NOTICE

1. Enclosed is a copy of a decision by an Administrative Law Judge of the Federal Mine Safety and Health Review Commission. The issuance date of this decision appears on the first page of the Decision.

THIS DECISION MUST BE POSTED ON THE MINE BULLETIN BOARD BY THE OPERATOR.

2. You may petition for review of this decision by the Commission. A PETITION FOR DISCRETIONARY REVIEW must be received by the Commission within thirty (30) calendar days after the issuance date of the decision to be considered [29 C.F.R. § 2700.5(f) and .70(a)]. If this decision is an ORDER OF TEMPORARY REINSTATEMENT, the Petition for Review must be received within 5 days of the receipt of the order [29 C.F.R. § 2700.45(f)].

If a party wishes to file a petition for discretionary review, you are encouraged to file it within the Commission's electronic filing system (https://www.fmshrc.gov). Petitions are not currently being accepted via fax during the Commission's pandemic related operational changes (https://www.fmshrc.gov). If you mail the petition, you should allow enough time for delivery by the thirtieth day. Petitions should be filed at:

DOCKET OFFICE
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Ave., N.W., Suite 520 N
WASHINGTON, D.C. 20004-1710
Telephone No. (202) 434-9950

3. The Federal Mine Safety and Health Review Commission's Rules of Procedure specify that a petition may be filed only on one or more of the following grounds:

A. A finding or conclusion of material fact is not supported by substantial evidence.
B. A necessary legal conclusion is erroneous.
C. The decision is contrary to law or to the duly promulgated rules or decision of the Commission.
D. A substantial question of law, policy or discretion is involved.
E. A prejudicial error of procedure was committed.

Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignment of error are based on the record. Statutes, regulations or principal authorities shall be relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge has not been afforded an opportunity to pass. For further details on the filing of documents and the review process, see 30 U.S.C. § 823{d) and Commission rules 5 through 9 and .70 through .78 [29 C.F.R. §2700.5-.9 and .70-.78].

4. A Petition for Review must be served on the opposing party.

5. If a petition is filed, each party will be notified of the Commission's action on the petition.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

August 31, 2026

ROBERT THOMAS,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEST 2018-0402-DM
	:	MSHA Case No. WE-MD-2018-06
v.	:	
	:	
	:	
CALPORTLAND COMPANY,	:	Mine: Sanderling Dredge
Respondent.	:	Mine ID: 45-03687
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2019-0205
Petitioner,	:	
	:	
v.	:	
	:	
CALPORTLAND COMPANY,	:	Mine: Sanderling Dredge
Respondent.	:	Mine ID: 45-03687

DECISION ON REMAND
ORDER DENYING RESPONDENT'S MOTION
FOR DISCOVERY AND REQUEST FOR HEARING
AND
ORDER TO PAY

Before: Judge Paez

This consolidated proceeding was remanded upon an Order issued by the Commission on December 4, 2025. The narrow issue now before me is the calculation of damages and interest owed to Complainant Robert Thomas ("Thomas"). The matter arises out of a complaint of discrimination brought by Thomas against Respondent CalPortland Company ("CalPortland"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, ("Mine Act"), 30 U.S.C. § 815(c)(3). As of April 20, 2026, CalPortland has exhausted all of its appeals. *Thomas v. FMSHRC and CalPortland Co.*, No. 24-1442, 2025 WL 2651299, at *1 (9th Cir. Sep. 16, 2025), *cert. denied*, No. 25-975, 2026 WL 1052123 (U.S. Apr. 20, 2026). This matter, with its massive record, was filed with the Commission in 2018 and has been pending through trial and appeals for over eight years. This matter was assigned to me on May 15, 2026, to conclusively resolve and calculate any damages and interest owed to Thomas.

I. BACKGROUND

On December 10, 2018, ALJ Miller issued a Decision and Order finding that CalPortland had discriminated against Thomas in violation of section 105(c)(1) of the Mine Act. *CalPortland Co.*, 40 FMSHRC 1503 (Dec. 2018) (ALJ). ALJ Miller awarded Thomas $76,185.67 in back pay, lost benefits, plus additional interest. Miller's calculations were based upon joint stipulations agreed to by the parties. The parties filed joint stipulations dated August 10, 2018, where they agreed to Thomas' average number of weekly hours worked, regular rate of pay, and benefits earned while working for CalPortland. Post-hearing, the parties filed an addendum to their joint stipulations on September 12, 2018, where they agreed to insurance and pension amounts paid to Thomas while working at CalPortland, as well as Thomas' mitigation efforts while working for another employer, A-1 Redi Mix. Following her decision on December 10, 2018, ALJ Miller issued a Supplemental Order for Attorneys' Fees and Costs on January 8, 2019, awarding $74,852.05 in attorneys' fees and costs to Thomas. After an appeal to the Commission and then the Ninth Circuit, the case was returned to ALJ Miller on remand. ALJ Miller affirmed her order requiring payment of the back pay, lost benefits, interest, and attorneys' fees and costs previously ordered under her December 10, 2018 and January 8, 2019 orders. ALJ Miller further issued an Order for Back Pay and Amended Supplemental Order for Attorney's Fees and Costs on February 9, 2022, awarding Thomas $224,220.15 in additional back pay, lost benefits, and interest, as well as an additional $110,558.26 in attorneys' fees and costs incurred during the appeals process. As of her order dated February 9, 2022, the total amount of back pay, benefits, interest, attorneys' fees and costs accrued was the sum of $493,652.66.

