April 2021

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Secretary of Labor v. Consol Pennsylvania Coal Company, LLC, Docket No. PENN 2019-00094 (Judge Lewis, March 9, 2021)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 19, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOL PENNSYLVANIA COAL COMPANY, LLC	Docket No. PENN 2018-0169

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

DECISION

BY THE COMMISSION:

This proceeding, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), involves three citations issued to Consol Pennsylvania Coal Company, LLC ("Consol") by the Secretary of Labor's Mine Safety and Health Administration ("MSHA"). The first citation alleges that the operator committed a significant and substantial ("S&S")[1] violation of its MSHA-approved roof control plan under 30 C.F.R. § 75.220(a)(1) when it neglected to place reflectorized signs at a face entry warning of unsupported roof. The second and third citations allege that the operator committed S&S violations of 30 C.F.R. § 75.1725(a) for failing to maintain hoisting cables on two machines in safe operating conditions.

Consol did not contest the fact of violation for any of the citations, but instead challenged the S&S findings. After a hearing on the merits, a Commission Administrative Law Judge issued a decision affirming the S&S findings for each citation. 41 FMSHRC 626 (Oct. 2019) (ALJ).

Consol filed a petition for discretionary review of the decision challenging the Judge's S&S findings, which we granted. For the reasons discussed below, we affirm the Judge's decision regarding each of the citations.

[1] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a … mine safety or health hazard."

I.

Citation No. 9076610

A. Factual Summary

On January 4, 2018, MSHA Inspector James Baker arrived at the Harvey Mine to perform a spot inspection. As the inspector examined an entry, he observed that a pile of debris with rocks the "size of large garbage cans" had fallen inby the last roof support. The pile of debris measured about two to three feet in height.[2] Baker noticed that the unsupported roof was in "very poor shape," and that non-reflective, white, Tensar mesh was used to control loose debris as mining progressed. Sec'y Br. at 4; Tr. 19, 24. At the time, the mesh was rolled up to the last roof strap and was left hanging.[3] He did not see any reflectorized signs warning of unsupported roof in the entry, in violation of Consol's roof control plan ("RCP"),[4] which requires that the operator place reflectorized signs on each side of all entries to the face.[5] Sec'y Resp. Br. at 3-4; Tr. 18-19, 22, 24.

As a result, Baker issued Citation No. 9076610 for failure to utilize reflectorized warning signs immediately outby unsupported roof in the No. 2 entry, in violation of the mine's roof control plan under section 75.220(a)(1) of the Secretary's regulations. Section 75.220(a)(1) states that: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. § 75.220(a)(1).

B. The Judge's Findings

The Judge stated that "[t]he purpose of the reflectorized signs is [to] keep miners from going under the unsupported roof." 41 FMSHRC at 632. He also recognized the continued hazard posed by the roof fall that had already occurred. The Judge also identified the danger posed by additional material falling, rolling down the pile of debris, and striking a nearby miner. *Id.* at 636.

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[2] He did not measure the rock since that would entail going under unsupported roof. Tr. 20.

[3] While the inspector and the operator's witnesses varied slightly in their estimates of the roof height and length of hanging Tensar mesh, those differences are not material to this decision.

[4] The roof control plan was not submitted into the record by either party. As such, we must rely on the parties' consistent and undisputed testimony regarding the official requirements of the plan.

[5] The section foreman had conducted an onshift inspection of the area only 47 minutes prior to Baker's inspection and had not noted the lack of reflective signs. 41 FMSHRC at 632.

The Judge rejected the operator's contention that the hanging mesh was a suitable alternative to a reflectorized sign. He found it compelling that the RCP does not provide that the hanging mesh can serve as an alternative to reflective signs. Instead, the Judge noted that under the RCP, the purpose of the hanging mesh is to be rolled out on the roof as roof bolts and straps are being installed. The mesh is not meant to serve as a warning device. Additionally, he observed that there was no testimony that the mine had instructed its employees that mesh extending down from the roof was to alert them that unsupported roof was beyond that point. *Id.*

The Judge further rejected the idea that the pile of fallen rock and coal also served as a warning barrier. Instead, the Judge saw it as a graphic demonstration of the danger involved in the hazard, thus underscoring the importance of the reflective signs. He reasoned that the pile was proof that roof had in fact fallen, and because of this, the Judge took issue with Consol's assertion that this obviously hazardous condition somehow "diminish[ed] the S&S determination." *Id*.

The Judge ultimately found that the lack of reflectors presented a discrete safety hazard by the absence of a genuine warning that unsupported roof was ahead. He found that roof falls, across the board, are a continuing threat in underground mining, and that in the current case, the roof did in fact fall. The Judge concluded that a roof fall "without qualification, is reasonably likely to cause injury," and that it is a given that any roof fall presents a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Id*. at 637.

C. Analysis

The Commission has recognized that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co*., the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co*., 6 FMSHRC 1834, 1836 (Aug. 1984). In evaluating that contribution, it is assumed that normal mining operations will continue. *See U.S. Steel Mining Co*., 6 FMSHRC 1573, 1574 (July 1984); *see also U.S. Steel Mining Co*., 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has held that the S&S inquiry considers "the violative conditions as they existed both prior to and at the

time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016), *quoting Knox Creek Coal Corp*., 36 FMSHRC 1128, 1132 (May 2014); *see also McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1991 (Aug. 2014). The second step of *Mathies* requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037-38 (Aug. 2016); *Mach Mining*, 40 FMSHRC at 3–4.[6]

A determination of "significant and substantial" must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease. *U.S. Steel Mining*, 6 FMSHRC at 1574; *Gatliff Coal Co.*, 14 FMSHRC 1982, 1986 (Dec. 1992). The Court cannot assume that miners would exercise caution. The hazard continues to exist regardless of whether caution is exercised, and the operator's responsibility is not lessened. *Eagle Nest, Inc*., 14 FMSRHC 1119, 1123 (July 1992). Additionally, "[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry." *Cumberland Coal Res., L.P. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *see also Buck Creek*, 52 F.3d at 136.

The first element of *Mathies* has been satisfied here as Consol does not contest the fact of violation. However, Consol argues that the Judge failed to substantiate the second element of *Mathies* because he misidentified the potential hazard resulting from an absent reflector as material falling from the roof and rolling off the pile of coal and rock. It contends that the only hazard that the standard was designed to protect against is a miner walking under unsupported roof. Obviously, the fact that no one had been identified as going under unsupported roof on this specific day does not negate the danger of falling roof or that a miner on a break would not be reasonably likely to cross the threshold.

Consol also argues that in addition to the ventilation curtain and wedge cut, the physical barrier of the roof mesh and the large pile of rocks and coal across the entire entry, as depicted in the inspector's notes, clearly indicated the location of the last row of permanent roof support. It contends that the pile of coal and rocks and the roll of Tensar mesh hanging from the roof created a physical barrier to prevent a miner from going into the hazardous area.

The roof control plan expressly mandates that the operator place reflectorized signs in all entries to the face to alert miners of bad roof. As noted by the Judge, Consol's roof control plan, which is enforceable as a mandatory standard, does not allow for other mechanisms to substitute for the reflectorized signs. 41 FMSHRC at 636; *Martin Cty. Coal Corp.*, 28 FMSHRC 247, 254-255 (May 2006). The mesh and debris from an earlier roof fall are not acceptable substitutes for

[6] Chairman Traynor believes that *Newtown Energy, Incorporated* was wrongly decided. He signs this majority opinion because he believes that the elevated burden of proof required by the Commission in *Newtown Energy* and its progeny is of no consequence in this particular proceeding. All Commissioners agree that substantial evidence supports the Judge's conclusion that these specific violations are S&S.

the roof control plan's requirement for reflective warnings. Unlike the non-reflective Tensar mesh and other conditions highlighted by Consol, the reflectorized signs are particularly noticeable in dark, underground mines. Specifically, a miner's cap light would reflect brightly off of the signs, thereby enabling the miner to see them. 41 FMSHRC at 632. The signs are a designated visual signal to alert miners of dangerous unsupported roof and to prompt them to stay a safe distance from the hazard. The Judge reasonably found that the absence of reflective signs contributed to the reasonable likelihood of the hazard of miners being exposed to roof fall injuries, as they might not know to keep from the area.[7]

The Judge also reasonably found that none of the conditions created a barrier to entry. 41 FMSHRC at 636, 638 (determining that "rock had fallen, creating an impediment, but not a barrier"). The mine's safety inspector, Albert Stein, described the pile as "two to three feet" in height and "just like a little hump." Tr. 401. The height of the entry was about eight to eight and half feet high, which would leave five to six feet of clearance. Tr. 400, 402.

Additionally, the MSHA inspector expressed justifiable concern that the reflectors would not be there to warn a less experienced miner who might attempt to enter the area to get the curtain or extra tubes. *See* 41 FMSHRC at 633. This is compelling as there may be numerous miners in the area with varying levels of experience getting the face ready for the next cut. Element two of *Mathies* is thus satisfied.

With respect to Step 3, the inspector determined that in addition to miners, an examiner would be exposed to this hazard twice per shift—during the pre-shift and on-shift examinations. *Id.* at 632.

Inspector Baker testified that, based on the fallen rock he saw on the ground, an injury "could be real bad" if a miner were in the unsupported area and something were to fall. Tr. 26. Characterizing the potential injury as "serious," the inspector stated that it could result in a broken neck or a broken back. Tr. 28. As the circumstances present ample opportunity for a miner to find himself in close proximity to the unsupported roof and to suffer serious injury, the Judge reasonably concluded that it would be of a reasonably serious nature.

We affirm the finding that the violation was S&S.

II.

Citation No. 9077085

A. Factual Summary

On January 6, 2018, MSHA Mine Inspector Bryan Yates performed an inspection at the Harvey Mine. While inspecting the advancing section, he saw a Caterpillar duckbill battery scoop used to transport supplies parked on the Number 2 track entry. The scoop has a winch

[7] Because we affirm the Judge's finding that the Tensar mesh did not serve as a substitute safety warning, we need not consider the Judge's additional finding that the Tensar mesh was a redundant safety measure that could not be considered.

located just behind the scoop bucket used for loading and moving heavy longwall components, including longwall shields that weigh approximately 22 tons, onto the duckbill scoop. The winch uses a one-inch diameter steel cable that wraps around a spool approximately one foot in diameter sitting in a two-foot wide housing. The cable is extended towards equipment being loaded and secured with a large stabilizing hook, which anchors the cable to the reel.

Yates noticed that the winch cable was badly damaged. It had broken strands, several kinks, and multiple frays sticking out. Ex. P-3A; 41 FMSHRC at 639. The stabilizing hook connecting the cable to the reel was broken, resulting in the cable no longer being connected to the reel, but merely wrapped around the reel. 41 FMSHRC at 643. He also noticed scratches in the scoop bucket. *Id.* The scoop had not been removed from service. *Id.*at 645. Yates issued Citation No. 9077085 on the basis that the winch cable was not being maintained in safe operating condition and had not been removed from service in violation of section 75.1725(a).

Section 75.1725(a) states that: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." 30 C.F.R. § 75.1725(a).

B. The Judge's Findings

The Judge affirmed the Secretary's S&S determination. Finding Consol's argument "unusual," he rejected the operator's position that the cable was in such poor condition that it was not useable. 41 FMSHRC at 645. Instead, relying on Yates' testimony, the Judge accepted that a miner attempting to use the damaged winch cable would be exposed to two discrete safety hazards: the cable snapping under the weight of a load, whiplashing, and striking a nearby miner due to the tension on the cable; and the load itself dropping and striking a miner. The Judge concluded that the obvious hazard is that a cable in this undisputedly poor condition can break and an injury could result in such an event.

The Judge found it compelling that the cable had not been removed and the equipment was not tagged out of service, thereby leaving it available for use. He also credited the inspector's testimony that the cable was the source of the scratches in the bucket, which

established that it was being used in its damaged state. Based on the circumstances and credible evidence, the Judge determined that this situation was "an accident waiting to happen." *Id*.

C. Analysis

Consol concedes the fact of violation, but maintains that the violation was not S&S. It argues that the rope cannot break if it cannot be used, and if it cannot be used, it is not reasonably likely to contribute to a hazard. It is Consol's position that because the rope was no longer attached to the winch reel, any tension put on the rope would simply cause the winch reel to free spin. Pointing to the testimony of Harvey Mine Safety Inspector Chase Shaffer, it contends that the rope is not long enough to wrap on itself to create an anchor point, and that the inspector did not conduct any tests to demonstrate his unsupported theory, which Consol asserts is "mere speculation." PDR at 9-10; Consol Reply Br. at 13.

We disagree. Substantial evidence supports the Judge's finding of S&S. The Judge identified the obvious safety hazard as the damaged cable breaking and causing injury to nearby miners. 41 FMSHRC at 645. In relying on the inspector's testimony, the Judge determined that this hazard could occur in one of two ways. If the severely damaged cable was used to pull heavy equipment, the tension could cause the equipment to drop and hit a nearby miner or cause the cable to snap, whiplash, and hit a miner. As support for the latter, Yates recounted a prior incident he witnessed where a miner had several bones in his face broken and was knocked unconscious after he was slapped in the face by a scoop cable that snapped and whipped back, hitting the miner who happened to be standing in the vicinity.

Additionally, the Judge did not accept Consol's argument that the reel would just free spin. Inspector Yates testified that if the cable is wrapped two to three times around the spool, with sufficient tension it would create a "binding" effect that would render the anchor point meaningless and it could sufficiently pull a load. Tr. 91-92. He stated that the anchor point on the reel is not made for tension and that the wrapped cable is part of the anchoring. Tr. 92-93. As for the length of the cable, according to Yates: "They use very long chains to hook onto stuff, so the rope don't have to go all the way to it. You meet the rope with the chain." Tr. 90. He further noted that you could simply take the hook and hook it to the chain. The Judge found the inspector's testimony credible. The Commission has long held that a Judge's credibility determination is entitled to great weight and may not be overturned lightly. *See Farmer v. Island Creek Coal Co*., 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co*., 3 FMSHRC 2767, 2770 (Dec. 1981); *Bussen Quarries, Inc*., 39 FMSHRC 970, 974 (May 2017).

Moreover, Consol's contention that the cable was not suitable and therefore would not be used, erroneously presumes that any miner attempting to utilize the cable would see its condition, surmise it unsafe for use and not use it. The miner could see the damage, simply decide it is not that bad and use it anyway. This is particularly so if the miner approaches the machine with the assumption that equipment unsuitable for use would have already been removed from service. Thus, there is a significant chance that a miner would not discover the cable to be unusable until an attempt to use it. By that time, the damage would be done.

We conclude that the damaged cable presented a discrete safety hazard and that it was reasonable for the Judge to rely on the experienced inspector's testimony.[8] We have recognized that an inspector's judgement is an important element in an S&S determination, and a Judge is well within bounds to credit the opinion of an experienced MSHA inspector that a violation is S&S. *Buck Creek*, 52 F.3d at 135 ("the ALJ certainly did not abuse his discretion here in crediting the opinion of [the] Inspector."); *Harlan Cumberland Coal Co*., 20 FMSHRC 1275, 1277 (Dec. 1998) ("We see no basis for overturning the judge's crediting of the first-hand observations of [the inspector] over the testimony of Harlan's safety director.").

[8] Inspector Yates has approximately 20 years of mining experience. He has previously worked as a scoop operator and shuttle car operator and was formerly a cargo specialist in the army where he operated heavy equipment, including cranes and forklifts and had experience using and inspecting winch cables. Tr. 58-59.

We also find that there is ample evidence to support the finding that the hazard was reasonably likely to result in an injury.[9] Inspector Yates gave undisputed testimony that the scoop operator often works with another miner who directs travel in low visibility conditions, but who is situated outside of the scoop, in the entry or crosscut. Additionally, he noted that there were three other miners working nearby. Tr. 78-79; 41 FMSHRC at 644. We conclude that other miners in the entry would still be exposed to the hazard of a whiplashing or snapping cable. Although Consol argues that its miners are trained to stay out of red zones, we have found that an operator cannot attempt to claim mitigation regarding S&S when it rests upon the assumption that miners would stay out of red zones or otherwise exercise caution. *Eagle Nest,* 14 FMSHRC at 1123.

Consol further contends that the inspector never saw the cable used in the manner alleged or otherwise demonstrated by his theory. It points out that the scoop is constantly used and for a variety of tasks. Consol maintains the scratches in the bucket could have occurred in any number of ways, "including the use of an undamaged rope or the rope bouncing around in the spool as the scoop is used." PDR at 10; Consol Reply Br. at 13.

In light of the photographic evidence, however, the Judge found the inspector's inference reasonable that as the cable is extended and retracted, the frayed metal strands will rub on the inside of the winch housing causing scratches each time it comes on and off, establishing use. 41 FMSHRC at 645. Yates stated that these scratches do not occur when a cable in good condition is used. He also did not agree that the scratches could have developed simply in the normal rolling up of the cable, because there were too many of them and such marks do not occur in the normal process of rolling up the cable. *Id.* at 641. Yates testified that he believed friction from frayed strands was "absolutely" how the scratches occurred. Tr. 74-75. He also noted that Consol could not explain why the scoop was left in that condition and that he was aware that they were setting up a new longwall face in the 4A section. Tr. 80. The Judge reasonably found the inspector's testimony credible.

Accordingly, we affirm the finding of S&S.

III.

Citation No. 9077091

A. Factual Summary

On January 19, 2018, Inspector Yates found the Venturo lifting device on a Brooksville jeep badly damaged. The lifting device is essentially a small crane on the back of a mantrip with a lifting capacity of about 1,600 pounds. Tr. 150. Miners use the lifting device to vertically lift and lower longwall components, such as motors, pumps, and jacks. Tr. 154-55, 412. The device

[9] Although the Judge stated that the violations in Citation Nos. 9077085 and 9077091 were "at least somewhat likely to result in harm" (41 FMSHRC at 645, 664), he cited to and applied the correct Commission standard, which requires that the violation be "*reasonably* likely" to result in injury. *Id.* at 627, 645, 664; *see Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981) (emphasis added).

uses a small winch with a wrapped stainless-steel cable that spools out 10-15 feet when being used and is meant to be operated from a distance. Tr. 150-51, 187, 414. There is a metal hook at one end of the cable that hooks onto a load. When a load is hooked, the jeep then travels down the track and loads equipment in or out of a scoop. 41 FMSHRC at 658, 660.

As Yates approached the jeep, he saw tape wrapped around the cable, which he removed to see what was underneath. He saw two to three feet of the original cable broken off from the hook, but with the hook still attached to the other end of the cable. The cable was frayed with broken and loose strands. The non-hooked end of the cable was looped back through the hook and braided back into the cable and then wrapped with black tape. The damaged cable had not been removed and the jeep had not been locked and tagged out. 41 FMSHRC at 659. The jeep, which is pre-operationally inspected once a week, was located in the track shoot at the bottom of Patterson Creek portal, in the crosscut between entries, where miners park their rides.[10] It was not in use and the winch controller was disconnected from the power source. Yates issued Citation No. 9077091, asserting another violation of section 75.1725(a) because the lifting device on the jeep was not maintained in safe operating condition. 41 FMSHRC at 658.

B. The Judge's Findings

The Judge determined that this violation was S&S. Relying on the inspector's testimony, he identified two hazards presented by this condition, the cable snapping back and a load dropping. He concluded that the twin discrete safety hazards presented a clear measure of danger to safety. The Judge found that the jeep was not locked or tagged out and was available for use. 41 FMSHRC at 664. He accepted the inspector's testimony, as credible, that the cable had been used in its improper condition, since the defect was discovered at the end of a shift. Accordingly, the Judge rejected Consol's position that the cable was not functional, posing no hazard. He reasoned that it was insufficient for Consol to depend on miners adhering to their safety training, especially as in this case, with an inadequate attempt at repair for an insufficient cable. He also rejected Consol's reliance on its preoperational check policy, since the improper attempt to secure the cable was insufficient, intentional, and contrary to that policy. *Id.*

C. Analysis

Just like the previous citation, this violative condition exposes miners to the discrete safety hazard of the cable breaking and causing injury to nearby miners. Specifically, injury may occur if the cable snaps under the weight of a load, whiplashes, and strikes a nearby miner, or if the load itself drops and strikes a miner—both creating a clear measure of danger to safety. 41 FMSHRC at 664; Tr. 162, 184.

[10] Although Consol's safety inspector Albert Stein testified that the last pre-op examination of the jeep was the day before the citation was issued, Consol's counsel indicated at trial that Stein's testimony was inconsistent with the pre-operational inspection records and sought to admit the records. The Judge rejected admission of the records on the ground that Consol had failed to disclose them to opposing counsel prior to trial. Tr. 416 -19.

Consol maintains that this winch cable was unsuitable for use and that the two hazards cited by the Judge were unlikely occurrences. It maintains that the inspector's conclusion was wholly speculative. It asserts that "[c]ommon sense dictates" that if the lifting device was used in this condition, the taped area would come apart and the rope would retreat into the spool, and there would be no whiplash. PDR at 29. It also argues that it trains its miners to stay out of red zones and to use the controller when operating the lift.

We, again, are not persuaded by these arguments. First, Consol suggests that the cable retreating into the spool is the only possible outcome if it is used in the damaged condition. The inspector pointedly disagreed with Consol and maintained that the cable would not retreat into the spool but would, instead, whip around at random. Second, even if Consol were correct that the cable was not capable of lifting anything, it erroneously presumes that a miner will look at the inadequately repaired cable, reach that same conclusion, and then decide not to use it. It is insufficient to depend on its miners resting on their safety training "about risks for cable failure," to keep them safe. *See* 41 FMSHRC at 664. Our history, unfortunately, is replete with well-trained, but injured, miners.

Moreover, the damaged portion of the cable was covered with black tape, which as the Judge noted, served to hide the inadequate fix, thus preventing miners from seeing the full extent of the damage. 41 FMSHRC at 664; *see also* Sec'y Resp. Br. at 7 ("With the black tape over it, the repair attempt was less visible."). This is further compounded by the fact that the jeep was not locked or tagged out of service, so there was nothing warning miners against powering the jeep and using the winch cable in its damaged condition. A miner could see the patch job done to the cable and assume that because it is patched and not tagged out of service, the cable is suitable for a quick, occasional or light use until it gets replaced.

Consol counters that "most likely" the rope was or "appeared to be" tied and taped up simply to avoid losing the hook and to keep the rope from being pulled back into the boom. PDR at 10, 29. It argues that electrical tape and a modest tie job were not going to allow the rope to be used to lift a load. Consol also points out that the controller must be connected to a power source to operate the boom and lifting device, which it was not. 41 FMSHRC at 661. We find this theory unavailing.

Consol presented no evidence, particularly testimony from any miner having direct knowledge of the taped cable, in support of this assertion. Neither the winch apparatus nor the jeep was locked out or removed from service for the purpose of initiating repairs. We also find compelling Inspector Yates' opinion that the improper repair took time and the only reason to invest such time is if one intended to use it. He stated that "you wouldn't do that if you was going to take it out of service. You would have left it broke. You would have threw it inside of the mantrip and went on back." Tr. 159. Consol presented no rebuttal evidence.

We further conclude that the controller being disconnected from a power source does not constitute a deterrent or impediment. One would simply need to connect the jeep to a power source in order to use the damaged cable.

Just like the previous citation, the Judge found that either hazard could reasonably be expected to cause cuts, broken bones, contusions, and even amputations, in the event of a falling load or whiplashing cable, and the injuries would be of a reasonably serious nature. 41 FMSHRC

at 659, 664. We conclude that the Judge's S&S finding here is reasonable and this citation is affirmed.

IV.

Conclusion

Based on the record evidence and the Judge's credibility determinations, we conclude that substantial evidence supports the Judge's S&S findings regarding each of the above citations. *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998) (noting that the "sensibly deferential" substantial evidence standard of review does not allow the court to reverse reasonable findings and conclusions, even if it would have weighed the evidence differently); *Donovan on Behalf of Chacon v. Phelps Dodge Corp*., 709 F.2d 86, 92 (D.C. Cir. 1983) (finding that it was error for the Commission to "substitute a competing view of the facts for the view the ALJ reasonably reached").

Accordingly, we affirm the Judge's decision in all respects.

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

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

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

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April 23, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ROGER COOK	Docket No. WEVA 2021-0203
v.	
ROCKWELL MINING, LLC	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

DECISION

BY: Rajkovich, Commissioner:[1]

I.

Introduction

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). At issue is a Judge's decision on April 2, 2021, granting the Secretary of Labor's application for temporary reinstatement of a miner, Roger Cook. Roger Cook was suspended by the operator on January 21, 2021 and terminated on January 25, 2021. On February 1, 2021, Cook filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") over his termination on January 25. Ex. S-1.

On March 10, 2021, the Secretary filed an application for temporary reinstatement on behalf of Cook, pursuant to section 105(c)(2) of the Mine Act.[2] 30 U.S.C. § 815(c)(2). The Secretary argued that Cook should be reinstated because his complaint was not frivolously

[1] Commissioner Rajkovich's separate opinion is part of the majority on every issue presented on appeal. As discussed more fully on the following page, Chair Traynor and Commissioner Althen each write separately, concurring in part and dissenting in part with Commissioner Rajkovich's opinion.

[2] Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2).

brought.[3] Rockwell Mining, LLC ("Rockwell") opposed the Secretary's application for temporary reinstatement, arguing that Cook's complaint was frivolous.

On March 29, 2021, the Judge presided over a hearing in this matter. On April 2, 2021, the Judge issued a decision granting the Secretary's application for temporary reinstatement and directing temporary reinstatement of the miner. 43 FMSHRC ___, slip op. at 1, No. WEVA 2021-0203 (Apr. 2, 2021) (ALJ) ("ALJ Dec."). The Judge applied the not frivolously brought standard to Cook's claim that he had engaged in protected activity that had motivated the adverse actions at issue.

On April 7, 2021, Rockwell filed a petition for review of the Judge's temporary reinstatement decision. On appeal, the operator argues that the Judge erred in finding that the operator's knowledge of Cook's protected activity and temporal proximity between the protected activity and the adverse actions were sufficient to establish a non-frivolous issue of discriminatory motivation. In addition, the operator argues that the Judge erred in declining to consider and weigh the operator's evidence regarding the operator's absence of animus and Cook's unprotected misconduct. The operator proposes a new "rule" which would require Judges to consider and analyze all evidence relating to a motivational nexus between a miner's protected activity and the adverse actions. Finally, the operator argues that prior to the hearing, the Judge erroneously excluded evidence of Cook's unprotected misconduct, denying the operator due process.

Upon review, a majority of Commissioners affirms the Judge's decision, while a separate majority affirms language in *Sec'y of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018) as the law of the Commission.

Commissioner Rajkovich finds error in the Judge's decision to exclude evidence; however, he finds such error harmless and forms a majority to affirm the Judge's decision in result with Chair Traynor, and a majority to affirm language in *Marion Cty.* with Commissioner Althen.

Chair Traynor concurs in result only with Commissioner Rajkovich. Commissioner Althen concurs in part and dissents in part with Commissioner Rajkovich.

II.

Factual Background

Roger Cook was employed as a fire boss at the Eagle #3 Mine operated by Rockwell Mining in Wyoming County, West Virginia from March 2017 until his termination on January

[3] In her decision, the Judge considered whether there was a non-frivolous motivational nexus between Cook's protected activity and two adverse actions - his suspension on January 21 and his termination on January 25. 43 FMSHRC ___, slip op. at 4-5, No. WEVA 2021-0203 (Apr. 2, 2021) (ALJ). Therefore, in reviewing the Judge's decision, I will consider both adverse actions.

25, 2021. At the time of his termination on January 25, 2021, Cook was classified as a salary outby foreman. Prior to his suspension and termination in January 2021, Cook had expressed various safety related concerns to mine management. In August 2020, Cook had filed an accident report claiming to have suffered respiratory problems as a result of spraying gunite[4] during his work during the prior February. Subsequently, in December 2020, a month prior to his termination, he voiced concerns about the manner of building certain stoppings in the mine. In January 2021, Cook expressed concern to management regarding an allegedly unsafe number of individuals on a man trip and informed management about a safety concern regarding a flat car.

