April 2020

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ADMINISTRATIVE LAW JUDGE ORDERS

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N

WASHINGTON, DC 20004-1710

April 20, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. CEDAR LAKE MINING, INC.	Docket No. SE 2019-254 A.C. No. 01-03444-493538

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 24, 2019, the Commission received from Cedar Lake Mining, Inc. ("Cedar Lake") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 20, 2019, and became a final order of the Commission on July 20, 2019. Cedar Lake asserts that it timely contested three citations issued in connection with an accident that occurred on December 11, 2018 but that MSHA only designated two of the citations as having been timely filed. However, Cedar Lake

provided signed Notices of Contest and certified mailing receipts that indicated that the contest was mailed to the Secretary a few days after the thirty-day deadline had passed. MSHA issued a delinquency notice to Cedar Lake on September 4, 2019, which led the operator to promptly seek to reopen this case. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Cedar Lake's request and the Secretary's response, we find that Cedar Lake missed the contest deadline by only a few days and that it promptly sought to have the case reopened upon discovering its mistake. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

April 23, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEST 2019-529-M A.C. No. 02-00826-494853
v.	Docket No. WEST 2019-530-M A.C. No. 02-00826-497050
ASARCO LLC	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 5, 2019, the Commission received from Asarco LLC ("Asarco") a motion seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment for WEST 2019-529-M was delivered on July

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEST 2019-529-M and WEST 2019-530-M involving similar procedural issues. 29 C.F.R. §2700.12.

16, 2019, and became a final order of the Commission on August 15, 2019. MSHA records further indicate that the proposed assessment for WEST 2019-530-M was delivered on August 12, 2019, and became a final order of the Commission on September 11, 2019.[2] Asarco states that it timely contested most of the citations at issue to the Commission on July 1, 2019.[3] The operator further asserts that, having mistakenly believed that the pendency of the contest proceedings obviated the need to respond to the proposed penalty, it failed to challenge the proposed penalty assessment. In addition, Asarco states that the employee responsible for filing contests with MSHA failed to contest four of the penalties because he was confused by the fact that MSHA had combined citations from multiple inspections in the proposed assessment in Docket No. WEST 2019-529-M. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

[2] At the time the motion to reopen was filed, the proposed assessment in WEST 2019-530-M was not yet a final order of the Commission. There is no evidence in the record that the operator attempted to remedy the situation by filing a contest of the civil penalty, even after this fact was pointed out in the Secretary's response. As the 30-day deadline for filing a contest has now expired, we entertain Asarco's motion to reopen as properly filed.

[3] These contest cases were docketed as Docket Nos. WEST 2019-388-RM; WEST 2019-389-RM; WEST 2019-390-RM; WEST 2019-391-RM; WEST 2019-392-RM; WEST 2019-393-RM; WEST 2019-394-RM; WEST 2019-395-RM; WEST 2019-396-RM; WEST 2019-397-RM; WEST 2019-398-RM; WEST 2019-399-RM; WEST 2019-400-RM; WEST 2019-401-RM; WEST 2019-402-RM; WEST 2019-403-RM; WEST 2019-404-RM; WEST 2019-405-RM; WEST 2019-406-RM; WEST 2019-407-RM; WEST 2019-408-RM; WEST 2019-409-RM; WEST 2019-410-RM; WEST 2019-411-RM; WEST 2019-412-RM; WEST 2019-417-RM; WEST 2019-418-RM; WEST 2019-419-RM; WEST 2019-420-RM; WEST 2019-421-RM; WEST 2019-422-RM; WEST 2019-423-RM; WEST 2019-424-RM; WEST 2019-425-RM; WEST 2019-426-RM; WEST 2019-427-RM; WEST 2019-428-RM; WEST 2019-429-RM; WEST 2019-430-RM; WEST 2019-431-RM; WEST 2019-432-RM; WEST 2019-433-RM; WEST 2019-434-RM; WEST 2019-435-RM; WEST 2019-436-RM; WEST 2019-437-RM; WEST 2019-438-RM; WEST 2019-439-RM; WEST 2019-440-RM; WEST 2019-441-RM; WEST 2019-442-RM; WEST 2019-443-RM; WEST 2019-444-RM; and WEST 2019-445-RM. On December 5, 2019 these cases were assigned to Judge Simonton, Judge Miller, and Judge Rae. The cases were dismissed as moot in orders issued on January 6, 2020, December 12, 2019, and February 5, 2020, respectively. Asarco did not move to reopen the aforementioned contest proceedings.