To conclusively resolve and calculate damages and interest owed to Thomas, I issued an Order to Reinstate, Order to Pay, and Order for Supplemental Briefing on May 29, 2026. My Order reinstated ALJ Miller's prior orders ordering payment of back pay, lost benefits, attorneys' fees and costs, and interest, and I adopted ALJ Miller's reasoning therein. Further, my Order required CalPortland to reinstate Thomas to his former position with CalPortland with the same pay and benefits as he would have accrued had he remained employed. My Order also ordered CalPortland to pay back pay and lost benefits to Thomas in the amount of $300,405.82 within 30 days of issuance of my Order. CalPortland was further ordered to pay $185,410.31 in attorneys' fees and costs to Thomas within 30 days of issuance of my Order. Finally, CalPortland was ordered to pay a civil penalty in Docket No. WEST 2019-0205 in the amount of $17,500.00, plus any applicable interest within 30 days of issuance of my Order.

My Order further required supplemental briefing from the parties, whereby Thomas was ordered to provide estimates of damages and interest accrued since the issuance of ALJ Miller's last order on February 9, 2022. Thomas filed Complainant's Third Memorandum in Support of Fees and Costs on June 27, 2026 (Compl't. Mem.), as well as declarations, an accountant expert report, time sheets, and tax records in support where he submitted an accounting of back pay, lost benefits, attorneys' fees and costs, and interest he alleges is owed in this matter. CalPortland was ordered to submit its response to Thomas' damages estimate within twenty days of service of Thomas' submission. On July 8, 2026, CalPortland filed an Opposition to Complainant's

Third Memorandum in Support of Fees and Costs (Resp't Opp. to Compl't. Mem.), as well as a Motion for Discovery and Hearing (Resp't Mot.). Thomas filed Complainant's Response to Respondent's Motion for Hearing and Discovery (Compl't. Resp. to Resp't Mot.) on July 10, 2026. Finally, CalPortland filed a Request for Reply and Reply to Motion for Discovery and Request for Hearing (Resp.'t Reply). I hereby **GRANT** CalPortland's request to file a reply in support of its motion for discovery and hearing.

II. RESPONDENT'S MOTION FOR DISCOVERY AND REQUEST FOR HEARING

A. <u>Parties' Arguments</u>

In its Motion for Discovery and Hearing, CalPortland argues that Thomas' damages calculations regarding back pay, lost benefits, mitigation offsets, and interest is speculative rather than based on evidence. (Resp't Mot. at 1–2.) CalPortland argues that due process demands discovery and an evidentiary hearing to develop a complete and testable record whereby the parties can examine and challenge the evidence in support of the damages. (*Id*. at 2, 10.) CalPortland argues Thomas did not accept its offer to continue working and did not request temporary reinstatement during litigation, which CalPortland could have been used to fully mitigate his back pay loss. (*Id*. at 4–5.) CalPortland further argues it was denied briefing and a hearing on Judge Miller's supplemental order calculating damages. (*Id*. at 8.) CalPortland denies that the 2018 stipulations during which it agreed to Thomas' pay rate, hours, and mitigation efforts should be used in calculations during the post-2022 period. (*Id*. at 10.) As such, CalPortland requests discovery and an evidentiary hearing on relief awarded in ALJ Miller's February 9, 2022, order and on all damages allegedly accrued since her 2022 order. (*Id*. at 9.)

In response to CalPortland's motion for discovery and hearing on damages, Thomas argues he is owed all back pay, lost benefits, attorneys' fees and costs, and interest incurred due to CalPortland's firing him in retaliation for engaging in protected activity. (Compl't Resp. to Resp't Mot. at 1.) Thomas argues CalPortland erroneously relies on facts that the appeals courts have set aside or reversed, including whether Thomas has mitigated his damages or was actually terminated by CalPortland. (*Id*. at 4–5.) Thomas argues CalPortland has waived any affirmative defenses regarding mitigating damages by failing to raise this issue in its pleadings or at hearing. (*Id*. at 1–3, 6–8.) Thomas points out that CalPortland had an opportunity to propose alternative calculations of damages or to contest the mitigation of damages and has failed to do so. (*Id*. at 7.) Finally, Thomas alleges CalPortland has withheld certain financial records requested by Thomas. (*Id*. at 8–9.) Thomas argues CalPortland's request for discovery and hearing is an attempt to take another bite at the apple and relitigate issues that were previously decided.

In its reply brief, CalPortland raises five arguments. First, it argues that Thomas mischaracterizes the 2018 stipulations, as CalPortland maintains these stipulations were limited to issues related only to the 2018 hearing and should not be used as the basis for later damages calculations. (Resp't Reply at 2.) Second, CalPortland argues it did previously raise the issue of mitigation and points to arguments it made in its Motion for Discovery and Hearing, as well as its Opposition to Complainant's Third Memorandum in Support of Fees and Costs. (*Id*. at 3.) Third, CalPortland maintains the Ninth Circuit remand to the Commission was limited to the "matter of the ALJ's [February 9, 2022] supplemental order regarding the amount of damages

. . . to be conclusively resolved" and that the Ninth Circuit did not order the Commission to award any new damages claims. (*Id*. at 3–4.) Fourth, CalPortland argues it was not obligated to reinstate Thomas pending litigation of this case through the appellate process. (*Id*. at 4–5.) Finally, CalPortland denies it withheld financial documentation from Thomas and that this request underscores the need for additional discovery in this case. (*Id*. at 5–6.)