In addition, on January 20, 2021, while he was conducting an airway examination, Cook noticed that the ground check monitor circuit on the cathead plug for the P-70 pump had been bypassed. Cook discovered that someone had installed a jumper to override the ground check monitor circuit, a protective device. In response to this unsafe condition, Cook locked and tagged out the cathead and left a note in the area with the words "No monitor, had wire under cathead[.] Dusty Cook 1-20-21 11:04 AM Shame[,] Shame" on it. Ex. S-2. Later the same day, Cook informed MSHA Inspector John Stone that he had found that the cathead at issue was plugged in while the ground monitor circuit on the active pump was bypassed. Inspector Stone issued Order No. 9247364 for this condition.

The order stated in relevant part that "[t]he Old 6 Head Return P-70 pump . . . has been in operation without the ground check monitor circuit working. When checked it has been determined and evidence indicates a jumper has been installed to bridge/override this protective device." Ex. S-3. This is consistent with testimony at the temporary reinstatement hearing that "the pump had been . . . jumped out or overrode . . . the ground run had been defeated to allow this pump to run in an unsafe condition." Tr. 82.

The operator alleges that Cook engaged in misconduct at the mine a few days prior to his January 20 conversation with the MSHA inspector. Specifically, the operator alleges that between January 15 and 16, 2021, Cook knew but did not inform management that the No. 6 scoop at the mine had an unsafe condition – a malfunctioning panic bar. In addition, the operator alleges that despite knowing of the defective condition, Cook instructed another miner, Charles Quarles, to operate the scoop on January 15.[5] However, Cook disputes that he knew about the unsafe condition claiming that "I did not know that the panic bar wasn't working [during the relevant time period]." Tr. 57, 101.

On January 21, Cook was suspended. The suspension occurred a few days after Cook's alleged misconduct between January 15-16, but the day after his conversation with the MSHA inspector. On January 25, 2021, four days after his suspension, Cook was terminated from his employment at the mine. On February 1, Cook filed a discrimination complaint with MSHA over

[4] Gunite is generally made of cement and is sprayed on pneumatically.

[5] The operator sought to introduce a written statement from Quarles to this effect. Resp't Proposed Ex. 1. The Judge refused to allow testimony on the matter and did not accept the proffered note into evidence.

his termination. On March 10, the Secretary filed an application for temporary reinstatement on behalf of Cook.

III.

The Judge's Decision

On March 26, a few days prior to the March 29 hearing, the Judge issued an order which excluded evidence relating to the operator's allegations of Cook's unprotected misconduct. The operator alleged that on January 15-16, 2021, Cook knew that the No. 6 scoop at the mine had a malfunctioning panic bar but failed to inform management of the issue, and failed to prevent another miner, Quarles, from operating the defective scoop. The operator alleges that this unprotected misconduct was the sole basis for Cook's suspension and termination. However, the Judge ruled that the proposed evidence was beyond the scope of the temporary reinstatement proceeding because it concerned an affirmative defense and raised issues of credibility. The Judge repeated this ruling in her post-hearing decision.[6] ALJ Dec. at 3 n.2.

On March 29, the Judge presided over a hearing in this matter. On April 2, the Judge issued a decision granting the Secretary's application for temporary reinstatement and directed that Cook be reinstated.

In her decision, the Judge found that Cook had engaged in protected activity. Furthermore, the Judge ruled that there was a non-frivolous issue that Cook's protected activity on January 20 had motivated the adverse actions – his suspension on January 21 and his termination on January 25.[7] The Judge found that the extremely short period of time between the January 20 cathead incident and Cook's suspension and termination on January 21 and January 25 respectively was sufficient to establish "a temporal nexus between the protected activity and the adverse action[s]." ALJ Dec. at 4-5. In addition, the Judge found that because management witnessed Cook's discussion with Inspector Stone regarding the cathead on January 20, there was "a non-frivolous issue that management was aware of the [cathead] incident and that [the operator] had knowledge of Cook's protected activity." *Id.* at 4.

Therefore, the Judge found that the Secretary had established the operator's knowledge of Cook's protected activity and temporal proximity between the protected activity and the adverse actions. On this basis, the Judge found a nexus between Cook's protected activity and the adverse actions sufficient to warrant reinstatement under the non-frivolous standard. Consequently, the Judge granted the Secretary's application for temporary reinstatement.

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[6] The operator filed a Motion to Reconsider the Judge's March 26 Order which the Judge also denied. ALJ Dec. at 3 n.2.

[7] Although the Judge briefly mentioned other instances of protected activity, she focused on Cook's protected activity on January 20, 2021. On that day, Cook engaged in protected activity when he informed an MSHA inspector why he had locked and tagged out the cathead on the P-70 pump. ALJ Dec. at 4-5.

IV.

Legal Principles

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has applied the substantial evidence standard to review a Judge's temporary reinstatement order. *Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC,* 31 FMSHRC 1085, 1088 (Oct. 2009).

The Commission has repeatedly recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). At a temporary reinstatement hearing, the question is whether the complaint is frivolous, "not whether there [was] sufficient evidence of discrimination to justify permanent reinstatement." 920 F.2d at 744.

In a temporary reinstatement proceeding, the Judge should "evaluat[e] the evidence of the Secretary's . . . case and determin[e] whether the miner's complaint . . . 'appear[ed] to have merit.'" *Williamson,* 31 FMSHRC at 1089. During a temporary reinstatement proceeding, the Secretary need not prove a prima facie case of discrimination but must simply prove a non-frivolous issue of discriminatory motivation. However, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at the temporary reinstatement stage meets the non-frivolous test. *Id.* at 1088. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity (i.e., that a motivational nexus existed between the protected activity and the adverse action). *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).[8]

The Commission has recognized that discriminatory motive may be shown by indirect evidence establishing a motivational nexus between the miner's protected activities and the adverse actions. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (citing *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). The Commission in *Chacon* stated that discriminatory motive can be established by circumstantial evidence of: (1) knowledge of the protected activity, (2) hostility or animus

[8] In a decision issued on April 14, 2021 the United States Court of Appeals for the Ninth Circuit rejected the *Pasula-Robinette* test for violations of section 105(c). *Thomas v. CalPortland Co.,* No. 20-70541 ___ F.3d ____, 2021 WL 1396753 (9th Cir. April 14, 2021). Here, neither party challenged the *Pasula-Robinette* test before the Administrative Law Judge, and it is not before the Commission in this decision. It should also be noted that this mine is not domiciled within the Ninth Circuit jurisdiction.

towards the protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant. *Id.* at 2510-12. The Commission has held that the Secretary may establish a non-frivolous motivational nexus simply through the operator's knowledge of protected activity and temporal proximity between the protected activity and the adverse action. *Sec'y of Labor on behalf of Stahl v. A&K Earth Movers Inc.,* 22 FMSHRC 323, 325-26 (Mar. 2000).

Commission Rule 45(d) addresses procedures for temporary reinstatement hearings, stating that "the Secretary may limit his presentation to the testimony of the complainant. The respondent [operator] shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought." 29 C.F.R. § 2700.45(d).

In contrast to a discrimination proceeding where the Judge must resolve conflicting evidence, the Commission has held that the Judge should not make credibility determinations during a temporary reinstatement proceeding. *Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011). In *Williamson,* 31 FMSHRC at 1089, the Commission determined that the Judge made "credibility determinations in evaluating the Secretary's prima facie case, which he clearly should not have done at [the temporary reinstatement stage]." And in *A&K Earth Movers,* 22 FMSHRC at 325-26, the Commission determined that during a temporary reinstatement proceeding, the Judge is not obligated to resolve testimonial conflicts regarding knowledge even if the operator claims that it has no knowledge of protected activity. In addition, the Judge should not weigh the operator's evidence against the Secretary's evidence when determining whether to grant temporary reinstatement. In *Williamson,* 31 FMSHRC at 1091, the Commission held that the Judge erroneously increased the Secretary's burden in a temporary reinstatement proceeding by "weigh[ing] the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case."

V.

Operator's Petition for Review

On April 7, 2021, the operator filed a petition for review of the Judge's temporary reinstatement decision. On April 13, 2021, the Secretary responded to the operator's petition.[9]

In its assignments of error, the operator's petition sets forth three alleged errors by the Judge. First, the operator alleges that the Judge erred in refusing to consider and weigh each element of nexus between the protected activity and adverse actions in determining whether the Secretary had met his burden of proof. The four nexus factors consist of the operator's knowledge of Cook's protected activity, temporal proximity between the protected activity and

[9] On April 15, 2021, the operator filed an unopposed motion with the Judge to substitute economic reinstatement for Cook's actual physical reinstatement, pursuant to an agreement with the Secretary and Cook for such economic reinstatement. The Judge issued an order granting this motion on April 16, 2021.

the adverse actions, the operator's hostility/animus towards Cook's protected activity, and any disparate treatment of Cook.[10]

Second, the operator alleges that the Judge erred in excluding evidence of Cook's unprotected misconduct. The operator alleges that between January 15-16, 2021, Cook knew but did not inform management that the No. 6 scoop at the mine had an unsafe condition – a malfunctioning panic bar, and that despite knowing of the defective condition, Cook instructed another miner, Charles Quarles, to operate the scoop on January 15. Resp't Proposed Ex. 1. As previously noted, exhibits related to this alleged event were excluded by the Judge prior to the hearing. Tr. 127-28; ALJ Dec. at 3 n.2.

Third, the operator alleges that it was denied due process by the Judge's improper exclusion of evidence.

A. Knowledge and Temporal Proximity

As stated above, in a temporary reinstatement proceeding, the four elements to be considered in determining whether a complaint is non-frivolous are whether the operator had knowledge of the protected activity, whether there was a close temporal proximity between the protected activity and the adverse action, whether the operator had animus towards the protected activity, and whether the complainant suffered disparate treatment. In this case, the operator does not dispute that it had knowledge of Cook's protected activity, i.e., Cook's discussion of the cathead with the MSHA inspector in January 2021. In addition, the operator does not dispute that protected activity took place on January 20, and that Cook was suspended and terminated in the following days – on January 21 and January 25.

Rockwell argues that its knowledge of the protected activity and temporal proximity between the protected activity and adverse actions are insufficient generally and especially in this case to show a motivational nexus. Regarding the specific facts presented here, the operator argues that its knowledge of the protected activity and temporal proximity between the protected activity and adverse actions are nullified by an absence of any evidence of animus towards Cook's protected activity.

However, under Commission precedent addressing temporary reinstatement, knowledge of protected activity and temporal proximity can be sufficient by themselves to establish a nexus between the protected activity and the adverse action. *A&K Earth Movers,* 22 FMSHRC at 325-26. In addition, the Commission has "never held that hostility is a prerequisite to a finding that a complaint is not frivolous. Rather, such evidence is but one of several circumstantial indicia of

[10] During its discussion of this alleged error, the operator argues that its knowledge of Cook's protected activity and temporal proximity between his protected activity and the adverse actions are insufficient to establish a non-frivolous motivational nexus, and that the Judge failed to consider and weigh its evidence regarding the absence of animus and Cook's unprotected misconduct. Moreover, the operator proposes a rule which would require a Judge to consider all evidence regarding the operator's motivation and the miner's unprotected misconduct before granting temporary reinstatement.

discriminatory intent that may be offered to show that a complaint is not frivolous."[11] *Id.* at 323 n.2. Therefore, it is clear that knowledge and temporal proximity are sufficient to establish a non-frivolous claim of motivational nexus which is not automatically nullified by an absence of evidence of operator animus towards the protected activity.

I decline to overturn our caselaw holding that knowledge and temporal proximity can be sufficient by themselves, in the absence of any other evidence of animus, to support a non-frivolous motivational nexus. Therefore, I reject the operator's argument that its knowledge of Cook's protected activity and temporal proximity between Cook's protected activity and the adverse actions were insufficient to demonstrate a non-frivolous claim. I conclude that the Judge properly found that the complaint was not frivolously brought, given the record evidence of operator knowledge and temporal proximity.

B. Credibility Determinations

In a temporary reinstatement proceeding the Judge may evaluate the Secretary's evidence of a motivational nexus between the protected activity and the adverse action. *Williamson,* 31 FMSHRC at 1089. However, the operator goes further, arguing that the Judge must resolve conflicts in the evidence (i.e. make credibility determinations) during temporary reinstatement proceedings.

In *Williamson*, 31 FMSHRC at 1089-90, and *A&K Earth Movers,* 22 FMSHRC at 325-26, the Commission ruled that the Judge should not resolve conflicts in the testimonial evidence (i.e., make credibility determinations) during a temporary reinstatement proceeding. I decline to overturn our caselaw prohibiting credibility determinations in a temporary reinstatement proceeding.

C. Weighing the Operator's Evidence

In its Petition for Review, the operator proposes that the Commission enact a rule whereby the Judge "is required to either consider and analyze each element [regarding the motivational nexus] set forth in *Chacon* . . . as well as whether there was independent misconduct by the Complainant to determine whether the case is frivolous or articulate why the ALJ decided against considering a specific element." Pet. for Rev. at 9. This rule would require the Judge to analyze (i.e., weigh) the operator's evidence regarding the motivational nexus and Cook's unprotected misconduct against the Secretary's evidence demonstrating knowledge and temporal proximity.

Commission caselaw prohibits the Judge from weighing the operator's evidence against the Secretary's evidence in a temporary reinstatement proceeding. In *Williamson,* 31 FMSHRC at 1091, the Commission held that "evidence that Williamson was discharged for unprotected

[11] The operator analogizes this case to a Judge's determination in *Sec'y of Labor on behalf of Fletcher v. Frontier Kemper Constructors, Inc.,* 34 FMSHRC 2189 (Aug. 2012) (ALJ). An Administrative Law Judge's decision is not binding on the Commission. 29 C.F.R. § 2700.69(d).

activity relates to the operator's rebuttal or affirmative defense" and that the Judge erroneously increased the Secretary's burden in a temporary reinstatement proceeding by "weigh[ing] the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case."

I emphasize that the operator's proposed rule requires the Judge to weigh the operator's evidence as would be appropriate to a final decision on the merits. I decline to overturn our caselaw prohibiting the Judge from weighing the operator's evidence in a temporary reinstatement proceeding. Consequently, I conclude that the Judge did not err in declining to weigh the operator's evidence during the temporary reinstatement proceeding.

D. Exclusion of Evidence

As noted, the operator sought to submit evidence regarding alleged unprotected misconduct by Cook. However, on March 26, a few days prior to the hearing, the Judge issued an order excluding such evidence.

It is clear that evidence of unprotected misconduct would relate to the adverse actions by providing alternative legitimate reasons for Cook's suspension and termination. It is also clear that if a Judge could not consider all evidence relating to the adverse action(s), the operator would lack a meaningful right to "present testimony and documentary evidence in support of its position that the complaint was frivolously brought." 29 C.F.R. § 2700.45(d).

In a prior case, two Commissioners addressed this issue, finding that a temporary reinstatement hearing must be a full evidentiary process, and during such a proceeding a Judge should consider any evidence which is both relevant to the adverse action and does not require any credibility or value determinations. *Marion Cty.*, 40 FMSHRC at 47 (separate opinion of Acting Chair Althen and Commissioner Young). The Commissioners stated:

> [A]ll evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- even that which seems directed to an affirmative defense or rebuttal of the miner's claim. While we agree that the Judge should not make credibility and value determinations of the operator's rebuttal or affirmative defense, if the totality of the evidence or testimony admits of only one conclusion, there is no conflict to resolve.

Id.[12]

Under this approach – hereinafter referred to as the *Marion* approach – the Judge can only consider evidence which does not require any credibility or value determinations. Therefore, this approach is consistent with the limited nature of a temporary reinstatement proceeding. The *Marion* approach also gives operators a meaningful opportunity to provide

[12] Commissioner Althen, as set forth in his separate opinion, joins Commissioner Rajkovich to affirm this holding as the law of the Commission.

undisputed evidence (i.e., evidence which does not require any credibility or value determinations) that the complaint was frivolously brought. Therefore, it is consistent with the purpose of Commission Rule 45 which seeks to provide operators with a meaningful opportunity to present their arguments at a temporary reinstatement hearing. I hold that the Judge can consider evidence regarding allegations of a miner's unprotected misconduct to determine if the miner has a viable case. Such evidence may not serve as a basis for denial of reinstatement if it requires resolution of an actual credibility determination.

Scenarios exist where there is no conflicting evidence regarding the miner's unprotected misconduct, i.e., a scenario where the Judge is not presented with any credibility or value determinations regarding the alleged misconduct. For example, a document, which both parties agree is genuine, may show that the operator's decision to fire the miner was made in response to the miner's unprotected misconduct and prior to any identified protected activity. Under these circumstances, the Judge would not need to make any credibility or value determinations regarding this document. And although the document would technically relate to an affirmative defense, it would strongly support a contention that there was no motivational nexus between the protected activity and the adverse action at issue. In this scenario I would find that the Judge cannot only consider the uncontroverted evidence regarding the miner's misconduct but is required to consider such evidence when making his temporary reinstatement determination.[13]

On appeal, the operator asserts that Cook engaged in unprotected misconduct. The operator contends that Cook failed to inform management of the malfunctioning panic bar on the No. 6 scoop and failed to prevent, in fact knowingly permitted, another employee, Quarles, from operating the scoop despite knowing of the defective condition. Therefore, Cook's alleged misconduct is predicated on his knowledge of the malfunctioning panic bar. In support, the operator desired to offer the testimony of its mine superintendent and a note from the equipment operator, miner Charles Quarles, confirming Cook's knowledge of the defect and authorization for its use in the defective condition.

In contrast to the operator's allegations, Cook disputed that he knew about the unsafe condition on the scoop. Cook testified that "I did not know that the panic bar wasn't working" during the relevant time period. Tr. 57. In order to resolve the conflicting evidence, the Judge would have had to make credibility determinations, which the Judge cannot do. *Marion Cty.,* 40 FMSHRC at 44, 47 (all four Commissioners, in their separate opinions, agreed that the Judge cannot make credibility determinations during a temporary reinstatement proceeding).

Given the statutory and constitutional importance of an operator's right to a full hearing, the Judge erred in excluding evidence of Cook's alleged misconduct. I believe that the proper approach for the Judge would have been to allow evidence of Cook's misconduct during the hearing. Then, in her post-hearing decision, the Judge could have determined whether the evidence required her to make any credibility or value determinations, as set forth in *Marion Cty.,* at 47.

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[13] I note that there may be other factual scenarios which similarly do not involve any credibility or value determinations. However, it is not necessary to consider such hypothetical scenarios for the purpose of this proceeding.

However, as stated above, it appears to me that the conflicting evidence regarding Cook's misconduct would have required the Judge to make credibility determinations. I find that even if the Judge had allowed such evidence of misconduct during the hearing, she would have been prohibited from considering it in her post-hearing decision. Therefore, because the evidentiary exclusion would not have affected the Judge's post-hearing decision, I conclude that the Judge's evidentiary exclusion constituted harmless error.[14]

E. Due Process

Lastly, the operator argues that the Judge denied it due process by characterizing the operator's evidence as an affirmative defense or as an effort to dispute credibility and by excluding the operator's evidence. In this regard, the operator's due process argument does not find fault with any specific Commission procedure but focuses on evidence the Judge declined to consider. As stated above, the Judge cannot make credibility determinations in a temporary reinstatement proceeding. Therefore, it is unnecessary to further consider the operator's due process argument.

VI.

Conclusion

For the reasons stated above, I affirm the Judge's decision.

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

[14] I am troubled by the Judge's order excluding evidence of Cook's unprotected misconduct. I note that such evidentiary exclusions may deny the operator an opportunity to introduce relevant evidence on its behalf during a temporary reinstatement proceeding.

Commissioner Althen, concurring in part and dissenting in part: [1]

Commissioner Rajkovich does an excellent job of covering the breadth of precedents bearing upon the adjudication of temporary reinstatement proceedings, and I concur with his holdings regarding such proceedings and the correctness and affirmance of the opinions of Acting Chairman Althen and Commissioner Young in *Sec'y of Labor on behalf of Shaffer v. The Marion Cty. Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018). To ensure our Judges do not miss the crucial rulings of law, I explicitly concur with Commissioner Rajkovich that:

1. A temporary reinstatement hearing is an expedited hearing but is a full hearing.

2. Respondents in temporary reinstatement proceedings are entitled to a full hearing of issues related to the allegation of discrimination, including grounds for an affirmative defense and whether animus motivated any adverse action. The Judge then reviews evidence on such matters and all other evidence under the non-frivolous standard of proof set forth in section 105(c)(2) of the Mine Act. 30 U.S.C. § 815(c)(2).

3. A "non-frivolous" case is a claim that is "viable." Thus, the Secretary must prove by a preponderance only that the claim of discrimination or interference may succeed.

4. If versions of events diverge without dispositive proof of either parties' version (including affirmative defenses), the outcome at the reinstatement stage may not rest upon a choice between credibility or the differing versions of events. However, the Judge need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous because such evidence fails to qualify as "substantial evidence" upon which a reasonable person might rely.

To restate these principles briefly, the Judge may not decide genuine disputes of fact or credibility arising at a reinstatement hearing. However, the dispute must be genuine. If the evidence demonstrates that one party's version of the "dispute" lacks any credibility, the Judge need not abandon commonsense and ignore established facts. Judges are not required to accept testimony demonstrated positively to be false. Suppose a picture properly introduced into evidence indisputably shows a witness present at a specific scene and such presence is confirmed by witnesses. In that case, the Judge need not accept the witness' protestation that he/she was not present.

[1] This opinion does not express any opinion regarding the merits of the complaint or defense. It treats only the rights of the respondent to a fair hearing. Presumably, MSHA is conducting its investigation into the claims of both parties. Indeed, because the complaint was filed on February 1, 2021, MSHA should have made its determination whether to proceed with a case by now or should make such determination within a few days of the issuance of this decision. 30 U.S.C. § 815(c)(3).

A respondent also may introduce evidence going to the absence of a demonstration of animus. If the evidence shows the absence of a viable claim, it means the claim is frivolous.[2]

Commissioner Rajkovich correctly describes the failure of the Judge below to conduct a full hearing by excluding evidence offered by the respondent to prove it terminated the complainant as a result of a gross safety violation. Such evidence was relevant to the respondent's claim of no showing of animus and that unprotected activity supported the termination. The evidence was relevant and admissible. The failure to hear this evidence was an error.

Turning to the disposition, however, I find myself compelled to disagree with affirming the reinstatement notwithstanding the clear denial of statutory and constitutional rights. Commissioner Rajkovich recognizes the error but finds the error harmless.

I disagree that the denial of fundamental statutory and constitutional rights may be swept aside as a harmless error. Such a finding repeats and reinforces the error by the Judge. Worse, it may encourage other Judges to shorten hearings on temporary reinstatement, believing that the deprivation of statutory and constitutional rights will be "harmless."

This expedited review is not a suitable place for an extended discourse on harmless error. Rather than engaging in a lengthy discussion of harmless error following *Chapman v. California*, 386 U.S. 18 (1967) and its numerous progeny, I simply state I find underlying considerations militate in favor of remand.[3]

First, applying developed concepts of harmless error, I cannot find the error harmless in this case. The Judge's action is more than a "trial error." Denial of the respondent's rights to present its case interfered with the substantial rights of the respondent, and the absence of

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[2] I do not understand the failure to discuss the excellent ALJ decision in *Sec'y of Labor on behalf of Fletcher v. Frontier-Kemper Constructors, Inc.*, 34 FMSHRC 2189 (Aug. 2012) (ALJ). I do not believe Commissioners have any greater knowledge or understanding of the Mine Act than Commission ALJs. Commission ALJ decisions are worthy of consideration even if not precedential. In the *Fletcher* case, there was a temporal connection between the complainant talking to an MSHA inspector and the termination of his employment. Nonetheless the evidence did not provide an element of animus to the employer's action. The Judge denied temporary reinstatement finding that there was no evidence of animus or disparate treatment. *Id*. at 2219-20.

Though stated in terms of animus, the Judge could have alternatively stated that the respondent demonstrated a proper motive for termination. Under either wording, the complainant's claim was not viable – that is, was frivolous.

[3] In *Chapman*, the Court referred to "small errors or defects that have little, if any, likelihood of having changed the result of the trial." 386 U.S. at 21-22. These are categorized as "trial errors." The error here certainly was not "harmless beyond a reasonable doubt" as described in *Chapman*. 386 U.S. at 24.

evidence and testimony may have substantially interfered with the potential outcome of the hearing. Such error is not harmless.

Second, the "non-frivolous" standard of proof for reinstatement is as low a standard of "proof" as may be stated. Further, reinstatement deprives a person of its property and the right to manage its workforce. For that reason, Congress necessarily gave operators the right to a hearing. The hearing must be full and robust; it must not be illusory.

If the operator is not allowed to introduce evidence of the absence of animus or a lawful basis for its action, the right to a hearing becomes merely a nod at due process rather than meaningful enforcement of constitutional rights. The only way to provide a measure of due process is to afford respondents full and fair hearings. By requiring Judges to hold proper hearings, the Commission assures full rights to respondents. If every error is "harmless," there is little incentive to accord respondents their full rights.[4]

Third, we should consider the error in this case in the context of the alleged actions of the claimant. Judges must not be legal automatons aware only of the law and unaware of the allegations. Respondent alleges that the complainant, a foreman and mine examiner, knowingly ordered or permitted an hourly employee to operate a scoop with an inoperable safety device. MSHA issued a citation for the operation of the defective equipment asserting an S&S violation and a likelihood of a fatality. For a foreman to knowingly authorize or order a miner to use a scoop with a defective safety device would be serious, potentially criminal, misconduct. Section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Certainly, MSHA must be investigating that possibility thoroughly.

Again, I do not express any opinion regarding the claims made by the complainant or respondent. However, it is relevant that this case involves more than an allegation that an hourly employee cursed at a supervisor, had an unexcused absence, or violated a work rule. Of course, due process and statutory rights apply to all cases. However, reinstatement of a mine inspector who allegedly authorized a miner to use unsafe equipment requires an especially vigorous review of the evidence.

[4] Just as this opinion offers no opinion on the outcome of this discrimination claim, it also offers no criticism of the respected Administrative Law Judge who presided at the hearing. The low standard of review may incentivize cutting through "red tape" to reach a decision that may seem inevitable. That incentive likely extends to all Judges and to the Commissioners.

In summary based upon the foregoing, I concur that the Judge erred in excluding evidence proffered by the respondent. I would not find such error harmless, and I would remand for the full hearing to which the respondent was entitled.[5]

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

[5] Chair Traynor's opinion warrants only a footnote. Respondent's Petition for Review challenged the exclusion of evidence relevant to its affirmative defense and the failure of the Judge to accept evidence that would fully undermine the complainant's trial claim. We granted that Petition and reviewed those issues. Those were the issues before us for decision. We have held the Judge erred and that the evidence was admissible. That is the holding in this case and the law of the Commission.

Chair Traynor, concurring in result only:

I join Commissioner Rajkovich's decision affirming the Judge's application of the "not frivolously brought" standard to temporarily reinstate the miner claimant's employment pending full litigation of the merits of his claim. I wish I could join his opinion and would have, but for his decision to join Commissioner Althen's foray into dicta addressing issues Commissioner Rajkovich and I did not reach and do not need to reach in order to affirm the decision below.

In their opinions, my colleagues attempt in vain to make big changes to the not frivolously brought standard – changes that are not necessary to resolution of this case. *See Export Group v. Reef Indus., Inc*., 54 F.3d 1466, 1472 (9th Cir.1995) (explaining that statements not necessary to the decision are dicta and thus are not binding precedent). Specifically, they seek in this case to resolve a split in one of our earlier cases.

In *Secretary of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 39 (Feb. 2018) ("*Marion*"), the Commission issued a 2-2 decision that unanimously held that during a temporary reinstatement hearing a Judge is not to make credibility determinations. Commissioners Jordan and Cohen issued a decision noting that evidence relating to whether the complainant was discharged for unprotected activity relates to the operator's rebuttal or affirmative defenses and thus is not appropriate to be considered in the temporary reinstatement decision. *Id*. at 44. Acting Chair Althen and Young concluded that evidence that may relate to the operator's defense is relevant in a temporary reinstatement decision, but if that evidence creates a conflict or requires a credibility determination, the Judge is not to resolve it at the temporary reinstatement stage.[1] Id. at 47.

In the case at hand, the majority attempts to cement the Althen/Young opinion into law, even though it is entirely unnecessary to the decision Commissioner Rajkovich and I reach to affirm the Judge in this case. Commissioner Rajkovich and I have produced a holding; their efforts produce only dicta. The current Black's Law Dictionary observes that "*obiter dictum"* is Latin for "something said in passing" and refers to:

> a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). — Often shortened to dictum or, less commonly, obiter.