Having reviewed Asarco's request and the Secretary's response, we find that the operator clearly expressed its intent to contest the citations by initiating contest proceedings with the Commission and that Asarco's failure to timely file a contest with MSHA was due to inadvertence or mistake within the meaning of Rule 60(b)(1). Moreover, Asarco took prompt action to file a motion to reopen after the citations became final orders of the Commission. In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

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

/s/ Arthur R. Traynor, III
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 29, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GIBSON COUNTY COAL LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2019-0329 A.C. No. 12-02215-493781 Mine: Gibson Mine

SUMMARY DECISION
ORDER ACCEPTING APPEARANCE
DECISION APPROVING PARTIAL SETTLEMENT

Before: Judge Simonton

I. INTRODUCTION

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Gibson County Coal LLC ("Gibson" or "Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (Mine Act) and 29 C.F.R. § 2700.20 *et seq*. The parties settled five of the six citations included in this docket, and the terms of the settlement, along with my approval, are set out at the end of this decision. Citation No. 9109632 remains in dispute.

This case was initially scheduled for hearing on December 18, 2019. During a prehearing conference call with the court, however, the parties asked to proceed without a hearing. The parties agree on all relevant facts and are in agreement that the only remaining dispute in this case can be resolved by answering a purely legal question. Both the Secretary and Respondent filed motions for summary decision and replies. The sole issue for resolution is whether the failure of a miner to wear the miner-wearable component of the proximity detection system provided by Respondent is a violation of 30 C.F.R. § 75.1732(a).

Based on the agreement of the parties to file cross-motions for summary judgement and the facts as represented by both parties, I find that there is no genuine issue of material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law, **AFFIRM** the citation, and assess a penalty of $832.00 against Gibson.

II. STIPUATIONS OF FACT

The parties submitted the following joint stipulations in their motions for summary decision:

1. Gibson County Coal, LLC, is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 803(d), at the coal mine at which the citation at issue in these proceedings was issued.

2. The Gibson Mine is operated by Respondent in this case, Gibson County Coal, LLC.

3. The Gibson Mine is an underground coal mine subject to the jurisdiction of the Mine Act.

4. At all relevant times, the products of the Gibson Mine entered commerce or products affect commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.

5. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.

6. 30 C.F.R. § 75.1732(a)[1] is a mandatory health or safety standard as that term is defined in Section 3(l) of the Mine Act, 30 U.S.C. § 802(l).

7. An injury caused by a proximity detection system failing to stop a continuous mining machine from coming into contact with a miner is reasonably likely to result in a fatality.

8. The parties agree the failure to wear a miner-wearable component would be a Significant and Substantial contribution to the cause and effect of a mine safety hazard.

9. Only one (1) miner was affected, as recorded in Block 10(d) of Citation No. 9109632.

10. The parties stipulate the negligence level of the operator is correctly reflected as low in Block 11 of Citation 9109632.

11. With the exception of the first sentence, paragraph 8 of Citation 9109632 correctly describes the accident that occurred at the Gibson Mine on May 2, 2019.

12. The proximity detection system in use on Respondent's #6467A Continuous Mining Machine required the use of miner-wearable components on individual miners working on the working section.

[1] Citation No. 9109632 was originally issued alleging a violation of 30 C.F.R. § 75.1732(b)(1). Pursuant to an unopposed Motion to Amend Complaint and Citation, granted on December 17, 2019, Box 9.C. for Citation No. 9109632 was amended to allege a violation of 30 C.F.R. § 75.1732(a).

13. On May 2, 2019, the injured roof bolter operator was a miner working on MMU 007-0, an active working section of the mine on the date in question.

14. On May 2, 2019, when he was struck by the #6467A Continuous Mining Machine, the roof bolter operator was not wearing his company-issued miner-wearable component.

15. The proposed penalty of $832.00 was properly assessed pursuant to the gravity determination in Citation No. 9109632, and the provision of Part 100 of the Code of Federal Regulation. Payment by Respondent of the proposed penalty of $832.00 will not affect Respondent's ability to remain in business.

16. The individual whose signature appears in Block 22 of the citation at issue in these proceedings was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.