B. Analysis and Legal Conclusions

This case is before me on the issue of damages and interest owed to Thomas due to CalPortland firing him in retaliation for engaging in protected activity. In its second review of this case, the Ninth Circuit vacated the Commission's most recent decision and remanded it to the Commission. In doing so, it clarified that ALJ Miller's 2022 order regarding damages remained to be "conclusively resolved." *Thomas v. FMSHRC and CalPortland Co.*, No. 24-1442, 2025 WL 2651299, at 3 (9th Cir. Sep. 16, 2025). This clarification does not, however, preclude the Court from evaluating and ordering any other damages that have accrued. As my Order of May 29, 2026, explained, CalPortland remains liable for Thomas' back pay that accrues up until the time at which he is reinstated. *See Ark.-Carbona Co.*, 5 FMSHRC 2042, 2052 n.14 (Dec. 1983) (holding that "[i]n a discrimination case where, as here, there has been an illegal discharge, the back pay period normally extends from the date of the discrimination to the date a bona fide offer of reinstatement is made."); *cf. Inda v. United Air Lines, Inc.*, 405 F. Supp. 426, 435 (N.D. Cal. 1975) (holding that, under Title VII, "United is further liable to plaintiffs for back pay in 1975 until such time as they are reinstated pursuant to this Court's order."). If the prevailing employee is not reinstated during the appellate process, the back pay period remains open and encompasses the time that the appeal was pending. *Cf. Taylor v. Philips Industries, Inc.*, 593 F.2d 783, 788 (7th Cir. 1979) (holding that, under Title VII, "[b]ecause we hold that Taylor was the victim of unlawful discrimination, the relief should cover the period up until the date of her reinstatement, including the time occupied by this appeal."). I reject CalPortland's argument that the Ninth Circuit's clarification of an issue that was yet to be conclusively resolved overrides the Mine Act and its requirement that Thomas be made whole through damages owed until the time he is reinstated to work. I determine that CalPortland is not entitled to additional discovery and hearing for this reason.

Indeed, the parties voluntarily entered into joint stipulations in 2018. In these stipulations the parties agreed to Thomas' average number of weekly hours worked, regular rate of pay, and benefits earned while working for CalPortland. In a post-hearing addendum to these stipulations, the parties further agreed to insurance and pension amounts paid to Thomas while working at CalPortland, as well as Thomas' mitigation efforts while working for A-1 Redi Mix. CalPortland argues these stipulations should not serve as the basis for calculating back pay, lost benefits, or mitigation offsets when calculating damages owed to Thomas and that discovery and hearing are necessary to determine damages that are not speculative. This issue was previously addressed by the Sixth Circuit. Similar to this present case, in the Mine Act discrimination case *Con-Ag*, the ALJ asked the parties to submit back pay and damages calculations. *Con-Ag, Inc. v. Sec'y of Labor*, 897 F.3d 693 (6th Cir. 2018). The Secretary promptly submitted his calculations, but Con-Ag did not submit any numbers or even respond to the ALJ's initial request and follow-up three weeks after the deadline. The hourly wage rate and overtime wage rate for the complainant in Con-Ag had been agreed to by the parties through stipulations. *Sec'y of*

Labor on behalf of Groves v. Con-Ag, Inc., 39 FMSHRC 1811, 1820 (Sept. 2017) (ALJ). Ultimately, the Sixth Circuit denied Con-Ag's petition for review as to the calculation of damages finding that Con-Ag had ample opportunity to provide calculations before and during hearing and that Con-Ag failed to raise the issue of back pay calculations in its petitions to the Commission for discretionary review. *Con-Ag, Inc. v. Sec'y*, 897 F.3d at 706–07. Here, I find unpersuasive CalPortland's argument that the stipulations to which it agreed should not be used for calculating damages owed to Thomas. CalPortland cites no caselaw in support of its argument and provides no reasons why the stipulated numbers could be considered flawed. I find here, as did the Sixth Circuit in *Con-Ag*, that it is appropriate and reasonable to rely on the numbers agreed to by the parties in stipulations in calculating damages owed to Thomas until such time he is reinstated.[1]

CalPortland repeatedly brings up issues in support of its argument for additional discovery that have already been decided. For instance, whether Thomas was terminated or voluntarily resigned was decided by ALJ Miller. Her December 2, 2021, decision on remand found, "[b]ased on my careful review of the evidence and my credibility determinations of the witnesses at hearing, I find that Thomas's suspension and later termination would not have occurred but for his protected activities." *CalPortland Co.*, 43 FMSHRC 531, 548 (Dec. 2021) (ALJ). Next, CalPortland asserts that in determining Thomas' mitigation efforts, the Court should consider that Thomas did not request temporary reinstatement at hearing. Yet, pursuant to section 105(c)(2) of the Mine Act, only the Secretary can request temporary reinstatement. 30 U.S.C. § 815(c)(2). This case arises under section 105(c)(3) of the Mine Act after the Secretary determined not to pursue Thomas' case, so the temporary reinstatement of Thomas at the time of hearing was statutorily barred. *See* 30 U.S.C. § 815(c)(3). This argument is therefore irrelevant to the Court's analysis of whether Thomas has mitigated his damages. Further, in her 2018 and 2021 decisions, ALJ Miller ordered reinstatement of Thomas, which I further ordered in my Order of May 29, 2026. I determine that these issues have been decided without the need for further discovery and hearing.

This case has been pending since May 23, 2018. Throughout the appeal process the parties have had ample opportunity to raise and brief issues, including those pertaining to damages now owed to Thomas. My Order of May 29, 2026, required the parties to submit updated estimates of Thomas' back pay, lost benefits, and interest accrued. Thomas understood this order and timely filed Complainant's Third Memorandum in Support of Fees and Costs on June 27, 2026, as well as declarations, an accountant expert report, time sheets, and tax records in support. Thomas' estimates provide a detailed accounting of back pay, lost benefits,

[1] Thomas submits alternative back pay and lost benefits calculations whereby annual raises and additional overtime are assumed for the work Thomas would have otherwise performed at CalPortland. (Compl't Mem. at 20–22; McHugh Decl. at Ex. D at 48–56.) These alternative calculations also use Thomas' actual pay earned while working for A-1 Redi Mix to mitigate his damages, rather than the stipulated pay rate. (McHugh Decl. at Ex. D at 48–56.) As I have determined it is appropriate and reasonable to use the parties' stipulations for calculations, I reject these alternative calculations. I also take no position on the parties' arguments regarding the additional production of financial records requested by Thomas from CalPortland, as they are irrelevant to the calculation of damages based on the parties' stipulations.