Dictum, Black's Law Dictionary (11th ed. 2019). The same dictionary defines "judicial dictum" as:

[1] Acting Chair Althen and Commissioner Young's separate evidentiary rule is impossible to apply in a temporary reinstatement proceeding. Evidence that may allegedly demonstrate that the miner either did not engage in protected activity or that the operator was motivated by non-protected activity creates a conflict in the evidence and therefore cannot be considered. They seem to simultaneously require the Judge to admit the evidence, but to exclude it from her consideration as to whether the case has been frivolously brought.

> An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight.

Id. Dicta is not law. *United States v. Pasquantino*, 336 F.3d 321, 329 (4th Cir.2003) (en banc) (stating that dicta "cannot serve as a source of binding authority in American jurisprudence.")

My colleagues both find error with the Judge's exclusion of evidence proffered in support of the operator's affirmative defense. But one - Commissioner Rajkovich - correctly decides such error is harmless because the Judge would not have been permitted to resolve credibility issues raised by the excluded evidence.[2] Slip Op. at 11. Accordingly, and because I also vote to affirm, the decision of the Judge is affirmed without need to consider or resolve the issue on which the Commission split 2-2 in *Marion*, i.e., whether a Judge can consider an operator's rebuttal or affirmative defense when applying the not frivolously brought standard to a claim for temporary reinstatement.

Not only are my colleagues' dicta not binding, their musings on the admissibility of evidence offered to prematurely substantiate an operator's affirmative defense or rebuttal case are unpersuasive.[3] I do not understand why they wish to require our Judges to conduct temporary reinstatement hearings in such a cumbersome manner, requiring the introduction of evidence that cannot be considered in the decision. Why would we require our Judges to unnecessarily prolong temporary reinstatement hearings in order to receive potentially extensive evidence as to the operator's affirmative defenses or rebuttal case, only to exclude the evidence from consideration? Only once the case proceeds to a decision on the merits will the claimant or Secretary of Labor have had a full opportunity to conduct discovery and develop their evidence.[4] And our Judges would then need to once again take evidence as to the operator's rebuttal and affirmative defenses. Judges should only take evidence germane to the decision at hand. In this case, at this stage, that is limited to evidence going to whether the discrimination claim – looking at preliminary evidence only as to each element necessary to establish the claimant's prima facie case – is frivolously brought.

Commission Judges should continue to exclude from their decision-making in temporary reinstatement proceedings any evidence offered solely to support an operator's affirmative

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[2] The Judge determined that the evidence proffered by the operator would require a credibility determination and thus it was beyond the scope of the temporary reinstatement hearing. ALJ Dec. at 3 n.2; Unpublished Order dated Mar. 26, 2021.

[3] I do not find it necessary to rebut Commissioner Althen's contention that our precedents precluding premature consideration of affirmative defenses and rebuttal cases at this stage violates any legally cognizable operator's "right to manage its workforce." Slip Op. at 14.

[4] Commission Rule 45 provides that a hearing on a petition for temporary reinstatement must occur very quickly after a petition requesting such relief is filed and without opportunity for either the claimant or operator to take discovery.

defense or rebuttal. Evidence that may not be considered in a temporary reinstatement decision should not be permitted to burden the docket and prolong proceedings. My colleagues' non-binding preference notwithstanding, we continue to prohibit not only untimely credibility determinations, but also any premature weighing of evidence offered in support of an operator's affirmative defense against or rebuttal to the claimant's prima facie discrimination claim.

I join Commissioner Rajkovich to affirm the decision below.

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

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April 2, 2021

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of ROGER COOK, Complainant, v. ROCKWELL MINING, LLC, Respondent.	TEMPORARY REINSTATEMENT Docket No. WEVA 2021-0203 MSHA Case No. HOPE CD 2021-02 Mine: Eagle #3 Mine Mine ID: 46-09427

DECISION AND ORDER OF REINSTATEMENT

Appearances: LaShanta Harris, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner

Christopher D. Pence, Esq. and James P. McHugh, Esq., Hardy Pence, PLLC, Charleston, West Virginia, for the Respondent

Before: Judge Rae

I. INTRODUCTION

A. Statement of the Case

This matter is before me upon an application for temporary reinstatement brought by the Secretary of Labor ("Secretary"), on behalf of Roger Cook, under section 105(c) of the Federal Mine Safety and Health Act of 1977, against Rockwell Mining, LLC ("Respondent"). 30 U.S.C. § 815(c); 29 C.F.R. § 700.45. The application seeks reinstatement of Cook as a fire boss at Respondent's Eagle #3 Mine pending final disposition of Cook's discrimination complaint. Ex. S-1.[1] Cook filed a discrimination complaint on February 1, 2021, after the Respondent suspended and terminated him in January 2021. Jt. Ex. 1.

A hearing was held via Zoom for Government videoconference on March 29, 2021. The Secretary gave a closing argument during the hearing, and the Respondent filed a post-hearing brief. Tr. at 138. For the reasons set forth below, I grant the application for temporary reinstatement and retain jurisdiction until final disposition of the complaint on the merits.

[1] In this decision, "Tr." refers to the transcript from the hearing. The Secretary's exhibits are numbered Ex. S-1 to S-3. The Respondent's exhibit is numbered Ex. R-2. The parties' joint stipulations are abbreviated "Jt. Ex. 1."

B. Joint Stipulations

The parties have submitted the following stipulations:

1. This proceeding is 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 Federal Mine Safety and Health Act of 1977 ("the Act"). Accordingly, presiding Administrative Law Judge Priscilla Rae has the authority to hear this case and issue a decision regarding this matter.

2. Respondent is a Limited Liability Corporation and a "person" within the meaning of section 105(c) and within the definition of section 3(f) of the Act. 30 U.S.C. § 802(f).

3. Respondent is the operator of the Eagle #3 Mine, MSHA Mine ID #46-09427, located in Wyoming County, West Virginia.

4. The products or operations of the Eagle #3 Mine enter or affect commerce, within the meaning and scope of section 4 of the Act.

5. The Eagle #3 Mine is a "mine" as defined by the Act. 30 U.S.C. § 802(h).

6. Respondent is engaged in the operation of a coal mine. It is, therefore, an "operator" as defined in section 3(d) of the Act. 30 U.S.C. § 802(d).

7. On January 25, 2021, Complainant was terminated by Respondent.

Jt. Ex. 1.

II. STATEMENT OF FACTS

Roger Cook has worked in the mining industry since 1991 and has been employed by Respondent—or Respondent's parent company, Blackhawk Mining—since approximately April 2016. Tr. at 18–19. At the time Respondent suspended and terminated Cook, Cook was serving as a fire boss at Respondent's Eagle #3 Mine. Tr. at 17; Jt. Ex. 1. As a fire boss, Cook was generally responsible for identifying and recording unsafe conditions, and Cook was also responsible for examining the mine's airways. Tr. at 17, 19.

Prior to Cook's suspension and termination in January 2021, Cook informed management of several safety-related incidents. In August 2020, Cook filed an accident report alleging that he suffered respiratory problems resulting from spraying gunite on stoppings without a mask. Tr. 26–28. Additionally, between December 2020 and January 2021, Cook voiced concerns about: instructions to build new stoppings to route air around a roof fall; a flat car being pushed with

one motor; and an overloaded mantrip. Tr. at 30–31, 44–47. Cook also told management in January 2021 about a non-functioning panic bar on a scoop.[2] Tr. at 56–58, 60–61.

On January 20, 2021, Cook was involved in an incident concerning a "jumpered" ground monitor on a "cathead" cable plug for a return pump. Tr. at 19–20, 76. Cook testified that this condition created a shock hazard, and that he locked and tagged out the piece of equipment to prevent injury. Tr. at 20–22; Ex. S-2. Cook then left the area to continue his examination of the return airway. Tr. at 22. Shortly after Cook left the area, MSHA Inspector John Stone[3] witnessed the locked and tagged-out equipment. Tr. at 76–77. After noticing Cook's name on the tag, Inspector Stone requested that mine management summon Cook so that Inspector Stone could question Cook. Tr. at 77–80. Superintendent Travis Hartsog and foreman Brad Bunch found Cook and informed him that Inspector Stone wanted to speak with him. Tr. at 121–22. Cook then spoke with Inspector Stone about the cathead in front of Hartsog, Bunch, and other individuals who were standing nearby. Tr. at 23–25, 81, 123. Inspector Stone issued a section 104(d)(2) order with respect to the condition Cook identified. Tr. at 83–84; Ex. S-3.

The following day, Cook was suspended from his position at the mine. Tr. at 32. Respondent terminated Cook from his employment four days later on January 25, 2021. *Id.* Cook had never received any disciplinary action from Respondent prior to his suspension. *Id.*

III. APPLICATION OF LAW

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

Unlike a trial on the merits of a discrimination complaint brought by the Secretary—where the Secretary bears the burden of proof by the preponderance of the evidence—the scope

[2] Respondent sought to argue that it suspended and terminated Cook because he knew about the deactivated panic bar on the scoop but did not inform management. Regarding Respondent's proposed exhibits and testimony concerning that incident, the Secretary filed a Motion in Limine and Objections to Respondent's hearing exhibits. On March 26, 2021, I granted the Secretary's Motion and Objections because the proposed evidence concerned an affirmative defense and raised issues of credibility—and was therefore beyond the limited scope of a temporary reinstatement hearing. Respondent filed a Motion to Reconsider my March 26, 2021 Order, which I denied. Respondent also made several proffers at hearing regarding the testimony and exhibits I excluded in my March 26, 2021 Order. Tr. at 127–29.

[3] Inspector Stone has been employed by MSHA for approximately 14 years and is currently a coal mining inspector and electrical specialist. Tr. at 73. On the day in question, Inspector Stone was present at the mine to terminate outstanding citations and to perform his regular inspection of the mine. Tr. at 74–75.

of a temporary reinstatement proceeding is statutorily limited. Section 105(c) of the Mine Act and Commission Rule 45(d) limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint was "frivolously brought." 30 U.S.C. § 815(c); 29 C.F.R. § 700.45(d).

The United States Court of Appeals for the Eleventh Circuit has noted that the "not frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. *Jim Walters Res., Inc. v. FMSHRC*, 920 F.2d 738, 744 (11th Cir. 1990). The standard is whether a miner's complaint appears to have merit. *Id.* at 747. The Commission has set forth the elements to be considered under this standard: 1) that the miner has engaged in some protected activity under the Act, and 2) that the adverse action identified in the complaint was at least in part motivated by the protected activity. *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The motivation can be established by showing knowledge of the protected activity, hostility or animus towards the protected activity, and coincidence in time between the activity and the adverse action. *Sec'y of Labor on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 326 (Mar. 2000). The nexus in time between the protected activity and the adverse action may be sufficient to find improper motive without a showing of animus or hostility. *Durango Gravel*, 21 FMSHRC at 957; *see also A&K Earth Movers, Inc.*, 22 FMSHRC at 325 n.2 ("[W]e have never held that hostility is a prerequisite to a finding that a complaint is not frivolous."). A temporary reinstatement hearing is not the appropriate forum for a determination of credibility between competing versions of events in evaluating whether a complaint appears to have merit. *Sec'y of Labor on behalf of Williamson v. CAM Mining LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009).

In this matter, there is sufficient evidence under the "not frivolously brought" standard to find that Cook engaged in protected activity. Cook testified that he witnessed or complained about several safety incidents between August 2020 and January 2021. The most recent such incident occurred on January 20, 2021, when Cook locked and tagged out the cathead. Cook then cooperated with Inspector Stone's inquiry regarding the condition. Cook's actions—including cooperating with Inspector Stone—are protected activity under the Act. *See Thomas v. CalPortland Co.*, 42 FMSHRC 43, 51 (Jan. 2020) (cooperation with MSHA inspection was protected activity); *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997).

The short amount of time between the January 20, 2021 incident and Cook's suspension—in addition to the fact that management witnessed Cook's discussion with Inspector Stone—sufficiently establishes a nexus in time and motivation for the purposes of this hearing. After Cook locked and tagged out the cathead, he talked to Inspector Stone about the condition in front of superintendent Hartsog and foreman Bunch—members of Respondent's management. Because of this, I find that there is at least a non-frivolous issue that management was aware of the incident and that Respondent had knowledge of Cook's protected activity. *CAM Mining LLC*, 31 FMSHRC at 1090 ("The Secretary need not prove that the operator has knowledge of the complainant's protected activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge."). Further, Respondent suspended and terminated Cook only days after speaking with Inspector Stone; this demonstrates a temporal nexus between the protected activity and adverse action. *See Turner v. Nat'l Cement Co. of Calif.*, 33 FMSHRC

1059, 1071 (2011) (complainant's termination days after his most recent complaint could support inference of improper motivation for termination); *Sec'y of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 39, 43 (Feb. 2018) ("[T]here is no dispute that . . . termination from employment was an adverse action."). In light of this clear temporal nexus and management's knowledge, there is sufficient evidence that Cook's protected activity motivated, at least in part, his suspension and termination—the adverse actions identified in the complaint. In sum, I find that Cook's complaint is not frivolously brought.

ORDER

Respondent is hereby **ORDERED** to immediately reinstate Roger Cook to his duties as a fire boss or equivalent position as of the date of his suspension and termination at the same rate of pay and number of weekly hours with restoration of all other benefits to which he was then entitled.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this Court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint as soon as possible. Counsel for the Secretary **SHALL** also immediately notify my office of any settlement or of any determination that Respondent did not violate section 105(c) of the Act.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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April 13, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner v. VULCAN CONSTRUCTION MATERIALS, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. SE 2019-0237 A.C. No. 09-00445-496283 Mine: Blairsville Quarry

DECISION AND ORDER

Appearances: Roy Timothy Cornelius, non-attorney representative, for the Department of Labor and Winfield Murray, Esq., Department of Labor, observer to the hearing.

Christopher Sorrows, Safety & Health Manager at Vulcan for Georgia.

Before: Judge William B. Moran

In this proceeding upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), the Secretary alleges that the Respondent, Vulcan Construction Materials, LLC, violated 30 C.F.R. §56.14101(a)(3), a safety standard titled "Brakes." The particular subsection cited provides that: "All braking systems installed on the equipment shall be maintained *in functional condition*." (emphasis added). A virtual hearing was held on February 4, 2021.[1] The Secretary filed a post-hearing brief and a reply brief. The Respondent filed a post-hearing brief. All contentions were fully considered by the Court and are addressed in this Decision.

It is the Secretary's contention that the Respondent violated the cited standard in that the braking system on the Respondent's Ford L 8000 water truck was not being maintained in a functional condition on the basis that, when tested by the MSHA inspector, evidence will show that the airbrake valve had an audible air leak while the pedal was being engaged. Tr. 18-19. For the reasons which follow, the Court finds that the Secretary failed to meet his burden of proof in

[1] At the conclusion of the hearing, both representatives acknowledged having a full opportunity to present their respective sides in this litigation. Tr. 213.

that the violation was not established by a preponderance of the evidence that the cited truck was not maintained in functional condition. Accordingly, the violation unproven, this matter is **DISMISSED**.

Findings of Fact

Testimony began with MSHA Inspector Tommy Wright, who issued the subject citation. Wright has been an MSHA inspector for more than ten years and, prior to that he had approximately 25 years of employment in the mining industry. Tr. 24. The inspection took place at the Respondent's Blairsville quarry on June 26, 2021. The Respondent mines granite at that location. Tr. 36.

On that day, Wright issued Citation Number 9428093. The "Condition or Practice" section of the citation stated:

> The braking system on the available for use Ford L8000 water truck, Co 34227, located on ready line is not being maintained in a functional condition. When tested, there is a brake air valve at center of the front tandem that has an audible present with the brake paddle [sic] engaged. Employees working in around this equipment were exposed to the possibility of injury, if the brakes were to fail. The truck passed a brake test making an accident unlikely.

Tr. 39; and text of Citation No. 9428093.

By using the term "audible," the inspector stated that meant there was an air leak. Tr. 39. The inspector conceded that the truck passed a brake test.[2] Tr. 40. However, he issued the citation because

> the valve that was leaking was part of the braking system. The whole time … the driver had his foot on the brake pedal with it engaged. There was a constant air leak, an audible air leak that I could hear and I could feel when I crawled up under the truck.

Id. It was the inspector's view that despite passing the brake test, based on his determination, he could not guarantee that the truck would pass the test again. *Id.*

The inspector did list the injury as unlikely to occur because "with the truck's engine running, the compressor was able to maintain the low power loss at the time of the inspection." Tr. 41. On the same basis, he concluded that it was not a "significant and substantial" violation. *Id.* Listing lost work days or restricted duty, the inspector's rationale was that "[i]n the event that brakes were to fail …, the par[k] brake would set up, it could cause loss of control maybe the vehicle, injuries to the driver is in bruises; broken bones." Tr. 41. One person, the truck driver, would be affected, as there was no one else around at that time. *Id.* Negligence was marked as

[2] The inspector described the test he conducted, stating, "[t]he truck was placed on an incline. The park brake was set, it would hold, you'd the release the par[k] brake and it came down the hill and he was able to stop the truck." Tr. 40.

"low," given that the Respondent stated the truck was a backup and the driver had also done a pre-op on it. The driver stated that he didn't hear any air leaks. Tr. 42.

The inspector believed that the truck was in violation of the standard he cited because "[t]he whole time the operator held his foot down on the brake, keeping it engaged. There was a constant audible air leak present at the valve. And when he release[d] them [sic] foot off the brake, the audible air leak stopped." Tr. 42-43.

Turning to Government Ex. P 8, the inspector identified it as MSHA's program policy manual. He referenced the applicable part of that manual for this matter stating:

> standard 56\57.14101(a)(3) should be cited if a component or a portion of any braking system on the equipment is not maintained in a functional condition. Even though the braking system is in compliance with one or two above. It is important to note that *if the component or portion of either system renders the equipment incapable of stopping or holding itself with its typical load on the maximum grade it travels* the appropriate standard is 56\5714101(a)(1) or (2) should be cited.

Tr. 43 (emphasis added). The inspector affirmed that the valve he cited is a component of the cited truck's braking system and is covered by the cited standard. Tr. 44.

Directed to Gov. Ex. P 2, the inspector identified it as the termination of the citation he issued. The citation was terminated the following day, on June 27, 2019. His termination noted that "[t]he cited air valve has now been replaced with a new one. When tested there is no longer an audible air leak present." Tr. 45. He confirmed that the operator installed a new valve and that he could not hear any air leak thereafter. *Id.* The inspector was also asked about Gov. Ex. P 4, the notes he wrote that regarding this citation.[3]

The inspector reaffirmed that he had the driver check the brakes on a grade before he issued the citation in issue and that the brakes held on that grade. Tr. 51. He added that the driver shut the engine off and it was at that time that he inspected for air leaks on the brakes. *Id.*

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[3] As the notes read by the inspector were simply cumulative to his earlier testimony, they are included here only as a footnote. That reading reflected that

> [a]vailable for use spare Ford L 8000 water truck, company number 34227, located under ready [line]. Brakes are not being maintained in a functional condition. When checked an audible air leak ... and when checked an air valve located at the center of the front (inaudible) has an audible air present when the foot brake is applied, this condition can expose the driver to a brake failure hazard. … *The driver did a pre-op but did not hear the air leak.* Gravity is unlikely; passed a brake test with the engine running and the brakes applied it would hold air pressure making an accident unlikely. I marked it lost work days. Expected injuries would be bruises, broken bones, person affected is the driver. I marked it low negligence; not being used since brought back to the mining site.

Tr. 46-47 (emphasis added).

Continuing, he confirmed that he walked around the truck and checked canisters and the lines and valves and other things for leaks. He then informed mine personnel that he found an air leak on the truck, so advising the mechanic, Vulcan employee Jim Young, of this. *Id.* The inspector affirmed that he could hear air coming from the valve. *Id.* Elaborating, the inspector stated that he "crawled up under the truck" which had been secured so that it would not move, and he "could hear where the air was coming from. And [he] put [his] hand at the bottom of the valve and [he] could also feel it." *Id.* The inspector affirmed that was a common way to detect a leak on a brake and that the leak was constant "[t]he whole time the driver had his foot on the brake with the pedal engaged; there was a constant air leak." Tr. 52. He then added that "leaks only get worse. They don't fix themselves." *Id.* He further affirmed that, in his view, the valve he cited was a component of the brake system on the cited truck, stating, "Yes, sir. The only time there was an audible air leak there, it was a continuous air leak was when the operator, the truck driver had his foot on the brake and kept the brakes engaged." *Id.*

Upon cross-examination, Mr. Chris Sorrows, a Safety & Health Manager for Vulcan, who is also not an attorney, asked about the inspector's air brake training and knowledge and experience. In terms of the inspector's training for air brakes, Wright stated it involved "[l]eaks, stroke, canisters, the type, the know what and how the stroke would be. Listen for air leaks, valves, how things should set up." Tr. 55. Regarding the procedure he would employ from training to verify if there were any leaks on the system, the inspector responded, "[t]he driver would put his foot [on the] brake pedal and I'd walk around and check for the air leaks. … [the equipment] would be off [during the test]." Tr. 56.

Inspector Wright was asked if he did a threshold pressure test during the inspection. With the inspector not understanding the question, Mr. Sorrows then asked if he had the air calculation rate. Tr. 56. The Court then interceded, suggesting that the Respondent determine if the inspector was familiar with those terms. Mr. Sorrows then offered different words, employing slang terms for his question, describing it as a "stone or a pump test." Tr. 57. The inspector responded that those tests were not done and in response to the Court, the inspector added that he did not know what a pressure threshold test was.[4] *Id.*

When the inspector was then asked if he "verif[ied] an air calculation rate during [his] inspection," the inspector answered that he is "not required to, no." [5] Tr. 58. The inspector was then asked how he verified that there was an air leak. He responded that "[t]he operator pushed the brake [ ] [a]nd the valve that I cited had an audible air leak present the whole time he had the

[4] Belatedly, an objection was made to the question on the basis that the MSHA inspector is "not a DOT [Department of Transportation] inspector." Tr. 58. This was overruled, with the Court expressing "it's appropriate for [the Respondent] to ask about the extent of [the inspector's] knowledge regarding the citation, and in particular, the brake issue that's in front of [the Court], so that objection is overruled." *Id.*

[5] The Court then advised the inspector that he was simply to answer the question posed, without adding a comment, such as whether he was required to perform such a test. The Court explained to him that his representative could follow-up on that issue, if he wished, during redirect. Tr. 58.

brake pedal engaged. He held at constant pressure on it." Tr. 59. Asked if he, Inspector Wright, was in the truck cab at the time of the inspection, the inspector answered, "[n]o, sir. I crawled up under the truck and heard the air leak and put my hand under the valve and felt it." *Id.* For the purpose of a clearer understanding the Court asked if the truck was running, that is, whether the motor was running, or was the vehicle off when the inspector crawled under it. The inspector confirmed that the truck was off at that time. Tr. 60. When the inspector heard the audible leak, he did not take the vehicle out of service, but the operator did. *Id.* He added, in an apparent justification of his not removing the truck from service, that "[a]t the time of the inspection, the air compressor with the engine running was able to keep up with the air leak. It was like a hiss; a rapid loss of air." Tr. 61.

Asked to identify the air valve he looked at, the inspector responded, "[i]t was at the center of the truck at the front tandem." *Id.* There were two axles on this truck. *Id.* Asked if he agreed that the component he examined was "a service relay," he answered it was not. Tr. 62. Asked if he was familiar with the components, in the way they operate, the inspector did not answer the question posed, instead only responding, "[t]o put it briefly (inaudible) put on the brake. You have (inaudible) any relief, as in would you let on put your foot on the brake and lay it off. But while you have continuous brake pressure the valve is not supposed to leak air." *Id*. Then asked if he agreed that any fluctuation in the brake pedal would exhaust air, the inspector answered that would be true "if [the driver] let it off, not while he was holding the pressure." *Id.*

Next, the inspector was asked if he used "any supporting agencies during [his] air brake inspections for guides," to which he answered, "no." Tr. 64. When then asked if "[d]uring mine training school was there any references back to a North American Standard CVSA, or any commercial motor vehicle inspections," the inspector, instead of answering the question, responded that inspectors "are not required to have, that was just a reference." Tr. 64-65. In a follow-up to that question, the inspector was then asked if there was "reference material for inspections." The inspector responded that he "cannot enforce those." Tr. 65. The Court then admonished the inspector that he was being "mildly combative" and that his role during cross-examination was to answer the question. In this instance, the Court advised the witness that the question he was being asked was if "there was [such] reference material that [he] came into contact with during [his] training" and his response was then "yes." *Id.*

Wright was then asked upon terminating his citation how he verified that termination was appropriate.

> They had the old air valve laying there and they put air valve on, and he fully engaged the brake pedal without the engine running, pressed the service brake pedal and held it down and there was no longer an audible air leak present at that valve, where the old valve was. The new one did not leak air.

Tr. 66. Asked if he crawled "back up under the truck and st[u]ck [his] hand to the bottom of the valve like [he] did the initial time," Wright answered, "I did not stick my hand there. No." *Id.* He then reaffirmed that he stuck his hand to the bottom of the valve at the time he first issued the alleged violation. Tr. 67.

Wright was then directed to Gov. Ex. P 10 and, asked to identify what is on that page, he responded, "a quick release valve." *Id*. He was then asked, relating to the same diagram at that page, if he could explain the port and what's pictured on that page. The inspector answered that:

> [i]t shows us supply port and upper body for the diaphragm, delivery port, a lower body port, a lock washer, sealing rings, exhaust port cap screw, another delivery port and mounting hose [and he then answered that the exhaust port on the valve is on] [t]he very bottom.

Id. In response to a follow-up question, the inspector answered that the location of his hand at the time he felt air exhausting was "[a]t the bottom." *Id*.

The Secretary then called as his next witness, Fred Terry Marshall, to testify about the function of the subject air brake systems. Tr. 68. Mr. Marshall is employed by the Mine Safety and Health Administration, as a mechanical engineer within technical support. Tr. 70. He has 23 years of employment with MSHA's Technical Support, in Triadelphia, West Virginia. *Id.* He established that he has experience with airbrake systems on haulage trucks and the Court so finds.[6] Tr. 71.

Mr. Marshall was first asked by the CLR to describe how brake systems work and for that purpose, the CLR made reference to Gov. Ex. P 9, *which the CLR described* as "some excerpts out of a Bendix quick reference catalog. Bendix is a manufacturer of air valves …, as far as braking systems."[7] Without laying any predicate, the CLR asked if the type of valve in Exhibit P 9 is "fairly common on the air brake systems on these haulage vehicles." Tr. 73. Witness Marshall responded "[t]he valve shown on page 30 is a -- the valve at the bottom of the page -- the second page of the Government's Exhibit is the valve *that was reported to me to have been replaced or installed on the water truck*. Or to terminate the citation that inspector Wright had issued. This is what they call a quick release valve. It's fairly simplistic as far as its purpose and functionality and composition." *Id.* (emphasis added).

The CLR then turned to Gov. Ex. P 10, asking Wright to identify it. The witness stated it was the service data sheet for the valve which appears at the bottom of the second page of Gov. Ex. P 9. That sheet explains how the valve works. Tr. 73-74. He then explained how the valve works, stating that the last page of Government Exhibit P 9 has maintenance kits for different air

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[6] In that respect, speaking to his experience, he stated that it included, "[o]n haulage trucks, yes, both off highway and on highway type trucks that are used on line sites. Then, essentially involved in accident investigations. … we assessed enforcement personnel in fatal and non-fatal accidents, if they request our systems. I've been doing those type[s] of accidents for almost my entire career." Tr. 71.

[7] Perhaps because he is not an attorney, the CLR apparently did not understand that, as he was not a witness, he may not identify or describe the contents of an exhibit, at least for evidentiary purposes. In the Court's view, when the government employs non-attorney representative it diminishes the importance of proceedings involving the safety and health of our Nation's miners.

valves that Bendix offers and the picture to the left of it shows the two components that are in that maintenance kit. Tr. 74-75. Specifically, the witness was referring to Bendix QRN, valve maintenance kit, PC number 104463. Tr. 75.