17. A duly authorized representative of the Secretary served the subject citation and termination thereof upon the agent of the Respondent at the date and place stated therein, as required by the Mine Act, and the citation and termination may be admitted into evidence to establish its issuance.

18. The citation contained in Exhibit A attached to the Petition for Assessment of Penalty for this docket is an authentic copy of the citation at issue in this proceeding with all appropriate modifications and terminations, if any.[2]

III. BACKGROUND FOR CITATION NO. 9109632[3]

On May 2, 2019, as a continuous mining machine (CMM) was moving across a section of the underground coal mine, a roof bolter cable was lying on the ground in the last open crosscut, in the way of the moving CMM. The CMM stopped moving to allow the roof bolter operator time to hang the cable. Once the cable was hung, the CMM operator checked to ensure that all miners were clear of the machine and then announced he was "coming out." After tramming another six to ten feet, the CMM operator heard the roof bolter operator yell to him to stop the CMM and back it up because it was on his foot. After lifting the CMM's cutting head, reversing the machine, and shutting it down, the CMM operator ran to the front of the machine and found the roof bolter operator with an injured foot.

[2] The citation contained in Exhibit A does not, in fact, account for the amendment made to the cited standard pursuant to the Secretary's unopposed motion granted on December 17, 2019. *See supra* note 1.

[3] This factual and procedural summary is based on the identical "Factual Background" sections found in the parties' motions for summary decision, as well as on the joint stipulations, where noted. Secretary's Motion for Summary Decision (Sec'y Mot.) at 4–6; Respondent's Motion for Summary Decision (Resp. Mot.) at 5–6.

The roof bolter operator was not wearing his miner-wearable component of the CMM's proximity detection system when he was struck. Joint Stipulation (Jt. Stip.) #14. It was found, instead, on the roof bolting machine he had been operating. After first aid had been administered to the roof bolter operator and he was transported to the hospital, both the CMM's proximity detection system and the roof bolter operator's miner-wearable component were tested. Both functioned properly. Mining operations resumed after it was determined that all other miners in the working section were wearing their respective miner-wearable components.

On May 13, 2019, MSHA Inspector Daniel Mann reviewed Gibson's records and learned of the May 2 accident. Inspector Mann issued Citation No. 9109632, alleging that Gibson violated 30 C.F.R. § 75.1732(b)(1) by failing "to ensure that a miner was wearing a miner-wearable component that stopped the continuous miner before coming in contact with a miner." Mann determined that the violation was reasonably likely to result in a fatal injury, and that the violation was significant and substantial and affected one person. He determined that the violation was the result of low negligence. Pursuant to the Secretary's unopposed Motion to Amend Complaint and Citation, granted on December 17, 2019, Citation No. 9109632 was amended to allege a violation of 30 C.F.R. § 75.1732(a).

IV. PARTY ARGUMENTS

Section 75.1732(a) states in pertinent part that "the mine operator must provide a miner-wearable component to be worn by each miner on the working section." The Secretary argues that Gibson violated § 75.1732(a) when it failed to ensure that the roof bolter operator was wearing his miner-wearable component while working on the working section. Sec'y Mot. at 8. The Secretary alleges that the standard's meaning is plain: operators must provide miner-wearable components of proximity detection systems and ensure that miners actually wear them. *Id*. Any other interpretation would undercut the purpose of the standard and put miners at risk of serious bodily harm or death. *Id*. at 9. Alternatively, if the court were to determine that the language of § 75.1732(a) is ambiguous, the Secretary asserts that his interpretation is both reasonable and entitled to deference. *Id*. at 11.

Respondent argues that the citation should be vacated because the plain language of § 75.1732(a) does not make operators liable if a miner fails to wear the miner-wearable component of a proximity detection system. According to Gibson, the word "provide" in the standard is the only term that imposes a duty on operators, limiting operators' obligation under the standard to furnishing miner-wearable components to miners. Resp. Mot. at 9; Respondent's Response to Secretary's Motion for Summary Decision at 2. Gibson asserts that while other subsections of the standard require operators to ensure that miners are wearing the components at the start of their shift and that the components are working properly, no part of the standard requires operators to ensure that miners wear the components for the duration of their shift. Resp. Mot. at 9–10. Because Gibson provided an operable miner-wearable component to the miner whose injury ultimately gave rise to this citation, Gibson argues that it cannot properly be held liable under § 75.1732(a).

