

February 2016

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Review was not granted in any case during the month of February 2016.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

February 8, 2016

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of JEFFREY PAPPAS

v.

CALPORTLAND COMPANY

Docket No. WEST 2016-156-DM

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On January 12, 2016, a Commission Administrative Law Judge issued a decision granting an Application for Temporary Reinstatement filed by the Secretary of Labor on behalf of Jeffrey Pappas against CalPortland Company pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).¹ 38 FMSHRC _____, slip op. at 13, No. WEST 2016-156-DM (Jan. 12, 2016). The operator subsequently filed a timely petition for review of the Judge’s grant of temporary reinstatement. For the reasons that follow, we affirm the Judge’s decision, pursuant to Rule 45(f) of the Commission’s procedural rules, 29 C.F.R. 2700.45(f).

¹ 30 U.S.C. § 815(c)(2) provides in pertinent part:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . [I]f the Secretary finds that such 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 . . .

(emphases added).

I.

Factual and Procedural Background

A. Factual Background²

Martin Marietta owned the Oro Grande cement plant in San Bernardino County, California through a subsidiary named Riverside Cement. Tr. 82–83. On October 1, 2015, Martin Marietta completed the sale of nearly all the assets of Riverside Cement, including the Oro Grande Quarry and cement plant, to CalPortland. Slip op. at 3; Tr. 83–84.

Jeffrey Pappas worked at the Oro Grande cement plant for 16 years. Tr. 24–25. In his time there, Pappas worked in nearly every hourly-wage position at the plant, excluding managerial positions. Tr. 25–26. In early 2014, Pappas grew concerned about a dangerous situation caused by a supervisor’s potentially unsafe directions. Tr. 26. Pappas brought his concerns to mine management’s attention, but management dismissed his concerns without fully addressing them. Tr. 26. Pappas later pointed out the problems to an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) who investigated and, in turn, issued citations to the mine for safety violations and caused changes in Oro Grande’s safety policy. Tr. 26–27. Pappas’s relationship with his managers and colleagues deteriorated sharply after MSHA issued the citations, and Martin Marietta eventually fired Pappas. Tr. 27.

On April 21, 2014, Pappas filed a section 105(c) discrimination complaint with MSHA against Martin Marietta. Slip op. at 4; Tr. 27. Following depositions in that discrimination case during December 2014, Martin Marietta and Pappas reached a Commission-approved settlement permanently reinstating Pappas at the Oro Grande mine; Pappas returned to work as a laborer at the cement plant in January 2015. Slip op. at 4; Tr. 27, 34–35. Upon Pappas’s return to work, however, Pappas’s direct supervisor and his coworkers harassed Pappas about his discrimination case and prior safety complaints. Tr. 29, 33–34. Pappas asked the mine’s upper management, including human resources manager Jamie Ambrose (née Rowe), to intervene and stop the harassing behavior. Tr. 28, 29, 34. Ambrose and the other mine officials did not address Pappas’s repeated complaints about the harassment. Tr. 30.

In August 2015, officials from CalPortland began visiting the Oro Grande Quarry to determine whether CalPortland should purchase the cement plant and three related assets from Martin Marietta. Slip op. at 4; Tr. 30. In a limited asset sale agreement, CalPortland agreed to purchase the Oro Grande Quarry, including the cement plant and other facilities. Slip op. at 4; Tr.

² The facts in this temporary reinstatement proceeding are based on the Judge’s findings, which accept the allegations made by the complainant as true, unless otherwise controverted by irrefutable evidence. As the Commission has noted, it is “not the judge’s duty, nor is it the Commission’s, to resolve the conflict in testimony at this preliminary stage of the proceedings.” *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (citation omitted). In reviewing a judge’s temporary reinstatement order, we apply the substantial evidence standard. *See id.*; *Sec’y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

83–84. The asset sale agreement did not include the labor force at these facilities because CalPortland did not want to be bound by the collective bargaining agreement Martin Marietta and the United Steelworkers Union had negotiated at the facilities. Slip op. at 4; Tr. 110–11. CalPortland and Martin Marietta agreed to fire all of the workers at four locations at 12:00 midnight on September 30, 2015. Tr. 111–12. Immediately thereafter, on October 1, CalPortland would rehire the employees it wanted at the cement plant. Slip op. at 4; Tr. 86–87, 112–13, 135–36, 146.

Because CalPortland wanted to take control of the Oro Grande cement operation without shutting down the plant’s kiln, the company began the process of staffing the plant early. Tr. 135–137. In mid-August, CalPortland’s vice president for human resources, Steve Antonoff, contacted Martin Marietta’s human resources manager Ambrose, for advice on hiring decisions at the facilities. Tr. 105, 146–47. In a statement to MSHA Investigator Jackson, Antonoff recalled comments that Ambrose had made to Antonoff about which workers she would not hire. Tr. 149–50. In late August, Antonoff offered Ambrose the human resources manager position at the Oro Grande mine following CalPortland’s takeover. Tr. 147. She accepted that offer.

In September 2015, CalPortland informed all of the miners at the Martin Marietta facilities that they would need to reapply for positions at the facilities. Tr. 36–37. Nearly all of the miners applied to work for CalPortland, including approximately 120 of the roughly 125 miners working at the Oro Grande cement plant. Slip op. at 5; Tr. 45, 112-13; 127. According to Antonoff, CalPortland arranged interviews for all of the miners applying to work for them. Tr. 112–13. Each miner’s interview was brief, with some lasting less than five minutes. Slip op. at 5; Tr. 38. CalPortland’s interviewers had a list of six questions for each miner regarding the miner’s honesty and workplace relationships but not examining the miner’s prior work performance. Tr. 38–40, 53–54. CalPortland did not receive Martin Marietta’s personnel files from the four facilities. Tr. 118, 156.

On September 26, 2015, CalPortland extended employment offers for the Oro Grande cement plant to approximately 115 miners. Tr. 113. Two days later on September 28, 2015, CalPortland informed the remaining miners that they would not be brought back to the mine. Tr. 41–42. Pappas was among ten hourly workers who were told that day they did not receive an offer of employment from CalPortland and were thus terminated. Tr. 41–42, 63–64. Martin Marietta told those miners to leave the plant immediately and not return for their shifts the following two days. Tr. 41. The miners were still paid through September 30, despite not coming to work. Tr. 41-42. As part of the asset purchase agreement, Martin Marietta and CalPortland arranged severance packages for Oro Grande miners whom CalPortland did not hire. Tr. 89-90.

Because CalPortland hired so many of Martin Marietta’s miners, the company did not advertise the Oro Grande positions to the general public. Tr. 146. CalPortland renamed a few positions at the mine and changed or combined job responsibilities for some hourly positions. Tr. 141–42. Most of the job positions remained unaltered. Slip op. at 6; Tr. 143–45. The plant now mostly produces the same cement product using the same equipment and the same processes as Martin Marietta. Tr. 144–45, 171–72. CalPortland continues to sell its cement to many of Martin Marietta’s former customers with some changes in the customer base. Slip op. at 6; Tr. 168.

B. The Judge's Decision

Citing Commission caselaw, the Judge recognized that temporary reinstatement is limited to “miners” and that “applicants for employment” are not eligible for temporary reinstatement. Slip op. at 6. The Judge then found, as a threshold matter, that Pappas was a “miner” for purposes of the temporary reinstatement provision in section 105(c)(2) of the Mine Act. In this regard, the Judge focused on whether Pappas, when he applied for a job with CalPortland in September 2015 and was denied an offer of employment, was a “miner” or instead an “applicant for employment.”

The Judge concluded that Pappas was a “miner” when he applied for a job with CalPortland, finding that:

Pappas was no stranger off the street applying for a position at the Oro Grande cement plant but had an extensive employment history at the mine. Pappas's discrimination complaint relates back to decisions made while he was still employed at the mine CalPortland's structured termination and application process for the Oro Grande workforce does not materially alter Pappas's status as a miner eligible for temporary reinstatement under section 105(c)(2) of the Mine Act.

Id. at 8 (footnotes omitted).

The Judge also concluded that CalPortland could be liable for Martin Marietta's discriminatory actions as a successor-in-interest. *Id.* Finally, he ruled that the Secretary had submitted sufficient evidence to establish that Pappas's discrimination claim against CalPortland was not frivolously brought.³ *Id.* at 13.

II.

Disposition

A. Whether Pappas was a “miner” or an “applicant for employment?”

The Commission has held that temporary reinstatement under section 105(c)(2) is limited to “miners,” as defined in section 3(g) of the Mine Act, 30 U.S.C. § 802(g).⁴ *Sec'y of Labor on behalf of Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 927, 930 (Sep. 1998). Accordingly, “applicants for employment” are not eligible for temporary reinstatement under section 105(c)(2). *Id.*; *Sec'y of Labor on behalf of Piper v. KenAmerican Res. Inc.*, 35 FMSHRC

³ On January 18, 2016, CalPortland filed a motion to stay the Judge's reinstatement order. The Secretary filed an opposition to that motion on January 20, 2016.

⁴ Section 3(g) of the Mine Act defines a “miner” as “any individual working in a coal or other mine.” 30 U.S.C. § 802(g).

1969, 1972 (July 2013). The Commission has considered the question of whether a complainant is a miner or an applicant as a threshold issue in temporary reinstatement proceedings. *See Lone Mountain*, 20 FMSHRC at 932 n.5.

The Judge found that, during August 2015, Pappas was a “miner” employed by Martin Marietta. Slip op. at 7, 8. Moreover, the Judge found that CalPortland’s vice president for human resources, Steve Antonoff, contacted Martin Marietta’s human resources manager, Jamie Ambrose, for advice on hiring decisions at the mine. Slip op. at 5, Tr. 146–47. In a statement to Investigator Jackson, Antonoff recalled that Ambrose had made comments about which workers she would not hire. Tr. 149–50; slip op. at 5. Subsequently, CalPortland made the decision not to retain Pappas as an employee.

Under the Mine Act, “no person shall discharge or in any manner discriminate against” any miner because that miner engaged in protected activity.⁵ Based upon the specific facts in this case, we conclude that there is a nonfrivolous claim that Pappas was a “miner” for purposes of the temporary reinstatement provisions of section 105(c)(2) during the time that he was allegedly being discriminated against. The record indicates that CalPortland began making its miner retention decisions in August 2015 as part of a process that lasted until September 26, 2015, when it announced which miners at the Oro Grande plant would be retained. Slip op. at 5; Tr. 70, 113, 147. Unquestionably, during this period Pappas was a “miner.”

The hearing testimony establishes that CalPortland’s decisions were based, at least in part, on the advice of Ambrose, Martin Marietta’s human resources manager at that time, whose recommendations were initially made in August 2015. Tr. 70, 147. CalPortland contacted Ambrose to discuss which miners to retain at the Oro Grande plant a month before the hourly workers even applied for their positions. Tr. 36-37, 146-47. Ambrose’s participation in this process was significant because she was aware of Pappas’ previous protected activities and his reinstatement in January 2015, following settlement of his previous discrimination claim under the Mine Act. Tr. 27-28. Ambrose was also aware that since his reinstatement, Pappas had alleged a pattern of harassment by his supervisor and co-workers, and that Pappas had filed grievances against three management officials, including Ambrose herself, alleging that they failed to act after he reported the harassment. Tr. 29-31, 34; slip op. at 4.

⁵ Section 105(c)(1) of the Mine Act provides, in relevant part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act]

30 U.S.C. § 815(c)(1).

Ambrose not only provided miner retention recommendations to CalPortland, but she also accepted CalPortland's offer for her to become the human resources manager for CalPortland at the mine. CalPortland extended the offer to Ambrose towards the end of August. Tr. 147. Therefore, Ambrose presumably continued to be involved in preparing the September 26 final list of miners who would not be retained by CalPortland. Under these circumstances, Ambrose's knowledge of Pappas' previous protected activities and his reinstatement must be imputed to CalPortland. *See, e.g., Turner v Nat'l Cement Co. of CA*, 33 FMSHRC 1059, 1067-68 (May 2011); slip op. at 12. Indeed, the Judge expressly found that "CalPortland, through Ambrose, had full knowledge of Pappas's prior discrimination complaint and reinstatement." Slip op. at 8.

The record reflects additional evidence that the decision-making process relating to CalPortland's rehiring of the miners was done in conjunction with Martin Marietta and occurred while Pappas was still a miner. For example, on September 28, prior to the transfer of mine assets, Martin Marietta instructed miners who CalPortland did not rehire to in effect "clean out their lockers," requiring them to leave the mine immediately and not return for their shifts the following two days (although Martin Marietta continued to pay them). Tr. 41-42. Thus, Martin Marietta differentiated between the miners who would be retained by CalPortland and those who would not. Hence, Pappas experienced the effect of CalPortland's decision not to hire him while he was still a miner working for Martin Marietta.

In addition, although CalPortland contends that "[t]here was no transfer of the labor force," PTR at 3, it arranged with Martin Marietta, pursuant to the asset purchase agreement, to provide severance packages for miners whom CalPortland did not hire. Tr. 89-90. The miners who continued to work at the mine for CalPortland did not receive severance pay. This calls into question the assertion that they were actually terminated by Martin Marietta, while it is clear that those who received severance packages (including Pappas) certainly were.

We reject our dissenting colleague's central point that Pappas was an applicant because he had no legal relationship (and thus no legal rights) vis-a-vis CalPortland. Longstanding principles of labor law rebut this contention.