attorneys' fees and costs, and interest he alleges is owed in this matter. CalPortland was ordered to submit its response to Thomas' damages estimate within twenty days of service of Thomas' submission, which was CalPortland's opportunity to dispute the numbers provided by Thomas. On July 8, 2026, CalPortland filed an Opposition to Complainant's Third Memorandum in Support of Fees and Costs whereby it argued Thomas was not entitled to damages because CalPortland asserts he was offered an opportunity to return to work. As noted above, ALJ Miller decidedly found Thomas was terminated and did not voluntarily resign, as such he did not in reality have an opportunity to return to work. CalPortland's opposition to Thomas' memorandum also repeated its argument that the 2018 stipulations should not be used in calculating damages beyond 2018. I have addressed this argument above. What CalPortland's opposition to Thomas' memorandum fails to do, however, is provide its own estimates of damages owed. The opposition does not meaningfully dispute the numbers submitted by Thomas, other than to attack Thomas' attorneys' fees request as vague block billing that is duplicative without pointing to any specific attorney billing entry. (Resp't Opp. to Compl't. Mem. at 12.) CalPortland did not ask for additional time to have an expert review Thomas' estimated damages. Rather, it has used its response as an attempt to persuade the Court to ignore the previous ALJ's rulings and relitigate issues that have already been settled. CalPortland had the same opportunity as Thomas to provide the Court with a detailed accounting of damages that are now owed to Thomas, which it failed to do. Accordingly, I reject CalPortland's argument that without additional discovery and hearing, it will be denied due process.

As of April 20, 2026, CalPortland exhausted all its appeals. *Thomas v. FMSHRC and CalPortland Co.*, No. 24-1442, 2025 WL 2651299, at *1 (9th Cir. Sep. 16, 2025), *cert. denied*, No. 25-975, 2026 WL 1052123 (U.S. Apr. 20, 2026). I will not grant CalPortland's last gasp attack to the adjudication process by reopening discovery and providing an evidentiary hearing to relitigate issues from eight years ago. I note that, "[a]lthough it is the policy of the law to favor hearing a litigant's claim on the merits, here that policy is outweighed by the need to achieve finality in litigation." *See* 11 Wright & Miller, *Federal Practice & Procedure* § 2857 at 159 (1973); *American Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1063 (D.C. Cir. 1986). We have now reached finality and CalPortland must comply with my Order of May 29, 2026, ordering payment of previously ordered back pay, lost benefits, attorneys' fees and costs and pay additional damages that have accrued since 2022.

Based on the foregoing reasoning, CalPortland's Motion for Discovery and Request for Hearing is **DENIED**.

III. DAMAGES AND RELIEF

The Mine Act gives the Commission the authority in proceedings under section 105(c)(3) to assess against an operator "a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner." 30 U.S.C. § 815(c)(3). The Commission determined back pay "is the sum a miner would have earned but for the discrimination, less his net interim earnings. Gross back pay encompasses not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package." *Shamrock Coal Co.*, 15 FMSHRC 972, 976 (June 1993). In addition, the Act's legislative history makes clear that Congress intended to provide "all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct." S. Rep. No. 181, 95th Cong., 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978). An award of attorneys' fees is "a matter that lies within the sound discretion of the trial judge." *E. Assoc. Coal Corp.*, 7 FMSHRC 2015, 2027 (Dec. 1985).

ALJ Miller, in previous orders which I have reinstated, awarded a total of $300,405.82 for back pay and lost benefits accrued through February 9, 2022. ALJ Miller also awarded a total of $110,558.26 in attorneys' fees and costs accrued through February 9, 2022. CalPortland was ordered to pay these amounts within 30 days of issuance of my Order dated May 29, 2026.

My Order of May 29, 2026, also ordered supplemental briefing from the parties on updated estimates of (1) the back pay, lost benefits, and quarterly interest at the Federal underpayment rate to which Thomas is entitled for the period between February 9, 2022, and May 29, 2026 (the date of my Order's issuance); (2) the reasonable attorneys' fees and costs incurred between February 9, 2022 and May 29, 2026; (3) the quarterly interest owed on Thomas' initial back pay and lost benefits award of $300,405.82 at the Federal underpayment rate through the date of payment; and (4) the quarterly interest owed on Thomas' initial attorneys' fees and costs award of $185,410.31 at the Federal underpayment rate through the date of payment. Thomas filed Complainant's Third Memorandum in Support of Fees and Costs on June 27, 2026, along with declarations, an accountant expert report, time sheets, and tax records in support of his estimated damages calculations. CalPortland filed an Opposition to Complainant's Third Memorandum in Support of Fees and Costs on July 8, 2026. CalPortland did not provide any updated estimates of back pay, lost benefits, attorneys' fees and costs, or interest. Nor did CalPortland submit a meaningful analysis of the estimates filed by Thomas or request additional time to have an expert witness review Thomas' accounting, as addressed above. Accordingly, my Order relies on the estimates provided by Thomas, as he is the only party to provide the Court with back pay, lost benefits, attorneys' fees and costs, and interest estimates and documentation in support of these estimates. In my Order of May 29, 2026, I adopted ALJ Miller's reasoning for calculating damages, which I will further employ here, including the reliance on stipulated pay rates, hours worked, and benefits accrued as well as Thomas' mitigation efforts. *See Con-Ag, Inc. v. Sec. of Labor*, 897 F.3d 693 (6th Cir. 2018).

A. **<u>Robert Thomas' Back Pay, Lost Benefits, and Interest Accrued since February 9, 2022</u>**

Thomas' Third Memorandum in Support of Fees and Costs argues additional back pay should be calculated using the pay rate and number of hours worked stipulated to at hearing. (Compl't. Mem. at 15–20.) In support of its estimates, Thomas submitted a report by CPA expert accountant Scott Bargaehr and cites to the 2018 stipulations in which the parties agreed on Thomas' pay rate, hours worked, benefits, and mitigation efforts. (*Id*.) The accounting report also calculates quarterly interest using the short-term Federal underpayment rate established by the Internal Revenue Service (IRS). (*Id*. at 15–17.) This report uses Thomas' stipulated hourly rate of $26.90 and an average of 53.9 hours per week worked while working for CalPortland.