V. DISCUSSION

Pursuant to Commission Rule 67(b), the Court may grant summary decision where the "entire record…shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. §2700.67(b). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Here, the parties have agreed that there is no genuine issue of material fact; indeed, they have submitted identical statements of the procedural and factual background relevant to this violation. Thus, summary decision is proper.

The disputed standard, § 75.1732(a) mandates that

> [o]perators must equip continuous mining machines, except full-face continuous mining machines, with proximity detection systems by the following dates. For proximity detection systems with miner-wearable components, the mine operator must provide a miner-wearable component to be worn by each miner on the working section by the following dates.

30 C.F.R. § 75.1732(a). As noted above, the sole issue for resolution in this case is whether this standard mandates that operators both provide miner-wearable components to their miners *and* ensure that miners actually wear the components. For the reasons that follow, I find that the standard unambiguously mandates that operators ensure miners wear miner-wearable components of proximity detection systems.

If a standard has a plain meaning, that meaning must be given effect unless it would lead to an absurd result or undermine the purpose of the Mine Act. *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 n.7 (Feb. 2004). To determine the meaning of a regulation, the Commission "utilizes 'traditional tools of construction, including an examination of the text and intent of the drafters.'" *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44–45 (D.C. Cir. 1990)). In a plain meaning analysis, the Commission "must look to the language and design of the Secretary's regulations as a whole. *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996). If statutory language is ambiguous, "deference to the Secretary's interpretation may be appropriate if the interpretation is reasonable, authoritative, and reflects fair and considered judgement." *Richmond Sand & Stone, LLC*, 41 FMSHRC 402, 404 (Aug. 2019). However, as the Supreme Court recently clarified in *Kisor v. Wilkie*, courts should only resort to deference after carefully considering "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." 139 S. Ct. 2400, 2411 (2019).

In this case, the various tools of statutory interpretation necessitate finding that § 75.1732(a) unambiguously requires that operators utilizing continuous mining machines equipped with proximity detection systems with miner-wearable components must actually ensure miners wear the components. First, the text of the regulation is clear, stating that "the mine operator must *provide* a miner-wearable component *to be worn* by each miner on the

working section." 30 C.F.R. § 75.1732(a) (emphasis added). I agree with the Secretary: "provide" is not the only part of the standard that places an obligation on operators. *See* Secretary's Reply to Respondent's Motion for Summary Decision at 1. The phrase "to be worn" is not superfluous, but rather extends the operators' duty to ensuring that miners utilize the provided miner-wearable components by actually wearing them. Any other reading would fail to give effect to each word and clause of the regulation. *See, e.g. Canyon Fuel Co., LLC v. Sec'y of Labor*, 894 F.3d 1279, 1289 (10th Cir. 2018).

The structure of § 75.1732 similarly supports this interpretation. Subsection (a), at issue here and excerpted above, directs operators to equip CMMs with proximity detection systems by certain dates. For proximity detection systems with miner-wearable components, the miner-wearable components must be provided by those dates, too. Subsection (a) thus signals that proximity detection systems may come in multiple forms, but that some include miner-wearable components. When these components are present, they are a critical part of the proximity detection system. Subsection (b) confirms this, stating that "a proximity detection system includes machine-mounted components and miner-wearable components." Subsection (b) then goes on to list specific requirements for the system, including that the system must cause a machine to stop tramming before contacting a miner. Subsection (c) sets out requirements for system checks, specifying when operators must ensure that the system is working properly. Lastly, subsection (d) obliges operators to create and retain certain records, including records of system checks, defects, and persons trained in the installation and maintenance of proximity detection systems.

According to Gibson, subsections (c) and (d) of the standard show that MSHA's intent was to require operators to provide miner-wearable components, check that they are operational, and record defects. Resp. Mot. at 9. Respondent argues that the whole of the section confirms that operators' "duty does not extend to the actions or omissions of an individual miner during the course of their shift." *Id*. at 9–10. I disagree. The standard requires operable proximity detection systems. And, in order for certain proximity detections systems to function properly, miners need to wear miner-wearable components while working on the working section of a mine. It is not enough that operators ensure the components are free of defects, or even ensure that miners are wearing the components at the start of every shift. The presence of miner-wearable components on working miners is as crucial to the proximity detection system as the machine-mounted component on the CMM. It would be absurd to only require operators to ensure that half of the system is in use during a shift. Without both components in use, the system does not function. The structure of § 75.1732 plainly and unambiguously compels this understanding.