Although the witness gave some detail about how the valve operates, in the Court's assessment, such information really has no value that the Court perceives in terms of resolving the issue before it. The witness then offered his view of the problem with the valve, stating, "[w]ell, in the balance mode, the diaphragm was not sealing up against the exhaust port adequately. Whether that was from a split in a diaphragm, a hole in the diaphragm or some kind of obstruction in there, I don't know." Tr. 78. He agreed that such a problem would cause the air to exhaust from that exhaust port in the bottom of that valve, when it is in the balance mode. In that mode, he added, the valve should not be exhausting air through the exhaust port. Tr. 79.

At that point, the Court interceded, first explaining that one of its responsibilities is to develop a complete record. The Court asked the witness if it was true that he had never personally seen the cited truck. The witness affirmed that was true – he has never seen the truck in issue. *Id.* He next agreed that he was not present at the time when the inspector issued the citation and therefore he also never heard any air hissing, again because he was never present at the mine. Tr. 80. He then confirmed that he was not present when the replacement valve was installed on the truck either. *Id.* The witness then agreed that his testimony related, generally, to how these valves operate. That, the Court would note, namely, how the valves operate, is not and was not an issue in dispute in this case. *Witness Marshall further agreed that he had no knowledge of the nature or the manufacturer of the valve that was originally on the truck at the time of the citation issuance*. *Id.*

The witness then added, in the nature of a defense to his earlier statements, that "these quick release valves, they are fairly much the same across the board. As far as the different manufacturers historically, what you see here is what you're going to get in another manufacturer of this quick release valve. Again, this is a fairly simplistic, very low level type valve as far as what it's intended to do, and how it gets it done. So, this design has not changed much, you may see different variations of how the valve body is put together, or how large the valve body is, but the operation is similar." Tr. 80-81.

The Court accepts that, in effect, based on the witness' testimony, once you've seen one quick release valve, you have seen them all. The Court's point is that, accepting that to be the case, it does not establish that the valve in this instance was in fact defective and further the witness has no basis to assert that the valve was defective, as he was never present. As the Court summed up the issue, the witness agreed that he could not know about the valve in question because he was never there, and therefore he did not know the source of the sound and it is only through secondhand information that he could surmise that the hissing noise came from that valve. Tr. 81. Asked if that was a fair synopsis of his testimony, the witness agreed that it was. *Id.*

The Secretary's non-attorney representative did not help himself when he tried to have the witness further explain about audible air leaks. The witness responded, referring to Ex P 10,

> Okay, so I'm looking at the operation and linkage tests up in the left hand corner of that page. If you go to number two; it talks about how the test is conducted to determine an air leak. And it's using a soap solution type test, in the soap solution type test you essentially have water and soap mix together, and you are spraying it on the valve body or specific areas in order to determine if you can visually see any bubbles being generated. The bubbles being generated are not necessarily audible leaks or you cannot hear those bubbles being generated. This is a visual test. And the first part of the test is a test for the sealing ring in which you apply soap around the valve body pieces where they're connected together a soap solution and you're looking for any bubbles being generated. It says in this data sheet that there should not be any leaks at all in that area. As far as the exhaust port, and we're using that soak solution to spray into the exhaust port area with the service brake applied; and essentially you have to have it connected otherwise you would have air leaks coming out of the delivery ports also but you're testing that in the balanced position. Again, where you're not supposed to have any leakage generally from the diaphragm and exhaust port area. So, the test there is a one inch bubble in three seconds at the exhaust port. Anything over that, it's a visual test. Anything over that is unacceptable for this test. In my opinion, the soap bubble test, anything that's going to fail the soap bubble test would not be audible at a distance from the valve."

Tr. 85.

Thus, the witness agreed that he did not need that sub-level test to determine the audible air leak if one is checking it "from the side of the truck, especially if you're standing around the truck, actually under it. Any audible leak is going to fail the soap bubble test." Tr.85-86.

The witness was then asked about Gov. Ex. P 13, which the witness described as the piping diagram for a typical tractor with an air brake system. It was created by the valve manufacturer, Meritor WABCO, as a troubleshooting guide. Meritor, like Bendix, "produces a variety of air valves for use on the braking systems of over-the-road type trucks." [8] Tr. 86-87. Asked if the valve depicted in the exhibit at page 11 had a leak could stop leaking without any repair to it, the witness answered with a qualified "no," stating:

> Generally, no. I mean, there are some times if -- cold environments, you can get some freezing in the exhaust valve or you can get contamination in the valve

[8] The witness went into some detail about the exhibit, but the value of this information is dubious to the issue before the Court, namely establishing that the cited water truck was not being maintained in a functional condition. Thus the witness's testimony describing the piping diagram, as he expressed it, "just shows the location and some of their valves and how they're used in the system. There is a quick release valve in this and … the exhibit [provides] an example of how it's used in the braking system or a typical use of it in the braking system." The witness then went on describing how the valves are used in the braking system depicted in Gov. Ex. P 13. Tr. 87. While it may be viewed as all very interesting information, the Court finds that it is not of value to the issue in this case.

through content and say you have a bad compressor and you get sludge that comes through. You can have items in there that could be worked out at that stage.

Tr. 89-90. However, the witness, referring to the same exhibit, did remark that the exhibit instructs that "leaks when service brakes are applied need to be repaired or replace." Tr. 91.

The Court would comment that it does not take issue with the witness' view, nor his citation to the valve manufacturer referred to in Gov. Ex. P 13, nor that, if one has a service brake leak, it needs to be repaired. However, again, the question is whether the government established by a preponderance of the evidence that the cited truck had such a leak. Tr. 91. Although the Court accepts that, speaking hypothetically about these valves in general, a valve failure can be sudden and complete or it can be a "just a slow progressive failure," that is not the critical issue in this case.

Assuming that it were to be established that the cited truck actually did have such a defective valve, the witness expressed "with the service brake applied, … it's difficult to determine what exact impact that that air leak has on the capacity of the service brakes. It's difficult to determine, but the key is, there is that you already know that you have an audible air leak. It's normal practice to go ahead and replace that valve when it's a low risk for failure." Tr. 92.

Again, even assuming that the air valve was defective, the witness acknowledged that one could try to "fix it through just trying to cycle the brake." *Id.* The Court notes that initially the inspector did not determine if such a procedure would fix the issue he believed to exist. On re-direct he did assert that he "afforded them the opportunity to pump the brakes at least three times to see if there was any contaminant inside the brake valve or inside that valve, that it would blow it out and seal." Tr. 206.

Upon cross-examination, the witness stated that has never received any certifications regarding air brakes. Tr. 95, 96. He has had a class on commercial braking systems, though it was not a certification. *Id.* Asked if he was familiar with the techniques and procedures in doing air brake inspections, the witness answered "generally familiar." *Id.* Asked to elaborate, he expressed, "I mean, on the job training, I've done inspections with MSHA enforcement before; part of what we did a while back, I can't remember exact time frame or date. But there was a time where the off highway or over-the-road type trucks, were an emphasis for coal mine safety and health. And I was involved in different programs over those years to conduct field inspections to assist enforcement conducting field inspections." Tr. 96.

Oddly, the witness was never provided with a diagram or picture of the component that was cited. Tr. 96-97. Other aspects of the witness' testimony did not, in the Court's view, advance the critical question of the functionality of the cited truck's brakes.[9]

[9] For example, when witness Wright was asked "where does the air go after the treadle valve is depressurized, where does the air go, he responded "[t]he air from the service brake chambers flows back through the quick release out to atmosphere. The air from the quick release back to (continued…)

Beyond the comment in footnote 9, it did seem to the Court that the witness was unable to directly answer several of the Respondent's questions. For example, asked if "any fluctuation in the treadle valve would cause the service relay valve to exhaust air, the witness responded with a question of his own, inquiring if the question was "about a service relay valve attached to the foot pedal." Tr. 100. The Respondent reminded the witness that the question was about the "service relay valve that that we're here for today." *Id*. Respondent then inquired of the witness if any fluctuation in the treadle valve will exhaust air. The witness responded that "[i]f a foot pedal was attached to a service relay valve, the service relay valve would exhaust air based off of the foot valve telling it to. However, the quick release valve we are talking about today is not a service relay valve*." Id.* The witness did acknowledge that, while *not any* fluctuation in the terminal valve would cause air to disperse, "distinct movement of releasing the foot pedal would cause release of air." *Id.*

Asked if he ever completed a pressure threshold test or net loss calculation in his experience, the witness Wright posed a question in return, asking "what did the respondent "mean by a pressure threshold test." Tr. 101. The witness then did respond that he has completed an air loss rate test. *Id.* Responding to the question asking how such a test is completed, the witness answered, "if we're talking about service [brakes], there's two different modes. Just a general air loss test. One is with the brake applied, the service brakes applied, and one is with it released. So, as far as what you're checking for, you have the engine shut off, and you're applying, find the brake and checking two things. You're … checking the amount of air seepage or leakage out of the vehicle. … And then you would also check it with the service brake applied, essentially looking at a PSI drop per minute." Tr. 101-102.

He was then asked if he agreed that air components on the cited truck are different from haul trucks and loaders, the witness stated that he didn't believe they were very different. The vehicle doesn't matter in terms of their function as a valve. Tr. 102. While the Respondent asked if Gov. Ex. 13 related to a different manufacturer than the one cited, the witness responded that the layout of the systems are "the same as far as the piping diagrams, [adding that] there are components, for example, the quick release valve that we are talking about today, has been used for 50 years in different pieces of mobile mining equipment." Tr. 103. Marshall's point was that such quick release valves have "been used in mobile equipment for half a century." *Id.* Elaborating, the witness stated "this quick release valve, it's been used in mobile equipment for half a century. It's used in other mining environments as far as mining equipment, stationary type of equipment. It's the simplest valve that you can have in an air brake system. And it's been around and it's used off-highway, it's used on-highway. I've seen them used in front-end loaders,

[9] (…continued)
the foot pedal flows out of the foot pedal exhaust." Tr. 99. Asked if he agreed that the service relay valve exhaust would help regulate the pressure going into the diaphragm to keep it from bursting, the witness asked for the question to be repeated. Tr. 99. Reframed, the witness was asked the purpose of the service relay valve for the cited truck. The Court was surprised by the inability to answer the basic question, but the witness expressed that he did not understand because the question referred to two separate types of valves. Tr. 99-100.

rigid frame haul trucks, articulated haul trucks. The list goes on and on. So, It's been around. They're not exclusive. This particular valve is not exclusive to on-highway trucks." *Id.*

The Court does not take issue with any of witness Marshall's general statements about how these valves operate, nor that they are commonly used, nor that they have been in use for a long time.[10] However, the Court's overriding point about the wealth of Mr. Marshall's testimony is that it doesn't advance the Secretary's case in terms of proving that the braking system on the cited Ford L 8000 water truck was not being maintained in a functional condition.

On redirect, witness Marshall was asked to explain the difference between the quick release valve and a service relay valve. Though the response appears in this footnote [11] the Court

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[10] Exploring the value of Gov. Ex. 13, the Court inquired of Mr. Marshall, if he knew "whether the cited truck here, the Ford L 8000 water truck …whether that truck has the Meritor WABCO arrangement in that truck physically?" Tr. 105. The Court clarified that it was asking if the cited truck had that Meritor WABCO brand. The witness answered he did not know. Tr. 105. Thus, the witness then agreed that his testimony was "speaking generally about how valves operate commonly in equipment such as this. He admitted to not knowing the exact system in the cited truck, but he added, "[t]he setup as far as the quick release around the service brake chambers is universal; similar." *Id.* The Court then inquired whether Marshall had a diagram of the cited truck and noting that the exhibit related to a Meritor WABCO and that he did not have a schematic for the cited truck. Marshall agreed he had no schematic diagram for the cited truck, while repeating that "the basic systems are somewhat standardized." Tr. 106.

[11] This testimony too was all very interesting but of no moment to the issue for disposition. Thus the response of witness Marshall is repeated here but only for the sake of completeness in setting forth the record. He responded that

> at least in the service brake side; the service relay valve is intended to apply the brakes quicker than what you would have if you had a direct connection versus the quick release is intended to release the brakes quicker. So, the service relay valve is used, again, similar to the quick release valve which is closer to where the brake ends are near the axles. The control valve sends a signal to the relay valve in order to apply the brakes, at least in the service brake system. So, the source of air which is supplying the service relay valve is closer to the relay valve. So, the air that's being pushed out to the service brakes downstream of the service brake relay valve is being supplied by a tank that's closer to the service relay valve. It doesn't have to go through the foot valve 10 in this case, all the way down to the service brake chambers. The tank air is being supplied to the relay valve. So, the tank air is being supplied from the relay valve to the chambers versus through the foot pedal. So, there is a distinct difference between what I consider to be a service relay valve and quick release valve.

Tr. 109. Asking for clarification, the CLR then asked if "that service release valve is something that is used to cut the distance which would actually cut the time that it takes for those brakes to

(continued…)

does not believe it advances the issue in need of resolution, namely did the Secretary establish that the brakes were not functional.

Attempting to focus the inquiry on that critical question of whether the brakes were established to be non-functional, the Court then inquired of Mr. Marshall, "[i]f one is standing in front of a truck, such as the water truck, in this cited instance, can air hissing from the area of the engine compartment only be attributable to a problem with a quick release valve or are there other sources that could be the potential source of hearing air hissing?" Tr. 110. The witness then asked for the question to be repeated. The Court, in response, rephrased its question, noting "that the inspector heard a sound of air hissing. And so my question is very simply, can the sound of air hissing from the engine compartment of a truck such as this be attributable to any other source other than a quick release valve? Can other things produce hissing besides a quick release valve or not?" Tr. 111. Marshall responded that "[o]ther things can produce hissing. However, a key thing here is to remember that an audible leak with the service brake applied is a red flag that needs to be addressed." *Id.* The Court responded, taking note that without detracting from Mr. Marshall's additional, nonresponsive, answer, that he was admitting that there are other sources of air hissing. Marshall then conceded, "[i]n general, yes, absolutely. … [b]ut *yes, there can be other leaks in other parts to the system that would attribute to a similar noise.* Tr. 112 (emphasis added).[12]

The Respondent then began its defense, calling Mr. Marty Rolfe. Tr. 118. By virtue of his background and experience, Rolfe established himself as a braking inspector for commercial motor vehicle inspections. Tr. 122-124 and Respondent's Ex. 6A, show that Rolfe has extensive background in matters of brakes. Elaborating upon his background, Rolfe stated he began working for Vulcan in January 2018, where his

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[11] (…continued)
actually engage." *Id.* The witness responded that the valve "applies the brakes quicker by shortening the length of travel that the air has to go through the lines." *Id.*

[12] As a follow-up the Court asked, it if is true that "even some air hissing noises may be normal or expected, not a sign of a defect?" Marshall responded,

> Again, getting back to when the service brake is applied, and you have an air leak in the service brake system, that's an issue. You can have other leaks but that doesn't mean that those are good leaks. I mean, under normal conditions you have air releasing cyclically, as far as from the compressor, in the engine compartment. There's air dryers on the front of the truck that cycle periodically. But those aren't necessarily near where the valves cited in the citation was located according to the notes that I read and possibly the citation itself.

Tr. 112. Thus, the witness identified two other sources for leaks, such as the compressor *in the engine compartment* and air dryers on the front of the truck. Tr. 112. The Court's point is that the witness conceded there can be other sources of air hissing and, perhaps of equal importance, Marshall's testimony was in the nature of generic information about braking system valves.

> primary job, [ ] was to perform systematic inspections on our operator contractors. And to obviously maintain a safety record. This is complying with [ ] all applicable law around commercial motor vehicles and operating roadways. Within a year of my employment in commercial motor vehicles, I was asked to move to the actual company side and do the same type of work along with the company vehicles. We have a large commercial fleet obviously here in Vulcan, so I moved to the company side and started dealing with actual company vehicles rather than contractor vehicles. And I've been here on the company side ever since.

Tr. 125.

Respondent's Exhibit 6C, Mr. Rolfe's training, was then admitted without objection. *Id.* Rolfe stated that it reflects his "certification that [he] received in 2002 from the North American Standard inspection of driver examinations. It allows [him] to conduct level three inspections. These levels encompass examination of drivers, the actual inspection of the commercial vehicle, which also includes inspection on a commercial motor vehicle and including the air brake system. *Id.* In particular,

> Level one inspection would be the most thorough inspection that you would do on a commercial motor vehicle; where you would check basically bumper to bumper. But you would include an air brake system, if that truck was so equipped, and that you would inspect each component of that air brake system and you would check the functionality of the air brake system separate from what would be done in level two.

Tr. 126-128.

Rolfe continues to actively perform brake inspections, stating he "conduct[s] [ ] brake inspections on air brakes whether they're on mine equipment or [not] … There's no difference in inspecting." Tr. 129. Rolfe identified Respondent's Exhibit 6 E as his "certificate from the Federal Motor Carrier Safety Administration granting me the authority to conduct and at the time, enforce laws on any commercial motor vehicle, here in the United States." Tr. 130. The Court noted, and Rolfe confirmed, that the exhibit reflects he "successfully completed dealing with standard level one … [which is] the ultimate level under inspections." *Id.*

Turning to the citation in issue, Rolfe was asked about the remark in that citation that "when tested, there is [an] air valve at the center front tandem." Tr. 131; Citation No. 9428093. Preliminarily, Rolfe affirmed that he has seen and inspected the cited truck. Tr. 132. This occurred within two or three days after the citation was issued. *Id.* Rolfe stated that he did a level one inspection of the truck at that time. Tr. 133. At that time the citation had been terminated. Rolfe asked that the valve be kept with the truck. In performing his level one inspection, Rolfe informed that he "was a little confused by the nomenclature on the inspector['s] citation. The

citation states that the inspector tested the air brake valve, but Rolfe saw no air loss calculation written anywhere on the citation. Then the brake valve had to be located." Tr. 133-134.

Rolfe then went on to explain that

> [a] brake valve is a general umbrella terminology. [The valve in issue in this case] happens to be a service relay valve. But also I had to determine the location of it because the inspector wrote that it was in the center of the front tandems. *That's not an accurate configuration of this truck.*

Tr. 134. (emphasis added).

He continued,

> [w]hen I hear the center of the front tandems, I expected the truck to be a five-axle truck or greater. I found this to be a three-axle truck. So, it was actually on the number two, this truck had one set of tandems. The tandem set is two axles within 48 inches of each other. So, this was not a five-ax[le] or more, it was actually a three-axle truck. And I was able to locate the specific component on the number two axle because obviously, it was a new component. It wasn't dirty. And … I was able to recognize it as a service relay valve, the components that came off the truck. And upon inspection of the truck, I found that the integrity and the adequacy of the brake system was within the specs of the manufacturer's standards as well as the commercial safety vehicle glances at a service criteria.

Tr. 134-135.

Explaining further, Rolfe stated,

> So, then after that, I went to the component that was removed from the truck. I was able to inspect the body of the component. I found that it was not cracked; it was not damaged by being struck by [ ] a foreign object. I was able to inspect the delivery port of the vehicle. The delivery was port proper. There was no knurling on the threads. The actual fitting that they screwed into the delivery port, those threads were proper, not rusted, not knurled, they were not replaced. I went to the supply port. The supply port is where the service line actually supplies the service relay valve with its initial air. Again, there was no cheeping, no knurling of the threads. The fittings that supply the supply port, those fittings were proper. They weren't knurled, they weren't rusted or anything like that. Next, I went to the control ports; same thing, the control ports are actually a little bit different in configuration as they provide air out to the brake chambers. Those control ports, same thing, the threads were not knurled. There was no evidence the air was escaping. *When air escapes, just like water, it's going to leave residue*, it's going to move dirt around, it's going to leave traces and evidence that the air is escaping. Those control service ports were in proper condition, no cracking, no bending, no cracking, no missing ports or anything like that. Then I went to the exhaust port because the service relay valve is designed to exhaust air as well. It keeps the air brake system from becoming

> over pressurized to the point that you essentially blow your diaphragms and your brake chambers. And your brake chamber[] is where the pneumatic energy is turned into mechanical energy to apply your brakes on your commercial vehicle. The exhaust port was not worn, it was out burned, it was not cracked, it was not full of material; it wasn't blocked. If it was blocked, the consequence of that, that I would expect to see is an over pressurization of the brake chambers to the point the diaphragms will be ruptured. Or it would try to push air out of the control ports, which I would see evidence of. *So, I was able to actually inspect the component, even though I didn't get to see the functionality because it was removed from the truck. I was actually able to examine and see evidence that it didn't appear to be defective at all.*

Tr. 135-136 (emphasis added).

The Court then interrupted for the purpose of clarification of the record, asking if it is accurate that when Rolfe came upon the scene, and saw the truck, the repair had been made and therefore he never saw the truck before the repair had been made. Rolfe confirmed that was the case. Rolfe also confirmed that there was a new service relay valve installed on the truck at that time. Tr. 137. He then confirmed that the service relay valve he saw was the one that had been removed from the cited truck. Tr. 138. Asking if the Court correctly characterized that Rolfe, upon examining the valve which had been removed, found nothing wrong with the valve, Rolfe agreed that was the case. *Id.*

Rolfe then explained how he performs an air brake inspection. He maintained that to check the functionality and integrity of an airbrake system, one performs a threshold pressure test.[13] This is the test used for all commercial motor vehicle operators. Tr. 139. The test provides an air loss calculation that allows one "to determine the air pressure balance, and whether or not the air brake system has a faulty component somewhere in it that is leaking air." *Id.* This is the preferred test because it is a simple test that an inspector can perform. Tr. 139-140. As he expressed it, "it will reveal whether or not the air brake system has an air leak within the system somewhere. Once you determine an air loss calculation, then if you find it necessary, you can chase down that component. It's a very elementary preliminary test to do." Tr. 140. It is important, Rolfe maintained, that the inspector does the test on his own, because if someone sits in the driver's seat while the inspector walks around the truck, any fluctuation of pressure on the treadle valve will cause exhausting of air. The treadle valve is actuated by the brake pedal. *Id.* He noted, as an example, if one is next to a commercial vehicle at a red light, one will hear that air exhaust, but it does not mean that the brake is not functioning correctly. Instead, it may only "mean that the driver has let up on the brake pedal a little bit." *Id.*

[13] Rolfe noted that in slang, the test may be called a "stop test," a "brake pump down test," or simply a "brake test." Tr 139.

Thus, Rolfe summed up that, in his view, if one wants "to verify if an air brake system has a leak of any kind, you must do a threshold pressure test and generate that air loss calculation." *Id.*

Asked if there is "any range of air loss that you can have before a brake system is deemed non-functioning," Rolfe answered that "[a] lot of times the range will be set by the manufacturer. A search criteria notes the air loss rate. But it also notes that an air loss rate must be done when a truck's at a certain configuration. You can't have the parking brakes applied. You must have your brakes released, so all of your air brake systems can actuate. So, what we do is we calculate it over a one-minute period. The initial test … is an actuation of the entire brake system completely released from the parking configuration. And then you will generate an air l[o]ss rate. Tr. 141.

Asked if Rolfe found any information of MSHA "using other guidelines, such as FMCSA, CVSA, out of service criteria as resources to complete any inspections," Rolfe responded that he had located case law showing such use. Tr. 142. Rolfe then proceeded to identify the documents he located which he believed supported the contention that MSHA has used other guidelines in completing such inspections. The Court required the witness to explain the basis for contending that Respondent's exhibits were relevant to the Court's determination of the issue of brake functionality. Tr. 145.

Rolfe first identified Respondent's Exhibit 3A, wherein an MSHA inspector speaking to a citation, measured the stroke distance on a push rod to determine the thickness of each brake. That method, Rolfe asserted, only exists from FMCSA [Federal Motor Carrier Safety Administration] regulations. *Id.* Rolfe added that the MSHA inspector stated he relied upon the North American out of service criteria guideline for commercial motor vehicles. That means, Rolfe contended, that "in order to determine that this vehicle … actually had non-functioning brake systems, [the inspector] had to go to the CVSA out of service criteria." Tr. 146.

The non-attorney CLR objected to the admission of Respondent's Ex. [4]A on the basis that it was an administrative law judge decision and that the decision was overturned by the Commission. Tr. 147. The Court noted that the claim that the decision of the judge was overturned might not have reversed the limited purpose for which Rolfe cited it. Therefore, depending on the scope of the Commission's ruling

> the fact that this may have been reversed by [t]he Commission is not necessarily the end of the story, because [the Court] would have to read what [t]he Commission said; what the basis of their reversal was, and then determine if the point that Mr. Rolfe made about the decision still stands.

Tr. 148.

Upon examining the cited administrative law judge decision, *Nally & Hamilton Enterprises,* (June 2009) (ALJ), the Court notes that the CLR *completely failed* to understand the Commission's reversal. The Commission sent back only *one* of the citations involved in that decision and that one dealt with a back-up alarm, not brakes. There was one citation addressing brakes and the decision by the Administrative Law Judge finding that the Secretary failed to

show that the truck had inadequate brakes was *not* disturbed, *nor even challenged*, upon appeal. And therefore, in fact, the Respondent is correct in noting the judge's remarks that

> During his inspection, [the inspector] conducted a brake function test on the Mack lube truck. [The inspector] asked the operator of the truck to operate the engine until a maximum of 120 psi was achieved which pressurized the braking system. The truck operator was then requested to turn off the truck engine, place the transmission in low gear, and release the parking brake. [The inspector] then walked around the truck and measured the stroke distance on the brake push rods to determine the effectiveness of each brake. Excess travel of the push rod causes metal to contact metal that results in a loss of compression. This condition is corrected by adjusting the slack adjuster to limit the push rod travel to under two inches. **[The inspector] testified that he relied on the North America out-of-service criteria guideline for commercial vehicles**.

31 FMSHRC 689 at *4 (emphasis added) (citation omitted).

This is yet another dismaying example of the problems attendant to having non-attorneys attempt to practice law in mine safety and health matters. Government representatives who do not have a license to practice law should not be engaged in the practice of law.

Turning to Respondent's Exhibit 3B, regarding *Oil Dry Production Co*., 40 FMSHRC 876 (June 2018) (Administrative Law Judge Gill), Rolfe stated that it involved a citation for nearly the same type of Ford L 9000 truck. Referring to page 32 of that exhibit, Rolfe noted that the inspector informed

> from his experience, he expected a system tick in this manner to have initiated a pressure drop off from between 10 and 15 PSI from the normal operating value of a 110 PSI to 120 PSI. He's just noting the normal drop off during the testing. Inspector LaRue waited for the initial drop off to start his measurements. LaRue testified that to his knowledge the drop off in pressure of 6 PSI within a 60-second period would qualify as a failure.

Tr. 150.

Rolfe then explained to the Court that his point was the use of the threshold pressure test, contending that was the test that the inspector was employing. *Id.* Continuing, Rolfe stated that the test gives the inspector

> an air loss rate calculation to determine whether or not the air brake system is truly functioning or if it's outside of what the North American standard out of service criteria provides or manufacturer's suggested pressure drop rate. [Rolfe agreed] with [the] inspector [ ] that in a 60-second period that, that drop off rate would have -- the drop off rate of nearly 30 PSI would be a failure in the system. And [on that

> basis, Rolfe] would agree with a citation. But he used the common practices under FMCSA to determine whether or not he had a functioning air brake system or not.

Tr. 150-151.

The CLR objected, noting that by the testimony of the issuing inspector in this matter, MSHA doesn't do these tests. The objection was overruled. Tr. 151.

Rolfe then turned to R's Ex. 3C. This exhibit is an MSHA fatality report dated March 17, 2015, CAI-2015-07, involving Rogers Petroleum Services and Republican Energy. Rolfe maintained this was another example of

> MSHA's use of Federal Motor Carrier Safety Administration rules and regulations, and out of service criteria. This is actually a tanker truck that overturned on haul road. During the investigation that MSHA conducted, the service brake chamber strokes were measured and evaluated in accordance with Kenworth operating manual for this truck and the Commercial Vehicle Safety Alliances; CVSA out of service criteria handbook. So, again, these regulations under 49 CFR and the CVSA promulgated out of service criteria are being used. So, the Kenworth manual defines proper maintenance of the vehicle and CVSA handbook has determined and when the vehicle is to be immediately taken out of service. So, again, they relied upon these regulations and out of service criteria to make a decision on whether or not the brakes were in functioning condition or not.

Tr. 152.

The CLR's objection was that the exhibit related to an accident investigation and that the government was not contending that Inspector Wright was an engineer or an investigator. Tr. 153. The exhibit was admitted, with the Court explaining that the weight afforded to an admitted exhibit is a separate issue.

