industries, Inc., *Brakleen Non-Chlorinated Brake Parts Cleaner*, 14 Wt Oz (Apr. 9, 2021), [CRC Product Data Sheet for Brakleen® Non-Chlorinated Brake Parts Cleaner, 14 Wt Oz.](#)

¹² *See* WD-40 Co., *WD-40 Specialist Penetrant, Technical Data Sheet*, [ElzQtPoBg2m7p7p71fiWa21uyVsAy93hqP6RaPVR.pdf](#); NAPA, *Safety Data Sheet for NAPA Mac’s Premium Starting Fluid Spray*, NAPA Mac’s Premium Starting Fluid Spray - 11 Oz MAC 7216 | Buy Online - NAPA Auto Parts (also explaining how the aerosol is “extremely flammable”).

the truck,¹³ but an analysis of the flashpoint for that “new and used oil” would be merely speculative without more information. However, if the oil was similar to the diesel oil in *Texas Utilities Generating Co.*, then it could be deemed flammable and violative. Regardless, at least two of the products, the Mac’s and CRC Brakleen, in the service body of the truck could be considered flammable and potential fire hazards, which is sufficient to trigger the regulation’s posting and signage requirements.

Second, the parties jointly stipulated that at “the time of the inspection, the only sign on vehicle No. 1757 related to fire hazards was a No Smoking decal on the driver’s side window.” Jt. Stip. ¶ 7. This coupled with Cook’s credible testimony that he observed no sign on the truck warning against smoking and open flames, means that this case is like *Summit Anthracite* and *Texas Utilities Generating Co.* Tr. 42; 29 FMSHRC at 1082; 1 FMSHRC at 205. In both those cases, a violation was found because the operator only had a warning against smoking and not one against exposure to open flames. The evidence shows that Cook did not see any sign, but the parties jointly stipulated there was a no smoking decal. Tr. 42; Jt. Stip. ¶ 9. Rain-for-Rent provided no evidence to the contrary. In fact, the submitted photographs taken by Respondent at Exhibit H affirmatively reveal that there is only a “No Smoking” decal present. Nowhere on the truck is a no open flames warning depicted. Ex. H, 2-4. A no smoking sign is insufficient alone to comply with the standard. I thus find that Rain-for-Rent failed to satisfy the requirement to post warnings against both smoking and open flames.

Third, the warning against no open flames is not readily seen since it did not exist. Tr. 42; Ex. H at 2-4. For the “No Smoking” sign, the photograph depicts a small decal on the truck’s side door. Ex. H at 2-3. When zoomed in, the sign is faded and hardly legible. Ex. H at 3. During his inspection, Cook explained that he did not even notice that sign. Tr. 68, 124-25. At hearing, he testified that it is not completely legible, but he believes it says, “no smoking.” Tr. 69. I agree that the photographs show a small, worn-out decal. This case is like *Rivco Dredging*, where the judge found that the sign was not very legible, not well-marked, and thus violative of the regulation. 10 FMSHRC at 1197. I find *Rivco* persuasive and agree that a small, illegible or worn-out decal is not “readily seen,” which is required by 30 C.F.R. § 77.1102. Alternatively, Cook explains, on cross-examination, that the sign is not “readily seen” as any sign should be “readily visible from all approaches,” or “all four sides.” Tr. 123.¹⁴ Here, the photograph only shows an illegible sign on the driver’s side door, which is insufficient to satisfy the regulation. Because the Secretary established that all three requirements of the standard have not been satisfied, I find a violation of section 77.1102.

¹³ A potential oil that was present is diesel because Floyd informed Cook that he was on the mine site to service a light plant and as part of that service, was changing the oil on the plant’s diesel engine. Tr. 67, 142.

¹⁴ At hearing, Cook affirmed his deposition testimony which was introduced into evidence as Exhibit D. Cook in his deposition testimony discusses the meaning of “readily seen” and states that it should be from “all approaches, look towards that vehicle, side, back, front, readily seen.” Ex. D., Dep. at 19. He explained that it would mean a “minimum of four” signs. *Id.* at 20. Later, he states “[t]hat’s what the readily seen is for. It’s to protect people from walking up on a danger.” *Id.* at 41.

3. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator’s conduct with respect to that standard, in the context of the Mine Act’s purpose of limiting violations and protecting the safety and health of miners. *See, e.g., Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially affected. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Inspector Cook designated this Citation as reasonably likely to cause “fatal” injury or illness which would affect one person. Tr. 71, 73, 75. Following a second conference between the parties, the citation was modified from “reasonably likely” to “unlikely.” Ex. A at 51; Tr. 72-73. Rain-for-Rent does not seem to contest any of these gravity findings. Here, inspector Cook, given his years of mining experience, offered credible testimony that one person, Floyd, would be affected as he normally worked alone when servicing equipment and he was the only person in the immediate vicinity of the cited truck. Tr. 75. In the unlikely event of an explosion or fire occurring, inspector Cook also anticipated that possible injuries would be devastating on the human body and caused by shrapnel releasing from the pressurized and compressed aerosol cans. Tr. 73. For that reason, he characterized the potential injury or illness as fatal. Tr. 73.

Given the facts above and Rain-for-Rent’s silence on this issue, I affirm modified likelihood and severity and number of people likely to be affected.

4. Negligence

Negligence is not directly defined in the Mine Act, but the Commission has held that “judges may evaluate negligence from the starting points of a traditional negligence analysis” rather than based on the Secretary’s definition of negligence under 30 C.F.R. § 100.3(d). *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) (explaining that the MSHA regulations are not binding in Commission proceedings). The Commission has further recognized that “[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation ... occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission’s negligence analysis asks whether an operator has met “the requisite standard of care – a standard of care that is high under the Mine Act.” *Brody Mining*, 37 FMSHRC at 1702. To determine whether an operator has met its duty of care, Commission ALJs consider “what actions would have been taken under the same circumstances by a reasonably

prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Id.* (citations omitted). An ALJ, however, “is not limited to an evaluation of allegedly ‘mitigating circumstances’ and should consider the ‘totality of the circumstances holistically’.” *Id.* at 1702-03. Lastly, the Commission has recognized that an “operator’s knowledge (actual or constructive) is a key component of a negligence determination.” *Ohio Cty. Coal Co.*, 40 FMSHRC 1096, 1099 (Aug. 2018).

The Secretary’s regulations at 30 C.F.R. § 100.3 define moderate negligence as when, “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” Here, Rain-for-Rent does not challenge inspector Cook’s designation of moderate negligence. In his determination, Cook explained that moderate negligence was appropriate because Floyd had reasonably not known that he was required to have the signage. Tr. 71. According to what Floyd told inspector Cook, Floyd believed that since he was only a subcontractor, only the DOT rules applied to him, not the C.F.R. However, Floyd also informed Cook that he received his miner training and annual refresher, which suggests that Floyd should have known of this regulation and requirement. Tr. 71. Nonetheless, Cook credited Floyd’s belief as held in good faith and Cook determined that high negligence was not warranted.

Considering the totality of the circumstances and Cook’s credible testimony, I conclude that MSHA’s designation of moderate negligence is appropriate.

In sum, for Citation No. 9656124, I find a violation of section 77.1102, and affirm the likelihood, severity of any potential injury, the number of people affected, and the moderate negligence designations. As further explained below, the assessed penalty of \$133.00 is upheld.

I now turn to analyze the remaining Citation, No. 9656125.

B. Citation No. 9656125

1. Findings of Fact

On March 4, 2022, inspector Cook also inspected Rain-for-Rent’s fire extinguisher. Tr. 77-80. While observing the fire extinguisher, Cook noticed a small tag wired to it. Tr. 78, 82. However, the tag was ripped in half and contained no reference to the last date of inspection. Tr. 78. Cook asked Floyd about the missing part of the tag, and Floyd claimed that the entirety of the tag had been present that morning at the beginning of his shift. Tr. 79-80. Cook explained that he wrote the violation because the tag did not meet his understanding of the standard, which required a showing of an inspection date within the last six months. Tr. 77, 85. When asked what constitutes a permanent tag, he stated, “a tag on the extinguisher that would take more than just pulling it to get off. Like wired to it with a piece of wire, zip tied to it, a sticker on the fire extinguisher.” Tr. 164.