In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), relied upon by our dissenting colleague, the Supreme Court upheld the right of union employees to be able to bargain with a successor company. *Id.* at 279. In subsequent cases since *Burns* was decided, the National Labor Relations Board has also routinely upheld the principle that a successor employer inherits the collective bargaining obligation of its predecessor if a majority of the successor's employees in an appropriate bargaining unit were employed by the predecessor, and if there exists "substantial continuity between the enterprises." *Specialty Hosp. of Washington-Hadley, LLC*, 357 N.L.R.B. No. 77 (2011) (citations omitted). This is true even when a predecessor's bargaining unit has been changed or diminished in size. *Id.*; *see also Golden State Bottling Co.*,

Inc. v. NLRB, 414 U.S. 168, 180 (1973) (ordering purchaser of a business to reinstate an employee with backpay in order to remedy the seller's unfair labor practice).⁶

Thus, in the context of federal labor law, the courts have rejected the stark distinction our colleague attempts to make between an asset seller and purchaser. Instead, the courts have taken a realistic view of these transactions, and acknowledged that employees caught up in these corporate changes nevertheless may be protected. These concepts are especially pertinent in this case, where the transition from Martin Marietta to CalPortland was almost seamless. Most of the CalPortland employees were working at the same mine, and at the same jobs that they held when Martin Marietta owned the assets, and the human relations director remained the same.⁷

Lone Mountain, relied upon by our dissenting colleague, is clearly distinguishable. In that case, the complainant had no prior relationship with the operator who was alleged to have committed the discriminatory act, nor had he ever worked at the mine at which the discrimination was alleged to have occurred.

⁶ For example, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), the Supreme Court ruled that a corporate employer was required to arbitrate with a union pursuant to a collective bargaining agreement between the union and another corporation which had merged with the corporate employer. The Court reasoned:

Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the wellbeing of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

Id. at 549.

⁷ This type of continuity, wherein most employees could probably discern very little difference between working conditions in their jobs under their former employer and their current employer, was relied on by the 4th Circuit in *Overnite Transportation Company v. NLRB*, (cited by the Supreme Court in *Burns*, 406 U.S. at 293), which noted that “[t]he record shows that Overnite [the new employer] continued Rutherford’s [the old employer’s] business and, with respect to the pertinent . . . terminals, made no significant changes in their operation. The . . . drivers, who punched in on a Rutherford time card the morning of November 19, punched out on an Overnite time card that afternoon.” 372 F.2d 765, 768 (4th Cir. 1967), *cert. denied*, 389 U.S. 838 (1967).

Here, in contrast, Pappas has alleged that he was the victim of a joint decision-making process involving Martin Marietta and CalPortland. Under that process, CalPortland relied upon the advice of Ambrose (human resources manager for Martin Marietta and subsequently human resources manager for CalPortland) regarding which miners should not be retained.

Although the Commission concluded it was not appropriate to order temporary reinstatement in *Lone Mountain*, here we deem such relief to be warranted. Temporary reinstatement was designed to maintain the status quo while miners proceed with their discrimination claims. Permitting Pappas, who had worked at the Oro Grande cement plant for 16 years, to continue working at that plant pending the resolution of this matter, is consistent with this underlying Congressional intent. The purchase by CalPortland under the totality of the circumstances described herein does not merit depriving Pappas of this remedy.

In summary, we conclude that the record establishes that there is a nonfrivolous claim that CalPortland's decision not to retain Pappas at the Oro Grande cement plant was made while Pappas was working as a miner at that same operation, prior to the October 1 transfer of assets. We further conclude that there is a nonfrivolous claim that CalPortland's decision not to retain Pappas as a miner at the same plant was based at least in part on unfavorable recommendations made by Ambrose as human resources manager for Martin Marietta and then human resources manager for CalPortland. As a result, CalPortland was aware of Pappas' previous protected activity and reinstatement. Because CalPortland was aware of Pappas' employment history and allegedly decided not to retain him during the time that he was still working as a "miner," we conclude that Pappas is a "miner" for purposes of the temporary reinstatement provisions of section 105(c)(2). The fact that Pappas's employment was officially terminated on September 30 and he was not "rehired" the next day does not alter the fact that he was a miner when these decisions were made.

B. Whether Pappas' discrimination claim was not frivolously brought?

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 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), (citations omitted) *aff'd*, 920 F.2d 738 (11th Cir. 1990) ("*JWR*"). The Mine Act's legislative history defines the "not frivolously brought" standard as indicating that a miner's "complaint appears to have merit." S. Rep. No. 95-181, at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *JWR*, 920 F.2d at 748, n.11.

At a temporary reinstatement hearing, the Judge must determine "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not

whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *JWR*, 920 F.2d at 744. As the Commission has recognized, “[i]t [is] not the Judge’s duty, nor is it the Commission’s, to resolve the conflict in testimony at this preliminary stage of proceedings.” *Chicopee*, 21 FMSHRC at 719.

In this regard, we address the Judge’s finding that Pappas’ complaint was not frivolously brought. The elements of a discrimination claim are that (1) the complainant engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (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, 817 (Apr. 1981). The Commission applies the substantial evidence standard in reviewing a Judge’s factual determinations.⁸

Indisputable evidence supports a finding that Pappas engaged in protected activity when he filed his section 105(c) discrimination complaint against Martin Marietta in April 2014, and when, as a result of settlement of that complaint, he was reinstated by Martin Marietta in January 2015. Tr. 26-27, 34-35, 68. Pappas has additionally made the nonfrivolous claim that after he was reinstated, he was harassed by his supervisor and co-workers as a result of his prior safety complaints, and that management officials, including Ambrose, failed to respond when he reported the harassment. Tr. 29, 30, 33-34; Slip op. at 4. Making complaints about harassment due to a previous safety complaint is itself protected activity. *See E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015) (in a Title VII case involving sexual harassment of female workers by a male supervisor, where a male co-worker of the harassed female workers complains about their treatment to the supervisor and is then fired, his complaint about the harassment of his co-workers constitutes protected activity). Furthermore, as stated above, we find that Pappas has made a nonfrivolous claim of an “adverse action” by CalPortland, specifically the decision not to continue his employment as a miner at the Oro Grande plant. Thus, the only remaining issue is whether substantial evidence supports the Judge’s conclusion that Pappas asserted a nonfrivolous “nexus” between the protected activity and the adverse action.

The Commission recognizes that discriminatory motive may be shown by indirect evidence establishing a 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)), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission in *Chacon* stated that discriminatory intent can be established by circumstantial evidence of: (1) knowledge of the protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the

⁸ *E.g.*, *Sec’y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000). “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 *Consolidation. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

protected activity and the adverse action, and (4) disparate treatment of the complainant. *Id.* at 2510.

In its petition, CalPortland continues to deny that it had any knowledge of Pappas's protected activity. However, as the Judge found, a supervisor's knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner's employment. *See Nat'l Cement*, 33 FMSHRC at 1067–68 (imputing knowledge and animus of miner's direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that “[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions”). The Secretary presented evidence that in August 2015, CalPortland's vice president for human resources, Antonoff, consulted with Martin Marietta's Ambrose about whom CalPortland should hire after taking over the Oro Grande cement plant. Tr. 146–47, 149–50. Moreover, Ambrose received an employment offer from CalPortland in August 2015 which she subsequently accepted. Tr. 147. Therefore, we agree with the Judge that the Secretary has raised a nonfrivolous claim that CalPortland had imputed knowledge of Pappas's protected activities and has thus met his evidentiary burden.

We also consider whether the Secretary provided sufficient evidence of a close temporal relationship between Pappas's protected activities – the April 2014 section 105(c) complaint and his subsequent reinstatement to the mine, and his subsequent complaints about harassment – and CalPortland's allegedly discriminatory decision not to retain him. As a result of the settlement of his discrimination complaint against Martin Marietta, it reinstated Pappas to the mine in January 2015, and the alleged harassment continued through August 2015. Tr. 27, 29, 33, 35. In August 2015, Ambrose advised CalPortland on hiring decisions at the mine, and the decision not to continue Pappas' employment was made in September. Tr. 41-42, 63-64, 146-47, 149-50. The Judge found that CalPortland, through Ambrose, knew of Pappas' prior discrimination complaint and reinstatement. Slip op. at 8. Accordingly, we find that the Secretary's evidence demonstrates a satisfactory coincidence in time under the standard of review for these limited proceedings between Pappas' protected activities and CalPortland's decision not to retain him.

Next, we consider whether animus existed because of Pappas' prior section 105(c) complaint and subsequent reinstatement. The Secretary presented evidence that Pappas was harassed by his direct supervisor and co-workers after his prior reinstatement at the mine. Tr. 29, 33-34. Moreover, the Secretary presented evidence that Martin Marietta's managers were indifferent to Pappas's complaints about this harassment. Tr. 30. Animus may be shown by evidence suggesting supervisors were indifferent to or angered by a miner's protected activity. *See Nat'l Cement*, 33 FMSHRC at 1069 (discussing supervisors' negative reactions to miner's safety complaints); *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC at 1085, 1089–90 (Oct. 2009). We therefore determine that sufficient evidence exists that Martin Marietta's management, in failing to address the regular harassment of Pappas, signaled a distinct animus toward his section 105(c) complaint and subsequent reinstatement. Because CalPortland's retention decisions were allegedly based on Ambrose's recommendations, that animus can be attributed to CalPortland as well.

Finally, we consider whether Pappas was subjected to disparate treatment. We determine that the Secretary has presented sufficient evidence to sustain a nonfrivolous claim that Pappas was treated disparately from other miners when CalPortland decided not to retain Pappas at the cement plant. The fact that 120 miners sought positions at the mine and Pappas was one of only ten miners who were not retained, strongly suggests that CalPortland's decision was based on unfavorable information concerning his employment history.

We conclude that Pappas' discrimination complaint was not frivolously brought, and that Pappas is eligible for temporary reinstatement at the Oro Grande cement plant. We note that the question of whether Pappas was discriminated against in connection with the firing and hiring of miners at the plant, and whether he is entitled to permanent reinstatement, has yet to be resolved. We express no view regarding the merits of Pappas' discrimination claim.

III.

Conclusion

For the reasons stated above, we affirm the Judge's decision. We also deny CalPortland's motion to stay the Judge's temporary reinstatement order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Commissioner Althen dissenting:

Prior to today's decision, the line between a "miner" and an "applicant for employment" for purposes of section 105(c) was clear. If a miner's employer *discharged him* and the miner had a non-frivolous claim that the discharge was motivated by protected activity, the miner was entitled to temporary reinstatement. If an operator *refused to hire* an applicant for employment based on protected activities in which the individual had engaged, the individual was entitled to file a complaint and receive relief under section 105(c). However, an *applicant for employment* with an operator, not having any employment relationship, could not obtain temporary reinstatement – he simply has not had a job with the potential new employer to which he may be "reinstated." With today's ill-considered decision, the Commission makes a muddled mess of the distinction between a miner and an applicant for employment for purposes of temporary reinstatement proceedings. The only guarantee from the Commission's decision is that we will now spend years trying to differentiate decisions on an issue that, until today, was in accord with the plain language and obvious purpose of section 105(c) and was perfectly clear. I respectfully dissent.

DISCUSSION

My disagreement with the majority is easily stated. The majority finds that, for purposes of an application for temporary reinstatement under section 105(c) of the Mine Act, Mr. Pappas was a miner for CalPortland. Of course, in reality, it is undisputed that Mr. Pappas was not a miner for CalPortland. Mr. Pappas was not working for CalPortland. He never worked for CalPortland. He was an applicant for employment and was not entitled to temporary "reinstatement" to a position he had never occupied.

Section 105(c) of the Mine Act delineates three classes of individuals entitled to the protection of the section – "miners," "applicants for employment," and "miners' representatives." The section also clearly provides two types of procedures for resolution of discrimination complaints – regular processing of complaints and an application for temporary reinstatement. There are distinct differences between the processes.

First, only the Secretary may file an application for reinstatement. Although an individual may press a discrimination case on his own behalf, the individual may not seek temporary reinstatement on his own behalf. Second, and of ultimate importance here, the Secretary may not maintain an "application for reinstatement" on behalf of an individual who claims she was denied employment on the basis of protected activity. *Sec'y of Labor on behalf of Young v. Lone Mountain Processing, Inc.* 20 FMSHRC 927 (Sept. 1998) ("*Lone Mountain*").¹

¹ I emphasize that, if the Secretary or Mr. Pappas can prove by a preponderance of evidence that CalPortland refused to hire him based on protected activity, he will be entitled to full relief under section 105(c). In its present posture, this case has nothing to do with the right of an applicant for employment to the protection of section 105(c). It only involves whether an individual who clearly was an applicant for employment may require a new employer to provide a position to him via a purported "reinstatement."

The majority and I agree that whether the complaint was an “applicant for hire” is a threshold decision under an application for temporary reinstatement. Here, there is essentially no question. Clearly, Mr. Pappas was an applicant for employment.