Next up was Respondent's Ex. 3D. It pertains to MSHA and an administrative law judge's decision in *Bresee Trucking*, 35 FMSHRC 2124 (July 2013) (Administrative Law Judge Bulluck). Involved was a Mack Truck, a commercial motor vehicle. Focusing on page 2 of 6, Rolfe stated that

> "[t]he inspector in th[at] case, also completed a threshold pressure test to determine the functionality of the brake system on this truck. [In the second paragraph of that page] it notes that the brake pressure gauge indicated that the brake system lost 20 pounds of air in 27 seconds. *That's your air loss calculation, [ ] [and] [t]hat can only [be] calculate[d] through a threshold pressure test which was not done in our case*. *So, that's how you determine the functionality and the integrity of the air brake system.* And this inspector [i.e. regarding R's Ex, 3D] did that …"

Tr. 154 (emphasis added). Rolfe next noted that at page 3 of 6 of the same exhibit, the inspector for that case

> opined that the truck brakes may not work properly without full amount of air pressure available and that the normal use the leak could expand or rupture chambers which would render the left brake completely inoperative and incapable of stopping the truck. He surmised that the air leak was coming from the service brake chamber rather than the parking brake chamber. Since the parking brakes were not activated during the inspection, and the gauge in the cab indicated that the air was being lost from the service brake system. That's what you find out through a threshold pressure test. But the more important statement made here is [this was done] according to the North American standard vehicle out of service criteria used by MSHA. Tr. 155.

Respondent then referred to Respondent's Ex. 3 E, at page 5, which exhibit involved an "underground coal mine fatal power haulage accident, [at] Savage Industries at Pinnacle Mine." Tr. 156; *see also*, Jerry O.D. Lemon, et al., *Report of Investigation: Fatal Powered Haulage Accident*, *Savage Industries Inc.*, Mine Safety and Health Administration (June 10, 2002), https://arlweb.msha.gov/fatals/2002/ftl02c08.htm ("*Report of Investigation: Savage Industries*"). In that matter, Rolfe stated,

> three defects were found. One brake chamber had an audible air leak when the service brake was applied, and the brakes at two wheels were out of adjustment. Audible brake chamber air leak was on axle number two on the right side. And out of adjustment brakes are on the axle number seven. The air compressor maintained 120 PSI of reservoir pressure despite the audible air leak. When the service brake was fully applied and the engine was at a low (inaudible), the type 30 brake chamber on the seven left position had a push rod travel of 2 and 1/8 inch. It was therefore 1/8 inch beyond the brake adjustment limit. The Type 24 long stroke brake chambers on the seventh position had a push rod travel of 2 and 1//2 inches and was therefore, 1/2 inch beyond the brake adjustment limit. Based on the criteria established by the Commercial Vehicle Safety Alliance, the percentage of defective brakes on the vehicle did not exceed the allowed 20 percent limit. So, the vehicle was still suitable for use. The above defects did not affect the parking brake performance. The CVSA, North America uniform out of service criteria are nationally recognized by the trucking industry for highway trucks and [are] used by MSHA to determine brake adequacy.

Tr. 156-157. Rolfe highlighted the last sentence which notes that the "CVSA North American uniform out of service criteria are nationally recognized by the trucking industry for highway trucks and are used by MSHA to determine brake adequacy." Tr. 157; *Report of Investigation: Savage Industries*. The report's conclusion also notes that "[t]he service and parking brake systems were inspected and met the criteria established by the Commercial Vehicle Safety Alliance (CVSA) for trucks in service on public highways." *Id.* at page 7.

Respondent's Ex. 3F was next. This exhibit pertained to a fatal power haulage accident on June 10, 2004. Sherman L. Slaughter, *Report of Investigation: Fatal Powered Haulage Accident, Tug Valley Coal Processing Company,* Mine Safety and Health Administration, https://arlweb.msha.gov/fatals/2004/ftl04c11.asp. Rolfe noted from page 9 of that exhibit that

involved was a commercial motor vehicle three-axle dump. When the vehicle was tested it was found that:

> the right front tandem drive axle brake chamber had an audible air leak with a foot pedal and parking brake released. The leak rate was 60 times the maximum acceptable level of leakage as specified by the manufacturer of Mack. The chamber would also leak if the foot pedal or treadle valve that we discussed earlier was applied when the parking brake was engaged due to the anti-compounding feature within the parking brake system.

Tr. 158-159. Rolfe explained that this involved the "threshold pressure test. [Rolfe expressed his view that] it was appropriate for the inspector to do that [test] to get [the] air loss rate calculation, which he [did in that case]." *Id.* Rolfe added that this was "just another example of why it's important to do a threshold pressure test which was absent from [the citation in issue in this case] [as] …[i]t goes to the functionality and adequacy of the air brake system." *Id.*

The Respondent continued with its next exhibit, Respondent's Ex. 3 G, pointing to pages 14 through 16 of that exhibit. It involved a surface coal mine, the *Colony Bay Surface Mine* and the MSHA investigation associated with that case. Rolfe's purpose for this exhibit was as another example showing that the functionality and adequacy of an air brake system should be assessed through a threshold pressure test. Tr. 160-161. As he stated,

> the service br[akes] were functionally tested using the foot valve or the service brake pedal. All six service brakes cycled when the foot valve was cycled. Service brake pressure at each of the three axles was consistent with a primary and secondary take system pressures. This is a threshold pressure test. It's important to determine the functionality of an air brake system. This was done by this inspector as well.

Id . Rolfe then highlighted page 16 and table number five, where it notes that "the secondary air tank system pressurized experience approximately 2 PSI per minute; air loss of air pressure with its brake chamber removed from the system at its initial pressure of 110 PSI. *Again, that's an air loss rate calculation determined by a threshold pressure test*." Tr. 160 (emphasis added).

Following that, Respondent's Exhibit 4A was admitted, with the Court noting that it could have taken official notice of the exhibit in any event, as it reflects a June 23, 2009 decision issued by Administrative Law Judge Feldman. This decision has already been discussed, *supra*.[14] Rolfe noted that the decision by Judge Feldman involved

> an MSHA inspection of a RD 600SX Mack [ ] truck. The point again, what I'd like to bring [to the Court's] attention is an MSHA Inspector, … testif[ying] … that he relies on the North American out of service criteria guidelines for commercial vehicles. … But the most important part of that statement is that the MSHA

[14] Respondent's Ex. 5A, a Commission decision involving *Daanen & Janssen*, Inc., 20 FMSHRC 189 (Mar. 1998) is discussed in this decision.

> inspector testified that he relies on the North American Standard out of service criteria.

Tr. 163.

In response to the Court's inquiry about the purpose and value of considering these exhibits offered by the Respondent, Rolfe responded that

> the point we're trying to make, Your Honor, is that 30 CFR has absolutely no guidelines, no promulgated standards or anything concerning air brake systems. MSHA sister agency FMCSA, however does. They've got an out of service criteria that sets forth when an air brake system is functioning and when it is to be considered non-functioning or out of service.[15] It provides plenty of guidelines on how to conduct threshold pressure tests, which was absent in this case here. [By contrast, in this case] [w]e have an MSHA inspector who felt that he heard an air exhausting from a component that's designed to exhaust air while the brake pedal is engaged, fully charging the system; which by the citation, that's exactly the configuration that Inspector Wright had the vehicle in. So, [one]would expect some sort of exhausting of air through specific components while the vehicle is in that configuration.

Tr. 164.

Following that was Respondent's Exhibit 7A, a one page drawing of a typical relay valve, was admitted. Tr. 170-171. While admitted, and included as a footnote for the reader's

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[15] Frankly, the Court did not initially grasp the applicability of using an "out of service guideline" but Rolfe dispelled the Court's misapprehension explaining that

> [t]he out of service guideline … is when you place a vehicle out of service, what violations -- you determine what violation or defect that you're finding. And then you go to the out of service criteria and see if the CVSA says that that condition is not a service. All right, if you'll look, subsection K under the break -- under out of service, it talks about air loss, right. We need to calculate air loss, right? Just because you do find an exhausting of air from a brake system does not put an air brake system out of service. And as a qualified inspector, if you are searching down some sort of air leak, you need to be qualified enough to determine whether that is a defect or if it's an exhausting of air.

Tr. 165. Thus, Rolfe cleared up the Court's too literal use of the term "out of service guideline" as it is meant to determine *when* a vehicle is to be removed from service. As Rolfe put it, the "criteria provides [ ] guidance on *when* an air brake system would be considered non-functioning [and therefore marked to be put] out of service." *Id.* Consequently, the Court's misunderstanding of the term used – out of service guideline – was cleared up and therefore there is no *in service* guideline.

convenience,[16] the Court considers the exhibit and the testimony related to it of minimal value, as it does not add to the issue to be resolved here, again namely, did MSHA establish by a

[16] Referencing that exhibit, Rolfe addressed the purpose, the design, the functionality of this relay valve and why it's important on these vehicles. In that regard, he stated

> [t]he service relay valve is a very integral safety function within an air brake system. Your relay valve, that you'll usually find on your rear drive axles has different functions. One of the functions is it provides air pressure balance between the right side and the left side of your vehicle. And these functions are in no particular order of importance. Another function of the service relay valves is it reduces or eliminates the air travel lag from your air reservoir tanks to the rear axles or rear brake systems of an air brake system. Think of it like this, commercial, I mean, a tractor trailer, the air tank reservoirs are up underneath the driver side and passenger side door. And you've got 18 feet of tractor trailer, then you've got 53 feet of trailer behind you. So, that's a long way for air to travel all the way back to a rear tandem set in order to actuate brakes. We don't need brakes taking a long time to actuate because as we know from everyone driving, there are times where you may have to brake rather suddenly. So, a service relay valve moved to the rear sets of tandems will actually allow the air to be already brought back to the rear tandems. So, when you actuate your brake pedal, the air is already back there and it eliminates the air travel lag. So, your brakes actuate a lot faster. That's what we want. Now, the service relay valve provides another function too. It provides exhausting of the air brake system in several instances. Again, if you sat next to a commercial motor vehicle, it'll light when the driver releases pressure on the panel or whatever you'll hear air exhausting. Now, the air comes from numerous different places whether it be the brake chamber. But it also exhausts as you can see on the bottom of the exhibit. These all start at the bottom of the service relay valve. Now, what that does is when you're letting up on the brake pedal, it allows the air to exhaust from the air brake system and it disengages your brakes. An air brake system doesn't run in reverse. And so we have to have a way to release the air from it when we're ready to move. … Also, that exhaust port, if you look towards the top under the control ports, you can have certain instances where you can over pressurize the brake system. If a driver is driving down the road and a child runs out in front of him and he stands on the brake pedal, he's over pressurizing that system, while instead of the air rushing to the diaphragms of the brake chamber and bursting them like a balloon, the service relay valves allow the air to exhaust; keeping the air system from essentially busting like a balloon. So, you'll have exhausting effects. In this case that we're talking about, Inspector Wright had our operator up in the driver seat, and he had the pedal engaged. So, again, any differentiation of pressure on that panel is going to put that service relay valve into operation and part of this operation is to exhaust air out of the system. Now, not being a qualified air brake
>
> (continued…)

preponderance of the evidence that the brakes on the cited truck were not functional? However, as the footnote demonstrates, by displaying Rolfe's testimony, it is useful in further establishing his considerable expertise and knowledge about braking systems and service relay valves.

Rolfe was then asked if it "correct that any fluctuation in the brake pedal would allow the system to exhaust air with this relay valve of what we're discussing?' Rolfe responded, "Yes, sir. Just like I said, if you're sitting next to a truck (inaudible), any fluctuation of pressure, you're going to have air exhausting from an air brake system." Tr. 175.

Then directed to Respondent's Exhibit 7B, at the second paragraph, the Respondent noted that there is a reference there that the "brake force is adjustable and when released, the relay valve exhausts air into the atmosphere. That is straight from the Bendix of this component." *Id.* Rolfe was asked if he agreed with that statement and he responded that he did agree with it. Tr. 176.

Exhibit 7C, the receipt for the service relay valve, was then introduced. Rolfe stated that was not the component that he examined. Instead, he explained that is a quick release valve, which was included as an exhibit for the purpose of providing contrast. Instead, he informed that the actual component was depicted on 7B on the Bendix page. He noted that they are all service relays, but all have the same function. *Id.* The Court then inquired of Rolfe why should it care about the second page of 7C, asking why it is of importance in this case. Rolfe answered it was included for contrast as one who is not technically sophisticated on service relay valves can "very easily mistake the two," and therefore he commented that one has to be "very careful what you're looking at." [17] Tr. 177.

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[16] (…continued)

> Inspector, you can very quickly make a determination that you've located a defect rather than proper exhausting from the component as designed.

Tr. 171-174. Similarly, Respondent's Exhibits 7 B, 7 C, and 7 D, while also admitted into the record, are not of particular value to the issue to be resolved.

[17] Although considered of negligible value, Ex. 7 D was admitted. Rolfe referred to a highlighted portion at that exhibit, at page 43, which notes

> depending on the level of service brake pressure, compressed air from the spring compressed chambers will be evacuated into the atmosphere through the outlet, E and vent 3 until the pressure in the chamber B is greater once again and the piston closes on the outlet, a neutral position has been reached.

Tr. 178. Rolfe added that he believed that section is referring to the function of a service relay as an air pressure balance, which protects the system. Tr. 179.

Cross-examination of Rolfe began with his admitting that he is not an MSHA inspector. Tr. 182. He also agreed that he was not present at the time the citation was issued. Tr. 185. The Court notes that he had already acknowledged these points during his direct testimony. Although the government remarked that the Respondent could have offered testimony from its mechanic at the quarry, this displays confusion about the parties' respective roles. Tr. 186. It is the government's burden to establish a violation by a preponderance of the evidence. It is not the Respondent's duty to disprove the violation. Tr. 186-188.

For its own understanding of Rolfe's testimony, the Court inquired:

> [a]nd the service relay valve, and in my understanding of the testimony [ ] you will looked at that [valve] from every possible angle, other than perhaps X-raying it or taking it apart. And as you did that, my understanding of the testimony is that you observed nothing, zero, wrong or defective that alerted you to the possible problem with that piece that was replaced. Is that fair or not accurate? Tr. 190.

Rolfe responded "[t]hat's completely accurate, Your Honor. I examined the component for any evidence of any defect or any cracks, broken off pieces, missing anything, and I found absolutely zero defects with this component." *Id.* And, further, Rolfe confirmed that short of an x-ray or completely taking the component, there was nothing else he could do regarding examination of it. Tr. 191. Thus, in terms of any outward signs of a problem, Rolfe noted that he saw no issues. These outward manifestations could include: narrowed threads, creating the potential for air to slip past, or a crack in the body of the component and he observed neither issue. Tr. 191-192.

In a further effort to make sure that it understood certain aspects of Mr. Rolfe's testimony, the Court presented the following hypothetical: "if [one] come[s] come upon a truck, such as the one involved here of that class, and [one] hear[s] a air hissing noise, does that per force indicate to you that there could be a problem with the braking system?" Tr. 194.

Rolfe responded,

> It doesn't immediately say there's a problem because [there] could be other explanations for that air exhausting. It could just simply be that the driver or operator failed to walk around and close (inaudible) on his air service reservoir. And he needs to do that so the air reservoir can capture air. It could be something as simple as that. It could be the airbags filling up on the suspension system. It could be the suspension filling up on the operator's seat. There [are] numerous reasons that you will hear air. But again, that goes back to being a qualified inspector to be able to recognize and determine [ ] whether it's a defect, or if it's by design.

Tr. 194-195.

Following up on that response, the Court then asked if it was Rolfe's "position that if one suspects that there's a problem with the braking system that the only legitimate way to determine that is by conducting a threshold pressure test?" Agreeing that was true, Rolfe added only one

qualifier – namely, apart from some impact to the system, such as a truck hitting an object and ripping off a brake chamber, Rolfe agreed that

> if the air brake system is intact, and the air brake system -- and there's no significant damage like that, yes, you want to do a threshold pressure test, to generate your air loss calculation. And that will tell you whether or not if you have a sound, adequate air brake system.

Tr. 195-196.

The Court then asked, characterizing its question as a "tough one" for Rolfe, if one assumes hypothetically that the part is replaced "and the inspector then goes to the truck and no longer hears the noise, doesn't the fact that that noise is no longer present under this hypothetical tend to indicate that there was a defect with the valve … [and there is] [a] new part with no hissing" Tr. 196. Rolfe answered,

> Well, no, sir. And let me let me explain. … If you have no hissing, there's several explanations for that. Number one, you may have an operator in the seat at that moment that might have pushed the pedal to the floor and hold it there and is not releasing pressure. In this case, here, I will refer you back to the inspector's notes that during his post brake test, he did it with the engine running. If you're going to have an engine running on an old model Ford L8000, you're going to have a whole lot of noise levels to overcome to hear [an]air leak.

Tr. 196.

In rebuttal testimony, the Secretary recalled the issuing inspector, Mr. Wright. The inspector was then asked "[t]he day that you issued the violation to Vulcan on the truck; when you were actually checking it, did you have the driver turn the engine off on the truck while you were checking for air leaks?" The inspector responded yes, he did that. Tr. 201. The inspector then was asked if he could tell exactly where the leak came from, to which he answered, "[i]t came from a[n] air valve located on the frame at the front tandem." *Id.* Wright also stated that the truck was running[18] and that he felt the air leak. Tr. 202. The inspector also acknowledged that he did not remove the truck from service when he issued the citation. However, the mine operator did remove it. The Court then asked why the inspector did not remove it from service, to which he responded that he "gave them a termination time [for] that next morning to have the truck fixed." Tr. 202. On re-cross-examination, the Respondent asked if the inspector held his hand under the component, to which the inspector responded yes. Tr. 205.

As noted earlier, on re-direct, the CLR asked the inspector what he had the mine operator perform in order to check the brake. The inspector answered "[w]hen I first heard the air leak, it was a continuous leak. I afforded them the opportunity to pump the brakes at least three times to see if there was any contaminant inside the brake valve or inside that valve, that it would blow it

[18] Syntactically, the question and answer were opaque, with the question posed "And the truck was not running when you heard that?" To which the inspector answered "[n]o sir." Tr. 202. The Court interpreted the question and answer as reflected above.

out and seal. It never did. They pumped it three times and it was still had a continuous leak. When he held the foot brake down, it was always a continuous air leak." Tr. 206.

On further re-cross-examination, the inspector was asked if he could "say 100 percent for certain that the operator was holding steady pressure to that brake pedal the whole time during [his] inspection." Tr. 206-207. Wright answered that the driver was asked to do that, but he could not confirm that was done. Thus, he could only assume that the driver did so. Tr. 207.

Given the inspector's testimony, that he put his hand under the engine and felt the air, the Court inquired if the Respondent wished to recall Mr. Rolfe to respond whether that in fact that did indicate that there was a problem. The Respondent accepted the invitation for additional testimony on this issue from its witness, Rolfe. Upon being recalled, Rolfe was asked if one is

> doing a walk around on the vehicle, doing a doing an inspection, and you heard an exhaust or a wisp of air and you got under the truck. And in this component, you stuck your hand under and you felt an exhaust of air. What does that mean, and what does that verify?

Tr. 210. Rolfe answered that it

> means [ ] that there's an exhaust air. What we'd have to verify is does the location that it's coming from, is it [from the]brake … [is] it [from] a[n] [im]proper connection [o]r is it a component that is designed to exhaust air? We have to determine what we're looking at.

Tr. 210-211.

The Court then inquired further about this, asking:

> hypothetically that I'm at a truck, such as the one that's cited in this case, and I put my hand under the service relay valve, and I feel air, does that not tell me that there's a problem with the service relay valve based solely on my feeling air coming from that relay valve?

Tr. 211.

Rolfe responded,

> not in this case, Your Honor, because if you'll recall, [Inspector] Tommy Wright's citation, he had a person up in the cab with the brake actuated. So, he's actually sending pressure back to the service relay valve. So, now you'll need to determine if that exhausting is caused by the pressure and is properly exhausting into the atmosphere, as you saw in the WABCO and Bendix examples, or if you truly have an exhausting of air coming from a different part of the component, where you have a defect. So, it's not black and white. *That's why we* [ ] *harp on being qualified to do these air brake inspections. That's why FMCSA has promulgated the standard to be qualified, because there's so many variables that can be placed than even*

> *trying to, hypothetically create a situation, there's a lot of variables that you'll have to consider*.

Tr. 211-212 (emphasis added).

The Court then inquired, if it is Rolfe's position that "merely placing your hand under the valve is insufficient to determine if the service relay valve is malfunctioning … [or] what one has to do instead is to do a bubble test?" Tr. 212. Rolfe answered that was the case, as

> [j]ust by trying to identify an exhaustion of a service relay valve [which is] *designed to do that*; you need to do a threshold pressure test, and generate your air loss calculation and see if it is in excess of the manufacturer's recommendation, or the out of service criteria. … [the] [t]hreshold pressure test is your functionality and integrity test.

Tr. 212. (emphasis added).

DISCUSSION

The safety standard at issue here, 30 C.F.R. §56.14101(a)(3), titled "Brakes," provides at the cited subsection that "All braking systems installed on the equipment shall be maintained in functional condition."

In *Daanen & Janssen, Inc*., 20 FMSHRC 189 (Mar. 1998), the Commission construed the same standard in issue in this matter and that decision is instructive. The language of the standard has remained the same. In that decision, the Secretary contended that the plain language of the standard mandates a finding of violation "*when a component of the braking system is not maintained in functional condition, regardless of whether the braking system is capable of stopping and holding the vehicle*." *Id.* at 192 (emphasis added). The Commission, upon determining that the language of the standard was vague, held that the Secretary's interpretation was reasonable. In that case, the administrative law judge found that the cited front-end loader's "rear adjusting bolts, [which were] 'integral component[s]' of the loader's service braking system, were frozen and inoperative." *Id.* at 191. The Commission observed that the

> common usage of the term "system" contemplates "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose," and "an aggregation or assemblage of objects joined in regular interaction or interdependence." *Webster's Third International Dictionary (Unabridged)* 2322 (1986). Because the definition of the term "system" entails an interrelationship of

> component parts, it follows that for the system to be considered functional, each of its component parts must be functional.[19]
> *Id.* at 193.

Thus, the Commission's decision in *Daanen & Janssen* makes it clear that a defective air valve, as an undisputed component of the cited truck's braking system, must be functional.

However, that does not end the inquiry, as the Secretary must still establish by a preponderance of the evidence that the cited valve was in fact defective. The preponderance of evidence is the appropriate standard of proof in proceedings before Commission administrative law judges. To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp*., 22 FMSHRC 1066, 1070 (Sept. 2000), aff'd, 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc*., 9 FMSHRC 903, 907 (May 1987). "Preponderance of the evidence means the greater weight of the evidence, such that the Secretary has demonstrated that the violation is more probable than not." *Marion County Coal Co*., 40 FMSHRC 39, 46 (Feb. 2018) (Acting Chairman Althen & Commissioner Young, concurring).

Other Commission cases are in accord with this expression of the preponderance standard.

> The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence. *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152 (November 1989). The preponderance standard, in general, means proof that something is more likely so than not so. *See* 3 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 72.01 (1987); 2 Kenneth S. Brown et al., *McCormick On Evidence* § 339, 439 (4th ed. 1992); *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990). The Supreme Court, in *Concrete Pipe*, 124 L.Ed.2d at 563, relied on by the judge, 16 FMSHRC at 895, explained that "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of

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[19] In reaching its conclusion that each component must be functional, the Commission also noted that:

> the Secretary has consisently applied the interpretation embodied in the citation. The *PPM* [*Program Policy Manual*], which the Commission long has recognized as evidence of MSHA's policies and practices (*Dolese Bros.,* 16 FMSHRC at 693 n.4), succinctly states the interpretation of the braking standard advanced here by the Secretary. The PPM provides: "Standard [56].14101(a)(3) should be cited if a component or portion of any braking system on the equipment is not maintained in functional condition even though the braking system is in compliance with (1) and (2) above." IV *PPM*, Parts 56/57, at 55-55a (1991).

Id. at 194.

> fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence."' *See also* 2 McCormick § 339, at 439 n.12, citing Model Code of Evidence, Rules 1(3) & (5).

In re: Contests of Respirable Dust Sample Alteration Citations, 17 FMSHRC 1819, 1838 (Nov. 1995). [20]

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[20] In discussing the burden of proof, the Commission has taken note of use of that term under the common law, remarking that:

> At common law, preponderance of the evidence 'means that amount of credible evidence which is most persuasive on a particular point.' *Herman & MacLean v. Huddleston,* 459 U.S. 375, 390 (1983). The preponderance of the evidence standard has also been defined at common law as '[t]he greater weight of evidence, evidence which is more convincing than the evidence which is proffered in opposition to it.' *St. Paul Fire & Marine Insurance Company v. U.S.,* 6 F.3d 763, 769 (Fed. Cir. 1993), *reh. denied.* In general, preponderance of the evidence is such evidence as, when weighed against that opposed to it, has the more convincing force that something is more likely so than not so. *Merzon v. County of Suffolk,* 767 F. Supp. 432, 444 - 445 (E.D. N.Y. 1991); *see* Standard Civil Jury Instruction for the District of Columbia § 2-8 (revised ed. 1985); *see also, Bazemore v. Friday* 478 U.S. 385, 400 (1986); *Smith v. U.S.,* 726 F.2d 428, 430 (8th Cir. 1984); *Nissho-Iwai Co., Ltd. v. M/T Stolt Lion,* 719 F.2d 34, 38 (2nd Cir. 1983); and *Hopkins v. Price Waterhouse,* 737 F. Supp. 1202, 1204 n. 3 (D. D.C. 1990). The preponderance standard is satisfied when the party bearing the burden has shown that "the existence of a fact is more probable than its non-existence...." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602 at ___, 113 S. Ct. 2264, 2279 (1993) (citations omitted).

In re: Contests of Respirable Dust Sample Alteration Citations Keystone Coal Mining Corp. 17 FMSHRC 1883, 1897 (Dec. 1995) (Commissioner Marks, dissenting).

Plateau Mining, 28 FMSHRC 501 (Aug. 2006) also speaks to the preponderance standard and the substantial evidence test.

> The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp*., 151 F.3d 1096 (D.C. Cir. 1998) (quoting *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). "The preponderance standard, in general, means proof that something is more likely so than not so." *In re: Contests of Respirable Dust*, 17 FMSHRC at 1838. Further, the occurrence of an ignition is not, in and of itself, evidentiary proof

(continued…)

Underlying the determination of the preponderance standard is application of the substantial evidence test, a subject also addressed by the Commission in *Daanen & Janssen.* There, the Commission remarked:

> [w]hen reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.,* 19 FMSHRC 30, 34 n.5

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[20] (…continued)
of an inadequate bleeder system. *Consolidation Coal Co.*, 20 FMSHRC 227, 240 (Mar. 1998) (Comm'rs Riley and Verheggen) (citing *Mar-Land Indus. Contractor, Inc.*, 14 FMSHRC 754, 758 (May 1992); *Old Ben Coal Co.*, 4 FMSHRC 1800, 1804 n.4 (Oct. 1982)). When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2) (A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co*., 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). Further, the Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.

Plateau Mining, 28 FMSHRC 501, 524 (Aug. 2006) (separate opinion of Chairman Duffy and Commissioner Suboleski)

(January 1997) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951)).

20 FMSHRC at 195.

The basis for the Secretary's alleged violation of 30 C.F.R. §56.14101(a)(3) is that, "when tested the airbrake valve had an audible air leak while the pedal was being engaged." Tr. 18-19. To establish this, the Secretary relied upon two witnesses – the inspector who issued the citation, Mr. Tommy Wright, and a brake expert from MSHA's Technical Support Center, in Triadelphia, West Virginia, Mr. Fred T. Marshall. While Mr. Marshall was undoubtedly qualified to testify about braking systems, including how airbrake valves work, none of the testimony he offered was of value to resolving the issue before the Court, to wit:

Did the Secretary establish, by a preponderance of the evidence, that the airbrake valve, as an acknowledged component of the cited truck's braking system, was in fact defective?

Mr. Marshall's testimony, while informative as a matter of general interest about braking systems on trucks, did not advance the resolution of the issue. The reasons for this are plain and not in dispute: Marshall *never saw* the cited Ford Truck, either before the citation was issued nor after. Consequently, he could offer nothing about the noise the inspector testified to hearing. Further, *he never saw the valve*, alleged by the Secretary to have been the source of the noise, even after the suspect valve had been removed, though there was nothing preventing the Secretary from access to the valve through discovery.