Cook further testified that usually the date of the examination is “punched out” since there is a place where the inspector can either punch a knife through or mark the date with a permanent marker. Tr. 82. In this case, Cook found no discernable date on the tag, and even

though Floyd claimed it was present earlier, Cook conducts a “snapshot in time” inspection. Tr. 92.

The photographic evidence submitted reveals a fire extinguisher with a blue tag stating, “[d]o not remove by order of the state fire marshal.” Ex. H, at 6. A small, wired tag is visible as well. Ex. H, at 6. Cook maintained that the exhibit constituted a “fair representation” of the fire extinguisher at the time of the inspection. Tr. 84. From the photograph, Cook still could not determine the date of the last inspection. Tr. 84.

Cook confirmed that the fire extinguisher had been in good working order and correct operating condition, so it did not present a hazard, but explained that it could be a paperwork violation. Tr. 77, 164. However, he testified that without first knowing whether the fire extinguisher was in good working order, a miner would not know if the fire extinguisher was going to work when he went to use it, so in the time spent trying to figure out the last inspection date, the miner could suffer smoke inhalation or burns. Tr. 84. He suggests that those are the potential hazards present when a fire extinguisher does not have a recorded last date of inspection. Tr. 84.

2. Finding of Violation

Citation No. 9656125 states that:

The Rain For Rent service truck (Ford F-550 Company number 1757) did not have a tag permanently attached to the extinguisher showing the last date of inspection. The extinguisher did have a paper tag affixed to the top of the extinguisher but it was torn in half and had lost any identifiable marks as to when it was last inspected. This exposes miners to smoke inhalation and burn type injuries resulting in permanently disabling injuries.

Standard 77.1110 was cited 4 times in two years at mine 4800086 (0 to contractor VVG).

Ex. A, at 4. Based on his observations as memorialized in the citation, inspector Cook concluded that Rain-for-Rent violated 30 C.F.R. § 77.1110. That regulation requires that “[f]irefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.” 30 C.F.R. § 77.1110.

Like section 77.1102, this regulation’s language is plain and clear enough to provide sufficient notice to an operator of what is required for compliance. As relevant here, 30 C.F.R. § 77.1110 requires that the *date of the fire extinguisher’s biannual examination* be recorded on the tag that is attached to the extinguisher (*emphasis added*). Even if the language arguably could be clearer, the Commission case law allows for consideration of the standard or regulation’s purpose to assist in understanding the requirements. *See e.g., Ideal Cement Co.*, 12 FMSHRC at 2416; *see also Emery Mining Corp. v. Sec’y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (explaining that the safety standards “must be interpreted so as to harmonize with and

further...the objective[s] of the Mine Act.”). The purpose of the standard is clear: to provide miners with a way of knowing whether the fire extinguisher is in good working order to effectively combat a fire that may occur. This is consistent with the overall purpose of the Mine Act to prioritize “the safety and health of [the mines’] most precious resource –the miner.” 30 U.S.C. § 801(a).

In this specific context, Commission ALJs have found a violation when the examination date was not present. *Margin Coal Co., Inc.*, 2 FMSHRC 1608, 1612 (June 1980) (ALJ) (finding a violation of section 77.1110 when a fire extinguisher on an explosives truck had no examination date); *Blackjack Coal Co., Inc.*, 2 FMSHRC 3353, 3364 (Nov. 1980) (ALJ) (finding a violation when portable fire extinguishers had not been provided with a permanent tag attached to the extinguishers showing the date of examination).

Rain-for-Rent primarily suggests that the focus of the issue is on the permanence of the tag. Resp’t Br. at 17-18. It argues¹⁵ that there is no requirement that the inspection date be continuously maintained on the tag for it to be visible or legible. Resp’t Br. at 17. As support, it adds that there is no evidence that it failed to attach a permanent tag with the date of the inspection at some point in time. Resp’t Br. at 17. It lastly states that “permanent tag” is vague and does not provide fair notice.

The Secretary counters that the language of the regulation necessitates that the date of the last examination be present and recorded on the tag. Sec’y Br. at 12-13. If the tag was allowed to be destroyed or torn, then the miners would have no way of knowing if the fire extinguisher was in working order or correct operating condition. Therefore, under Respondent’s approach, the purpose of the standard would be frustrated and unable to be achieved.