(*Id*. at 15.) In calculating the back pay and lost benefits that have accrued since February 9, 2022, Bargaehr's accounting report relies upon the following stipulated numbers:

AD&D Insurance	$2.02 per month
Annual Money Purchase Payment	12 % of base pay
Short Term Disability Insurance	$12.77 per month
Average Hours	53.9 hours per week
Rate of Pay	$26.90 per hour
Salary – Regular Time	$1,076 ($26.90 x 40 hours)
Salary – Overtime	$560.87 ($40.35 x 13.9 hours)
Salary – Combined	$1,636.87

(Compl't. Mem. at 15.)

Bargaehr's accounting report also calculates Thomas' mitigation efforts from the time he spent working for A-1 Redi Mix. Bargaehr's accounting report uses the following stipulated numbers for mitigation efforts:

Average Hours Worked for A-1 Redi Mix	45.07
Total Salary Working for A-1 Redi Mix	$851.73 per week

(Compl't. Mem. at 15.) After calculating the back pay and lost benefits owed to Thomas since February 9, 2022, and subtracting the pay he earned at A-1 Redi Mix as mitigation, Thomas estimates $323,984.49 has accrued in back pay and lost benefits, as well as $49,447.27 in interest, since February 9, 2022. (*Id*. at 15–17.)

CalPortland's opposition to Thomas' Third Memorandum does not offer an alternative methodology or provide alternative estimates or evidence in support of any alternative estimates for calculating the back pay, lost benefits, and interest that has accrued since February 9, 2022. (Resp't Opp. to Compl't. Mem.) CalPortland instead argues Thomas was not entitled to damages because CalPortland asserts Thomas was offered an opportunity to return to work. As noted above, ALJ Miller determined Thomas was terminated by CalPortland and he did not have an opportunity to return to work, and section 105(c)(3) of the Mine Act contains no reinstatement provisions when the Secretary is not involved in the litigation, as is the case here. CalPortland's opposition to Thomas' memorandum also repeated its argument that the 2018 stipulations should not be used in calculating damages beyond 2018. Above, I rejected this argument and determined it appropriate for the Court to rely on the stipulations agreed to by the parties in calculating damages. *See Con-Ag, Inc. v. Sec. of Labor*, 897 F.3d 693 (6th Cir. 2018).

Consequently, I determine that Thomas' estimates for back pay, lost benefits, and interest accrued since February 9, 2022, are reasonable and supported by the evidence and are, therefore, appropriate. Thomas is entitled to the following back pay, lost benefits, and interest:

Back Pay and Lost Benefits Accrued Since February 9, 2022	$323,984.49
Interest	$49,447.27
TOTAL	**$373,431.76**

Thus, I **AWARD** Thomas a total of **$373,431.76** in back pay, lost benefits, and interest accrued since February 9, 2022.

B. Attorneys' Fees and Costs Accrued since February 9, 2022

1. Parties' Arguments

Thomas' Third Memorandum in Support of Fees and Costs estimates the attorneys' fees and costs that have accrued since February 9, 2022. In support of his estimates, Thomas submitted declarations and billing records from the attorneys, intern, and paralegal who worked on this case. (Compl't. Mem. at 6-13.) The following is Thomas' summary of billing rates and hours billed for each attorney, intern, and paralegal who worked on this case since February 9, 2022:

	Hourly Rate	**Hours Billed**	**Total**
Colin McHugh – Attorney	$400	235.70	$94,280.00
Trevor Cartales – Attorney	$400	40.80	$16,320.00
Alex Higgins – Attorney	$650	12.30	$7,995.00
Sydney Nguyen – Intern	$175	41.00	$7,125.00
Taylor Yerroeck –Paralegal	$200	25.00	$5,000.00
TOTAL			**$130,720.00**

(Compl't. Mem. at 6-13.)

In support of its request for attorneys' fees, Thomas submits declarations from four local attorneys working in the same community as Thomas' attorneys that address the standard billing rates for their area. (Compl't Mem. at 6.) Attorney Matthew Ellis' declaration reviews his training, education, and work experience. (Ellis Decl. at ¶¶ 1–4.) Ellis states he is familiar with fees charged with attorneys and paralegals in the community. (*Id*. at ¶ 5.) Ellis knows attorney Colin McHugh's reputation and experience and has familiarized himself with the briefings in Thomas' case. (*Id*. at ¶¶ 6–7.) Ellis believes McHugh's requested rate of $400 and billed hours are more than reasonable, if not low. (*Id*. at ¶ 8.) Attorney Beau Harlan's declaration reviews his training, education, and work experience. (Harlan Decl. at ¶¶ 1–7.) Harlan states he is familiar with the market rates for attorneys, paralegals, and interns in the community. (*Id*. at ¶ 7.) Harlan is familiar with attorney McHugh's employment law practice and understands the skill needed to handle these complex cases. (*Id*. at ¶¶ 8–9.) Harlan believes the billing rate of $400 for McHugh and Cartales, $650 for Higgins, $200 for Yerroeck, and $175 for Nguyen are either in line with the market rate or are low. (*Id*. at ¶¶ 10–13.) Attorney Gregory Ferguson's declaration reviews his training, education, and work experience. (Ferguson Decl. at ¶¶ 1–4.) Ferguson states he is familiar with contingent fee employment law cases against large companies and is familiar with the legal work required for Thomas' case. (*Id*. at ¶¶ 5–8, 10–11.) Ferguson knows the reputation and experience of attorneys McHugh, Cartales, and Higgins, as well as paralegal Yerroeck. (*Id*. at ¶¶ 15–16.) Ferguson believes the billing rate of $400 for McHugh and Cartales, $650 for Higgins, $200 for Yerroeck, and $175 for Nguyen are in the accepted range for the market. (*Id*. at ¶¶ 14–16.) Attorney Moloy Good's declaration reviews his training, education, and work experience. (Good Decl. at ¶¶ 1–7.) Good's practice focuses on representation of plaintiffs in employment and housing cases in Washington and Oregon and he is familiar with the rates charged by plaintiff's attorneys. (*Id*. at ¶ 6.) Good is familiar with McHugh's legal practice, billing practices, competence, and reputation. (*Id*. at ¶¶ 8–12.) Good believes the billing rate of $400 for McHugh and Cartales, $650 for Higgins, $200 for Yerroeck, and $175 for Nguyen are in the accepted range for the market. (*Id*. at ¶¶ 13–14, 16.)