Finally, the history and expressed purpose of this regulation further demonstrate that the standard plainly requires operators to ensure that miners wear miner-wearable components during their shifts. The final rule codified at § 75.1732 was issued in January 2015. In the Federal Register notice announcing the rule, MSHA explained that a review of fatal and nonfatal pinning, crushing, and striking accidents in underground coal mines between 1984 and 2013 demonstrated that proximity detection systems could have prevented 75 fatalities, 34 of which were associated with CMMs. Proximity Detection Systems for Continuous Mining Machines in Underground Coal Mines, 80 Fed. Reg. 2188, 2189 (Jan. 15, 2015). In addition, MSHA

estimated that 238 nonfatal injuries associated with CMMs could have been prevented by proximity detection systems. *Id*. In the final rule, after considering the comments on its proposed rule, MSHA determined that "all miners on a working section where the continuous mining machine is equipped with a proximity detection system *must* wear a wear a miner-wearable component. Under the final rule, the mine operator must provide a miner-wearable component to be worn by each miner on the working section." *Id*. at 2190. This language is clear. Miners *must* wear the components, and operators must ensure that they do. The purpose of the regulation cannot be achieved otherwise.

Gibson's proffered interpretation of the standard would allow operators to take a hands-off approach to miner safety and subvert the core purpose of the Mine Act. The Mine Act and its implementing regulations do not aim to make safety merely an option to be made available to individual miners, as Gibson implies. *See* Resp. Mot. at 9–10. To the contrary, the statutory scheme aims, unequivocally, to protect the health and safety of the nation's miners and accordingly imposes strict liability on *operators* for violations. Safety standards, such as § 75.1732(a), "must be interpreted so as to harmonize with and further . . . the objective[s]" of the Mine Act. *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). Gibson's interpretation simply cannot be squared with these objectives.

I find that 30 C.F.R. § 75.1732(a) is unambiguous: it plainly requires that operators not only provide miner-wearable components, but also that operators ensure miners actually wear the components. Accordingly, I find that Gibson violated the standard and uphold the violation.

VI. PENALTY

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

> (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).

According to the penalty petition, no violations of this standard became final orders of the Commission in the 15 months preceding the issuance of this citation. According to MSHA's Mine Data Retrieval System website, Gibson produced 1,640,113 tons of coal in 2019, making it a fairly large operator. In the citation, Gibson's negligence was determined to be low, and the parties stipulated that this was an accurate designation. Jt. Stip. #10. Based on the facts provided by the parties, I agree. The parties stipulated that the penalty amount would not affect Gibson's ability to continue in business. Jt. Stip. #15. The parties have likewise stipulated that "the failure

to wear a miner-wearable component would be a significant and substantial contribution to the cause and effect of a mine safety hazard," Jt. Stip. #8, that one miner was affected, Jt. Stip. #9, and that an injury caused by a failure of a proximity detection system to stop a CMM from contacting a miner is reasonably likely to result in a fatal injury. Jt. Stip. #7. I agree, and thus in assessing the penalty I considered the gravity as it's recorded in the citation and stipulated to by the parties. Finally, the parties noted that Gibson ensured that every miner on the working section was wearing his miner-wearable component after the relevant accident occurred on May 2, 2019. Sec'y Mot. at 5–6; Resp. Mot. at 6 . Though Gibson asserts such behavior is not mandated by § 75.1732(a), I have taken this action into account as a demonstration of Gibson's good faith concerning the safety of its miners. Applying the penalty criteria, I find that the proposed penalty of $832.00, as proposed by the Secretary, is appropriate for this violation.