I agree with the Secretary. The determinative issue in this case is whether there was a recorded examination date on the tag at the time of the inspection. Any discussion of the permanent attachment to the fire extinguisher or interpretation thereof is a red herring when applied to the specific facts at issue here.

Here, the facts are simple. Cook wrote a citation because the date of the fire extinguisher’s last examination was absent from the tag that was attached. The issue is not about

¹⁵ Rain-for-Rent provides another argument explaining that when analyzing the standard, the relevant inquiry is whether the requisite inspection occurred, not whether the tag was torn off. Resp’t Br. at 18-19. As support, it cites *North Idaho Drilling, Inc.*, 35 FMSHRC 2472, 2489 (Aug. 2013). This argument is not persuasive. For starters, the cited case addresses a wholly different standard at § 56.4201(a), which states, “Firefighting equipment shall be inspected according to the following schedules... (2) [a]t least once every twelve months, maintenance checks shall be made of mechanical parts...” Without going too much into an analysis, clearly the language for that standard is much different as it makes no mention of a tag. Rather, the *North Idaho* case focuses on whether an actual inspection occurred because that is what the underlying standard required. In short, that case is inapposite here. I note that Rain-for-Rent points to several other case illustrations in its post-hearing brief that are not relevant. For example, Rain also cites *Summit Anthracite*. But, that case deals with 30 C.F.R. § 75.1715 involving a check-in and check-out system. 24 FMSHRC 720, 763 (July 2002) (ALJ).

permanence, or a tag being affixed to the extinguisher. Cook's citation and testimony confirm that there was in fact a tag permanently attached to the top of the extinguisher. Ex. A, at 4; Ex. H, at 6; Tr. 78. Regardless of whether the tag was affixed, there is no point in having such a tag affixed to the extinguisher if the date of the inspection is no longer present. The protective purpose of the regulation, which is to assist miners in recognizing which equipment would likely be in good working order to combat a fire hazard, would be hindered. *See e.g.*, Tr. 84. That is what occurred here. Cook noticed that the tag had been ripped in half so he could not tell the date, month, or even year that it was last inspected. Tr. 82. This provides a miner, who picks up the fire extinguisher, with little to no confidence that it would work. Tr. 84. Because the purpose of the standard would be hindered and the evidence reveals that the tag had been torn or ripped off leaving behind no last examination date, a violation of section 77.1102 occurred.

3. Gravity

Inspector Cook designated this Citation as unlikely to result in a permanently disabling injury, which would affect one person. Ex. A, at 4. Respondent does not contest any of these gravity findings. Cook, like for the other citation, explained that Floyd would be the only one affected as he was the sole person in the vicinity of the cited truck and extinguisher. Tr. 87-90; Tr. 75. For the severity of injury, Cook explained that any injury that would occur would result in smoke inhalation, exposure to any chemicals from the truck, and would be permanently damaging to the lungs. Tr. 86, 90. I conclude that Cook presented credible testimony on these two gravity findings.

However, there is no evidence that the "unlikely" designation is proper. Cook testified that after his inspection of the fire extinguisher, he determined it to be in good working order and correct operating condition. Tr. 87, 89; 77. Since it was in this condition, there would be no likelihood of injury. When asked at hearing to convince the ALJ why this should be "unlikely," Cook provided unpersuasive testimony and at one point said, "I can't." Tr. 90. He also stated, "[i]f [Floyd] had picked the extinguisher up that morning, turned it upside down, done the full inspection on it, I would have rated it 'no likelihood' because the extinguisher...was in proper working condition. But without him knowing exactly how to do that full inspection...there was no way of knowing that it was...in full working condition." Tr. 87. This reasoning is a bit confusing, especially since the fire extinguisher was in good working condition. Confusion aside, it was usable, operative, and in good working condition. I therefore lower the likelihood of injury from "unlikely" to "no likelihood."