Thomas also submitted an itemized listing of costs incurred since February 9, 2022, while litigating his claim. The costs span from August 27, 2023, through June 15, 2026, and cover travel to Washington, District of Columbia for oral argument before the Commission, filing fees, shipping fees, and Mr. Bargaehr's expert CPA fee. (Compl't. Mem. at 14-15.) The total amount of litigation-related costs incurred by Thomas since February 9, 2022, is $12,825.13.

Date	**Description of Cost**	**Dollar Amount**
8/27/2023	Airfare to Washington, DC for hearing	517.81
8/27/2023	Lodging in Washington, DC for hearing	914.32
10/08/2023	WiFi charge	8.00
10/08/2023	Meal in Washington, DC	100.10
10/08/2023	Meal in Washington, DC	16.45
10/09/2023	Meal in Washington, DC	23.00
10/10/2023	Meal in Washington, DC	33.42
10/10/2023	Meal in Washington, DC	72.20
10/10/2023	Meal in Washington, DC	30.55
10/11/2023	Meal in Washington, DC	50.76
10/12/2023	WiFi charge	8.00
10/12/2023	Meal in Washington, DC	54.55
10/12/2023	Meal in Washington, DC	13.16
10/12/2023	Meal in Washington, DC	20.00
3/12/2024	Ninth Circuit Filing Fee	600.00
5/31/2024	Fed Ex Copies of Brief and Excerpts	421.32
5/31/2024	Fed Ex Shipping of Brief and Excerpts to Lundgren and FMSHRC	67.12
6/06/2024	Fed Ex Copies and Binding for Court of Appeals Judges, Per Court Order	949.51
6/07/2024	Fed Ex Mailing of Bound Court Copies to Appeals Judges	54.96
8/22/2024	Fed Ex Printing of Bound Reply Brief for 9th Circuit	105.40

8/22/2024	Fed Ex Mailing of Bound Copies of Reply Brief to Send to 9th Circuit	14.50
6/15/2025	Expert CPA Fees from Lewis Group CPAs 25.00 hours-Scott Bargaehr, CPA	8,750.00
TOTAL		**12,825.13**

(Compl't. Mem. at 14–15.)

CalPortland filed its opposition to Thomas' Third Memorandum in Support of Fees and Costs, requesting reduction of Thomas' requested attorneys' fees and costs. (Resp't Opp. to Compl't. Mem. at 12–13.) CalPortland argues the itemized billing statements are vague, reveal block billing, are duplicative, and were not reasonably necessary to obtain compensable relief. (*Id.*)

2. Statement of the Law

Thomas is entitled to reasonable attorneys' fees and costs. 30 U.S.C. § 815(c)(3). The Supreme Court has addressed the issue of attorneys' fees and has determined that a court should analyze reasonable attorneys' fees using the "lodestar method," which requires the multiplication of a reasonable hourly rate by the number of hours reasonably expended on the litigation. *See Perdue v. Kenny A., ex rel. Winn*, 559 U.S. 542, 550–53 (2010). In determining an appropriate award, the burden is on the party seeking an award to submit evidence of hours worked and rates claimed, and the court should exclude hours that are "excessive, redundant, or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983). Other considerations may also lead a court to adjust the award upward or downward. *Id*. at 434. The court has discretion to make this equitable judgment. *Id*. at 436–37.

3. Analysis and Legal Conclusions

CalPortland does not raise any specific concerns regarding any of the itemized attorneys' fees bills other than to argue they are vague, reveal block billing, are duplicative, and were not reasonably necessary to obtain compensable relief. In my review of these itemized bills, I do not find evidence in support of these allegations. The legal work described by the attorneys, intern, and paralegal shows time spent performing tasks that are necessary and are neither excessive nor duplicative. As such, I reject CalPortland's argument that the attorneys' fees should be reduced for these reasons because I find the hours billed supported and reasonable.

After reviewing the documentation and arguments submitted by the parties, I determine that Thomas has met his burden of proof in establishing that his attorneys' fees are reasonable as to attorney Colin McHugh. McHugh's declaration reviews his education and training, work history, and experience with employment litigation. (McHugh Decl. at ¶¶ 3–15.) McHugh discusses his attempts to resolve Thomas' complaint through a settlement, which would have mitigated the amount of attorneys' fees incurred in this case. (*Id*. at ¶¶ 17–19.) McHugh further states he worked many additional hours he did not track and, therefore, did not submit for reimbursement. (*Id*. at ¶ 20.) McHugh believes his hourly rate of $400 is at or below the market rate for attorneys in his area. (*Id*. at ¶ 24.) Given McHugh's experience and training, as well as the length and complexity of this case, and the declarations of local attorneys Ellis, Harlan, Ferguson, and Good regarding the market rate for attorney billing, I find that McHugh's declaration reasonably supports the hours he has billed and his requested hourly rate. Accordingly, I find that the $400 rate and 235.70 hours billed sought by McHugh are reasonable and appropriate. I thus **AWARD** Thomas a total of **$94,280.00** in attorneys' fees for the legal work performed by McHugh since February 9, 2022.