The majority cannot and does not contend that CalPortland ever employed Mr. Pappas. Commission law and labor law case law make that completely clear. The Commission can incorrectly order CalPortland to hire Mr. Pappas; it cannot order CalPortland to reinstate him at CalPortland. He never had a position with it. Indeed, the majority recognizes that the transaction did not include the labor forces at the acquired facility, saying that CalPortland “extended offers of employment.” Slip op. at 3.²

Lone Mountain is directly on point. There, the Commission ruled that “applicant[s] for employment” are not eligible for temporary reinstatement under section 105(c)(2) of the Act. In that case, the complainant, as here, was actively working for a different coal operator. In anticipation of a layoff from his current active employment as a miner with a different employer, he applied for a job with Lone Mountain. Lone Mountain gave him a roof-bolting test as part of the employment application process. Subsequently, Lone Mountain did not extend a job offer to the complainant alleging that he had failed to meet the minimum requirements of the roof-bolting test. The complainant filed a non-frivolous complaint. He alleged that he failed to meet the minimum requirements of the test because he encountered unsafe conditions during the test that he brought to the attention of the operator. Therefore, the complainant claimed that the operator’s failure to hire him was a result of discrimination prohibited under the Mine Act. The Secretary filed an application for temporary reinstatement on his behalf. The Commission found that the complainant was an “applicant for employment.” 20 FMSHRC at 927-32. On that basis, it denied the application for temporary reinstatement.

The Commission based its decision on a careful and sound reading of the plain language of section 105(c). It noted that the temporary reinstatement clause is one of only two instances in which “miner” is used as a stand-alone term in section 105(c)(1) and (2). Further, Congress recited versions of the phrase “miner, applicant for employment, or representative of miners” eight times – in six instances before mentioning temporary reinstatement and two instances afterward.

Obviously, the applicant in *Lone Mountain* was a “miner” in the sense he was actively working as a miner for a different coal operator. However, the unmistakable purpose of the reinstatement provision in section 105(c) is to prevent employers from discriminating against

² Elsewhere, the majority mischaracterizes to the point of tediousness CalPortland’s hiring decisions as “retention” decisions or a decision to “retain.” The majority knows and should deal with the fact that they were “hiring” decisions. For example, the majority states, “CalPortland informed all of the miners at the Martin Marietta facilities that they would need to reapply for positions at the facilities.” Slip op. at [3] (citing Tr. 36–37). In fact, Mr. Pappas testified that he was told, “You should be receiving applications any day. Fill them out, and do what the application says. Call -- there's a number for you to call and set up the interview for the following week.” Tr. 37. Fortunately, as set forth above, at other points the majority properly recognizes the true nature of CalPortland’s hiring decisions.

their miner employees. If they do discriminate to the point of discharge, an immediate remedy is imperative. The former employee is entitled to reinstatement upon a non-frivolous showing of discrimination. The reinstatement provision and the extraordinarily low threshold of proof arise from Congress' reasonable demand that operators not discharge their miners in retaliation for protected activities.

In *Lone Mountain*, the Commission correctly observed that, if a prospective employer denies employment based on protected activity, section 105(c) provides relief to the applicant, but an applicant for employment is not entitled to force the prospective employer to hire her temporarily. There is no previously held position to which the prospective employer may reinstate the applicant. The clear distinction for an application for temporary reinstatement is that it is an immediate remedy for an unwarranted discharge.

Indeed, the plain language of section 105(c) makes it obvious that the "reinstatement" provision does not apply to hiring individuals that did not, and do not, have an employment relationship with the operator. The remedy is not an "application for temporary *employment*." It is an "application for temporary *reinstatement*." The word "reinstatement" means "To place again in a former state or position; to restore." *Webster's Third New International Dictionary* 1915 (1993) defines "reinstatement" as "the action of reinstating (as in a post or position previously held but relinquished)." *The Random House Webster's Unabridged Dictionary* 1625 (2d ed. 1998) defines "reinstatement" as "to put back or establish again, as in a former position or state."

Going further, the Commission frequently turns to decisions of the National Labor Relations Board and labor cases generally for assistance in resolving issues, including cases of alleged discrimination. *Sec'y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 7-11 (Jan. 2005); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-43 (Dec. 1990). In this case, labor cases dealing with asset transfers amply demonstrate that, in the context of an asset transfer, employees of the seller are not "transferred" as employees by the buyer. The employees of the seller are not employees of the buyer. The buyer may offer them an opportunity to apply for jobs and, then, they are either offered or not offered jobs.

The Judge here cited, but misconstrued, the importance of *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). *Burns* dealt with whether the obligations of a labor agreement apply to an unrelated company that purchases the assets of a company signatory to a union contract. Under *Burns*, if an asset purchaser does not take the terms of the existing labor contract, then it is free to establish its own initial terms and conditions of employment. That principle is significant here because it establishes that employees hired to work at the same facility in an asset transaction have a new employment relationship. In every factual and legal sense, they apply for employment and then are hired or not hired by the new owner. The employees fill out employment applications and the buyer makes individualized decisions whether to hire each former employee of the seller. The applicants may choose to work for the new employer under the new terms or may decline an offer of employment. In fact, here, ten to 15 of the applicants to whom CalPortland offered employment refused to accept it. Tr. 113. Apparently, the new terms of employment were not sufficient for those former employees of Martin Marietta to accept employment offers from CalPortland.

As applied to the mining industry, NLRB case law makes it evident that if a seller has a contract with the union and a buyer purchases the assets of the seller and is careful not to take the union contract, the buyer is free of all existing employment obligations to employees. Indeed, it need not hire any of the employees.³ Of course, the buyer may not discriminate in making hiring decisions but no employment relationship or obligation to hire any employee arises from the sale of the mine. The point here is that the rights of employees run with the employer not with the land.

CalPortland made it clear in the terms of the purchase agreement that it was not taking any obligations to the existing employees of Martin Marietta and was not “transferring” any of Martin Marietta’s employees to CalPortland. Each person discharged by Martin Marietta had a right to apply for employment but there was no guarantee CalPortland would hire the applicant. An applicant for hire may obtain a job at CalPortland if, after a hearing, the Commission determines the applicant was refused employment for discriminatory reasons. However, Congress chose not to provide applicants for employment with temporary “reinstatement” to jobs they never had.

The majority makes an unavailing effort to turn directly adverse labor law to its favor. To do so, the majority notes the well-known principle that if an asset purchaser has hired a majority of its workforce from the discharged employees of the predecessor when it has hired a substantial and representative complement of employees, it takes on a bargaining obligation. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). *Fall River* and many other asset transaction cases demonstrate beyond question, that employees hired by the asset buyer are first applicants and, then, if hired, employees. The majority even goes so far as to quote a passage from *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), a case decided eight years before *Burns*.⁴ Indeed, *Burns* distinguished the *Wiley* case in terms meaningful for this case. The Court said, “*Burns* merely hired enough of Wackenhut’s employees to require it to bargain with the union as commanded by § 8(a)(5) and § 9(a).” 406 U.S. at 286. Notice the precise wording of the Court, “merely hired enough of Wackenhut’s employees.”⁵ Here, there is no doubt that labor

³ Of course, the failure to hire any employees would create a strong likelihood of anti-union animus. If that were the case, the terminated employees could be awarded jobs after a full hearing.

⁴ *Wiley* involved a merger; the case bears no resemblance to the asset transfer involved in this case. In any event, *Burns* clearly establishes that an asset buyer hires or does not hire employees of the seller.

⁵ The majority cites, without argument, *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973). Ultimately, that case involved a successor-in-interest theory, a theory the majority cannot and does not embrace as having relevance to this case where there has been no showing at this point of any misconduct by the predecessor. It is notable, however, that the Court did provide instructions on the due process concerns of attempting to apply liability for wrongs by
(continued...)

law cases confirm that CalPortland was making hiring decisions with respect to Martin Marietta's workforce. This is not the "stark distinction" pejoratively proclaimed by the majority. It is the legal distinction between hiring and reinstating. It is a distinction made by the Supreme Court in *Burns* and numerous other labor cases for over fifty years.

Finding nothing of use in labor law cases that are, in fact, contrary to its position, the majority turns to an ill-conceived attempt to distinguish the Commission's *Lone Mountain* decision. It does not overrule *Lone Mountain*. *Lone Mountain* is clearly correct and precedential regarding the plain meaning and purpose of temporary reinstatement under section 105(c). The attempted distinction is baffling. The majority bases its attempted distinction on the ground that Ms. Ambrose was an employee of Martin Marietta when she provided some unknown input about the Martin Marietta employees.⁶

The majority attaches decisive importance to the fact that subsequently CalPortland hired Ms. Ambrose. The majority provides no cogent explanation of why Ms. Ambrose change of employment changes the status of Mr. Pappas as an applicant for employment with CalPortland. If anything, the majority's analysis that Martin Marietta employed Ms. Ambrose and that she subsequently left to become a new employee of CalPortland confirms that Martin Marietta employees were applying for work with CalPortland.

⁵ (...continued)
one party upon a third party saying,

Moreover, procedures were announced in Perma Vinyl which provide the necessary procedural safeguards. There will be no adjudication of liability against a bona fide successor 'without affording (it) a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices.

Id. at 180.

⁶ At the outset of its attempted justification, the majority makes a number of suggestions that truly are frivolous. It suggests that the fact that miners whom CalPortland hired did not get severance "calls into question that they were actually terminated by Martin Marietta . . ." Slip op. at 7. Is the majority kidding? What employer gives employees severance when it knows the employee is immediately moving to a new job. The majority also states that there may be some importance to the fact that Martin Marietta fully paid the 17 employees not hired by CalPortland but did not require them to report to work on the 29th or 30th. Again, has the majority no business experience whatsoever? You have informed 17 workers that after the asset transfer, the new owner has not decided not to hire them. Out of concern for those workers and reasonable concern for having potentially disgruntled workers present, they were not required to work. That is not evidence of anything with regard to the applicant for employment issue. It is merely a good business practice.

Indeed, *Lone Mountain*, where the Commission established that the plain meaning of section 105(c) meant that the temporary reinstatement did not apply to applicants for hire, presented a more favorable set of facts for the claimant. In *Lone Mountain*, Lone Mountain both gave the test where the alleged protected activity occurred and made the decision not to hire Mr. Young. Therefore, in *Lone Mountain*, there was never a question that, if discrimination occurred, a then current employee of Lone Mountain made such discriminatory decision. The Commission found that Mr. Young was an applicant for hire with respect to Lone Mountain rather than a miner. If an employee of Mr. Young's current employer had called to suggest not hiring him because he was active in safety matters, that advice, which would be similar to what the majority says is non-frivolously claimed here, would not have changed his status as an applicant for hire. "Temporary reinstatement" to Lone Mountain was not available.

In *Lone Mountain*, the miner could cite test conditions at Lone Mountain as evidence of discrimination; here, Mr. Pappas may cite his work for Martin Marietta. In neither case, does such evidence give Mr. Young or Mr. Pappas any legal relationship other than an applicant for hire.

Going further, Mr. Young was a working miner. However, he was not, and had not been, a working miner for Lone Mountain. This also is Mr. Pappas' situation. As we have noted, repeatedly, the purpose of temporary reinstatement under section 105(c) is to prevent a miner's employer from terminating him because of protected activity. As a legal matter, Mr. Pappas had no closer relationship to CalPortland than Mr. Young had to Lone Mountain.

Going another step further, as we have explained, the fact that Mr. Pappas was applying for a job with a new employer who had purchased the assets of his former employer certainly makes Mr. Pappas' status an applicant for employment. The majority cites no case for the proposition that a purchaser of assets must decide to employ all or even any employee of the former owner.

Indeed, in the coal industry, when an employer's current coal reserve is nearing exhaustion, it is not uncommon at all for a productive operator to purchase the assets of a less productive operator and move its workforce to the newly purchased assets. Obviously, such transactions do not present overtones of discrimination, but they do fully illustrate that asset buyers hire their own employees whether those employees are existing employees of the buyer, workers hired from the street, or workers whom the seller previously employed. To find otherwise, would be essentially to find that employees are encumbrances that run with the land. Working at a particular location does not create employment rights; working with an employer creates and protects employment rights. *Burns, supra*, and many other NLRA cases firmly establish that principle. If the Secretary files a complaint claiming CalPortland discriminated against Mr. Pappas and if the Secretary or Mr. Pappas on his own prevails, Mr. Pappas will be compensated fully for his damages.

Under *Burns*, after an asset transfer employees hired by the buyer still work at the facility but they have no employment relationship with the seller of the assets; they have a newly-hired employment relationship with the buyer. The site at which a person is working or desires to work does not determine if the person is an applicant for hire. That determination depends solely upon

whether the person has any existing work relationship with the employer from whom he seeks employment.

Status as an applicant for employment is a legal matter that is a prerequisite for maintaining an application for temporary reinstatement. The Judge and Commission make that decision to determine whether the application for temporary reinstatement may be considered. Is the Commission saying that we must first reinstate an applicant for employment who claims to be a miner and then determine whether the person can pursue reinstatement? Although the standard of proof is low at a temporary reinstatement hearing, the Secretary bears the burden of proof. Part of that burden is to establish that the applicant for reinstatement has a right to file the petition for temporary reinstatement. In any event, the majority's assertion that Mr. Pappas has a non-frivolous claim of having had an employment relationship with CalPortland is flat out wrong. As has been repeatedly demonstrated above, Mr. Pappas never had any such relationship. Any claim otherwise is indeed wholly frivolous.