VII. SETTLED CITATIONS

On December 23, 2019, Conference and Litigation Representative (CLR) Marsha Price filed a Motion to Approve Partial Settlement in this case. It is **ORDERED** that she be accepted to represent the Secretary in for the limited purpose of this partial settlement. *See Cyprus Emerald Resources Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The Secretary has filed a motion to approve settlement of five of the six citations at issue in this matter. The Secretary's motion at paragraph five highlights "maximizing" the Secretary's "prosecutorial impact" in agreeing to this settlement. Insofar as this statement, as well as other statements related to prosecutorial impact proffered by the Secretary, departs from Rule 31(b) and offers information that is superfluous to the Commission's authority to approve settlements of Mine Act disputes, *see* 30 U.S.C. § 820(k), the statement is stricken from the Secretary's motion pursuant to Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), and Rule 12(f) of the Federal Rules of Civil Procedure, Fed. Civ. P. 12(f). Under Commission Procedural Rule 31(b), a motion to approve settlement "shall include . . . facts in support of the amount of penalty agreed to in settlement," 29 C.F.R. § 2700.31(b)(1), and nothing in the Secretary's statement on "prosecutorial impact" in any way lessens the burden of the parties to show that a settlement is justified by the facts and circumstances surrounding each individual compromise. 30 U.S.C. § 820(k). The Secretary's insistence on larding settlement motions with unhelpful, extraneous language in no way changes the fact that it is the *Commission* that has *independent* "authority to assess all civil penalties provided in [the Mine] Act." 30 U.S.C. § 820(i).

I acknowledge and accept the explanation for the agreed upon settlement contained in the parties' settlement motion and amendments. The originally assessed amount for these five citations was **$5,620.00** and the proposed settlement is for **$3,672.00**. The parties agree to bear their own legal fees and costs associated with this matter, including costs which may be available under the Equal Access to Justice Act. The parties have moved to approve the proposed settlement as follows:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
LAKE 2019-0329			
9109786	$2,006.00	$902.00	Reduce Negligence from "Moderate" to "Low"
9109326	$558.00	$250.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely," Remove S&S Designation
9109631	$832.00	$666.00	Penalty Reduction Only
9109635	$372.00	$372.00	Affirm as Issued
9109636	$1,852.00	$1,482.00	Penalty Reduction Only
Total	**$5,620.00**	**$3,672.00**	

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve partial settlement is **GRANTED**, and five of the citations contained in this docket are **MODIFIED** as set forth above.

VIII. ORDER

For the reasons set forth above, I find that there is no dispute of material fact concerning Citation No. 9109632 and that the Secretary is entitled to summary decision as a matter of law. The Secretary's motion for summary decision is **GRANTED** and Respondent's motion for summary decision is **DENIED**.

In accordance with this summary decision regarding Citation No. 9102632 and the partial settlement reached by the parties for the other citations contained in this docket, Gibson County Coal, LLC, is **ORDERED** to pay the Secretary of Labor the sum of **$4,504.00** within 30 days of this order.[4]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

[4] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

Distribution: (Email[5])

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[5] For the foreseeable future, Federal Mine Safety and Health Review Commission (FMSHRC) notices, decisions, and orders will be sent only through electronic mail. Because FMSHRC will not be monitoring incoming physical mail or faxes, parties are encouraged to submit all filings through the agency's electronic filing system. If you are not able to file through our electronic filing system, please send an email copy and we will file it for you.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th ST. SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 FAX: 303-844-5268

April 14, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) obo MICHAEL SALVO, Complainant, v. PILOT THOMAS LOGISTICS dba THOMAS PETROLEUM, LLC, Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEST 2020-0214-DM MSHA Case No. WE MD 20-05 Mine: Goldstrike Mine Mine ID: 26-01089 (A2612)

ORDER GRANTING TEMPORARY ECONOMIC REINSTATEMENT

Before: Judge Gill

This case involves an Application for Temporary Reinstatement filed by the Secretary of Labor (Secretary) on behalf of complainant, Michael Salvo, against Respondent, Pilot Thomas Logistics dba Thomas Petroleum, LLC, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On April 8, 2020, the parties submitted a Joint Motion for Temporary Economic Reinstatement that included the individual terms of the settlement.

Pursuant to the terms of the Joint Motion, the parties move for an order that would temporarily, economically reinstate Salvo during the investigation and litigation of the merits of Salvo's February 14, 2020, discrimination complaint by the Mine Safety and Health Administration (MSHA). Specifically, the parties agree that Salvo's temporary reinstatement shall be subject to the following terms and conditions:

(1) The Secretary asserts that the complaint of discrimination filed by Complainant Michael Salvo under Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act") was not frivolously brought.