I determine that Thomas has met his burden of proof in establishing that his attorneys' fees are reasonable as to attorney Trevor Cartales. Cartales' declaration reviews his education and training, work history, and experience with employment litigation. (Cartales Decl. at ¶¶ 3–13.) Cartales addresses the time he spent working on this case reviewing CalPortland's claims, drafting memoranda, and researching relevant legal issues. (*Id*. at ¶¶ 15–16, 19–21.) Cartales believes his hourly rate of $400 is at or below the market rate for attorneys in his area. (*Id*. at ¶ 18.) Given Cartales' experience and training, as well as the length and complexity of this case, and the declarations of local attorneys Harlan, Ferguson, and Good regarding the market rate for attorney billing, I find that Cartales' declaration reasonably supports the hours he has billed and his requested hourly rate. Accordingly, I find that the $400 rate and 40.80 hours billed sought by Cartales are reasonable and appropriate. I thus **AWARD** Thomas a total of $**16,320.00** in attorneys' fees for the legal work performed by Cartales since February 9, 2022.

I determine that Thomas has met his burden of proof in establishing that his attorneys' fees are reasonable as to attorney Alex Higgins. Higgins' declaration refers to his previously submitted declaration that thoroughly reviews his education and training, work history, and experience with employment litigation. (Higgins Decl. at ¶ 2 & Attachment.) Higgins addresses the time he spent working on this case reviewing and revising motions and briefs, conferring with counsel, researching relevant case law, and negotiating potential settlement. (*Id*. at ¶ 4.) Higgins believes his hourly rate of $650 is at or below the market rate for attorneys in his area, especially given his experience and skill level. (*Id*. at ¶ 3.) Given Higgins' experience and training, as well as the length and complexity of this case, and the declarations of local attorneys Harlan, Ferguson, and Good regarding the market rate for attorney billing, I find that Higgins' declaration reasonably supports the hours he has billed and his requested hourly rate. Accordingly, I find that the $650 rate and 12.30 hours billed sought by Higgins are reasonable and appropriate. I thus **AWARD** Thomas a total of **$7,995.00** in attorneys' fees for the legal work performed by Higgins since February 9, 2022.

Thomas has not met his burden of proof in establishing that his attorneys' fees are reasonable as to intern Sydney Nguyen. Nguyen's declaration reviews her education and training, work history, and experience with employment litigation. (Nguyen Decl. at ¶¶ 2–6.) Nguyen addresses the time she spent working on this case researching, drafting, and editing pleadings and preparing for trial. (*Id*. at ¶ 2 & Attachment.) Nguyen states her standard hourly rate on employment cases was $150 an hour. (*Id*. at ¶ 9.) However, Thomas seeks an hourly rate of $175 for Nguyen. (Compl't. Mem. at 11–12, 13.) Given Nguyen's experience and training, as well as the length and complexity of this case, I find that her declaration reasonably supports the hours she has billed and an hourly rate of $150, not the $175 hourly rate requested by Thomas. Accordingly, I find that an hourly rate of $150 and 41.00 hours billed is reasonable and appropriate for intern Nguyen. I thus **AWARD** Thomas a total of **$6,150.00** in attorneys' fees for the legal work performed by Nguyen since February 9, 2022.

I determine that Thomas has met his burden of proof in establishing that his attorneys' fees are reasonable as to paralegal Taylor Yerroeck. Yerroeck's declaration reviews her education and training, work history, and experience with employment litigation. (Yerroeck Decl. at ¶¶ 2–5.) Yerroeck addresses the time she spent working on this case reviewing motions and briefs, communicating with the team, and preparing for trial. (*Id*. at ¶ 2 & Attachment.) Yerroeck states her standard hourly rate on employment cases was $200 an hour. (*Id*. at ¶ 7.) Given Yerroeck's experience and training, as well as the length and complexity of this case, and the declarations of local attorneys Harlan, Ferguson, and Good regarding the market rate for paralegal billing, I find that Yerroeck's declaration reasonably supports the hours she has billed and her requested hourly rate. Accordingly, I find that the $200 rate and 25.00 hours billed sought by Yerroeck are reasonable and appropriate. I thus **AWARD** Thomas a total of **$5,000.00** in attorneys' fees for the paralegal work performed by Yerroeck since February 9, 2022.

I also determine that Thomas has met his burden of proof in establishing his litigation-related costs are reasonable. Thomas provided adequate documentation in the form of an itemized listing of costs incurred while litigating his claim since February 9, 2022. The costs include travel to Washington, District of Columbia for oral argument before the Commission, filing fees, shipping fees, and Mr. Bargaehr's expert CPA fee. (Compl't. Mem. at 14–15.) The total amount of litigation-related costs incurred by Thomas since February 9, 2022 is $12,825.13. CalPortland has not taken a position on these costs. Based on my review of the request, these costs are reasonable and justified given the length and complexity of this case. I thus **AWARD** Thomas a total of **$12,825.13** in litigation-related costs accrued since February 9, 2022.

In sum, for the foregoing reasons, I determine that the following attorneys' fees and costs, which have accrued since February 9, 2022, are reasonable and supported by the evidence submitted, and are thereby appropriate. Thomas is entitled to the following attorneys' fees and costs:

	Hourly Rate	**Hours Billed**	**Total**
Colin McHugh – Attorney	$400	235.70	$94,280.00
Trevor Cartales – Attorney	$400	40.80	$16,320.00
Alex Higgins – Attorney	$650	12.30	$7,995.00
Sydney Nguyen – Intern	$150	41.00	$6,150.00
Taylor Yerroeck –Paralegal	$200	25.00	$5,000.00
Costs			$12,825.13
TOTAL			**$142,570.13**

I hereby **AWARD** Thomas a total of **$142,570.13** in attorneys' fees and costs accrued since February 9, 2022. Thomas may elect to have the fees and costs paid directly to his attorney.