The majority cannot and does not articulate the basis for any employment relationship between Mr. Pappas and CalPortland. Because it is impossible to find any principled basis for the majority's decision, it is also impossible to imagine the possible ramifications of the decision regarding future cases where an applicant has never worked for an operator to whom he applies for a job. The majority throws the law related to temporary reinstatement into an unnecessary, unwarranted, and unfathomable state of confusion. If Ms. Ambrose had quit Martin Marietta and found other employment but voluntarily agreed to speak to CalPortland, would Mr. Pappas be "entitled" to reinstatement? If CalPortland had not asked for her comments until she worked for it, would that make a difference? If CalPortland called a former employee of Martin Marietta about candidates for hire and that person, who knew of Pappas protected activity at Martin Marietta, gave a negative reference (for unknown reasons) would Pappas be entitled to reinstatement? What if a fellow employee of Mr. Pappas made an unsolicited call to CalPortland and said he did not want to work with him? Would CalPortland be compelled to hire him on a temporary basis through a "reinstatement" proceeding? What if CalPortland spoke with some person completely unrelated to Martin Marietta but who knew of Mr. Pappas protected activity at another mine, would "reinstatement" follow?

In all those examples, employees of Martin Marietta would have worked at the facility until the closing date of the purchase. In none of the above examples would the timing of the sale or the timing of the job offers determine whether a person was an applicant for employment with CalPortland.

Of course, avoiding confusion within the law cannot be a driving factor in a decision affecting individual rights. However, prior to this decision, the Commission was clear, precise, and correct in its interpretation. The Commission based temporary reinstatement upon an employment relationship between the individual and the affected employer – that is why it is "reinstatement." This case presents no basis for muddling the law.⁷

⁷ I do not understand why the Secretary could not and/or did not actually pursue Mr. Pappas' former employer if it took an adverse action against him (perhaps an adverse
(continued...)

The majority attempts to muster every fact in the record that might support a discrimination claim by Mr. Pappas. With all respect to the majority, it needs to be clear that allegations supporting possible discrimination have nothing whatsoever to do with whether Mr. Pappas was an applicant for employment. Surely, the Secretary will use such facts, if he chooses eventually to file a discrimination complaint, in support of his case. They are not relevant to the applicant for hire question.

Finally, the concluding paragraph in the section of the majority's opinion dealing with the applicant for employment issue manages to recapitulate virtually all the errors of its decision. The majority first states, "there is a non-frivolous claim Cal Portland's decision not to retain Pappas at the Oro Grande Cement Plant was made while Pappas was working as a 'miner' at the Oro Grande plant, prior to the October 1 transfer of assets." Thus, the majority again mistakenly refers to CalPortland's hiring decisions through the term "retain." More importantly, it actually is undisputed that CalPortland made its hiring decisions while Martin Marietta's employees were still working for Martin Marietta. As demonstrate above, that is not relevant to the fact that these were hiring decisions by CalPortland regarding applicants for employment. Certainly, the majority cannot be suggesting seriously that it makes a difference whether a new employer makes a job offer while the applicant is working for his/her current employer. If CalPortland had waited until closing to offer jobs to the new employees that would make no difference to the employment issue upon this case turns and only would cause disruption of operations and loss of income to the newly hired workers.

The majority also states that the decision not to hire Mr. Pappas may have resulted from knowledge that he had engaged in protected activity. As repeatedly stated here and as established in *Lone Mountain*, the possibility that the hiring decision was discriminatory is not relevant to whether the applicant is eligible to seek reinstatement. Perhaps in the *Lone Mountain* case, Lone Mountain's decision not to hire its applicant, Mr. Young, may have been discriminatory; that was not relevant to a temporary reinstatement petition. Young did not, and had not, worked for Lone Mountain. Therefore, he could not be "reinstated" at Lone Mountain. He was an applicant for hire.⁸ The same conclusion should apply here.

CONCLUSION

As demonstrated, the majority's decision conflicts with the plain language and obvious purpose of section 105(c); it conflicts with established Commission case law; it conflicts with

⁷ (...continued)

employment review), based upon protected activity, that resulted in loss of employment. Obviously, Martin Marietta could not obtain employment for Mr. Pappas with CalPortland as CalPortland made its hiring decisions. However, the Commission recognizes, accepts, and orders economic reinstatement in temporary reinstatement proceedings.

⁸ The majority makes the inconsequential and obvious observation by footnote that Martin Marietta coordinated with CalPortland to make a smooth change of ownership of the purchased facilities. That is not meaningful. Any other actions by sophisticated entities would be surprising.

basic labor law principles governing the termination and commencement of employment relationships in asset transfers; and, it conflicts with the public interest in the clear and understandable application of Mine Act provisions. Congress was properly mindful of the right of applicants for employment in mining positions to be free from discrimination based upon protected activities by empowering and directing the Secretary to pursue claims the Secretary determines to be valid. Congress, however, understandably and intentionally stopped short of forcing employers to hire applicants for employment without a full hearing. Mr. Pappas was an applicant for employment with CalPortland and, therefore, in accordance with Congress' purpose and the express terms of section 105(c), he was not eligible for reinstatement to a position with an employer for whom he had never worked.

Result driven decisions are not necessarily wrong, and they need not create bad and confusing law. Unfortunately, the Commission's decision in this case is both wrong and harmful to the proper administration of section 105(c) of the Mine Act. I respectfully dissent.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

February 12, 2016

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

v.

POCAHONTAS COAL COMPANY, LLC

Docket Nos. WEVA 2014-642-R
WEVA 2014-646-R
WEVA 2014-647-R
WEVA 2014-648-R
WEVA 2014-649-R

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). It involves five notices of contest filed by Pocahontas Coal Company, each challenging the validity of a notice of safeguard issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) pursuant to section 314(b) of the Act.¹ At issue in this matter of first impression is whether the Mine Act grants the Commission jurisdiction to review a safeguard notice directly, independent of a citation alleging a violation of that safeguard notice. We conclude that it does not.

I.

Statutory Summary and Background

A safeguard notice informs the mine operator about conduct that is mandated or prohibited in a given situation involving transportation of miners and materials in the mine. Although an operator is usually cited for violations of mandatory safety and health standards developed through notice-and-comment rulemaking pursuant to Title I of the Mine Act, 30 U.S.C. § 811(a), Title III of the Mine Act, in section 314(b), also gives the Secretary the authority to issue safeguards in underground coal mines to reduce hazards associated with the transportation of miners and materials. 30 U.S.C. § 874(b). The Secretary implements this provision by authorizing inspectors to issue safeguards on a mine-by-mine basis. The inspector issues the safeguard in writing and indicates a time by which the operator must provide and subsequently maintain that safeguard. 30 C.F.R. § 75.1403-1(b). If the operator does not comply with the safeguard, the inspector issues a citation. *See Wolf Run Mining Co.*, 659 F.3d 1197,

¹ Section 314(b) of the Act states that “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.” 30 U.S.C. § 874(b).

1203-04 (D.C. Cir. 2011), *aff'g*, 32 FMSHRC 1228 (Oct. 2010). When challenging such a citation, an operator may contest the validity of the underlying safeguard notice. *Wolf Run*, 659 F.3d at 1202; *Southern Ohio Coal Co.*, 14 FMSHRC 1, 2-4 (Jan. 1992) (SOCCO II).

MSHA recently adopted a “technical citation” policy for safeguards, akin to the procedure used in resolving disputed roof control and ventilation plans. Program Policy Letter (“PPL”) No. P14-V-02 (issued Sept. 24, 2014); *Contest of Mine Approval Actions*, MSHA’s Program Policy Manual, V.G-4; *see also, e.g., Mach Mining, LLC*, 34 FMSHRC 1784, 1787 n.8 (Aug. 2012). Under this policy, an operator who wishes to obtain Commission review of a safeguard notice may request a “technical” citation with a nominal penalty, based on momentary non-compliance with the terms of the safeguard notice. Thus, the technical citation provides a basis for Commission review while ensuring miner safety.²

II.

Procedural Background

In January and February 2014, MSHA issued five safeguard notices to Pocahontas Coal Company pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b), directing that certain safeguards to ensure the safe transportation of men and materials be put in place at Pocahontas’ Affinity Mine. On February 27, 2014, Pocahontas filed five notices of contest under section 105(d) of the Act, challenging the validity of the safeguard notices.³ 36 FMSHRC 1645, 1645 (June 2014) (ALJ).

Upon a motion by the Secretary, the Judge issued an order dismissing the five notices of contest. Noting that the Mine Act does not grant the Commission unfettered jurisdiction, the Judge found that “[a] review of the Mine Act reveals no statutory authority for the Commission to hear a contest to a notice to provide safeguard in the context of a dedicated proceeding.” *Id.* at 1646. She specifically noted that section 105(d), which provides an operator’s right to contest the issuance of citations or orders, the associated penalties, and abatement times, does not provide a right to contest safeguard notices, which the Judge considered to be distinct from citations and orders. *Id.* at 1646-47.

Pocahontas filed a petition for discretionary review challenging the Judge’s dismissal of the notices of contest, which the Commission granted.

² After the PPL was issued, the Secretary notified Pocahontas of the availability of a technical citation. On October 16, 2014, counsel for Pocahontas stated that Pocahontas was not interested in receiving technical citations for the safeguard notices at issue.

³ Section 105(d) states that if an operator contests the issuance or modification of “an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 . . . the Commission shall afford an opportunity for a hearing.” 30 U.S.C. § 815(d).

III.

Disposition

Pocahontas contends that the Act provides jurisdiction to directly review safeguard notices in two respects. First, Pocahontas claims that the Act generally grants the Commission broad jurisdictional power to review all enforcement actions by the Secretary, including safeguard notices. Second, Pocahontas claims that safeguard notices are essentially citations, and are therefore reviewable under section 105(d) of the Act. As discussed below, Pocahontas' position conflicts with the language of the Act, its legislative history, basic principles of administrative law, and Commission case law. Accordingly, we conclude that the Commission lacks jurisdiction to directly review a safeguard notice.

A. The Commission may only review enforcement actions over which Congress granted it jurisdiction.

Although it is well settled that the Commission has broad authority to address a wide range of disputes arising under the Mine Act, the exercise of that authority is governed by the language of the Act's jurisdictional provisions. The Commission has long recognized that it is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers. *See generally, e.g., Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169-70 (Sept. 1988); *Old Ben Coal Co.*, 1 FMSHRC 1480, 1484 (Oct. 1979); *Rushton Mining Co.*, 11 FMSHRC 759, 764 (May 1989). As an administrative agency created by statute, the Commission cannot exceed the jurisdictional authority granted to it by Congress. *Kaiser Coal*, 10 FMSHRC at 1169; *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-73 (1977); *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 322 (1961).⁴

Contrary to Pocahontas' argument, the Commission does not possess plenary authority to review all enforcement actions taken under the Act. In *Kaiser Coal*, we explained that several

⁴ Where the Commission has found broad authority to consider a wide range of issues, it has been in the service of fully resolving a dispute for which jurisdiction otherwise properly exists. Thus our colleague's reliance on *Drummond Coal Co.*, 14 FMSHRC 661 (May 1992), slip op. at 12 n.2, is misplaced. In that civil penalty proceeding, the Commission held that it could review the validity of an MSHA Program Policy Letter where MSHA had relied on the letter to calculate a civil penalty which had been properly contested pursuant to section 105(d). *Id.* at 673-74. The Commission reasoned that several of the Mine Act's provisions confer subject matter jurisdiction by establishing specific enforcement and contest proceedings over which the Commission has jurisdiction. We explained that once that jurisdiction attaches, the Commission has a range of adjudicatory powers to consider issues and to "dispose fully of cases committed to Commission jurisdiction." *Id.* at 674. Consequently, in contest proceedings where there is clearly jurisdiction, the Secretary's less formal regulatory pronouncements fall within the Commission's jurisdictional purview. *See also Kaiser Coal*, 10 FMSHRC at 1170-71 (holding that the Commission lacked jurisdiction over an application for declaratory relief when the related contest proceeding had been withdrawn, and that Mine Act language establishing the Commission "is not an invitation from Congress to legislate for ourselves virtually unlimited jurisdiction over 'any proceeding'").

provisions of the Mine Act, including section 105(d), grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission presides.⁵ 10 FMSHRC at 1169. “Specific provisions, such as these, delineate the scope of the Commission’s jurisdiction.” *Id.*⁶

B. The Act does not grant the Commission jurisdiction to directly review safeguard notices.

We conclude that no provision of the Act explicitly grants the Commission jurisdiction to review safeguard notices, nor may any part of the Act be read broadly to authorize such review. We focus our analysis on section 105(d), 30 U.S.C. § 815(d), and section 301(a), 30 U.S.C. § 861(a).⁷

1. Section 105(d)

As noted above, section 105(d) states in relevant part that if an operator contests the issuance or modification of “an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 . . . the Commission shall afford an opportunity for a hearing.” 30 U.S.C. § 815(d). In other words, section 105(d) provides for Commission review of citations or orders issued under section 104,⁸ proposed penalty assessments, and the reasonableness of abatement times.

Significantly, section 105(d) does not mention notices or other issuances establishing safeguards. The precise list of jurisdictional triggers in section 105(d) strongly indicates a Congressional intent to exclude other types of actions. *See Saxon v. Georgia Ass’n of Indep. Ins.*

⁵ Section 105(d), 30 U.S.C. § 815(d), provides for the contest of citations or orders, or the contest of civil penalties proposed for such violations; section 105(b)(2), 30 U.S.C. § 815(b)(2), provides for applications for temporary relief from orders issued pursuant to section 104; section 107(e), 30 U.S.C. § 817(e), provides for contests of imminent danger orders of withdrawal; section 105(c), 30 U.S.C. § 815(c), provides for complaints of discrimination; and section 111, 30 U.S.C. § 821, provides for complaints for compensation.

⁶ But see discussion of section 103(k) of the Mine Act, *infra*.