This means that the Secretary's ability to establish the alleged violation rested entirely upon the testimony of Inspector Wright. For the reasons which follow, deficiencies in the testimony of the MSHA inspector, when considered in comparison with the testimony of the Respondent's brake expert, Mr. Marty Rolfe, who *did examine* the cited valve and otherwise raised significant issues detracting significantly from Wright's testimony, leads the Court to conclude that the Secretary of Labor did not establish, by a preponderance of the credible evidence, that the cited brakes were nonfunctional.

Wright testified that he issued the subject citation *upon testing* the brakes because he heard an audible present with the brake pedal engaged. His citation asserted that the audible emanated from a brake air valve at center of the front tandem. However, the inspector acknowledged that the truck passed a brake test, making an accident unlikely.

No one has challenged that the inspector heard an audible air noise. Nor does anyone contend that the valve, defective or not, was a component of the truck's braking system. However, establishing that an air noise was heard, does not spell that the violation was established. It is also not in dispute that when the suspected to be defective valve was replaced the air noise was not then detected.

It may be tempting to believe that, by virtue of the replacement of the valve and the air noise not then being detected, that clinches the Secretary's case. But that conclusion relies upon

a finding that the source of the air noise came, in fact, from the valve that was replaced.[21] *If the air noise was attributable to another source or reason, replacing a non-defective valve with a new non-defective valve would not be surprising.* The issue of the source of the air noise is an evidentiary matter for the Court to resolve. That resolution in turn relies upon the Court's analysis of the testimony from Wright and Rolfe.

Wright testified that, in using the word "audible," he meant an air leak and he attributed that to a brake air valve at center of the front tandem. He asserted that the whole time during the brake test the driver had his foot on the brake pedal[22] with it engaged and that under those conditions there was a constant, audible, air leak. He added that when the driver released his foot off the brake, the air noise stopped. Wright also testified that he crawled up under the truck and could feel the air leak, although he subsequently said he could *hear* where the air was coming from and he put his hand at the bottom of the valve and could also *feel* it. Tr. 51.

Upon cross-examination, it is fair to state that Wright has no specialized training regarding air brakes, vaguely answering that it involved "[l]eaks, stroke, canisters, the type, the know what and how the stroke would be. Listen for air leaks, valves, how things should set up." Tr. 55. His method for determining if there were any leaks on the brake system was similarly brief, advising that the driver would put his foot on the brake pedal and Wright would then walk around and check for the air leaks. The equipment would be off during the test. Tr. 56.

Asked if he did a "threshold pressure test" during the inspection, Wright did not know of such a test. After employing different terms to describe that test, sometimes referred to as a stone or pump test, Wright answered that such test was not done. Next, asked if he verified an air calculation rate during his inspection, the inspector answered that he is not required to, that answer meaning no. When asked how he verified that there was an air leak, the inspector repeated his earlier testimony on that subject. Asked if he, Inspector Wright, was in the truck cab at the time of the inspection, the inspector answered that he was not, offering that he crawled up under the truck and heard the air leak and put his hand under the valve and felt the air. When he had crawled under the truck, the motor was not running; the truck was off at that time.

Upon further questioning, Wright stated that the valve was at the center of the truck at the front tandem and that the truck had two axles. He denied that the component he examined was a service relay. When asked if he was familiar with how the brake components operate, the inspector informed that one applies the brake and if continuous pressure is applied to it, the valve is not supposed to leak air. He conceded that air would be exhausted if the driver failed to keep continuous pressure on the brake.

Regarding the Respondent's contention that other supporting agency guides are used by MSHA, Wright informed they were not. As a follow up, he was asked if, during his MSHA

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[21] As discussed *infra*, a second issue is whether it was established that constant pressure was in fact being applied to the brake pedal during the whole time of the test.

[22] Wright insisted, several times, that the truck driver had his foot on the brake pedal the whole time and that the driver kept the brakes engaged. Tr. 40, 42-43, 52.

training, there were references to a North American Standard CVSA, or any commercial motor vehicle inspections, Wright avoided a direct answer, responding that inspectors "are not required to have those and that it was just a reference. In a follow-up to that question, the inspector was then asked if there was reference material for inspections and again he avoided answering the question, responding that he cannot enforce those other sources. The Court, dismayed by the non-responsive answers, asked of Wright if there was such reference material that he came into contact with during his training, to which the inspector acknowledged that he had.

Addressing his termination of the citation, Wright advised that after the new valve was installed and the brake was then applied without the engine running and held down, there was no longer any audible air leak present at that valve, where the old valve was. However, he did not, as had done before, crawl back up under the truck and stick his hand to the bottom of the valve, answering that he did not need to do that after the valve was replaced. Finally, regarding the subject valve, after describing what is depicted on Gov. Ex. P 10, Wright informed that the exhaust port on the valve is on the very bottom and that the location of his hand at the time he felt air exhausting from it was at the bottom.

In its defense of the alleged violation, the Respondent called Mr. Marty Rolfe, who was established as an expert in the field of braking systems and as an inspector for commercial motor vehicles. It is worth noting again that Rolfe has a certificate from the Federal Motor Carrier Safety Administration granting him the authority to conduct and enforce laws on any commercial motor vehicle in the United States. His qualification includes "level one" inspections, which level is the ultimate level under such inspections. In significant contrast to MSHA's expert witness, Marshall, Rolfe *did view* the cited Ford truck and he examined the suspect valve that was replaced. He performed a level one inspection on the cited truck, though this was done after the valve had been replaced.

In reviewing the citation, Rolfe noted that no air loss calculation was reflected on it. Rolfe then stated that the valve in issue was a service relay valve, but he also had to determine the valve's location because the inspector wrote that it was *in the center of the front tandem.*[23] Rolfe contended was not an accurate configuration of this truck. Rolfe asserted that the inspector's use of "center of the front tandems" would indicate that the cited truck had five axles or greater, but in fact the cited truck had *three* axles and had *one* set of tandems. As the component was newly installed, he easily located it on the number two axle.

In detailed testimony, Rolfe then described his examination of the valve that was removed from the truck, and it is fair to state that he found nothing wrong with it. As he put it, the valve "didn't appear to be defective at all." Tr. 135-136. His exam was an external review of the valve; no x-rays or disassembly of the valve's internal parts were conducted. The Court does not believe that the Respondent was under an obligation for its defense to conduct such an extraordinary exam of the valve, as by x-ray or disassembly, of it.

[23] Rolfe was correct. The citation does state "there is a brake air valve *at center of front tandem* that has an audible present." Citation No. 9428093 (emphasis added).

Beyond his thorough examination of the valve, Rolfe took exception to the test itself conducted by the MSHA inspector. Rolfe asserted that a proper check of the functionality and integrity of an airbrake system requires one to perform a threshold pressure test. This is because that test provides an air loss calculation that allows one "to determine the air pressure balance, and whether or not the air brake system has a faulty component somewhere in it that is leaking air." Tr. 139. Importantly, Rolfe stated that it is a "simple test that an inspector can perform." *Id.* As he expressed it, the test will "reveal whether or not the air brake system has an air leak within the system somewhere. Tr. 139-140

Finding fault with the method employed by the inspector in concluding that the valve was defective, Rolfe maintained it is important that the inspector does the test on his own, because if someone sits in the driver's seat while the inspector walks around the truck, any fluctuation of pressure on the treadle valve will cause exhausting of air. Merely hearing air exhaust from such a truck does not, by itself, indicate that the brake is dysfunctional, as air will exhaust if a driver lets up on the brake pedal even a little.

Thus, Rolfe summed up that, in his view, if one wants "to verify if an air brake system has a leak of any kind, you must do a threshold pressure test and generate that air loss calculation." *Id*. In support of his view of the need for the threshold pressure test to accurately determine brake functionality, Rolfe identified several exhibits which were admitted into the record in support of his contention. These have all been described, *supra*, and will not be repeated here. However, collectively, the Respondent's exhibits indicate that MSHA has at least referred to the sources that Rolfe maintained are essential to validly determine brake functionality.

It must be said that the inspector's training for air brakes pales in comparison to Respondent's witness, Mr. Rolfe. As noted above, when asked about his training for air brakes, Wright vaguely responded that it involved "[l]eaks, stroke, canisters, the type, the know what and how the stroke would be. Listen for air leaks, valves, how things should set up." Tr. 55.

The inspector contended that the method he used was a common way to detect a leak on a brake and that the leak was constant "the whole time the driver had his foot on the brake with the pedal engaged; there was a constant air leak." Tr. 52. Thus, he asserted that "[t]he whole time the driver had his foot on the brake pedal with it engaged. There was a constant air leak, an audible air leak that I could hear and I could feel when I crawled up under the truck." Tr. 40. It is noted that the Secretary did not call the driver, nor produce a statement from the driver attesting to the testing procedure he employed.

The inspector conceded that he never did an air calculation rate during his inspection, adding that he is not required to do that. Tr. 58. When asked how he verified that there was an air leak, he responded that "[t]he operator pushed the brake [ ] [a]nd the valve that I cited had an audible air leak present the whole time he had the brake pedal engaged. He held at constant pressure on it." Tr. 59. Asked if he, Inspector Wright, was in the truck cab at the time of the inspection, the inspector answered, "[n]o, sir. I crawled up under the truck and heard the air leak and put my hand under the valve and felt it." Thus, the inspector could only surmise that the driver pushed the brake pedal down the whole time.

The Court acknowledges that MSHA does not require that an air calculation rate for enforcement of this standard. The Court also acknowledges that it cannot require MSHA to conduct such a test in order to enforce a violation of 30 C.F.R. §56.14101(a)(3). However, that is a distinct issue from the need for MSHA to establish by a preponderance of the evidence that the brake valve was defective.

Applying the preponderance of evidence standard, the Court concludes that Rolfe's testimony was more persuasive, that is to say, more convincing, on the issue of whether the suspect valve was in fact defective. Restated, the Court concludes that the Secretary did not show that it was more probable than not that the braking system was defective.

Based on the recounting of the testimony, as set forth above, the Court finds the following: As detailed above, Wright's understanding of the truck and braking systems generally was far less detailed than Rolfe's. Being more knowledgeable about the truck's braking system, the Court places more credence in Rolfe's analysis of whether the suspect valve was truly defective. Part of this conclusion is based on the fact that Wright could not be sure, under the testing system he employed, that the driver kept continuous pressure on the brake pedal the entire time. Wright admitted that it was essential that the driver not let up on the brake pedal during testing. Though the Secretary could have deposed and/or called the driver as a witness on this issue, it did not take either of those steps.

The Court's conclusion is also based on the concession from the Secretary's brake expert that there can be other sources for the sound of air on the truck. Tr. 110-112. In meeting its required burden of proof, the Secretary also could have, through discovery, obtained the suspect valve, for x-ray analysis or possible disassembly, but did not avail itself of this either.

Last, there is the matter of Rolfe's examination of the alleged defective valve, an examination for which he could not find any outward manifestation of a defect. The Court finds that Rolfe's testimony as to the condition of the alleged defective valve was credible.

CONCLUSION

Based upon the above, the Court concludes that the Secretary failed to establish by a preponderance of the reliable evidence that the cited truck's braking system was not functional. In particular this finding means that for the one component cited by the Secretary as the culprit for the allegation that the braking system was not functional, namely the service relay valve, the Secretary failed to establish under the same preponderance standard that the valve was defective. Accordingly, it is found that the alleged violation described in Citation No. 9428093 was not established.

ORDER

It is hereby ordered that Citation No. 9428093 is **VACATED** and this proceeding is **DISMISSED**.

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

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April 15, 2021

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

DECISION AND ORDER

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

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

Before: Judge Rae

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

Respondent contested the citations and orders, arguing that the excavation site was not a "mine" subject to MSHA jurisdiction. Answer at 1. Previously, Federal Mine Safety and Health Review Commission Administrative Law Judge Margaret Miller ruled that Respondent's operation was subject to the Mine Act. 39 FMSHRC 399 (Feb. 2017) (ALJ). On April 13, 2017, the Commission denied Respondent's Petition for Discretionary Review. Respondent then successfully appealed to the United States Court of Appeals for the Sixth Circuit. *Jones Bros. Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) (holding that ALJ Miller was not constitutionally appointed and that Respondent was entitled to a new hearing before a constitutionally appointed ALJ).

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

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

I. FINDINGS OF FACT

A. Background

This matter concerns Respondent's open-pit excavation site in DeKalb County, Tennessee. Tr. I at 84–85, 89–90. Respondent's employees worked at the site up to six days a week from August 2015 to August 2016. Tr. I at 94, 230, 291; Ex. S-25. Respondent was excavating at the site in support of its contract with the Tennessee Department of Transportation ("TDOT") to repair "slide" damage[2] to nearby State Route 141. Tr. I at 26; Ex. S-26; Ex. S-27. The contract required Respondent to obtain approximately 68,615 tons of "graded solid rock" to complete the road repair. Ex. S-26 at 59; Ex. S-27 at 4. TDOT's Standard Specifications for Road and Bridge Construction ("Standard Specifications") define graded solid rock as "sound, non-degradable rock having the following characteristics": (1) "[m]aximum particle size of 3 feet

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

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

in any direction"; (2) "[p]article size distribution in which at least 50% of the rock is uniformly distributed between 1 foot and 3 feet in diameter, and no more than 10% is less than 2 inches in diameter"; (3) "[r]oughly equi-dimensional in shape"; and (4) "[n]o thin, slabby material." Ex. S-28 at 10–11. Further, the Standard Specifications require that graded solid rock be processed "using an acceptable method that produces the required gradation" and that "the weighted percentage of loss shall not be more than 12" when "subjected to five alterations of the sodium sulfate soundness test." Ex. S-28 at 11. Finally, the Standard Specifications require "the [e]ngineer's approval before using the material." *Id.*

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

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

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

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

On April 5, 2016, MSHA Inspector Danny Williams[5] inspected Respondent's excavation site after witnessing it from a nearby road. Tr. I at 88–89. During the inspection, Inspector Williams spoke with Respondent's employees. Tr. I at 121. One employee allegedly told Inspector Williams of a discussion the employee had with Respondent's management regarding the possibility that the operation would be subject to MSHA jurisdiction. Tr. I at 121–22. The employee also allegedly stated that Respondent's management dismissed the employee's concerns by stating something to the effect of "we're going to call it a borrow pit."[6] *Id.* After observing and photographing Respondent's operations, Inspector Williams returned on April 6, 2016 and issued the nine citations and orders at issue in this matter. *See infra* Section III.B; Ex. S-4, S-6, S-9, S-11, S-13, S-15, S-17, S-20, S-22.

B. Credibility Findings

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

i. Testimony of Kevin Hinson

On direct examination, project manager Kevin Hinson[7] stated that he picked up a piece of rock at the excavation site to have it tested by TDOT to determine whether it qualified as graded solid rock. Tr. I at 215, 217. Hinson also agreed with Respondent's counsel that every time Hinson was required to obtain rock at other job sites for TDOT to test, Hinson was able to find suitable rock. Tr. I at 217. However, Hinson also admitted on cross-examination that Respondent performed core drilling "to ensure that the rock would meet TDOT requirements," and that

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

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

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

TDOT performed a visual test of the rock to ensure that it was not "thin or slabby" and "up to the inspector's preference." Tr. I at 227–29.

Regarding Respondent's use of the hoe ram, Hinson first agreed on cross-examination that Respondent used the hoe ram to break rock. Tr. I at 230. Then, on redirect, Hinson stated that Respondent used the hoe ram "to break the larger rock that we could not move . . . to get it out of the way and load the other material that we wanted." Tr. I at 232. Hinson later stated on recross-examination that if rock broken up by the hoe ram was "small enough, then yes, it could have been" loaded up and taken to the road site. Tr. I at 233. Hinson then contradicted himself again on redirect by stating that Respondent "couldn't afford to break rock with a hoe ram and make it cost efficient." Tr. I at 234. I find that Hinson's contradictions—coupled with his answers to Respondent's counsel's leading questions—make his testimony not credible.

ii. Testimony of Anthony Williams

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

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

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

Finally, Anthony Williams testified that Ben Coleman—who served as Respondent's superintendent of drilling and blasting—could not control whether the blasted material was too

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

large or too small and that Coleman could not "help when a big rock falls off." Tr. I at 260. However, Coleman himself testified that "to some extent" he had "control over the size of the rock" that was blasted off and that, depending on the hardness of the rock and its intended application, the blaster typically develops a drilling pattern and uses a specific type of explosive charge. Tr. II at 48–50.

In additional to the factual contradictions above, Anthony Williams was evasive throughout cross-examination by the Secretary, further diminishing his credibility. *E.g.* Tr. I at 269–74; Tr. I at 282 (Anthony Williams replied "[i]t drills" in response to counsel's question "[a]nd the drill does what?"). Consequently, I find Anthony Williams' testimony not credible.

iii. Testimony of Kevin Williams

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

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

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

than going down to the road that was next to the Caney Fork River?

Kevin Williams: No.

Tr. I at 306–07.

iv. Testimony of Jimmy Givens

Bulldozer operator Jimmy Givens[10] agreed with counsel for Respondent's comparison that "what the quarries considered trash is what you guys were using . . . as the bulk fill material." Tr. I at 318. However, on cross-examination, Givens stated that graded solid rock "is usually anything over [two feet] in diameter," which highlights his lack of knowledge regarding TDOT's requirements for graded solid rock. Tr. I at 321. Further, Givens agreed that he was "not someone who was spending much time" at the excavation site. Tr. I at 317.

v. Testimony of Stephen Wright

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

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

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

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

> down and they have a higher interlocking angle, a phi angle it's called, and it makes it much stronger and the water can free—flow freely . . . through it and that gives just a tremendously stable base for the rock.

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

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

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

II. LEGAL PRINCIPLES

A. Jurisdiction Under the Mine Act

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

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

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

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

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

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

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

> [A]n area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-

> time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

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

When determining whether a facility is a "mine" under the Act, "Congress clearly intended that any jurisdictional doubts be resolved in favor of coverage by the Mine Act." *Watkins Eng'rs & Constructors,* 24 FMSHRC 669, 675–76 (July 2002) (citing S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978)). The Interagency Agreement references this legislative history, and makes clear that questions of jurisdiction between MSHA and OSHA should be resolved in favor of coverage by the Mine Act. 44 Fed. Reg. at 22,828.

B. Gravity

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

C. Negligence

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary's regulations, an operator is held to a high standard of care. 30 C.F.R. § 100.3(d). Operators must be wary of conditions and practices that could cause injuries, and are required to take the necessary precautions to prevent or correct those conditions or practices. *Id*. The Secretary defines moderate negligence as having occurred in connection with a violation when "[t]he operator knew or should have known of the violative condition or practice, but there

are mitigating circumstances." *Id.* § 100.3(d), Table X. The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the circumstances. *Leeco, Inc*., 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (explaining that Commission ALJs "may evaluate negligence from the starting point of a traditional negligence analysis" rather than adhering to the Secretary's Part 100 definitions); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

III. ANALYSIS

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

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

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

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

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

Although Respondent's extraction of minerals is enough to make its operation a "coal or other mine" under the Act, I also find that Respondent engaged in milling and preparation of the extracted minerals. 30 C.F.R. § 802(h)(1)(C); *Drillex, Inc.*, 16 FMSHRC at 2395 (holding that the operator "engaged in both mineral extraction and milling, either of which independently qualifies its operation as a 'mine' within the meaning of the Act"). Respondent engaged in mineral milling and preparation by using the hoe ram and slotted bucket to size and remove dirt from the extracted material—processes by which Respondent made the extracted material "ready

for use" as graded solid rock. *See Drillex, Inc.*, 16 FMSHRC at 2395; *see also Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3d Cir. 1979) (separation of gravel from dredged material was mineral preparation).

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

Further, under the Commission's functional *Elam* test, *Oliver M. Elam, Jr.*, 4 FMSHRC at 7, Mine Act jurisdiction over Respondent is appropriate. With respect to the first prong, Respondent engaged in activities normally performed by a mine operator, such as: core drilling and sample testing; the creation of roads, benches, and a highwall; removal of overburden; drilling and blasting; excavating material using mechanized equipment; the processing of the excavated material using the hoe ram and slotted bucket; and loading the excavated material onto trucks for transportation. Regarding the second prong, Respondent engaged in activities to make the extracted material suitable for a particular use or to meet market specifications by blasting in a pattern, using the hoe ram to break down large rocks, and using the slotted bucket to select clean rock that was within the size requirements and phi angle dimensions for graded solid rock.

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

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

Respondent's primary contention is that the excavation site is a borrow pit under the Interagency Agreement. Respondent set forth a host of arguments in its post-hearing brief, including that: (1) Respondent only removed unconsolidated rock, not bedrock; (2) Respondent's

extraction activities were "only on a one-time basis or intermittently as need occurred"; (3) the extracted material was "fill" that was used in the form in which it was extracted and used more for its bulk than its intrinsic qualities; (4) Respondent did not engage in milling; and (5) the extracted material was used on land relatively near the site of extraction. Resp't Br. at 8–25. The Secretary argued that Respondent's operation was not a borrow pit because: (1) Respondent was not extracting overburden; and (2) Respondent was not extracting material on a one-time or intermittent basis. Sec'y Br. at 16–18.

Respondent's operation fails to meet the borrow pit criteria set forth by the Interagency Agreement. Importantly, the Commission has treated the criteria for a borrow pit as necessary elements and not as factors to be considered. *Drillex, Inc.*, 16 FMSHRC at 2391 (material was used on land "relatively near" the extraction site, but operation failed to meet other borrow pit requirements); *Jermyn Supply Co., LLC*, 39 FMSHRC 1472 (July 2017) (ALJ) (extraction operation was active only "sporadically," but the operator milled the material and the material was not being used for bulk fill); *State of Alaska, Dep't of Trans.*, 33 FMSHRC 1550 (June 2011) (ALJ) (screening operation was active for three or four weeks per year, but the operation was "sizing" aggregate and used specific aggregate for its "intrinsic qualities"); *Island Constr. Co, Inc.*, 11 FMSHRC 2448 (Dec. 1989) (ALJ) (material was used "in the form in which it [wa]s extracted as fill," but operation failed to meet other borrow pit requirements).

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

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

Commission precedent supports the conclusion that Respondent's operation is not a borrow pit. The Commission's decision in *Drillex, Incorporated*, 16 FMSHRC 2391 (Dec. 1994), contains similar facts to the instant matter, and in that case, the Commission held that the borrow pit exception did not apply. *Drillex* concerned a project where the operator was contracted to perform "drilling, blasting, rock excavation and crushing" of 20,000 cubic meters of stone "to be used as fill for embankment and road base." *Id.* at 2392. The operator excavated and processed material approximately three times per week and reduced the material in size using a hydraulic hammer. *Id.* at 2393, 2396. The Commission held that the operator did not qualify for the borrow pit exception because: (1) extraction did not occur on an intermittent basis; (2) the operator engaged in "milling" by crushing the excavated material into smaller particles; and (3) the material was sized for its intended use as fill, and was therefore not solely "bulk" in nature. *Id.* at 2396. Here, Respondent similarly drilled, blasted, and excavated material for the purpose of road construction, extracted the material more than intermittently, and milled the material by sizing it with the hoe ram and slotted bucket.

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

In its post-hearing brief, Respondent cited to *David Duquette Excavating*, 37 FMSHRC 744 (Apr. 2015) (ALJ) and *Kerr Enterprises, Inc.*, 26 FMSHRC 953 (Dec. 2004) (ALJ).[13] Resp't

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

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

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

B. Negligence Assessment for Citations and Orders

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

i. Citation No. 8817591

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

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

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

Inspector Williams testified that he assessed Citation No. 8817591 as involving high negligence because Respondent was previously a contractor at other mines and was therefore familiar with MSHA's regulations. Tr. I at 120–21. I agree with Inspector Williams' negligence assessment. I find the gravity of this violation to be serious because without notification of the commencement of operations, MSHA has no reliable way to ensure the health and safety of miners through inspections and enforcement of the Act.

ii. Citation No. 8817592

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

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

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

Inspector Williams testified that he assessed Citation No. 8817592 as involving moderate negligence because Inspector Williams "was told[] management . . . did not know that the can needed to be labelled," and Inspector Williams credited that statement. Tr. I at 141. I agree with Inspector Williams' negligence assessment. I find the gravity of this violation to be reasonably

serious because the risk that a miner might mistake the contents of the safety can for a different liquid is somewhat mitigated by the red color and warnings on the can. Ex. S-3 at 16, 19.

iii. Citation No. 8817593

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

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

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

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

iv. Citation No. 8817594

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

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

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

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

v. Order No. 8817595

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

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

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

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

vi. Order No. 8817596

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

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

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

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

vii. Citation No. 8817597

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

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

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

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

viii. Citation No. 8817598

Citation No. 8817598 has a proposed penalty of $100.00 and was assessed as involving moderate negligence. Ex. S-13. Citation No. 8817598 alleges a violation of 30 C.F.R. § 50.30(a),

which requires mine operators to complete and submit a MSHA Form 7000-2 within 15 days after the end of each calendar quarter. 30 C.F.R. § 50.30(a). The narrative portion of the citation states that "[a]n MSHA #7000-2 (Quarterly Employment Report) for the 3rd Quarter 2015 (July, August, September) was not completed nor mailed to MSHA's Health and Safety Analysis Center prior to the required 15 days after the end of each calendar quarter, October 15, 2015." Ex. S-13 at 1. Respondent terminated the citation by filing "the Q3 Mine Employment and Production Report." *Id.* at 2.

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

ix. Citation No. 8817599

Citation No. 8817599 has a proposed penalty of $100.00 and was assessed as involving moderate negligence. Ex. S-15. Citation No. 8817599 alleges a violation of 30 C.F.R. § 50.30(a), which requires mine operators to complete and submit a MSHA Form 7000-2 within 15 days after the end of each calendar quarter. 30 C.F.R. § 50.30(a). The narrative portion of the citation states that "[a]n MSHA #7000-2 (Quarterly Employment Report) for the 4th Quarter 2015 (October, November, December) was not completed nor mailed to MSHA's Health and Safety Analysis Center prior to the required 15 days after the end of each calendar quarter, January 15, 2016." Ex. S-15 at 1. Respondent terminated the citation by filing "the Q4 Mine Employment and Production Report." *Id.* at 2.

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

IV. PENALTY

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

> [T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the

> demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

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

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

Respondent previously received two section 104(a) citations while serving as a contractor, and paid the $343.00 proposed penalty. Ex. S-8 at 2. Additionally, Anthony Williams testified that he supervised seven of Respondent's employees at the road repair project. Tr. I at 247. I find that Respondent is a small-sized operator with a minimal history of violations. Additionally, there is no evidence that the proposed penalty would directly impact Respondent's ability to continue in business, and Respondent did not raise such a claim. "The Commission has held that '[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur.'" *John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (quoting *Sellersburg Co.*, 5 FMSHRC 287, 294 (Mar. 1983)).

B. Negligence and Gravity

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

C. Good Faith

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

D. Conclusion

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

ORDER

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

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 16, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner v. THE CREATOR'S STONE, Respondent	CIVIL PENALTY PROCEEDING Docket No. CENT 2020-0067 A.C. No. 03-02067-504511 Mine: The Creator's Stone

DECISION AND ORDER

Appearances: Felix Marquez, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas 75202 for Petitioner

Mr. Charles Mosely, pro se, President and CEO, The Creator's Stone, Subiaco, Arkansas, 72865

Before: Judge William B. Moran

This matter is before the Court upon a petition for the assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d), ("Mine Act" or "Act.") Two section 104(a) citations were issued to The Creator's Stone, ("Creator's Stone" or Respondent), one for failure to notify MSHA of the operation's opening and the other for failure to provide a record of miner training, but the larger issue and chief contention in this matter is the Respondent's position that his location is not a mine and that the activity carried out there does not constitute mining. For the reasons which follow, the Court finds that while the Respondent's business and the activity carried out at its business location is on the very low end of the spectrum of jurisdiction under the Mine Act, The Creator's Stone is a mine and the activity carried out there constitutes mining pursuant to 30 U.S.C.§802 (h)(1) and §803 of the Mine Act and case law determinations issued by the Federal Mine Safety and Health Review Commission ("Commission") and Federal Court of Appeals.

Findings of Fact regarding Mine Act jurisdiction of The Creator's Stone

As noted above, two citations spawned this litigation, but the challenge here is fundamentally about The Creator's Stone's position that its operation is not a mine. The Findings of Fact relating to the jurisdictional issue are first presented, while the Findings relating to the citations which were issued will follow.