(2) Without admitting that Mr. Salvo's complaint was not frivolously brought, Respondent agrees to the entry of an Order of Temporary Economic Reinstatement pending investigation of the merits of Mr. Salvo's discrimination complaint to the Mine Safety and Health Administration and the completion of any subsequent litigation on a complaint filed by the Secretary of Labor regarding Mr. Salvo's discrimination complaint.

(3) The parties agree that, due to the distances involved and the need for quick action in this matter electronic signatures or electronically scanned signatures shall be deemed valid.

(4) Respondent agrees to economically reinstate Mr. Salvo to his position as an equipment/haul truck operator, effective upon the approval of this Settlement and Order Granting Temporary Economic Reinstatement by a Federal Mine Safety and Health Review Commission ("Commission") Administrative Law Judge ("ALJ"). Respondent agrees to pay Mr. Salvo a gross pay of $1,579.29 per pay period subject to normal deductions.

(5) Respondent shall provide benefits (including but not limited to retirement plan and seniority accrual) associated with Mr. Salvo's employment, in which he participated or was a beneficiary and consistent with those provided pre-termination except for health insurance. Respondent may deduct all applicable tax withholdings and other withholdings on the same basis as generally required for payment of other benefits pursuant to its policies and practices applicable to other employees.

(6) The first payment shall be due to Mr. Salvo on Respondent's first regular weekly pay day after the date of approval of this Settlement Agreement by an ALJ. All subsequent payments shall be due on Respondent's regular weekly pay days. All payments shall be made by regular payroll or certified check to "Michael Salvo" and deposited directly into Mr. Salvo's bank account as Respondent did pre-termination.

(7) Respondent agrees to continue its practice of not providing job references and potential employers will be provided standard dates of employment and job title.

(8) Mr. Salvo's economic temporary reinstatement shall terminate upon a finding by the Secretary that Section 105(c)(1) of the Mine Act has not been violated, or if the investigation or discrimination proceeding is otherwise discontinued for any reason that is permitted under the Act and its regulations. Alternatively, if the Secretary finds that the discrimination complaint has merit and the Secretary files a Complaint of Discrimination pursuant to Section 105(c)(2) with the Commission, Mr. Salvo's economic temporary reinstatement shall expire only after any decision or other similar order on such Complaint from the Federal Mine Safety and Health Review Commission becomes a final order that is not appealed by the Secretary or Respondent.

(9) Mr. Salvo understands and agrees that he is not entitled to request or collect any unemployment compensation benefits during the economic temporary reinstatement period.

(10) The Secretary represents that the terms of this Settlement Agreement and Joint Motion for Temporary Economic Reinstatement have been conveyed to Mr. Salvo, who has agreed to the terms of the economic temporary reinstatement.

(11) The parties further agree that by entering into a settlement agreement of the temporary reinstatement proceeding, in which the standard of review is limited, Respondent reserves

all rights, including all legal and factual defenses it has to the substantive Section 105(c) complaint, and that none are waived. By agreeing to economic temporary reinstatement of Mr. Salvo, Respondent does not concede in any way the merits of Mr. Salvo's claims and nothing herein shall be construed as an admission of liability by the Respondent. Further this agreement may not be relied upon by either party for any reason other than to enforce its terms during the pendency of the temporary reinstatement order.

I have reviewed the Joint Motion and determined that it reflects a clear meeting of the minds on the issue of temporary economic reinstatement, as required by Commission precedent. I have further determined that the parties' agreement is consistent with the purposes of the Act and Section 110(i) of the Act. Upon consideration of the foregoing, the Joint Motion for Temporary Economic Reinstatement is **GRANTED**.

Accordingly, pursuant to the terms of the parties' agreement, Respondent is **ORDERED** to economically reinstate Michael Salvo, as specified in the Joint Motion, as approved herein. The parties are **FURTHER ORDERED** to comply with all of the individual provisions the parties agreed upon and included in the Joint Motion.

As set forth in the parties' Joint Motion, this Order Granting Temporary Economic Reinstatement is not open-ended. If MSHA determines that there is insufficient evidence to proceed on Salvo's discrimination complaint, this order will terminate on the date of MSHA's determination. *See N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744-46 (6th Cir. 2012); *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 309 (7th Cir. 2012). Otherwise, it will end upon final order on the underlying discrimination complaint. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not he will file a complaint with the Commission under section 105(c)(2) of the Act and so advise the Respondent and this tribunal.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

Distribution:

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