⁷ Other provisions of the Act such as section 105(c), 30 U.S.C. § 815(c), and section 107(e), 30 U.S.C. § 817(e), narrowly authorize Commission review of actions taken pursuant to those sections and need not be discussed further.

⁸ The statutory language is reflected in Commission Procedural Rule 20(a)(1), which states that an operator may contest: “(i) A citation or an order issued under section 104 of the Act, (ii) A modification of a citation or an order issued under section 104 of the Act; and (iii) The reasonableness of the length of time fixed for abatement in a citation or modification thereof issued under section 104 of the Act.” 29 C.F.R. § 2700.20(a)(1). Safeguard notices are not included.

Agents, Inc., 399 F.2d 1010, 1014 (5th Cir. 1968) (holding that “a power which has been withheld or denied by Congress cannot be found to exist as an ‘incidental’ and ‘necessary’ power” when Congress has specifically delineated other powers). Indeed, the Mine Act’s legislative history provides that “an independent Mine Safety and Health Review Commission is established to review orders, citations and penalties.” S. Rep. No. 95-181, at 11 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 599 (1978) (“*Legis. Hist.*”); *see also Kaiser Coal*, 10 FMSHRC at 1169; *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620 (Sept. 1987) (“The statutory scheme for review set forth in section 105 provides for an operator’s contest of citations, orders, and proposed assessment of civil penalties.”). Safeguard notices are not citations or orders issued pursuant to section 104, but rather issuances that establish safeguards pursuant to section 314(b).

Accordingly, we conclude that section 105(d) does not give the Commission authority to review a direct challenge to a safeguard notice.

Pocahontas argues that the terms “citation” and “order” in section 105(d) should be read broadly to encompass all enforcement actions, so as to include safeguard notices. However, safeguard notices are by their nature distinct from citations and orders described in section 104. Section 104(a) provides that a citation shall be issued by the Secretary if an operator has “violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated . . . [and] fix a reasonable time for [] abatement.” 30 U.S.C. § 814(a). Thus, according to the statutory language and consistent with MSHA practice, a section 104 citation is a written allegation detailing a specific violation of a specific standard, and containing a specific time by which the violation must be abated.

In contrast, safeguard notices function as mandatory standards. Section 314(b), which grants the Secretary authority to require additional safeguards, is an interim mandatory standard enforceable “in the same manner and to the same extent” as any Title I mandatory standard, i.e., through the issuance of a section 104 citation or order. 30 U.S.C. §§ 861(a), 814(a). Because notices of safeguard implement that authority, they are also, in effect, mandatory standards. *Wolf Run*, 32 FMSHRC at 1233. The result is a two-step process for enforcing violations of section 314(b). An operator first receives a notice establishing the safeguard to be provided. Then, in the event of a failure to provide that safeguard, the operator may be issued a citation or order alleging a violation of the relevant mandatory standard, i.e., the safeguard notice under section 314(b). *Id.* An issuance cannot simultaneously provide a standard and allege a violation of it; thus, a safeguard notice cannot be both a mandatory standard and a reviewable citation or order. Accordingly, we reject Pocahontas’ claim that notices of safeguard fall within the definition of a citation.

For similar reasons, a safeguard notice differs from an order reviewable under section 105(d) of the Act. Such orders generally require both the existence of violative conduct and the withdrawal of miners from an affected area of the mine. *See* 30 U.S.C. § 814(b), (d), (e), (f), (g). As discussed above, safeguard notices are mandatory standards which require an operator to implement protective measures; they do not allege violative conduct or require withdrawal.

Finding that safeguard notices are reviewable citations or orders under section 105(d) would contravene both the plain language of section 105(d), and the nature of safeguard notices as mine-specific mandatory standards.⁹

In its reply brief, Pocahontas points to judicial precedent indicating that the Commission has authority to review orders issued under section 103(k), 30 U.S.C. § 813(k), even though the statutory language is silent on the matter.¹⁰ However, unlike a safeguard notice, authority for Commission review of section 103(k) orders can be found in the Act's legislative history. *See Am. Coal Co. v. Dept. of Labor*, 639 F.2d 659, 660-62 (10th Cir. 1981); *Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 515-16 (8th Cir. 2012). In determining that the Commission possessed the requisite jurisdiction to review section 103(k) orders, the Tenth Circuit found support in its reading of the entire Mine Act, as well as the legislative history, which states that "an operator . . . may appeal to the Commission the issuance of a closure order." *Am. Coal Co.*, 639 F.2d at 660, quoting S. Rep. No. 95-181, at 13 (1977), *Legis. Hist.* at 601 (emphasis added). This language is particularly important, because a section 103(k) order, like other MSHA enforcement orders, frequently does result in the withdrawal of miners, i.e., it involves closure of an affected area. As stated in the Senate Report on the Mine Act, the grant of authority in section 103(k) "is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders." S. Rep. No. 95-181 at 29, *Legis. Hist.* at 617 (emphasis added). In contrast, as discussed above, a safeguard notice requires the implementation of safety measures rather than the withdrawal of miners. That section 103(k) orders are reviewable despite the lack of an explicit grant of authority reflects their similarity to withdrawal orders reviewable under section 105(d), a similarity which safeguard notices do not share.

2. Section 301(a)

Section 301(a) of the Act provides:

The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act, and *shall be enforced* in the same manner and to the same extent as any

⁹ Although our colleague argues that safeguard notices fall within the general dictionary definition of an "order," the relevant question here is whether safeguard notices are orders *of the specific type that are reviewable under section 105(d) of the Mine Act*, i.e., orders that allege violative conduct and generally require withdrawal of miners. As discussed above, we find that they are not.

¹⁰ Although the Secretary correctly asserts that Pocahontas did not raise the section 103(k) argument prior to its reply brief, we believe that this example of the Commission's jurisdictional authority is sufficiently related as part of the larger reading of the Act's structure and language, and therefore should be considered. *See Oak Grove Res., LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011). Moreover, the argument is too important not to be considered.

mandatory safety standard promulgated under section 101 of this Act. Any *orders issued in the enforcement* of the interim standards set forth in this title shall be subject to review as provided in Title I of this Act.

30 U.S.C. § 861(a) (emphasis added). As its text indicates, the purpose of section 301(a) is to ensure that Title III interim standards are enforced, and that such enforcement is reviewed, to the same extent as any Title I mandatory standard.¹¹ In practical terms, it provides that citations or orders may be issued for violations of Title III interim mandatory standards, including, of course, for violations of safeguard notices issued pursuant to Title III, and that such citations and orders are reviewable by the Commission.¹²

Significantly, section 301(a) states that the interim mandatory safety standards created by Title III shall be “enforced” like the mandatory safety standards to be promulgated under section 101 of the Act, and then says that orders issued in the “enforcement” of the Title III interim standards shall be reviewable by the Commission as provided in Title I of the Act (i.e., in accordance with section 105(d)). As noted above, a safeguard functions as a mine-specific mandatory standard. It does not allege violative conduct. The creation of such a standard – i.e., the issuance of the safeguard by an inspector – is not, by itself, the “enforcement” of a standard which would be reviewable by the Commission pursuant to section 301(a). Rather, the “enforcement” – and hence the reviewable event – occurs at a later time when a citation or order is issued because of a violation of the safeguard. As with citations and orders contested pursuant to section 105(d), the safeguard does not function as both a standard and a notice of violation of the standard. Put another way, the second sentence of section 301(a) provides for Commission review of an order “issued in the enforcement of the interim standards set forth” in Title III. Since the issuance of a safeguard is the creation rather than the enforcement of a standard, such issuance, by itself, is not reviewable by the Commission under section 301(a).

This conclusion is consistent with the Commission’s treatment of roof control plans and ventilation plans, which are addressed in sections 302 and 303 of the Act. 30 U.S.C. §§ 862, 863. Like safeguard notices, roof control and ventilation plans are mine-specific mandatory standards authorized by a provision of Title III. *See Wolf Run*, 659 F.3d at 1201-02; *Wolf Run*,

¹¹ Section 301(a) appeared in the Federal Coal Mine Health and Safety Act of 1969 (“Coal Act”). The legislative history of the Coal Act confirms that “such implementation actions, conditions, or requirements, as well as any actions taken or instructions issued by an inspector, will be enforced in the same manner as the standards themselves.” Senate Conference Report (Dec. 18, 1969), *reprinted in* Senate Subcomm. On Labor, Comm. On Labor and Pub. Welfare, 94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1609 (1975).

¹² The language of section 301(a) was carried over without modification from the 1969 Coal Act, and the Coal Act did not provide for review of “citations.” Pub. L. 91-173, 83 Stat. 753-55, 765 (§§ 105, 301(a)). Accordingly, despite the omission of the word “citation,” we read section 301(a) to provide for the review of the types of enforcement actions available for violations of Title I mandatory standards, which under the 1977 Mine Act includes section 104 citations. 30 U.S.C. § 104(a).

32 FMSHRC at 1233; *Martin County Coal Corp.*, 28 FMSHRC 247, 254–55 (May 2006). The Commission has held that review of a disputed plan provision is not available until a citation or order alleging a failure to comply with the provision – i.e., an enforcement action of the type normally reviewable under Title I – has been issued. *See, e.g., Target Industries Inc.*, 23 FMSHRC 945, 973 n.2 (Sept. 2001) (citing *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2773 n.8 (Dec. 1981)). We conclude that the same holds true for safeguard notices.

As an administrative agency created by statute, our jurisdiction is delineated by specific provisions of the Act. No provision of the Act explicitly grants jurisdiction to review safeguard notices. Given the nature of safeguard notices as mine-specific mandatory standards, such jurisdiction cannot be read into sections 105(d) or 301(a) of the Act, and jurisdiction of contests of section 103(k) orders is not analogous. Accordingly, we hold that the Act does not grant jurisdiction to directly review safeguard notices.

C. Although the Commission has no jurisdiction to review a safeguard notice by itself, jurisdiction attaches once a citation, including a technical citation, is issued pursuant to such notice.

Although an operator may not obtain direct review of a safeguard notice, it is not precluded from challenging such a notice. Review is available through a challenge to a subsequent citation alleging a violation of the safeguard notice at issue. *See SOCCO II*, 14 FMSHRC at 14 (Jan. 1992); *Wolf Run*, 659 F.3d at 1202-03.

Pocahontas challenges the adequacy of the existing procedure. Pocahontas argues that without the ability to obtain direct review of a safeguard notice, operators may have to expend significant time and resources complying with a potentially invalid notice while awaiting an opportunity to challenge it through a related citation. While we recognize that safeguard notices may remain in effect for some time before a citation is issued, we find that the availability of technical citations resolves this concern. Technical citations have long been the accepted method for challenging mine-specific mandatory standards issued pursuant to Title III. *See, e.g., Wolf Run*, 32 FMSHRC at 1240; *C.W. Mining Co.*, 15 FMSHRC 1559, 1564 (June 1993) (ALJ); *Jim Walter Res.*, 12 FMSHRC 1384, 1388 (July 1990) (ALJ); *see also Contest of Mine Approval Actions*, PPM V.G-4. In 2014, MSHA announced that “technical citation procedures similar to those used in the context of roof control, ventilation, and emergency response plans”¹³ are available for safeguard notices as well. PPL No. 14-V-02. The technical citation process gives operators the opportunity to request the issuance of a nominal citation based on momentary

¹³ *See, e.g., Prairie State Generating Co. LLC v. Sec’y of Labor*, 792 F.3d 82 (D.C. Cir. 2015) (discussing the technical citation process for roof and ventilation plans); *Mach Mining, LLC v. Sec’y of Labor*, 728 F.3d 643, 655-56 (7th Cir. 2013) (discussing the use of technical violations when an operator seeks review of an impasse in the development of a ventilation plan).

noncompliance. This process allows operators to timely obtain review of a safeguard notice without endangering miner safety or risking significant economic harm.¹⁴

Pocahontas also argues that the existing review procedure does not provide a sufficient “check and balance” against the lack of notice-and-comment rulemaking for safeguard notices. It claims that direct post-issuance review is necessary to counterbalance operators’ lack of pre-issuance involvement in the creation of these mine-specific mandatory standards.

We disagree. Congress chose not to subject safeguard notices to the notice-and-comment rulemaking required for mandatory standards issued pursuant to Title I. *See Wolf Run*, 659 F.3d at 1202-03. The D.C. Circuit in *Wolf Run* found concerns regarding lack of pre-enforcement review to be “overstated,” noting that the Commission has “interpreted the criteria [for a valid safeguard notice] so as to ensure that an operator has adequate notice of what safeguard is required.” *Id.* (citations omitted). As the D.C. Circuit affirmed in *Wolf Run*, an operator can “seek meaningful review” of a safeguard notice in a subsequent citation proceeding. *Id.*

We conclude that the Mine Act does not grant the Commission the authority to directly review the validity of safeguard notices, and that the existing method of indirect review through subsequent related citations, including technical citations, is adequate.

¹⁴ Pocahontas claims that technical citations are insufficient because they are granted at MSHA’s discretion. We agree that, in order for technical citations to resolve the concerns raised by the potential for delay, an operator must be able to rely on their availability. Indeed, if a procedure for technical violations did not exist, there could be a significant due process issue. However, we are reassured by the long accepted use of technical citations in other Title III contexts, as well as the use of “should” (rather than “may”) in MSHA’s policy statement. PPL No. 14-V-02. We are also unpersuaded by Pocahontas’ stated concern that an operator who requests a technical citation may instead be issued a serious non-technical citation.