4. Negligence

Inspector Cook designated this violation as resulting from moderate negligence. Respondent does not contest this negligence finding. Cook credibly testified that he characterized the level of negligence as moderate because Floyd knew that the tag with the last examination date needed to be there, but it was not present at the time of the inspection. As a potential mitigating circumstance, Cook accepted Floyd's claim that the tag had been present earlier in the shift, so Floyd had no reason to know a violation existed. Tr. 85-86. Floyd also had no knowledge of how or why the tag had been ripped. Tr. 86, 167. He testified that since the tag was present that morning, he observed the date, but that he could not remember it. Tr. 86. A

second mitigating circumstance is that Floyd checked and saw that the gauge showed the extinguisher was in “good” working order. Tr. 86. Cook concluded that Floyd did his “due diligence” to verify the gauge and dial, which revealed the fire extinguisher was in working order, but Cook also recognized that Floyd had not known how to conduct a full inspection. Tr. 87, 165-66. Given Cook’s testimony and no contradictory evidence or testimony presented by Respondent, I affirm the assessed level of moderate negligence.

In sum, for Citation No. 9656125, I find a violation of section 77.1110, and affirm the severity of any potential injury, the number of people affected, and moderate negligence designations. However, I modify the likelihood of occurrence from “unlikely” to “no likelihood,” and assess a penalty of \$133.00, as further explained below.

VII. Penalty

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

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

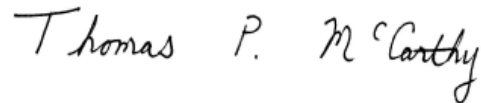
30 U.S.C. § 820(i).

For Citation No. 9656124, the Secretary proposed a regular assessed penalty of \$133.00. In the fifteen months preceding issuance of the citation, MSHA issued two violations of section 77.1102 to the Kemmerer Mine, but none specifically to Rain-for-Rent. *See* MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 26, 2025). Neither party addresses whether there would be a negative effect on the operator’s ability to continue in business. Without any evidence, I presume that no such adverse effect would occur. *See John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (confirming 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.”) (citations omitted). I also find that the small penalty proposed is appropriate to the small size of the business of Rain-for-Rent. As discussed above, I determined Respondent’s negligence to be moderate. Regarding the gravity of the violation, I found that it would affect one person and was unlikely to result in a fatal injury. Moreover, Respondent demonstrated good faith by immediately taking the truck off the mine property to correct the citation. Ex. A, at 2. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$133.00.

For Citation No. 9656125, the Secretary proposed a regular assessed penalty of \$133.00. In the fifteen months preceding issuance of the citation, MSHA issued one violation of section 77.1110 to the Kemmerer Mine, but none specifically to Rain-for-Rent. *See* MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 26, 2025). Like the first citation, there is a presumption that no adverse effect on the operator’s ability to continue in business would occur. *See e.g., John Richards Const.*, 39 FMSHRC at 965. Also, the \$133.00 penalty is appropriate for the small size of the business. As discussed above, I determined Respondent’s negligence to be moderate. Regarding the gravity of the violation, I found that it would affect one person and that there was no likelihood of a resulting permanently disabling injury. Moreover, Respondent demonstrated good faith by immediately taking the truck off the mine property to correct the citation. Ex. A, at 4. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$133.00.

VIII. Conclusion and Order

In light of the foregoing, it is hereby **ORDERED** that Citation No. 9656124 be **AFFIRMED** as modified by MSHA,¹⁶ Citation No. 9656125 be **MODIFIED** to reduce the likelihood of occurrence from “unlikely” to “no likelihood,” and that Respondent pay a total civil penalty of \$266.00 within 30 days of this Decision.¹⁷ Accordingly, this case is **DISMISSED**.



Thomas P. McCarthy
Administrative Law Judge

¹⁶ The citation is affirmed with the modification that the parties reached with MSHA reducing the likelihood of occurrence from “reasonably likely” to “unlikely.” Ex. A, at 51; Tr. 72.

¹⁷ Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508> or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Karen E. Bobela
Office of the Solicitor
U.S. Department of Labor
1244 Speer Blvd., Suite 515
Denver, CO 80204
Bobela.karen.e@dol.gov

Byron J. Walker
Ty R. Bordenkircher
Rose Law Firm
120 E 4th St.
Little Rock, AR 72201
bwalker@roselawfirm.com
tbordenkircher@roselawfirm.com