A virtual hearing was held on February 2, 2021, with the testimony from that hearing reflected in the following findings of fact. The Respondent contends that his operation is not a mine and accordingly there was no duty to notify MSHA of the business and, from that premise, that the two employees cited in one of the citations are not miners. Tr. 16. Preliminarily, the Court noted, based on one of the Respondent's exhibits, which included five photos, that the description with those photos stated: "The first five photos of *the quarry* that the DOL is calling a mine, The Creator's Stone quarry." Tr. 17 (emphasis added). Given those descriptive words associated with the photos, the Court inquired whether the Respondent agreed that his operation is a quarry. The Respondent answered, "I am calling [it] rock, and I would say quarry best depicts it, a quarry or a borrow pit." *Id.* Amplifying his response, Mr. Mosley added, "[w]hat we do there is very comparable to a borrow pit, yes. …but it's not a mine, and it's not a quarry in the sense that I'm pulling rock out and crushing it and sizing it either." Tr. 18. Mr. Mosley's position, in part, was expressed as his "underlying point of all of that is, if there are no risks and there's no imminent danger in all of the definitions that are in the CFRs and acts that don't apply, how can I be a mine." Tr. 38.

Dave E. Smith, an inspector for the Mine Safety and Health Administration testified, as the government's first witness. Tr. 47. He has been an MSHA Inspector since 2008. His mining background includes working as an assistant quarry manager at a dimensional stone quarry, which he described as "much like Mr. Mosley's [quarry]." Tr. 48-49.

Regarding the inspection for this matter, which took place on May 14, 2019, the inspector went to the Respondent's site in order to determine if it was a mine. Tr. 50. The site is located in between Midway and Subiaco, in Logan County, Arkansas. Tr. 117. When making such visits, Smith will "look for evidence of heavy equipment having been traveled in and out.[1] That would usually mean excessive dirt and mud on the turnout for the driveways, ruts, things of that nature." Tr. 52.

When the inspector arrived at the potential mine site, there was no signage, and nothing identifying it as The Creator's Stone. He did see "large ruts, roads that had been traveled by heavy equipment, such as semis and such." Tr. 52. He then traveled the road "to another gate at the edge of this property, which opened up into what [he] saw, which [he described as] a quarry." *Id.* He stated observing "dimensional stone stacked [and as he] entered to the right there was a

[1] The government's exhibits, numbering 1 through 35, were all admitted. Tr. 118. From the Respondent's Exhibits, Ex. 3 at page 4, the inspector identified the skid steer he had previously referred to in his testimony. Tr. 120, 121.

miner stacking stone onto pallets." *Id*. Elaborating on the term "dimensional stone," the inspector explained

> it can vary in sizes, … [and] [i]t can be 1 to 2 inches, 2 to 4 inches, and they're stacked accordingly as they're classified. And they'll stack this on a pallet, a typical pallet, and stack it upwards of 3 to 4 feet high. And it'll weigh about 1 to 2 tons.

Tr. 55.

Explaining the removal process generally, the inspector stated, "[t]his stone is removed from the earth in laminated layers." Tr. 55. After first clearing overburden, which consists of dirt, sand, mud, and things that are less desirable, such an operation will pull the stone up in laminated layers and break them up. *Id*. Then the stone will be classified "in different ways in 1 to 2 inches, 2 to 4 inches, depending on the size, depending how they're selling the stone." *Id*.

The inspector stated that he observed the same process at The Creator's Stone. Tr. 56. Elaborating, Smith stated he

> could see evidence of heavy equipment usage, land being cleared, and … [he] … could see that there was a miner in a skid steer, which is a small piece, specialized piece of equipment with a bucket that's used to load material or to remove material … [and he saw a person] actually pulling this stone from there.

Tr. 56-57. That person, seeing Smith, stopped his work to determine who he was. *Id.* The inspector confirmed to the Court that he observed the material being put on pallets and that the material appeared to be coming from the site. Tr. 59. Smith saw the material being removed from the ground, observing that it had been pulled from the ground. In terms of the material being put on pallets, it was broken into triangular or trapezoidal shapes one to two inches in thickness. Tr. 62. He informed that such material typically is used for patio or house siding. *Id*.

He also saw where land had been cleared and a bulldozer and a skid steer, which was being operated, pulling stone up from the ground. Tr. 50, 56-57. Adding more detail to his observations upon first arriving at the site, he saw a person stacking stone onto pallets. Tr. 54. That person "was stacking stone onto pallets. There was in excess of 20 or so pallets that had been stacked. And these pallets are going to weigh between 1 to 2 tons." Tr. 54.

The inspector added that upon entering the property through a gate, to the right, off the road, was a palletizer and approximately 50 yards further down the road he saw the skid steer, and learned it was being operated by Brandon Boss. Boss was the first person he spoke with. Tr. 64. The inspector stated that it appeared he was "removing stone from the ground, breaking it into smaller sizes and preparing it to be palletized." Tr. 65. He was performing this with the skid steer bucket. Tr. 65, 68. The inspector elaborated about the function of a skid steer, informing it is "machinery that [ ] does not have a steering wheel, … [and is] controlled by levers and by foot pedals. … it has [a] single seat." Tr. 65. It has a bucket on the front and it is hydraulically driven,

and it is used much like a front-end loader. The bucket is used "to pull material up or to move material or to clear material." Tr. 66.

In terms of the size of the property, the inspector stated it was not more than 2 acres, at least as to the land that was excavated. Tr. 68. It is a small operation. Tr. 113. The inspector stated there was no mine office at the site. Tr. 81-82. The individuals the inspector met on that day informed him that they were employees of The Creator's Stone. Tr. 83.

Regarding other equipment at the property, the inspector saw a bulldozer "directly in front as [he] entered the property." Tr. 69. Compared to the skid steer he saw, the bulldozer was five to six times larger. Tr. 70. While the dozer was not running at that time, he saw tracks reflecting it had been moved and that it appeared to be ready for use. Tr. 71.

After identifying the purpose of his presence at the property, the inspector asked about training and whether the site had registered with MSHA. Tr. 71-72. As for the training issue, the inspector informed that some training is transferable from another operation but there is a separate requirement for "site-specific" training. Tr. 73.

The inspector also saw a second individual during his inspection; that person was palletizing stone. Tr. 74. That process, palletizing, was described as "several different pieces of stone piled up near [the individual who] was using a chisel to clean off the flat surface of [the pieces] … to break off rougher ends, sizing it a little bit further" by breaking it down so that the pieces could fit on the pallet. Tr.74. Thus, the individual "was using his hammer and chisel to clean off the edges, to clean off the flat surface, and then to actually fit and palletize -- fit the stone to the pallet. So stacking the, stacking it in layers on the pallet." *Id.* The pallets were about 3 ½ feet in height. Tr.75.

On the subject of training, the inspector determined that one individual, Mr. Cabrera, the one doing the palletizing, had received some training, but not site specific nor task training. Tr. 78-79. However, the skid steer operator, Mr. Boss, did not have training. Later, the inspector determined that another person, Mr. Noyce,[2] the bulldozer operator, did not have training. Tr. 76-77. Only Boss and Noyce were listed in the inspector's citations. Tr. 78.

In the inspector's process of deciding to issue a citation for an alleged violation of 30 C.F.R. § 56.1000, a standard requiring mines to inform MSHA of openings and closings, the inspector believed he had observed enough to conclude that the site was a mine. Tr. 84. In his experience, the inspector stated that he had viewed 20 to 30 mines of this size and nature. *Id.* His determination that The Creator's Stone is a mine was based upon concluding that it was engaged in removing minerals from the earth, which minerals entered commerce. Tr. 85. This was based on seeing active removal of minerals, evidence that minerals had been removed in the past and

[2] Although Respondent, through the testimony of Mr. Barnes suggested that Mr. Noyce did little at the site, stating that "[i]t would be hard to say. Mostly he just stops by to drop off a little fuel," [Tr. 184], the Court finds that the inspector's more detailed testimony is a more reliable description of that individual's activity at the site.

upon learning that the site was selling stone, the latter determination of sales being derived from the inspector's speaking with Mr. Mosely. Tr. 85.

The inspector stated that he did consider whether The Creator's Stone could be deemed outside of the Mine Act's jurisdiction by being classified as a borrow pit. Tr. 88. He defined a borrow pit as "generally a one-time use or infrequently used pit where they remove the material and place it in a nearby location in virtually the same state. So basically dig a hole, fill a hole." Tr. 88. Elaborating, he stated, a borrow pit

> would generally be close to [the] site that they were moving the material to. … [there] won't be sizing going on, and … to the extent there is sizing going on, it may be removing large rocks from the dirt to be filled. A lot of times they're used on construction sites and such to build pads and things like that. … [t]he material is not used for its intrinsic value. It's just used for its fill.

Tr. 89-90. As an example, the inspector continued,

> [a] borrow pit would be … on a construction site if they had a shale pit, and they would be removing the shale and taking out the larger rocks, you know, too large to make a pad out of. And they would remove the shale from this borrow pit and then either build a pad or, like I said, they could also potentially fill holes with. … [a]nd that's generally what it is. They're just using the material for fill. It's removed and replaced in basically the same state it's removed.

Tr. 90.

The inspector determined that The Creator's Stone was a mine, not a borrow pit,

> [b]ecause the stone was being sized on at least three different occasions, the initial removal, the breaking up into smaller pieces, and then onto the pallets. It was being sized in that way. It was being removed because of its intrinsic value because it was to be sold as stone patio.

Tr. 90-91. Mr. Mosley informed the inspector that the stone was being sold. Tr. 95.

The inspector, having determined that the Respondent's site was a mine, cited it for not complying with standard 56.1000 because mining operations are to notify MSHA of their intent to engage in that activity *prior* to mining. Tr. 91. No such notification was made to MSHA. *Id.* The inspector did later learn from Mr. Mosley that a newspaper, the Paris Express, in Logan County, contained a notification about the business but that is not a substitute for notifying MSHA. Tr. 92. Instead, a mine is to notify MSHA of "their intent to mine, their company name, their location, their owner's name, contact information, and address is [the inspector] believe[d] the majority of what is [required] on that standard." Tr. 92. Although the Paris Express contained much of that information, the inspector stated that does not displace the notification requirements which are to be made directly to MSHA. Tr. 96-97. In fact, driving home the importance of

informing MSHA directly, the inspector informed that he lives in Paris but did not see that notice in the local paper. Tr. 93. As a practical matter, the inspector noted that MSHA can't be in the business of scouring all the publications in a given state in search of such notices.[3] *Id.*

While the inspector could not recall the source of the information, his citation asserted that The Creator's Stone had been in operation for a year or so, and therefore this was not a new start up. Tr. 96. There is no dispute in the record on this point.

Addressing the inspector's evaluation of the citation for failing to notify MSHA of the operation's start-up, the inspector noted his determinations of the negligence and gravity associated with the alleged violation. Tr. 98, 100. Regarding those evaluations, the inspector characterized the citation as a "paperwork violation." Tr. 101. The inspector then described his evaluation of the training violation. Tr. 103. This was more than a paperwork violation. Underpinning his evaluation regarding the lack of training, the inspector noted that the Mine Act itself states that "an untrained miner is a hazard to themselves and to others." Tr. 104. In the inspector's view, the new miner training is the most important one:

> That's going to be the 24 hours of training that they're required to receive to indoctrinate them into mining, you know. These are the hazards you can expect. These are, these are the hazards you need to avoid, or these are the things you need to be made aware of. It's the most important training that they receive, should have received.

Tr. 105.

He marked the gravity as "fatal" because, once again, he stated:

> this is the most important training they receive. … [t]here's overturn hazards. There's special equipment. They're in a confined area, and that was my reasoning for fatal. Whether they could be caught in a piece of equipment, struck by a piece of equipment, run over by a piece of equipment, overturn a piece of equipment, and they hadn't received the training that would pertain to specifically all those instances. …[and by equipment the inspector was referring to] the [ ] skid steer and the bulldozer that was on-site.

Tr. 106. In deciding to mark the citation as "significant and substantial," the inspector again referred to the:

> new miner training [as] the most important training that is provided to these gentlemen. Them not having that training makes them unaware of any hazards that are on-site, you know, other than what they could determine personally. But there's very specific things that [they] … have to deal with the equipment that, you know,

[3] Later, the inspector's supervisor would confirm that publishing a notice in the local newspaper is not a substitute manner for complying with the required notice to MSHA. Tr. 156.

> again, it was evaluated as reasonably likely and -- loss of work days, loss or restricted work days.

Tr. 107.

> Applying standard 46.5(a), the inspector identified the discrete hazard as:
>
> [m]iners operating equipment without the proper task training. There was a raised area in which the skid steer could have overturned on. There were no berms in place. There was no signage as to hazards that were on-site … they were in a confined area … it's a small area to be operating a large piece of equipment in. So and there's training that's supposed to be given and received that's going to have them do their checks to ensure that all the safety features on that equipment are being checked and that they are working. And there was no evidence of that having been done.

Tr. 108-109. He added that the training was especially important as it is a confined area to be operating heavy equipment. *Id.* Underscoring his view of the hazards associated at the site, as the individuals did not have the required training, the inspector issued a section 104(g)(1) order and by invoking that provision, those individuals could not continue to work at the site until they had completed the required training. Tr. 111.

Inspector Smith was cross-examined by Mr. Mosley, who began with questions about the authority of the inspector and the basis for his determination that The Creator's Stone is a mine. Tr. 124-125. The Court would note that the inspector identified himself as an authorized representative of the Secretary and that the question of whether the site is a mine is a legal question for the Court to decide based upon the factual record, as reflected in the Court's findings of fact and the application of those facts to the definition of a mine under the Mine Act, as that term has been set forth in that Act as amplified and explained in decisions of the Federal Mine Safety and Health Review Commission and the Federal Courts.

Mr. Mosley challenged the basis for the inspector's determination that "sizing" was occurring, contending that his operation is "not creating the size. [It is] not making anything uniform out of it. We're just looking at it and laying it on a pallet." Tr. 126. The inspector responded that:

> [s]izing is a process of separating particles of mixed sizes into groups and particles of the same size or into groups in which particles range between maximum and minimum sizes, and that is sizing. And as for the stone being in the ground, the stone is in the ground as one continuous sheet.

Tr. 127. The inspector affirmed that, in his view, using equipment to pull up rock constitutes sizing. Tr. 129.

He also affirmed that placing the rock on a pallet is also considered sizing, stating,

> Yes. As it states in the -- policy manual, into groups in which particles range between maximum and minimum sizes, and generally it's put, stacked on pallets. I'm not certain how you do yours, but it's 1 to 2 inches or 2 to 4 inches, depending on the stone that you're categorizing and selling.

Id.

In terms of the hazards he identified, the inspector repeated his earlier testimony that an untrained miner is a hazard to himself. *Id.* To that, he added his view that there were turnover hazards at the site,

> which is going to be the elevated area of the land, … and the excavated portion of the land. Berming if you are traveling on or near your overburden. The equipment itself, you have restricted views to the rear … [w]ith your skid[-]steer you have a restricted -- semi-restricted view to the rear. With your bulldozer you have safety checks that weren't being performed on all these pieces of equipment, which could relate to having [overturn] hazards.

Tr. 129-130.

Though the Court does not consider it at all critical, in response to Mr. Mosley's question asking what the inspector believes constitutes "dimensional stone,"[4] the inspector answered: "As for the actual definition, I don't know. The lay term is, you know, sized or cut, I believe is going to be a dimensional stone. Stone that -- dimensional stone is generally stone that you could handle by hand."[5] Tr. 131.

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[4] The Court takes judicial notice that "dimension stone" is defined as "natural stone or rock that has been selected and finished (e.g., trimmed, cut, drilled, ground, or other) to specific sizes or shapes. Color, texture and pattern, and surface finish of the stone are also normal requirements." *Dimension Stone*, Wikipedia, the Free Encyclopedia, https://en.wikipedia.org/wiki/Dimension_stone (last visited Apr. 15, 2021). *See also*, the National Minerals Information Center's description, which essentially repeats the first definition. *Dimension Stone Statistics and Information*, National Minerals Information Center, https://www.usgs.gov/centers/nmic/dimension-stone-statistics-and-information (last visited Apr. 15, 2021).

[5] In another issue that the Court does not consider significant to the jurisdictional issue, although the inspector referred to the equipment at the site as "highly specialized," he only meant specialized in the sense of performing certain tasks but that it could be used for other tasks and (continued…)

Turning to Respondent's Exhibit 3, at page 1, Mr. Mosley asked about the site's highwall, with the inspector responding that it was about a foot to a foot and a half high, possibly two feet. Tr. 133-134.

Asked again what constitutes "mining," the inspector answered that

> it's going to be removing minerals from the earth and those minerals entering commerce. And that's what mining activity is going to go into the removal of that material, the selling of that material, the sizing of that material is how it's going to -- how you would -- some of the ways you would define mining activity.[6]

Tr. 138. Thus, the inspector expressed that simply by removing the material and loading it directly onto a truck, such actions would constitute mining.[7] *Id.* As also explained, *infra*, the Court finds that, as long as such activity was more than a mere borrow pit, the inspector is correct.

The Court explained to the Respondent during the hearing that the Mine Act itself describes a mine "very simply as an area of land f[ro]m which minerals are extracted in non-liquid form. And then it includes a whole lot more in 30 U.S. Code … section 802, definitions under G, which describes … a … coal or other mine." Tr. 139-140.

Because of Mr. Mosely's particular expressed frustration with "bureaucrats," the Court took special pains to note that this definition of a mine "was created by Congress, not by bureaucrats." Tr. 140.

The Court then went on to explain that its responsibility was "to determine whether what's involved at [the Creator's Stone] site is an area of land from which minerals were

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[5] (continued…)
not simply for mining tasks. Tr. 131-132. Mr. Mosley pointed out that the equipment at his site may be used in many situations, including farming. Tr. 132. There is no dispute about this; the equipment at the Respondent's site is not exclusively used for mining. A recurring theme by Mr. Mosley was that he questioned the idea that such equipment was "inherently dangerous" or made "death imminent." *See, for example*, Tr. 132 and Tr. 135, 137. In this respect, the Court notes that it does not need to find either of those situations are present for Mine Act jurisdiction to apply. Such characteristics, where found, simply make the situation more serious, but they are not prerequisites to jurisdiction.

[6] The Court finds, as elaborated *infra*, that the essence of the inspector's statement is accurate.

[7] As also explained *infra*, case law supports the inspector's view. Sizing is not a critical element for Mine Act jurisdiction to apply.

extracted in non-liquid form," but then adding that "borrow pits are a recognized exception." Tr. 140. The Court followed up that comment, noting that under subsection (h)(1) of that provision,

> it's all about resulting from the work of *extracting minerals from their natural deposits* …[with the Court then adding that] [i]t talks about private ways and roads are pertinent to such area, lands, excavations, shafts -- tunnels, working structures, facilities, *equipment, machines, tools*, or other property on the surface, as in your case, or underground as it may be marginally underground, *but it's all about resulting from the work of extracting minerals from their natural deposits*.

Tr. 140-141 (emphasis added).

While Mr. Mosely took in the Court's observations, he expressed his view that he didn't "believe that the Mining Act or the legislature's intent was to apply mine status to what's going on at The Creator's Stone." Tr. 142. Although the Court respectfully accepts that to be Mr. Mosley's view, the definitions from the Mine Act, as cited above, and the case law from the Commission and the Federal Courts of Appeal, do not agree with his view, unless a site fits within the very narrow definition of a borrow pit.

The Secretary then called Dwight Shields as its next witness. Mr. Shields is the field office supervisor for Mine Safety and Health Administration's Little Rock, Arkansas field office. Tr. 148. His testimony essentially echoed that of Inspector Smith. He considered The Creator's Stone to be a mine because:

> [t]hey're extracting minerals or rock out of the ground, which rock is comprised of many minerals. We don't know what all is in those things without analyzing them. But you're extracting that out of the ground, you're sizing those, and then you're selling them. So you're affecting commerce. That's mostly the three criteria we use.

Tr. 151. Shields acknowledged that borrow pits are under OSHA's jurisdiction. He explained that a borrow pit is "material [which] is extracted just in its -- whatever state it's in, it's dug out and used basically for fill more so than it's intrinsic value I believe is what the program policy says." Tr.152.

With that in mind, he distinguished the activity at the Respondent's site because it's "taking the stone out. It's probably laminated, and typically the dimensional stone places are. So they're breaking that stuff out. They'll break it down to a size they can put on a pallet. Then they'll sell that for folks for construction." *Id.*

Adding to Inspector Smith's explanation of dimensional stone, and essentially agreeing with it, Shields stated:

> [i]t's usually laminated or in layers, and it may be anywhere -- thicknesses from -- I guess it could be a foot thick, but typically when they're using that in the building industry -- and in other word they'll call it flagstone. That's the thinner stuff. It may

> be 1 inch thick. And you'll see that on patios or floors or hearths around fireplaces or build up fireplaces with, that type.

Tr. 153. By that description, Shields agreed that the Respondent's operation involves dimensional stone. *Id.*

Upon cross-examination, Mr. Mosley asked Inspector Shields to distinguish the activity at The Creator's Stone from a borrow pit.[8] Tr. 158. Shields responded that the Respondent's site was "sizing material [and] selling that material for its value as a -- not just a fill, but as a building stone … for … fireplaces, a rock floor, whatever, depending on the thickness of the material that they would need." Tr. 158. As to whether the action of "sizing" material Shields could not say if the level of hazards for that would be different from that of a borrow pit.[9] Tr. 159.

Inspector Shields also maintained that there is no commerce, nor sizing, associated with a borrow pit.[10] Tr. 161.

In a very real sense, Mr. Mosley expressed his overall objection to Mine Act jurisdiction on the grounds that:

> common sense would say regardless of what precedent there is that I should not fall under the Mining Act because that's [not] why the Mining Act was even created. You know, there is nothing in the Mining Act or CFRs that would suggest that they

[8] In a separate concern expressed by Mr. Mosley, referring to Section 101(7)(c) of the Mine Act, [30 U.S.C. § 811 (7)(c)], he noted that the Secretary of Labor may modify the application of a safety standard to a mine "if the [S]ecretary determines that an alternative method of achieving the result of such standard exists." Tr. 164. The Court would simply note that provision does not impact Mine Act jurisdiction. Instead, upon filing a petition, it allows for an alternative method of compliance where the same measure of protection is provided.

[9] The Court would point out that, as discussed further *infra*, it is *not* the level of hazard that determines whether an activity is classified as a borrow pit or a mine.

[10] The Court then posed a hypothetical question for the Inspector, asking if one assumes there was no sizing at all and that the Respondent's operation only removed the rock from the site, loaded it directly onto a truck, and delivered it to some other location, whether that would be classified as a mine or a borrow pit. Inspector Shields answered "If they're just dumping [the material] into a hole and using it for fill only, they're not using it for its intrinsic value then." Tr. 162-163. In such cases it would not be a mine. *Id.*

> ever intended for a simple operation like [The Creator's Stone to be covered under the Mine Act].

Tr. 168-169.

As examples of the inapplicability of the Mine Act to his site, he continued,

> [as] I show in one of my pictures a little hammer and chisel. Yeah, someone can get something in his eye, but I can drive down the street and see porches that don't have any handrails in them that are far more hazardous than a 1-foot wall in the quarry. And just the application of this to this operation is to me obviously moronic. It's just impediment, overreach, burdensome regulation.

Tr. 169.

The Court does not treat Mr. Mosley's concerns and frustrations dismissively. However, as it suggested to him during the hearing, *the Court's responsibility is to determine whether, presently, the activity at the Respondent's site constitutes mining under the Mine Act. Whether that activity should be relieved from coverage under the Mine Act is a legislative issue, and as such it is not a matter for this Court to address*.

The Secretary, having rested, Mr. Mosley called Mr. Jerry Barnes as its witness. Barnes was asked if he viewed the activity at the Respondent's site to be mining. Tr. 176. Barnes expressed that

> segregating, separating the rock, you know, getting it to a uniformity where you can sell it is different than what [The Creator's Stone] is doing. [The Respondent] is taking the rock out of the ground like it was put there, and they are stacking it on pallets, but they're not making it dimensional. They're not making it an inch thick. They're not making it two inches thick. They may be separating it, yes, but they're not making it dimensional … they are using a raw product out of the ground, natural resource.

Tr. 177.

Barnes also informed as to the use of the rock derived from the site, stating, "[i]t's used in, you know, in various products. You know, it's from flower beds to building materials to mausoleums. You know, it just -- there's no way to say just exactly, you know, what the limits are for the natural stone." Tr. 177-178. He elaborated that "[i]t's [used] for building projects, whether it be a home project or a federal project, you know, it's used for building." Tr. 178. Continuing, he stated, Respondent "has some building home supply places, you know, a small individual place[s] [that buy the pallets] or by the piece, … a lot of times they just ship it on pallets because that is the most efficient way to ship it." Tr. 179.

When the Court noted, looking at Respondent's Exhibit 3 at page 5, a photo of an industrial type hammer and chisel resting on rock, and queried if together those tools would be used to size the material that had been removed from the ground, Barnes did not agree that it would be called sizing. Instead, he described their use for "cleaning purposes. You know, when it comes from the ground it's laminated, you know. And you have to take part of it off. If you'll see in that picture, there's shale on top of these rocks. That has to be removed." Tr. 181.

The Court would comment that, apart from the nomenclature preferred, sizing or cleaning, Barnes still described processing the rocks, and therefore not merely removing material and depositing it in a new location without altering its mined state.[11] As Barnes described the activity, "[w]hat you're doing is just picking it up off the ground, making it usable, and putting it on a pallet." Tr. 184. One could accurately call this activity to be mining, though as this Court has noted, mining on the low end of the spectrum.

Though intended to show the absence of any "inherent risk" at the site,[12] Barnes' description also shows that the activity is more than a borrow pit, with his stating "[y]ou have the operator on the skid steer in one area, and then he is transporting the rock up to another area where the other guy's working. … He digs it up out of the ground and carries it up on top of the hill." Tr. 186-187. Thus, compared to the activity at a large quarry, Barnes described The Creator's Stone as "just a completely different operation." Tr. 192.

The Court would observe that it is fair to state that the Respondent's operation is "completely different," but only in the sense of scale, as minerals are being removed from the ground, and though with minimal action to it, then placed on a vehicle for transportation to a sales' site. This activity is not consistent with that of a borrow pit.

Mr. Barnes has had extensive experience working in mines, most of it with rock quarries. Tr. 192. In those years most of his work was for large quarries, though he had a few instances involving:

> one to two acre spots in the woods where we'd go out and find something usable, and we would, you know, capture it. And in the early days we'd just load that on

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[11] The Respondent brought out, through Mr. Barnes, that it is in The Creator's Stone economic interest to have the pieces as large as possible, as larger pieces fetch more money. Tr. 183. Smaller pieces, he noted, are called a "builder," and are "[w]hat a homeowner would use for around a flowerbed or stepping stones or something similar to that." *Id.* But, minimal processing or not, the Court notes that this testimony underscores that the site was not functioning as a borrow pit.

[12] Describing the skid steer operation, he stated, "I don't know how you could be a danger to yourself. That, you know, that the operator on the machine, that's all he's doing, you know. He [ ] very seldom get[s] off the machine. He just stays on the machine." Tr. 186.

the truck by hand. We didn't use pallets. And then we'd haul it to our destination and unload it there.

Tr. 193-194. In his experience, there were three such small operations, like the Respondent's. Tr. 194. He did not agree that those small operations were mines. Tr.194-195. He acknowledged that two or three of them were inspected in the past, but "since they were not sizing the material, the inspectors have not been back."[13] Tr. 195.

It was Barnes' opinion is that the Respondent's operation is a borrow pit. Tr. 200. However, Barnes did concede that, in response to the question whether "**there were activities that were going on here at The Creator's Stone where they're extracting stones and [those stones] have value, and they're being sold for a commercial purpose**," his answer was "**Yes. That's the only reason for working isn't it?**" Tr. 202-203. Thus, by Barnes' own description of the activity at the subject site, he established that the operations at The Creator's Stone is a mine.