IV.

Conclusion

For the reasons set forth herein, we conclude that the Commission lacks jurisdiction to review a direct challenge to a safeguard notice independent of a related citation alleging a violation of that safeguard notice. Accordingly, we affirm the Judge's Order dismissing the five notices of contest at issue for lack of jurisdiction.¹⁵

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

¹⁵ Dismissal of these notices of contest does not preclude Pocahontas from disputing the validity of the safeguard notices in the course of litigating any subsequent related citation properly challenged and brought before the Commission.

Commissioner Althen, dissenting:

A safeguard is a self-executing command issued by an individual inspector. It requires the operator to institute specific mining practices. The Department of Labor's Mine Safety and Health Administration ("MSHA") enforces compliance with the command through issuance of citations and imposition of civil penalties. I disagree with the majority's abdication of the Commission's jurisdiction to review safeguards until and unless the operator disobeys the inspector's order. Therefore, I respectfully dissent.

DISCUSSION

A. Jurisdiction under Title I of the Mine Act

Title I of the Mine Act provides MSHA with a variety of tools to achieve miner safety and for enforcement of the Mine Act and the regulations issued under it. These processes include section 103(k) (control orders after accidents), section 104 (citations and orders), and section 107 (imminent danger orders). *See* 30 U.S.C. §§ 813(k), 814, 817. In turn, Title I provides the Federal Mine Safety and Health Commission ("Commission") jurisdiction to review these enforcement actions.¹

For some enforcement actions, the Mine Act expressly provides Commission jurisdiction. For example, section 105(d) explicitly grants the Commission jurisdiction, *inter alia*, to hear contests by operators or miners of citations and orders issued under section 104. Separately, section 107 expressly gives the Commission jurisdiction to review imminent danger orders. Section 111 gives the Commission jurisdiction to require compensation for miners. *See* 30 U.S.C. §§ 815(d), 817, 821.

Other commands (orders) reviewable by the Commission are not expressly included within these specific jurisdictional grants. The Commission and courts have read the legislative history of the Act, the limited jurisdiction granted to federal courts in mine safety matters, and the broad review authority of the Commission and have found Commission jurisdiction for review.

For example, as noted above, section 103(k) permits MSHA to issue control orders. The Mine Act, including section 105(d), does not expressly grant the Commission jurisdiction to

¹ The Mine Act provides specific procedures for notice and public comment for the promulgation of mandatory health and safety standards. 30 U.S.C. § 811. Any person adversely affected by a mandatory safety standard may seek judicial review of the standard within sixty days of promulgation. Such review may occur only in the United States Court of Appeals for the District of Columbia Circuit or the circuit where the petitioning person resides or has his principal place of business. *Id.* Thus, the Mine Act expressly restricts review of mandatory safety standards to federal circuit courts of appeal. *See Nat'l Mining Ass'n v. Sec'y of Labor*, 763 F.3d 627, 631 (6th Cir. 2014). Federal district courts have limited jurisdiction under sections 108 and 110 of the Mine Act. Section 108 identifies specific circumstances not relevant here in which MSHA may institute a civil action in district courts, and section 110(j) authorizes actions in district courts to collect penalties imposed under the Act. 30 U.S.C. §§ 818, 820(j).

review such orders. However, citing the legislative history of the Act, the legislative scheme, and the specialized authority of the Commission, circuit courts of appeal have affirmed the Commission's jurisdiction over such orders. *Am. Coal Co. v. U.S. Dep't of Labor*, 639 F.2d 659, 660-62 (10th Cir. 1981); *see also Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 516 (8th Cir. 2012).

Within the last six months, in *Jim Walter Resources, Inc.*, the Commission reviewed a section 103(j) order, invalidating it because the order exceeded MSHA's statutory authority. 37 FMSHRC 1868, 1870 (Sept. 2015). We then upheld a section 103(k) order that imposed affirmative duties upon the operator including mandatory training of all miners on ignition issues. *Id.* at 1870-73.²

Consequently, it is plain that Title I broadly grants the Commission jurisdiction to review orders both through explicit provisions and through reliance upon the specialized knowledge and authority of the Commission to review orders issued by MSHA. The majority's decision does not provide but rather denies the important right to immediate judicial review of binding agency orders having immediate impact upon the citizen's actions.³

B. Jurisdiction under Title III of the Mine Act

Title I provides for the development, promulgation, revision, and judicial review of mandatory safety and health standards. Titles II and III retained certain existing mandatory health (Title II) and safety (Title III) standards. These interim standards initially were included in the Coal Mine Health and Safety Act of 1969. The sections of Title III relevant to this case – sections 301(a) and 314(b) – remain unchanged from 1969 until today.

² Further demonstrating Congress' grant of broad powers to the Commission, the Commission has found that it has the authority to review an MSHA Program Policy Letter. *Drummond Co.*, 14 FMSHRC 661, 673-78 (May 1992). Relying on an expansive reading of the Mine Act, a court has held that the Commission can also entertain requests for declaratory relief. *Climax Molybdenum Co. v. Sec'y of Labor*, 703 F.2d 447, 452 (10th Cir. 1983). As the Commission stated in *Drummond*:

The reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program. Addressing claims of arbitrary enforcement by the Secretary is at the heart of that adjudicative role.

14 FMSHRC at 675 (citation omitted).

³ The procedure adopted by MSHA for issuance of "technical" citations is sufficient to alleviate constitutional concerns. However, those procedures do not address the jurisdiction of the Commission as an agency independent from MSHA to review orders issued by MSHA – a matter of overarching importance in the scheme of federal agency jurisprudence.

Section 301(a) provides:

The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of this Act. *Any orders issued in the enforcement of the interim standards set forth in this title shall be subject to review as provided in Title I of this Act.*

30 U.S.C. § 861(a) (emphasis added).

By its plain terms, section 301(a) allows operators affected by any order issued in implementing the standards of Title III to challenge such order just as they may challenge orders implementing the provisions of Title I. Title III does not permit challenges to the validity of the interim mandatory standards themselves. The purpose of section 301(a), therefore, is to establish a review mechanism for later agency actions enforcing the interim standards. Congress ensured that actions of inspectors enforcing the interim standards of Title III would be subject to the same type of review as actions by inspectors enforcing mandatory standards promulgated under Title I.

Section 314(b) grants inspectors the authority to enforce the mandatory hoisting and mantrip standards of section 314 through issuance of safeguards to minimize transportation hazards. It states that “[o]ther safeguards adequate, in the judgement of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.” 30 U.S.C. § 874(b).

Section 301(a) could not be more plain and direct. Orders issued in enforcement of the Title III interim mandatory standards are subject to review just as enforcement actions under Title I of the Mine Act are subject to review. Safeguards are orders enforcing section 314(b), and are thus subject to challenge before the Commission.

C. Application of the Commission’s Jurisdiction

This case involves five safeguards. All of the challenged safeguards are commands unilaterally issued by inspectors requiring specific actions by the operator. For example, one of the safeguards at issue in this case, No. 9002751, provides:

This is [a] notice to provide safeguard requiring [the] operator to ensure that all track D-rails are placed on track rails when track equipment is parked in an inclined area to prevent a possible run away from track equipment. The track D-rail was not placed on the track rail on the #2 inclined track spur while a loaded track rail car

was parked in spur and not adequately secured to prevent a run away.

Docket No. WEVA 2014-647-R, Notice of Contest, Ex. A. Clearly, this is a unilaterally issued order enforcing the interim mandatory safety standard of section 314 of the Mine Act.

As defined in the Administrative Procedure Act (“APA”), an agency “order” is “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.” 5 U.S.C. § 551(6).⁴ Separately, in the absence of a statutory or regulatory definition or technical usage, the Commission turns to dictionaries for a term’s ordinary meaning. *See Newmont USA Ltd.*, 37 FMSHRC 499, 503 (March 2015).

Black’s Law Dictionary (10th ed. 2014) defines an “order” as: “1. A command, direction, or instruction. See MANDATE (1). 2. A written direction or command delivered by a government official, esp[ecially] a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands.” Lay dictionaries define an “order” as “an authoritative direction, or instruction; command; mandate” (*Random House Webster’s Unabridged Dictionary* 1362 (2d ed. 1998)), or “an authoritative mandate, usu[ually] from a superior to a subordinate.” *Webster’s Third New Int’l Dictionary Unabridged* 1588 (1993). Each of the Mine Act safeguards at issue here bears all the hallmarks of an “order.”

First, Safeguard No. 9002751 reads like an order. It sets forth a concise and direct command. The operator must follow the command “requiring [the] operator to ensure that all track D-rails are placed on track rails when track equipment is parked in an inclined area.” Further, it is final and non-appealable within MSHA.

Second, MSHA issued Safeguard No. 9002751 like an order. An MSHA inspector issued it after having viewed conditions at the mine and found a condition he believed created a hazard. He then unilaterally demanded specified action by the operator. There was no requirement that the inspector engage in any discussion whatsoever with the operator’s representative before doing so. Certainly, there were no “negotiations” over issuance of the safeguard.

Third, Safeguard No. 9002751 operates like an order. Failure to comply with it results in issuance of a citation and assessment of a civil penalty. The safeguard, itself, does not cite violative practices or conditions. Instead, it asserts MSHA authority to order specific actions by the operator to comply with section 314 of the Mine Act. A safeguard represents MSHA taking control of specific conditions or practices at a mine and enforcing the interim mandatory standard by imposing operational constraints and/or obligations upon the operator regarding such conditions or practices. Such constraints may well be exercises of an inspector’s authority under

⁴ The provisions of the APA do not apply generally to Commission proceedings. *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 159 (D.C. Cir. 2006). However, that does not mean that the principles underlying the APA are inapplicable. *Id.* The Commission has referenced the definitions in the APA in defining matters under the Mine Act. *See Tarmann v. Int’l Salt Co.*, 12 FMSHC 1, 2 n.1 (Jan. 1990).

section 314(b). However, that does not place such orders beyond immediate review by the Commission.

A safeguard reads like an order, issues like an order, and acts like an order – it is an order. That being the case, section 301(a) and Title I confer jurisdiction upon the Commission to review safeguards.

A safeguard is so clearly an order that the majority struggles in attempting to define what form of legal instrument it is, other than an order. At first, they pass safeguards off as a form of “notice” that simply “informs the mine operator about conduct that is mandated or prohibited.” Slip op. at 1. This is the majority’s first tacit recognition that a safeguard has the characteristics of an order. The “information” is a unilateral command by an inspector that “mandates” or “prohibits” conduct. It “notifies” the operator that it must do as the inspector commands or pay a civil penalty – that is, an order.

A few pages later, however, the majority implicitly reduces safeguards to the ambiguous status of “issuances,” theorizing that “[s]afeguard notices are not citations or orders issued pursuant to section 104, but rather issuances that establish safeguards pursuant to section 314(b).” *Id.* at 5. So, safeguards are deemed simple “issuances.”⁵

Later in the opinion, however, the majority dances to the other end of the legal spectrum to declare that safeguards actually “are mandatory standards which require an operator to implement protective measures” (slip op. at 6), and states “[g]iven the nature of safeguard notices as mine-specific mandatory standards” *Id.* at 8.⁶ Here, the majority would find

⁵ This case illustrates the outsized importance MSHA may seek to attach to the name given to issuances and decrees. Had MSHA properly entitled safeguards as “Safeguard Orders,” I am confident the majority would agree that we have jurisdiction to review such orders. By choosing to instead call them “Safeguard Notices,” the Secretary seeks to have safeguard orders treated as mere “notices” or, according to the majority, even more ambiguously, “issuances.” An enforceable demand, however, is not a mere notice or issuance; if a safeguard is a notice, it is one mandating specific conduct backed by a penalty for failure to comply. The operator for the first time is commanded to take or refrain from taking specified actions. In substance, a safeguard is an order, not a notice. “Beware lest you lose the substance by grasping at the shadow.” Aesop, *The Dog and the Shadow*, in *The Harvard Classics Vol. 17 Part 1* (Charles W. Eliot, ed., P.F. Collier & Son 1909-14, Bartleby.com online ed. 2001) (c. 6th Century BCE).

⁶ This characterization of safeguards is a departure from the Commission’s prior care in characterizing safeguards. The Commission had previously referred to safeguards as “in effect” mandatory safety standards. *Southern Ohio Coal Co.*, 14 FMSHRC 1,8 (Jan. 1992) (“section 314(b) extends authority to the Secretary to create on a mine-by-mine basis what are, in effect, mandatory standards, without the formalities of rulemaking”); *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). Such wording avoids an obvious problem: the Mine Act does not permit inspectors to establish mandatory safety standards. Congress expressly stated in Title III of the Mine Act that the Interim III standards as written would exist until “superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act.” 30 U.S.C. § 861(a).

safeguards are mandatory safety standards issued by individual inspectors, but obviously without notice and comment and without any opportunity for judicial review before their enforcement – a notion wholly contrary to the right to immediate judicial review of mandatory standards.⁷

The majority recognizes that safeguards implement the authority granted to the Secretary to enforce the interim mandatory standards. Slip op. at 5. A safeguard implements a mandatory safety standard by an inspector commanding an operator to take specified actions in order to comply with the mandatory safety standard. It is a final agency action and has an immediate and concrete impact upon the operator. The result of a failure to obey the command is a citation and penalty. So, by recognizing that a safeguard implements a mandatory safety standard with a civil penalty for noncompliance, the majority recognizes that a safeguard is the quintessential type of command that constitutes an order that is subject to review by the Commission.