C. <u>Interest Owed on Thomas' Initial Back Pay and Lost Benefits Award of $300,405.82</u>

As part of ALJ Miller's initial December 10, 2018, decision in this matter, CalPortland was ordered to pay $76,185.67, plus quarterly interest at the Federal underpayment rate through the date of payment, in back pay and lost benefits to Thomas. *CalPortland Co.*, 40 FMSHRC at 1517–18. Thereafter, as part of ALJ Miller's February 9, 2022, supplemental order, CalPortland was ordered to pay an additional $224,220.15, plus quarterly interest at the Federal underpayment rate through the date of payment, in back pay and lost benefits to Thomas. The back pay and lost benefits previously ordered by ALJ Miller totaled $300,405.82. My Order of May 29, 2026, reinstated these two orders and ordered the parties to provide estimates of the quarterly interest owed on Thomas' initial back pay and lost benefits award of $300,405.82 at the Federal underpayment rate through the date of payment.

Complainant's Third Memorandum in Support of Fees and Costs estimates the interest owed on Thomas' previously ordered back pay and lost benefits. (Compl't. Mem. at 16–17.) In support of its estimates, Thomas submitted a report by CPA expert accountant Bargaehr, which analyzes the interest accrued on the previous orders of back pay. (*Id.*).

Interest on $76,185.67 Back Pay through 12/22/21	$10,939.95
Interest on $76,185.67 Back Pay through 6/29/26	$22,580.88
Interest on $224,220.15 Back Pay through 12/22/21	$11,600.65
Interest on $224,220.15 Back Pay through 6/29/26	$66,457.21
TOTAL	**$111,578.69**

CalPortland's Opposition to Complainant's Third Memorandum in Support of Fees and Costs does not address Thomas' interest calculations on the previously awarded back pay and lost benefits in any meaningful way. (Resp't Opp. to Compl't. Mem.) CalPortland generally argues Thomas is not entitled to interest because he is not entitled to back pay for failing to voluntarily return to work at CalPortland and because CalPortland rejects using the 2018 stipulations as the basis for calculating back pay and lost benefits. (*Id.*) I have already rejected these arguments as addressed above.

I determine Thomas' estimates of the quarterly interest accrued on Thomas' initial back pay and lost benefits award of $300,405.82 at the Federal underpayment rate through the date of payment to be reasonable and supported by the evidence submitted and thereby appropriate. I thus **AWARD** Thomas a total of **$111,578.69** in interest on the previously awarded back pay and lost benefits amount of $300,405.82.

D. <u>Interest Owed on Thomas' Initial Attorneys' Fees and Costs Award of $185,410.31</u>

Following ALJ Miller's initial decision after hearing, CalPortland was ordered to pay Thomas $74,852.05 in attorneys' fees and costs on January 8, 2019. Then, as part of ALJ Miller's February 9, 2022, supplemental order, CalPortland was ordered to pay an additional $110,558.26 in attorneys' fees and costs. ALJ Miller also ordered payment of quarterly interest at the Federal underpayment rate through the date of payment, but solely on Thomas' initial award of $74,852.05. The attorneys' fees and costs previously ordered by ALJ Miller totaled $185,410.31. My Order of May 29, 2026, reinstated these two orders and ordered the parties to provide estimates of the quarterly interest owed on Thomas' initial attorneys' fees and costs award of $185,410.31 at the Federal underpayment rate through the date of payment.

Complainant's Third Memorandum in Support of Fees and Costs estimates the interest owed on Thomas' previously ordered attorneys' fees and costs. (Compl't. Mem. at 16–17.) In support of its estimates, Thomas submitted a report by CPA expert accountant Bargaehr, which analyzes the interest accrued on the previous orders of attorneys' fees. (*Id.*)

Interest on $74,852.05 Attorneys' Fees through 12/22/21	$9,472.94
Interest on $74,852.05 Attorneys' Fees through 6/29/26	$22,185.60
Interest on $110,558.26 Attorneys Fees through 6/29/26	$32,340.56
TOTAL	**$63,999.10**

(Compl't. Mem. at 16–17.)

CalPortland's Opposition to Complainant's Third Memorandum in Support of Fees and Costs does not take a position on Thomas' interest calculations on the previously awarded attorneys' fees and costs. (Resp't Opp. to Compl't. Mem.) CalPortland's arguments only address attorneys' fees and costs accrued since February 9, 2022, not the previously awarded attorneys' fees and costs. (*Id.*)

I determine that Thomas' estimates of the quarterly interest accrued on Thomas' initial attorneys' fees and costs award of $185,410.31 at the Federal underpayment rate through the date of payment to be reasonable and supported by the evidence submitted and thereby appropriate. I thus **AWARD** Thomas a total of **$63,999.10** in interest on the previously awarded attorneys' fees and costs amount of $185,410.31.

IV. ORDER

WHEREFORE, based on the foregoing reasoning, Respondent's Motion for Discovery and Request for Hearing is **DENIED**.

Respondent is **ORDERED** to **PAY** back pay, lost benefits, and interest accrued since February 9, 2022, to Complainant in the amount of **$373,431.76** within 30 days of the date of this Order.

Respondent is further **ORDERED** to **PAY** attorneys' fees and costs accrued since February 9, 2022, to Complainant in the amount of **$142,570.13** within 30 days of the date of this Order.

Respondent is further **ORDERED** to **PAY** interest in the amount of $**111,578.69** owed on Complainant's initial back pay and lost benefits award of $300,405.82 within 30 days of the date of this Order.

Respondent is further **ORDERED** to **PAY** interest in the amount of $**63,999.10** owed on Complainant's initial attorneys' fees and costs award of $185,410.31 within 30 days of the date of this Order.

Alan G. Paez
Administrative Law Judge

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