DISCUSSION

The Secretary's Post-Hearing Brief[14]

The Secretary notes that, per 30 U.S.C. §§ 802(h)(1), "coal or *other mine*" means:

> (A) ***an area of land from which minerals are extracted in nonliquid form*** or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) ***lands, excavations***, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, ***equipment, machines, tools***, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of ***extracting such minerals from their natural deposits in nonliquid form***, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to

[13] Two comments by the Court are in order regarding Mr. Barnes' remark. First, those two or three other unidentified operations are not the subject of this litigation. Second, the Court must determine whether the factual record supports a determination whether The Creator's Stone is a mine or not.

[14] The Secretary advised that he would not be filing a response brief in this matter. Email from Felix Marquez, Esq., Department of Labor, to the Court (Apr. 1, 2021).

> one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

Sec. Br. at 3 (emphasis added).

Given that definition from the Mine Act, the Secretary states:

> [t]hese activities fall within the meaning of a mine covered by the Mine Act and, accordingly, The Creator's Stone, a dimensional stone mining operation, is a mine subject to MSHA's jurisdiction. Further, Boss and Noyce, who work at this mine, are considered miners defined by § 802(g) as "any individual working in a coal *or other mine*." As such, MSHA has properly asserted jurisdiction over Respondent.

Id. at 4.

Observing that the Respondent has asserted that its operation is a borrow pit, the Secretary, in response to this contention, points to the "MSHA and OSHA Memorandum Interagency Agreement as the source of authority for jurisdiction disputes relating to borrow pit operations. *Jermyn Supply Co*., 39 FMSHRC 1472, 1483-84, (July 31, 2017)." *Id.* at 4. The *Jermyn Supply* decision, the Secretary adds, also holds that in decisions as to whether an operation is a borrow pit, "deference is given to the Secretary's interpretation as long as the interpretation is within reason. *Jermyn Supply* at 1486." *Id.*

The Secretary also points to MSHA's Program Policy Manual's interpretation on Mine Act coverage, noting from that Manual that "MSHA has jurisdiction over operations whose purpose is to extract or to produce a mineral," but it acknowledges that it does not have jurisdiction "where a mineral is extracted incidental to the primary purpose of the activity." Sec. Br. at 5 (citing MSHA Program Policy Manual, Volume I, Section 4.)[15]

[15] The same Program Policy Manual addresses "Borrow Pits," and nothing in that discussion conflicts with MSHA's position in this case, as that manual informs that

> 'Borrow Pits' are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction.) 'Borrow Pit' means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. *Extraction occurs on a one-time basis or intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted.* No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. *The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit*.

Sec. Br. at 5-6 (emphasis added).

Case law in support of the Secretary's position that The Creator's Stone is within the jurisdiction of the Mine Act was also cited in its brief. The cases cited – *Kerr Enterprises,* 26 FMSHRC 953, 954-58 (Dec. 21, 2004); *New York State Department of Transportation*, 2 FMSHRC 1749, 1758-61 (July 3, 1980) – do indeed establish that a "borrow pit" is a narrowly defined concept. To qualify as such, terms such as "fill material," that is to say, material extracted for its bulk as opposed to its intrinsic qualities, with that material used relatively near the extraction site, with the lack of any sizing, and the process occurring on a one-time basis or intermittently as need occurs, come into play. In contrast, things like continuously extracting materials for sale to customers located nearby do not fit within the scope of borrow pits.

To its credit, and of value in better understanding the distinction between activity which constitutes mining in comparison to mere borrow pit activity, the Secretary notes a decision where the activity was determined to *not constitute* mining. *David Duquette Excavating*, 37 FMSHRC 744, 745-52 (April 8, 2015) is one such case outside of Mine Act jurisdiction "because the extraction occurred intermittently (approximately three times in two years), the extracted material was used as fill in the form it was extracted, the fill material was used more for its bulk to fill low places in a yard than for its intrinsic qualities, and the only milling involved was with a scalping screen to remove large rocks, wood and trash." Sec. Br. at 8 (citing *David Duquette Excavating*, 37 FMSHRC at 750-52).[16]

However, the Secretary asserts that the activities being carried out by The Creator's Stone is not like the case just referenced. A critical distinction, it cannot be denied that the "Respondent is in business of selling dimensional stones for their intrinsic value. … [t]he activities are ongoing, rather than on a one-time or an intermittent basis [and] …. the activities have been performed continuously since operations started on May 23, 2018." *Id.* at 9.

In sum, the Secretary contends that the purpose of the Respondent's operation is preparing the dimensional stones for commercial sales, a process which requires extraction of the stones with heavy equipment, such as a skid steers and bulldozers, and also involves "cleaning, sizing, and milling the unearthed stones to create various sizes, as a stone's size impacts its market value." *Id.*

[16] However, the Secretary mistakenly cites *State of Alaska, Dept. of Transportation*, 34 FMSHRC 179, 181 (Jan. 2012)(ALJ) as a second example of activity deemed outside of Mine Act jurisdiction because that judge found that "the extraction activities were relatively close to the maintenance sites (approximately one-quarter mile), conducted intermittently (seasonal use), and had no intrinsic value. … [a]lthough the material may have had 'commercial value' it did not have intrinsic value to the end-user." Sec. Br. at 8. As described *infra*, in fact the Commission reversed the administrative law judge, rejecting the determination that it was a borrow pit and finding that the Alaska operations *were* subject to the Mine Act. *State of Alaska*, *Dep't of Transportation*, 36 FMSHRC 2642, 2649 (Oct. 2014).

The Respondent's Post-Hearing Brief and Response Brief

Respondent begins its post-hearing brief with expressions of frustrations over the manner in which MSHA handled this matter. In voicing these feelings, Respondent contends that the government has infringed upon the rights of its citizenry, citing the Declaration of Independence. Respondent believes that, in enforcing its authority, the government has acted bureaucratically, "assum[ing] authority rather than assist[ing] the public." R's Br. at 1.

Turning to its view of the facts, Respondent sees its activity at The Creator's Stone as "placing layered material on a pallet. The material is not sized or processed. The material comes out of the ground just as The Creator placed it there. The desirable material is placed on a truck by a skid steer." *Id.* at 2. Respondent contends that the chief argument advanced by the government is the claim that the operation performed "sizing." But, Respondent counters that no sizing is actually involved. It takes issue with the inspectors' claim that material is derived in one continuous sheet, asserting instead that the material has "natural seams where it comes apart," giving it a character that makes it desirable and thus smaller pieces occur by virtue of handling it. *Id.*

The Respondent then makes an argument of a different nature, namely that not only does its operation not perform what is recognized as sizing, but also that its activity is not hazardous. Respondent asserts that it merely "look[s] at a rock or lay[s] a tape measure on a rock," and, in The Creator's Stone's understanding or interpretation of such activity, that does not "constitute sizing or mining." *Id.* at 3. As for the equipment it uses at the site, none of it is highly specialized, as it all can be rented at an equipment rental shop. *Id.* Further, one renting such equipment is not required to receive training before renting it. *Id.* On the subject of training, Respondent adds its own take that "[t]here is nothing but On-The-Job-Training that makes [one] qualified, certified, or capable of doing a good job on a piece of equipment." *Id.*

Respondent has other criticisms of MSHA's claim of jurisdiction over his operation, contending that there are no "imminent dangers" nor "occupational diseases" present. *Id.* at 4. As the Respondent sees it, given the Mine Act's statement, per section 2(d) of that Act, that "unsafe and unhealthy conditions and practices in the Nations coal or other mines is a serious impediment to future growth," it should be considered that "it is over zealous regulators that are creating conditions that impede future growth." *Id.* at 4. Underlying all of these objections to these contested citations is the Respondent's sincere belief that his place of business is a "non-mining situation." *Id.*

The Respondent then turns to a very different line of defense, namely that The Creator's Stone no longer engages in milling or sizing and no longer stacks material on pallets. Instead, it intends to make operational changes under which it

> will put the material on a dump truck, take to an area that is not considered confined and tailgate the material onto the ground. This will allow natural occurrences, rain,

> sun, heat and cold to clean and separate the material. At that point the only sizing that will need to be done is to measure and put on the truck.

Id. at 5.

Turning to the two citations, and first addressing the jurisdiction issue, Respondent states he had no idea that MSHA would apply to his operation. *Id.* at 6. Therefore, he claims his failure to notify was not negligent nor willful. He asserts that none of the state agencies he contacted ever mentioned the Mine Act. *Id.* at 6. As Respondent's friend, Jerry Barnes, with many years of dealing with MSHA did not think that The Creator's Stone was a mine, he claims it is unreasonable to expect the Respondent's start-up company to know this. *Id.*

As for the lack of training citation, Respondent asserts that Jerry Barnes stated that Tom Noyce "was not an employee of the pit." *Id.* In support of this contention, Respondent refers to "Subchapter H, 46.2 (2) [which] specifically states that delivery people, commercial truck drivers, maintenance workers and service workers who are not frequent or there for extended periods are not miners." *Id.* In terms of the penalty ascribed to this, Respondent contends that Barnes testified that there is no risk from a reasonable person standard and that this makes sense because, returning to its jurisdictional argument, the Respondent again argues that The Creator's Stone is not a mine. *Id.* at 7. Further, Respondent takes special note that his operation is not a mine because "[a]ll of the elements of an industrial operation with high-walls, moving parts, crushers, processors, conveyors, large equipment, detailed operations, hazardous chemicals, cat walks, ventilation systems, dust, explosives, blasting, drilling, occupational diseases and imminent danger don't exist" at his operation." *Id.*

In light of all of his arguments, Respondent asks that the citations be vacated. *Id*

Respondent's Response Brief[17]

Respondent again contends that "[due] to the nominal nature of cleaning and the lack of sizing or milling, [The Creator's Stone] did not and do[es] not feel that [it is engaged in] sizing or milling." R's Response at 1. Speaking to its contention that The Creator's Stone is a borrow pit, Respondent, asks for reasonableness in making that determination. *Id.* However, the Respondent then translates that reasonableness determination "to the level of hazard." R.'s Response Br. at 1-2.

Another argument made by the Respondent is that it has changed its operation so that it operates only intermittently, asserting that it has only been used in "nine days out of the last 45

[17] As with the parties' initial briefs, the Court considered all contentions raised in those submissions. That particular arguments may not be expressly addressed does not mean they were not considered. Rather, the Court determined that its other findings and statements sufficiently spoke to those issues, directly or indirectly, and therefore did not require additional discussion.

days." *Id.* at 2. Respondent repeats its contention that it does not clean, size[18] or mill the material it removes from its natural deposit, contending that the material it removes only has "nominal cleaning." Respondent adds that it no longer palletizes the material it gets from the pit. *Id.*

Additional arguments presented include the Respondent's belief that the Secretary must prove that its activity is "somewhat likely to result in harm." *Id*. The Respondent contends that the Secretary must establish such reasonable likeliness of injury or illness. Respondent asserts that was not established by the Secretary, as The Creator's Stone has a perfect safety record for this "pit [which] has been open for about 3 years." *Id*.

Turning away from the jurisdictional arguments, the Respondent then contends that civil penalties do not deter unsafe mine operations. *Id.* at 3-4. This claim is wholly immaterial to this proceeding and will not be further addressed for that reason. This does not mean that the Court agrees with the assertion.

Shifting to the citation involving lack of miner training, Citation No. 9451586, Respondent asserts that it "does not take miner training to operate a skid steer." *Id.* at 4. Respondent also contends that one employee, Mr. Noyce, "was performing no function at the pit other than fueling or general maintenance." *Id.* at 5. Regarding employee Mr. Boss, Respondent, citing 30 C.F.R. § 46.5,[19] "New Miner Training," contends that, as Mr. Cabrera was present, Boss "could be on location without training." *Id.* at 6.

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[18] The Respondent continues its argument that it does not engage in sizing, going so far as to assert that "[t]he inspectors want [The Creator's Stone] to be breaking and sizing in order for them to have jurisdiction. The only breaking taking place is ***during the excavation***. The layers (thickness) were already established by The Creator." *Id.* at 4 (emphasis added).

[19] The cited provision, 30 C.F.R. § 46.5, titled "New miner training," provides:

> (a) Except as provided in paragraphs (f) and (g) of this section, you must provide each new miner with no less than 24 hours of training as prescribed by paragraphs (b), (c), and (d). Miners who have not yet received the full 24 hours of new miner training must work where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner.

The record matters. In this case, there is no evidence of a record that the miner was working "where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner." Mr. Cabrera did not testify.

The Respondent makes similar arguments along this line, invoking 30 C.F.R. § 46.2 for the proposition that miners do not include "maintenance or service workers who do not work at a mine site for frequent or extended periods." *Id.* at 7. Again, there is no evidence to support this claim. Then, returning to his fundamental argument, the argument which is really what this case is about, Respondent cites to 30 C.F.R. § 46.2(h), for his belief that The Creator's Stone is not a

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CASE LAW REGARDING MINE ACT JURISDICTION

In *Drillex, Inc*., 16 FMSHRC 2391 (Dec. 1994), the only issue to be decided by the Commission was whether the Respondent's operations were subject to Mine Act jurisdiction. In finding that the operation was a "mine" within the meaning of section 3(h)(1) of the Mine Act, the administrative law judge found that Drillex had engaged in both mineral "extraction" and "milling." Distinguishing the Respondent's activities from a "borrow pit," the judge found that the Respondent did not extract minerals on a one-time or intermittent basis and that it milled minerals for a specific purpose.[20] The Commission affirmed the judge's decision.

The Respondent had argued that "it did not extract and process rock for the material's *intrinsic* qualities but, rather, performed such activities merely as an 'incidental operation ... for the construction of ... roads ... .'" *Id*. at 2394 (emphasis added). In deciding that Drillex was a mine, the Commission first turned to Section 4 of the Mine Act, 30 U.S.C. § 803, which provides that each "coal or other mine" affecting commerce shall be subject to the Act. It also noted that Section 3(h)(1) of the Mine Act defines "coal or other mine," in part, as "an area of land *from which minerals are extracted* ... and ... lands, *excavations*, ... facilities, equipment, ... used in, or to be used in, the milling of such minerals ...." *Id.* (quoting 30 U.S.C. § 802(h)(1)) (emphasis added).

Although the Commission observed that "the Act does not further define 'extracted' or 'the milling of minerals,'" it took note that both the Commission and courts have recognized that the legislative history of the Mine Act indicates that a broad interpretation is to be applied to the Act's definition of a mine. *Id.* (citing *Marshall v. Stoudt's Ferry Preparation Co*., 602 F.2d 589, 592 (3rd Cir. 1979); *Cyprus Indus. Minerals Corp*., 3 FMSHRC 1, 2-3 (January 1981), *aff'd*, 664 F.2d 1116 (9th Cir. 1981)). Those sources also took note that this view is supported by the legislative history of the Mine Act. *Id.* at 2394 (citing S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th

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[19] (…continued)
mine. *Id*. However, Respondent does not take account of the full text of that provision, which provides that "[**m**]**ining operations means** mine development, drilling, blasting, ***extraction***, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; ***and associated haulage of materials*** within the mine from these activities." 30 C.F.R. § 46.2(h) (emphasis added).

[20] If something were a "borrow pit," as opposed to a "mine," it would be subject to the jurisdiction of the Department of Labor's Occupational Safety and Health Administration rather than MSHA jurisdiction, pursuant to the interagency agreement between MSHA and OSHA. However, as set forth in this decision's Findings of Fact, The Creator's Stone is a mine, not a borrow pit. *See*, MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (Apr. 17, 1979), amended, 48 Fed. Reg. 7521 (Feb. 22, 1983) ("Interagency Agreement.").

Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("*Legis. Hist."*)).

In finding that *Drillex* engaged in *both* mineral extraction and milling, the Commission pointed out that ***either*** of those activities **independently qualifies** as a basis to constitute the operation as a "mine" within the meaning of the Act. *Id.* at 2395. The Commission then turned to the definitions of the terms "extraction" and "milling," looking to the commonly understood definitions for those words. Those definitional sources informed that "'extraction' means the separation of a mineral from its natural deposit in the earth" and that "'milling' includes processes by which minerals are made ready for use."[21] *Id.* at 2395.

As the Court explained during the hearing and in conference calls with the parties in advance of the hearing, it is not for this Court to fashion its own determinations of what is a mine, but rather to look at what Congress,[22] the Commission, and the Federal Courts have said about the subject.

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[21] For the term "extraction," the Commission cited the Bureau of Mines, U.S. Dept. of Interior, Dictionary of Mining, Mineral, and Related Terms 404 (1968) ("DMMRT") at 932. Concerning "milling," the same source defined that term to include "processes by which minerals are made ready for use." *Id*. at 706. It noted that *Webster's Third New International Dictionary, Unabridged* 1434 (1971) is in accord with that definition of "milling." The Commission also pointed out that the Interagency Agreement is in concert with those sources. That Interagency Agreement

> defines "milling" as: the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

Id. at 2395 (citing the Interagency Agreement at 44 Fed. Reg. at 22829). The same Agreement defines "crushing" as "the process used to reduce the size of mined materials into smaller, relatively coarse particles," among milling processes subject to MSHA's regulatory authority." *Id*.

[22] Regarding Congress' intent, the report of the Senate Committee on Human Resources states:

> "the definition of '**mine**' **is clarified to include the areas, both underground and on the surface, from which minerals are extracted** ... and areas appurtenant thereto.... The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under [the] Act be

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The Commission also specifically addressed whether an operation could be deemed a "borrow pit." In that regard it looked to the Interagency Agreement, remarking that borrow pits are subject to OSHA jurisdiction, but even borrow pits are not always under OSHA, as MSHA has jurisdiction over those borrow pits located on mine property or related to mining. A

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

Drillex at 2396 (citing 44 Fed. Reg. at 22828) (emphasis added).

Although Respondent has called his activity a "borrow pit,"[23] the facts clearly demonstrate that it is not a borrow pit at all.[24]

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[22] (…continued)

> given the broadest possibl[e] interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act."

Legis. Hist. at 602.

Drillex at n. 4.

[23] Mr. Mosley stated that his site was "very comparable to a borrow pit." Tr. 18. At hearing, he said, "I'm declaring it to be a borrow pit." Tr. 27. At other times, he described it as a "quarry." For example, in Respondent's Exhibit 1, photos are described as "The first five photos of the quarry that the DOL is calling a mine, The Creator's Stone quarry." Tr. 17. However, when asked about calling it a quarry, Mr. Mosley responded, "I am calling [it] rock, and I would say quarry best depicts it, a quarry or a borrow pit." *Id*. The Court cannot ignore that in the Respondent's Exhibit 2, his various local state filings continually refer to the operation as a quarry. For example, within that Exhibit 2, a filing with the State of Arkansas Mining Program, The Creator's Stone filed a "Notification of Intent to Quarry in June 2018. Of course, the names either side attaches to the description of the activity at The Creator's Stone do not determine the outcome. Rather, the underlying facts determine the correct appellation for the site.

[24] The limited scope of a borrow pit was highlighted in a different State of Alaska case, *State of Alaska, Dep't. of Transportation*, 36 FMSHRC 2642 (Oct. 2014) ("*Alaska DOT*"). There, the Commission determined that sand and gravel operations performed by the State of Alaska Department of Transportation ("AKDOT"), which operations were conducted in

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Although the foregoing is more than sufficient to resolve this matter, another instructive decision on the issue of jurisdiction is the D.C. Circuit's decision in *Carolina Stalite Co.,* 734 F.2d 1547, (D.C. Cir. 1984). That case involved a slate gravel processing facility. Finding that the operation was a mine within the meaning of section 3(h) of the Act, 30 U.S.C. § 802(h) (1982), the Court of Appeals upheld Mine Act jurisdiction. In fact, applying *Carolina Stalite* to this case, the Court finds that the operation at The Creator's Stone, small as it indisputably is, to be a more compelling case for jurisdiction.

Carolina Stalite owned and operated a slate gravel processing facility. Stalite's property was immediately adjacent to a quarry owned and operated by another company but the two businesses were entirely independent of each other and their interaction was solely as buyer and seller. A percentage of the quarry's stone was transported from the quarry to Stalite via conveyors. There was no dispute that the quarry was subject to Mine Act jurisdiction. Instead the

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[24] (…continued)
conjunction with maintaining a highway used by vehicles to service the Alaska Pipeline, were subject to the Mine Act's jurisdiction. Although the Interagency Agreement generally accords OSHA, and not MSHA, jurisdiction over borrow pits, it:

> limits what can be considered a "borrow pit" to an area of land where
>
> > "[e]xtraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit. [Interagency Agreement] at 22,828.

Alaska DOT at 2649. But contrast that MSHA describes a borrow pit as applicable to situations "where a landowner uses material in basically the same form as it is extracted to fill potholes in a road, the excavation will be considered a borrow pit and thus not subject to MSHA jurisdiction." *Id.* at 2649 (quoting underlying ALJ decision at 34 FMSHRC 179, 184-185 (Jan. 2012) (Administrative Law Judge Feldman)) (emphasis added). So too, the Commission found that "milling" occurred. Again the Commission looked to the Interagency Agreement and its statement that:

> [m]illing consists of one or more of the following processes: crushing, grinding, pulverizing, *sizing*,…. 44 Fed. Reg. at 22,829 (emphasis added). "Sizing" is defined in the Interagency Agreement as " [t]he process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes. "

Alaska DOT at 2649 (citing Interagency Agreement at 22,829-30).

court was determining if Stalite's activity, upon receiving the stone from the quarry, was also within the Mine Act's coverage. Stalite subjected the material from the quarry to intense heat in a rotary kiln and then crushed and sized the material. That end product was thereafter sold for making concrete masonry blocks.

The D.C. Circuit's analysis focused on Section 3(h) of the Mine Act. It observed that the distinction within that section involved milling and preparation as compared to manufacturing, with the latter covered by Occupational Safety and Health Act regulation, but with milling and preparation under the Mine Act.

Though separate and legally independent entities, the Court of Appeals could not ignore that the two businesses, the quarry and Stalite, constituted "a unified mineral processing operation." *Id.* at 1551. The Court also referenced that Section 3(h)(1)(C) of the Mine Act includes within the definition of a mine all facilities engaged in the milling or the work of preparing minerals. By Congress employing both those terms, the Court held it signaled that "an expansive reading is to be given to [the] mineral processes covered by the Mine Act." *Id.* Thus, all those terms can be viewed "interchangeably to describe the entire process of treating *mined* minerals for market." *Id.* Accordingly, the Court of Appeals rejected the view that the Mine Act only covers facilities which engage in mineral milling and preparation in conjunction with the initial extraction of the mineral.[25] *Id.* at 1552. It emphasized that "the Act was intended to establish a 'single mine safety and health law, applicable to *all mining activity.*'" *Id.* at 1554 (citing S.Rep. No. 461, 95th Cong., 1st Sess. 37 (1977)) (emphasis original).

The Court of Appeals then took note that decisions "by the Third, Ninth, and Fourth Circuits accord with our interpretation of the Act, and uniformly recognize section 3(h)'s 'sweeping definition' of a mine." *Id.* (citing *Marshall v. Stoudt's Ferry Preparation Co.,* 602 F.2d 589 (3d Cir.1979), *Cyprus Industrial Minerals Co. v. Federal Mine Safety & Health Review Commission,* 664 F.2d 1116 (9th Cir.1981), and *Harman Mining Corp. v. Federal Mine Safety & Health Review Commission,* 671 F.2d 794 (4th Cir.1981)).[26]

These cases drive home the point that even in cases where the extraction has occurred that does not preclude Mine Act jurisdiction. In The Creator's Stone's very minimal operation,

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[25] The Court of Appeals also held that the determination by the Secretary of Labor in deciding the whether an activity should be ascribed to OSHA or to MSHA is due deference. *Carolina Stalite Co.,* 734 F.2d at 1552-1553.

[26] Ever so briefly, this Court notes that in *Marshall v. Stoudt's Ferry,* though the operation didn't extract minerals, it still prepared them. In *Cyprus Industrial Minerals*, drilling exploratory drifts into hill in search of "a commercially exploitable deposit" was enough, even without any extraction, for the Mine Act to apply. Perhaps the most striking example of the breadth of the Mine Act is *Harman Mining Corp*., where jurisdiction was upheld under circumstances where the mineral had been extracted and prepared. Harman was engaged only in car dropping, which was loading the coal on railroad cars.

all of the elements for jurisdiction obtain, as it removes, that is to say "extracts," what is undeniably a mineral and then loads those extracted minerals for transportation to sale sites. Thus, The Creator's Stone's miniscule operation nevertheless carries the mining process from start to finish.

Accordingly, on the basis of the foregoing findings of fact, the discussion of the definitional terms in the Mine Act, the legislative history, and relevant case law, the Court finds that The Creator's Stone is a mine. Although the Respondent's operation is of extremely small size, a description which is both undeniable and undisputed, in every other respect Mr. Mosley's tiny operation is a mine: it extracts minerals and loads the excavated material onto a vehicle for delivery to a point of sale.

Penalty Determination

In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider 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).

As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co*., 8 FMSHRC 491, 492 (Apr. 1986). A Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000)." *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).

Penalty Factors, as applied to this case

The Creator's Stone was issued two citations: Citation No. 9451585, for an alleged violation of notification of commencement of operations and closing of mines, citing 30 C.F.R. § 56.1000; and Citation No. 9451586, for an alleged a violation of standard 46.5(a). That latter standard speaks to new miner training and the citation alleged that two employees, Mr. Boss and Mr. Noyce did not have that training. At the hearing, Respondent's owner, Charles Mosley conceded that if he does not prevail on the jurisdictional issue, he would concede the fact of violations for the two citations, but not the penalties assessed for them. Tr. 15. In a case of this nature, an extended discussion of the application of the penalty factors to the citations is unwarranted.

History of violations: The Respondent mine's history of violations is reflected in Ex. P-1. Its history consists only of the two citations in this matter. Accordingly, this factor is of no consequence in the penalty determination.

Size of operator's business: The mine act does not exempt small mines. However, the size of a mine is taken into account, as it is one of the six statutory factors to consider when imposing a civil penalty. The Respondent's mine is very small. Tr. 130, 213. Consideration of this factor warrants a lower penalty.

Good faith in compliance after notification of a violation: For the two citations involved in this docket the Respondent demonstrated good faith.

Effect on the operator's ability to continue in business: The Court finds that the Respondent did not meet its affirmative obligation to establish that the proposed penalties would have a cognizable effect on the mine's ability to continue in business. As the penalties imposed in this decision are, in total, less than the amounts proposed, this conclusion is reinforced.

Negligence and Gravity are discussed separately for these two violations.

Negligence: For the failure to notify of commencement of mining operations, citing 30 C.F.R. § 56.1000, Citation No. 9451585, the penalty was assessed at a proposed $121.00. The negligence was assessed as high for that violation, but the Court finds that it is more properly designated as 'low.' The Respondent made no attempt to hide its operation and believed, albeit incorrectly, that the Mine Act did not apply to its operation.

The same low negligence rationale applies to the other established violation, Citation No. 9451586, for the violation of the miner training standard 30 C.F.R. § 46.5(a), which was assessed at a proposed penalty of $355.00.

Gravity: For Citation No. 9451585, the failure to notify of commencement of mining operations, the inspector marked the gravity as 'unlikely,' with 'no lost workdays,' one person affected, and not significant and substantial. The Court finds each of those designations as consistent with the evidence at the hearing.

For Citation No. 9451586, the violation of the miner training standard, the inspector marked the gravity as 'reasonably likely,' 'fatal,' with two persons affected, and significant and substantial. The Court finds, based on the evidence at the hearing, that an 'unlikely' designation is more appropriate. That determination means that the significant and substantial designation is unsupported. While a fatal accident is within the realm of possibilities, given the use of heavy equipment, the unlikely injury designation is given more weight for this factor.

Conclusion

Upon consideration of the each of the statutory penalty factors, the Court concludes that the appropriate civil penalty for Citation No. 9451585, the violation of notification of commencement of operations is $50.00 and the appropriate civil penalty for Citation No. 9451586, the violation of the miner training standard, is $75.00. The Respondent should not be lulled by the imposition of these reduced penalties to assume that future Mine Act violations will

be similarly treated. Each proven violation is determined on the basis of the particular facts established, which are then applied to the statutory criteria.

ORDER

For the reasons set forth above, Citation No. 9451585, is **AFFIRMED** and a civil penalty of $ 50.00 (fifty dollars) is imposed for that violation and Citation No. 9451586 is also **AFFIRMED** and a civil penalty of $ 75.00 (seventy-five dollars) is imposed for that violation

A total civil penalty of $125.00 is hereby imposed upon Respondent for these two violations. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this Decision. Upon timely receipt of payment, the captioned civil penalty matters are **DISMISSED**.

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

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