Having recognized that a safeguard has the attributes of an order, the majority implicitly further recognizes that a safeguard is an order by attempting to distinguish safeguard orders from 103(k) orders. Slip op. at 6. Stating that a safeguard is a different kind of “order” does not make it not an “order.” It attempts to make it a kind of order over which the Commission has no jurisdiction. However, for purposes of jurisdiction, section 103(k) orders and safeguard orders are indistinguishable.

Obviously, my difference with my colleagues is more than legal terminology. Our difference involves the right of citizens to pre-enforcement review of government commands issued by individual federal agents. I would find a safeguard is the type of action that may be reviewed immediately. It commands specific and immediate action by a private citizen enforced by penalties. My colleagues think that, in Title III, Congress gave individual inspectors the right to go beyond enforcement and actually issue mandatory standards. Under that rubric, a safeguard does not enforce Title III, but rather creates a uniquely unreviewable mandatory safety standard – a safety standard that is unreviewable unless and until a citizen violates the inspector’s command. Slip op. at 6-7. I do not know of any provisions in Title I that allow individual inspectors to unilaterally issue unreviewable mandatory safety standards to operators, and I do not think we should interpret Title III to allow such action. My colleagues recognize all the underpinnings for Commission review but do not take the logical final step and accept our jurisdiction.

The Mine Act does not expressly grant the Commission jurisdiction to review section 103(k) orders. However, as explained above, the Commission and circuit courts of appeal have recognized that Congress created the Commission as a specialized agency with broad powers to

⁷ The Supreme Court has repeatedly stressed the fundamental importance of the right to review of government mandates that have a direct and immediate impact upon a private person’s rights. As the Supreme Court has emphasized, “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Here, as in section 103(k), not only is there no evidence to support that Congress wished to deny review of safeguard orders but instead section 301(a), legislative history, and court cases demonstrate that Congress created the Commission to address MSHA commands compelling an operator to take specific actions or to incur civil penalties.

review MSHA enforcement actions. In other words, the Commission is the agency designated by Congress to review MSHA enforcement actions, and we have jurisdiction to review section 103(k) orders (*American Coal Co.*, *supra*; *Pattison Sand*, *supra*). Therefore, Commission jurisdiction is not strictly limited by the wording of section 105(d).

The majority argues that safeguards are not “analogous” to a section 103(k) order, saying that section 103(k) orders have a “similarity” to withdrawal orders. Slip op. at 6. The indisputable fact, however, is that section 103(k) orders are not always withdrawal orders and may be mandatory in nature. In *Jim Walter*, the Commission adjudicated a section 103(k) order requiring all miners to take an hour-long training course on ignition safety and prevention before they could enter the mine. 37 FMSHRC at 1871. Clearly, this was a mandatory command (an order) to take a set of prescribed actions. From a legal standpoint, that order is identical in nature to a safeguard. An inspector issues both section 103(k) and safeguard orders unilaterally, and both dictate actions that the operator must take. Indeed, a safeguard is more obviously an “order,” as it commands the operator to take specific actions to comply with the interim standard of section 314(b) of the Mine Act. Despite its protestations, the majority cannot consistently maintain that the Commission has jurisdiction to review mandatory directives issued under section 103(k) but cannot review safeguard orders issued by individual inspectors. We may review section 103(k) orders, and we may review safeguard orders.⁸

Finally, the majority asserts that the issuance of a safeguard resembles MSHA’s role in roof control and ventilation plan disputes. Slip op. at 8. Because section 301(a) of the Mine Act expressly provides for enforcement of safeguard orders in accordance with Title I, this argument is irrelevant.

In any event, approval of roof control and ventilation plans is markedly and substantively different from the immediate issuance of a final binding order by a lone inspector on his personal initiative. There are substantive differences between obtaining the statutorily prerequisite approval of a plan and the unilateral issuance of a binding command through a safeguard.

The Mine Act expressly places a duty upon the operator to devise a plan that is acceptable to MSHA. The operator has the obligation to develop a plan acceptable to MSHA and MSHA has discretion in approving or rejecting the proffered plan. Further, the plan approval process involves negotiations, proposals, and counter-proposals between MSHA and the operator. In a legal sense, MSHA rejects insufficient plans proposed by the operator and informs the operator of changes that would satisfy MSHA. That does not foreclose the operator from submitting further variations of the plan in an attempt to win MSHA’s approval.

⁸ The majority seeks to minimize and deflect the importance of the Commission’s jurisdiction to review section 103(k) orders by inferring that such orders are “withdrawal orders.” See slip op. at 6 (“That section 103(k) orders are reviewable despite the lack of an explicit grant of authority reflects their similarity to withdrawal orders reviewable under section 105(d), a similarity which safeguard notices do not share.”). Certainly, a command to provide mandatory training as issued in *Jim Walters*, *supra*, has nothing in common with a withdrawal order. In any event, section 301(a) of the Mine Act is a positive grant of jurisdiction to review safeguard orders that enforce (i.e., implement) mandatory safeguards in the same manner as orders issued under Title I.

If the operator refuses to satisfy MSHA's right to approve plans, it may challenge MSHA's disapproval as an abuse of discretion. The Mine Act places the burden upon the operator to satisfy MSHA or show an abuse of discretion. If the operator fails to obtain plan approval, it is not violating an order issued by MSHA. It is disobeying a requirement of the Mine Act to obtain pre-approval from MSHA.

Indeed, the United States Court of Appeals for the District of Columbia Circuit recently emphasized the "notice and comment" aspect of the plan approval process in sustaining the Commission's standard of review for plan approval disputes. In *Prairie State Generating Co. LLC v. Sec'y of Labor*, the court stated:

The statutory requirements of negotiation between the Secretary and an operator in the development of suitable, mine-specific plans, and the Mine Act's provision for miners' input during the plan-approval process, can be thought to play a role in the development of mine-specific plans akin to that of notice and comment in formal administrative rulemaking. Mine operators receive written notice of the reasoning and bases for the Secretary's initial plan-suitability determinations and have multiple opportunities to respond with arguments and supplemental data. *Carbon County*, 7 FMSHRC at 1370-71; 30 C.F.R. §§ 75.220, 75.370. Plan negotiations thus may reasonably be characterized as serving the same interests as notice and comment, albeit less formally: notice to affected parties, opportunities for such parties to develop the record by submitting factual and legal support, and improvement of the agency's decisionmaking. See, e.g., *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

792 F.3d 82, 90-91 (D.C. Cir. 2015). None of this occurs before issuance of a safeguard. With a safeguard, MSHA does not define a safety hazard and ask for a plan from the operator to deal with the issue. There is no advance written notice of the bases for the inspector's intention to issue a safeguard; there is no, let alone multiple, opportunities to convince any MSHA official that the safeguard is unnecessary, too broad, ambiguous, etc. In sum, the operator does not fail to provide a suitable plan to MSHA; an MSHA inspector unilaterally imposes an immediate obligation upon the operator.⁹

⁹ In *Elk Run Coal Co. v. U.S. Dep't of Labor*, 804 F. Supp. 2d 8 (D.D.C. 2011), the district court upheld the plan review process against a claim of facial unconstitutionality. In so doing, the court found that the plan approval process is a cooperative process and that, rather than MSHA compelling action, the operator must obtain approval of a plan submitted by it. The Secretary argued and the court accepted that MSHA's refusal to adopt a plan submitted by an operator does not constitute "final agency action." In response to operator complaints that it needed to commit a violation to obtain review, the district court accepted the Secretary's argument, finding that "[w]hile these complaints may describe what Plaintiffs believe to be 'programmatic' deficiencies with MSHA's ventilation-plan review-and-approval process, they do not identify any discrete, final agency actions that this Court can review." *Id.* at 31.

It is not tenable to contend that an inspector imposing mandatory obligations upon an operator is not taking a discrete final agency action or to assert that such action has any attribute of rulemaking. A safeguard has only the legal attributes of an order. The inspector comes; the inspector sees; the inspector commands. In short, the plan approval process most certainly is not a template for safeguard orders.

Conclusion

Our system of justice does not favor issuance of binding governmental commands without a right to pre-enforcement challenge. The right to challenge government mandates is fundamental. Here, immediate jurisdiction is consistent with Title I's provision of review of government-mandated actions and with section 301(a)'s provision of jurisdiction over orders enforcing Title III standards. Such jurisdiction also is consistent with the broad authority of the Commission recognized by the Commission and circuit courts of appeal. I respectfully dissent.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 16, 2016

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

v.

POCAHONTAS COAL COMPANY, LLC

Docket No. WEVA 2014-202-R

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). It involves a notice of contest filed by Pocahontas Coal Company, LLC challenging the validity of a notice of pattern of violations issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) pursuant to section 104(e)(1) of the Mine Act, 30 U.S.C. § 814(e)(1).¹ At issue in this case of first impression is whether section 105(d) of the Act, 30 U.S.C. § 815(d), grants the Commission jurisdiction to hear an operator’s direct challenge to a notice of pattern of violations, independent of a contested section 104(e) withdrawal order. We conclude that it does not.

¹ 30 U.S.C. § 814(e)(1) provides:

If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

I.

Statutory Summary and Background

Section 104(e) of the Mine Act, 30 U.S.C. § 814(e), sets forth provisions regarding MSHA’s issuance and termination of a notice of pattern of violations (“POV notice”). It provides that if an operator has demonstrated a pattern of violating mandatory health or safety standards and those violations are of a significant and substantial nature (“S&S”), the operator shall be given “written notice” that such a pattern exists.² 30 U.S.C. § 814(e)(1). If an inspector cites the operator for a S&S violation within 90 days following issuance of the POV notice, then MSHA may issue a withdrawal order under section 104(e) of the Act. The operator will thereafter be subject to additional withdrawal orders for each S&S violation subsequently discovered until a complete inspection of the mine has revealed no further S&S violations. 30 U.S.C. § 814(e)(1)-(3); *see also Brody Mining, LLC*, 36 FMSHRC 2027, 2028-29 (Aug. 2014).

In enacting the pattern of violations provisions, Congress explicitly recognized that they were necessary to “provide an effective enforcement tool to protect miners when the operator demonstrates [its] disregard for the health and safety of miners through an established pattern of violations.” S. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977 (“Legis. Hist.”)*, at 620 (1978). The legislation essentially introduced enhanced enforcement procedures for mine operators that have displayed a proclivity for violating the Act. It is employed when MSHA’s standard enforcement scheme is unable to address a mine’s problem of recurrent violations. *See Brody*, 36 FMSHRC at 2029.

Despite its inclusion in the 1977 Mine Act, the pattern of violations authority has only recently been employed by the Secretary as an enforcement tool. According to a report released in 2010 by the Department of Labor’s Office of the Inspector General (“OIG”), MSHA had only once issued a POV notice to an operator in the 32 years since passage of the Act.³ In response to the report and recommendations contained therein, MSHA issued revisions to its POV rule, which became effective on March 25, 2013. *See Brody*, 36 FMSHRC at 2030. The instant case involves one of the first POV notices issued since adoption of the newly revised rule.

II.

Factual and Procedural Background

On October 24, 2013, MSHA issued POV Notice No. 7219153 to Pocahontas’ Affinity Mine pursuant to section 104(e)(1) of the Mine Act. The POV notice was issued following a 12-month screening period ending on August 31, 2013, after which MSHA determined that

² 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.”

³ The Commission has taken judicial notice of the OIG Report. *See Brody*, 36 FMSHRC at 2030 n.4.

Pocahontas had exhibited a pattern of violating the Mine Act's mandatory health and safety standards. The POV notice states:

Pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act), you are hereby notified that a pattern of violations exists at the Affinity Mine (ID 46-08878). A review of the S&S violations cited at the mine demonstrates a pattern of violations. As illustrative of this pattern of violations, the following groups of violations are representative of violations which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards.

Notice of Contest at 2, PCC Ex. 1 - Att. Ex. A. The notice lists 36 different citations and orders issued between September 6, 2012 and August 13, 2013, citing conditions and/or practices that contribute to roof and rib hazards or emergency preparedness and escapeway hazards. It further states that: "These groups of violations, taken alone or together, constitute a pattern of violations of mandatory health and safety standards . . ." *Id.* at 2.

On November 26, 2013, Pocahontas filed a notice of contest asserting jurisdiction under section 105(d) of the Act contesting "the issuance of Section 104(e)(1) Written Notice Number 7219153" and requesting an expedited hearing. Notice of Contest at 1, 6. The contest was assigned to an Administrative Law Judge, and the matter was initially set for hearing on March 18, 2014.

As a result of the POV notice, MSHA subsequently issued a number of section 104(e) withdrawal orders to Pocahontas between December 9 and 30, 2013. Pocahontas shortly thereafter contested the orders, and its contests were assigned to the same Judge in nine separate dockets.⁴ The cases were set for hearing on May 14, 2014.

On January 24, 2014, Pocahontas filed an unopposed motion to withdraw its previous request for an expedited hearing. It asked that the hearing be rescheduled to allow the parties to complete discovery. The Judge granted that motion on January 30.⁵ On February 27, 2014, the Secretary of Labor filed a motion to dismiss with prejudice Pocahontas' contest for lack of jurisdiction, asserting that the Act does not permit Commission review of a POV notice independent of a subsequent section 104(e) order. The Judge granted the Secretary's motion. 36 FMSHRC 1371 (May 2014) (ALJ).

In granting the motion, the Judge held that the Mine Act provides "no statutory authority for the Commission to hear a contest to a *notice* of pattern of violations in the context of a

⁴ The Judge dismissed eight of the nine contest dockets, electing to address the validity of the withdrawal orders in the penalty cases in which the operator had contested the proposed penalties associated with those orders. ALJ Ord. of Dism. at 2 (Oct. 29, 2014).

⁵ Pocahontas made similar requests in the related cases containing the underlying violations and the subsequent section 104(e) orders.

dedicated proceeding.” *Id.* at 1372 (emphasis added). She determined that although section 105(d) of the Act provides operators with the right to challenge the issuance or modifications of citations and orders, it “does not afford a right to contest written notices.” *Id.* The Judge also found that “the legislative history, the Secretary’s regulations, Commission case law, and the Commission’s Procedural Rules do not reveal any language which could be interpreted to grant the Commission jurisdiction to hear a contest of a written notice of pattern of violations.” *Id.* She concluded, however, that the Commission’s broad grant of authority to direct “other appropriate relief” under section 105(d) permits Commission review of the validity of the POV notice in the context of a contest to a section 104(e) order issued as a result of the POV notice. Consequently, the Judge stated that any challenges to the validity of the POV notice would be heard when the subsequently issued section 104(e) orders were heard.⁶ *Id.* at 1373-74.

The Judge also declined to treat the POV notice as a citation or order. She determined that the Act makes clear that the notice is a separate document which must be issued prior to any order issued pursuant to section 104(e). Lastly, she rejected Pocahontas’ claim that its inability to directly contest the POV notice violated its right to due process. In addition to the operator’s ability to challenge the POV notice once a section 104(e) order has been issued, the Judge reasoned that the Secretary’s need to assure a safe and healthy work environment at a mine with a history of serious violations outweighed the need of the mine operator to be heard immediately. She also found Pocahontas’ argument meritless given its “halfhearted attempt to pursue [] prompt review of the matter” after the related section 104(e) orders had been issued. *Id.* at 1374-75.

⁶ Pocahontas raised the same challenge to the validity of POV Notice No. 7219153 in Docket No. WEVA 2014-395-R, which is the contest docket for associated section 104(e) Order Nos. 9001636 and 3576153. Recently, in two separate orders granting summary decision in favor of the Secretary, the Judge upheld the validity of the POV notice and the section 104(e) orders and dismissed the case. *See* Nov. 3, 2015 ALJ Order and Dec. 24, 2015 ALJ Order. Pocahontas appealed the Judge’s orders and the Commission granted review on January 6, 2016. The Judge’s substantive ruling on the POV notice raises the question of whether the issue currently before us is moot because Pocahontas has obtained Commission review of the validity of POV Notice No. 7219153, which is the relief it seeks from the instant appeal.

A case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome. *North Am. Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012); *Climax Molybdenum Co.*, 2 FMSHRC 2748, 2750 (Oct. 1980), *aff’d* 703 F.2d 447 (10th Cir. 1983). However, when there is a substantial likelihood that an allegedly moot question will recur, the issue remains justiciable. *Marfork Coal Co., Inc.*, 29 FMSHRC 626, 628-29 (Aug. 2007); *North Am. Drillers*, 34 FMSHRC at 358; *Mid-Continent Res., Inc.* 12 FMSHRC 949, 957 (May 1990). Although Pocahontas has obtained the relief it seeks here, and thus no longer has a legally cognizable interest in the outcome, we conclude that the question of whether an operator must wait for a section 104(e) order to issue before it may challenge a notice of POV is highly likely to recur with other operators. Therefore, the issue presented here remains justiciable.

On June 29, 2014, Pocahontas filed a petition for discretionary review challenging the dismissal of its contest, which the Commission granted.

III.

Disposition

Pocahontas argues that the Commission has broad jurisdictional power to hear all disputes arising under the Mine Act, including the authority to review issues surrounding the exercise of the Secretary's enforcement actions. It asserts that section 105(d) permits operators to challenge all enforcement actions issued by MSHA, including a POV notice. Pocahontas maintains that because the section 104(e) POV notice is a written allegation of a violation, it is an enforcement action equivalent to a section 104 citation or order.

As discussed below, Pocahontas' position conflicts with the language of the Act, its legislative history, basic principles of administrative law, and Commission case law. Accordingly, we conclude that the Commission lacks jurisdiction to directly review the issuance of a POV notice.

A. The Commission's jurisdiction to review enforcement actions is limited by Congress' grant of authority as set forth in the Act.

Although it is well settled that the Commission has broad authority to address a wide range of disputes arising under the Mine Act, the exercise of that authority is governed by the language of the Act's jurisdictional provisions. The Commission has long recognized that it is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers. *See generally, Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169-70 (Sept. 1988); *Old Ben Coal Co.*, 1 FMSHRC 1480, 1484 (Oct. 1979); *Rushton Mining Co.*, 11 FMSHRC 759, 764 (May 1989). As an administrative agency created by statute, the Commission cannot exceed the jurisdictional authority granted to it by Congress. *Kaiser Coal*, 10 FMSHRC at 1169; *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-73 (1977); *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 322 (1961).

In *Kaiser Coal*, we explained that:

Several provisions of the Mine Act grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission presides: *e.g.*, *section 105(d)*, 30 U.S.C. § 815(d), provides for the contest of citations or orders, or the contest of civil penalties proposed for such violations; *section 105(b)(2)*, 30 U.S.C. § 815(b)(2), provides for applications for temporary relief from orders issued pursuant to section 104; *section 107(e)*, 30 U.S.C. § 817(e), provides for contests of imminent danger orders of withdrawal; *section 105(c)*, 30 U.S.C. §

815(c), provides for complaints of discrimination; and section 111, 30 U.S.C. § 821, provides for complaints for compensation.

10 FMSHRC at 1169 (emphasis added). Specific provisions, such as these, delineate the scope of the Commission's jurisdiction. *Id.* Thus, contrary to Pocahontas' argument, the Commission does not possess plenary authority to review all enforcement actions taken under the Act.

B. Section 105(d) does not grant the Commission jurisdiction to directly review POV notices.

In section 105(d), Congress explicitly set forth enforcement actions that invoke this Commission's jurisdiction. By section 105(d)'s express language, the Commission's jurisdiction under this section only attaches when an operator contests MSHA's issuance or modification of a citation, order, or proposed penalty assessment, or the reasonableness of the abatement time. Section 105(d) states in pertinent part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends *to contest the issuance or modification of an order* issued under section 104, *or citation or a notification of proposed assessment of a penalty* issued under subsection (a) or (b) of this section, *or the reasonableness of the length of abatement time fixed in a citation or modification* thereof issued under section 104, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

30 U.S.C. § 815(d) (emphasis added).

Significantly, section 105(d) does not mention contesting the issuance or modification of a "notice of pattern of violations." In fact, although the statute specifically allows for contesting a "*notification of proposed assessment of a penalty*," it does not permit a challenge to any other form of "notice." This precise list of jurisdictional triggers strongly indicates a Congressional intent to exclude other actions, such as other types of "notices." See *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1014 (5th Cir. 1968) (holding that "a power which has been withheld or denied by Congress cannot be found to exist as an 'incidental' and 'necessary' power" when Congress has specifically delineated other powers).⁷ Indeed, the Mine Act's

⁷ In accordance with the language of section 105(d), Commission Procedural Rule 20(a)(1) states that an operator may contest:

- (i) A citation or an order issued under section 104 of the Act, 30 U.S.C. 814;
- (ii) A modification of a citation or an order issued under section 104 of the Act; and

(continued...)

legislative history provides that “an independent Mine Safety and Health Review Commission is established to review orders, citations, and penalties.” S. Rep. No. 95-181, at 11; *Legis. Hist.* at 599. Significantly, the word “notice” is absent. *See also Kaiser Coal*, 10 FMSHRC at 1169; *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620-21 (Sept. 1987) (“The statutory scheme for review set forth in section 105 provides for an operator’s contest of citations, orders, and proposed assessment of civil penalties.”).

Accordingly, we conclude that the language of section 105(d) does not give the Commission authority to review a direct challenge to a POV notice.

C. POV notices cannot be treated as citations or withdrawal orders for review purposes.

Faced with the language of section 105(d), Pocahontas argues that the terms “citation” and “order” should be read broadly to encompass all alleged violations, so as to include POV notices. This reading is based in part on the location of the POV provision, which is found in section 104 of the Act – the section that primarily governs the process for citations and orders. 30 U.S.C. § 814. However, the language of section 104 does not support this theory.

Section 104(a) provides that a citation shall be issued by the Secretary if an operator has

violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated . . . [and] fix a reasonable time for [] abatement.

30 U.S.C. § 814(a). Thus, according to the statutory language and consistent with MSHA practice, a section 104 citation is a written allegation, detailing a specific violation of a specific standard, and containing a specific time by which the violation must be abated.

In contrast, a POV notice simply alerts a mine operator that it has displayed a propensity for violating the Act through prior S&S citations and orders referenced in the notice. It further informs the operator that after being placed on notice, it faces enhanced enforcement penalties *if* it continues to significantly and substantially violate federal mine standards. *See Brody*, 36 FMSHRC at 2029, *quoting* S. Conf. Rep No. 95-181, at 33, *Leg. Hist.* at 621 (stating that the POV notice indicates “to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem”).

⁷ (...continued)

(iii) The reasonableness of the length of time fixed for abatement in a citation or modification thereof issued under section 104 of the Act.

30 C.F.R. § 2700.20(a)(1). Commission Procedural Rule 26 provides that an operator may contest a “proposed penalty assessment.” 30 C.F.R. § 2700.26. As in the statute, “notice” is omitted in both of these provisions.

A POV notice differs from an enforcement order under the Act for similar reasons. Most significantly, “orders” under the Mine Act usually require the withdrawal of miners from an affected area of the mine. *See* 30 U.S.C. §§ 814(b), (d)(1), (d)(2), and (e) (describing withdrawal orders due to an operator’s failure to abate a violation, unwarrantable failure violations under certain circumstances, or based on a pattern of S&S violations).⁸ A POV notice requires no such withdrawal or mine closure.

Additionally, section 104(e) employs both a POV notice and a withdrawal order as discrete and sequential steps in the POV process. First, the POV notice is issued. Then, if another S&S violation is found, a withdrawal order follows. In other words, the notice and the withdrawal order cannot be one and the same.

Section 110(a)(1) of the Act also requires the proposal and assessment of a civil penalty for each violation of the Act in the case of a citation or order. 30 U.S.C. § 820(a)(1). However, the Secretary lacks the authority to propose a penalty after the issuance of a POV notice.

Furthermore, adjudicating a direct challenge to a section 104(e) POV notice would not only ignore the statutory language, but would conflict with the Act’s legislative history. In the Senate floor debate on the final bill, Senator Schweiker, an author of the POV provisions, was repeatedly asked by Senator McClure whether POV notices would be immediately and directly reviewable by a court. *Leg. Hist.* at 1080-81. Senator Schweiker responded that immediate judicial or administrative review would not be available but that POV notices would be reviewable before the Commission after a section 104(e) withdrawal (closure) order had issued. In particular, he stated that an operator would not have access to the courts after issuance of the POV notice because “[n]othing has happened to him yet.” *Id.* at 1080. He explained that the operator could seek Commission review with regard to a withdrawal order and the Commission could grant relief. This debate reveals that Congress not only considered the question of whether POV notices would be directly reviewable, but that the drafters decidedly intended to prohibit such review.

In its reply brief, Pocahontas points to judicial precedent indicating that the Commission has authority to review orders issued under section 103(k), 30 U.S.C. § 813(k), even though the statutory language is silent on the matter.⁹ However, unlike a section 104(e) POV notice,

⁸ Throughout the history of mine safety legislation, references to “orders” issued by the Secretary have generally been in the context of a withdrawal of miners or of mine closures. *See, e.g.*, sections 203 (a) and (c) of the Coal Act of 1952, 30 U.S.C. § 471 et seq. (1964) (repealed 1969); sections (a) and (b) of the Metal and Nonmetal Mine Act of 1966, 30 U.S.C. § 721 et seq. (1976) (repealed 1977); sections 103(f) and 104 of the Coal Act of 1969, 30 U.S.C. §801 et. seq. (1970) (amended 1977). However, withdrawal and closure are not always required, particularly where the Secretary has determined that there is no physical area affected or are any miners to withdraw. *See Mid-Continent Res., Inc.*, 12 FMSHRC 949, 951 n.4, 957 (May 1990).

⁹ Although the Secretary correctly asserts that Pocahontas did not raise the section 103(k) argument prior to its reply brief, we believe that this example of the Commission’s jurisdictional authority is sufficiently related as part of the larger reading of the Act’s structure and language, and therefore, should be considered. *See Oak Grove Res., LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011).

authority for Commission review of section 103(k) orders can be found in the Act’s legislative history. S. Conf. Rep. No. 95-181, at 13 (1977), *Leg. Hist.* at 601; *see also Am. Coal Co. v. U.S. Dep’t of Labor*, 639 F.2d 659, 660 (10th Cir. 1981); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 515 (8th Cir. 2012). In determining that the Commission possessed the requisite jurisdiction to review section 103(k) orders, the Tenth Circuit found support in its reading of the entire Mine Act, as well as the legislative history, which states that “an operator . . . *may appeal to the Commission the issuance of a closure order.*” *Am. Coal Co.*, 639 F.2d at 660, quoting, S. Conf. Rep. No. 95-181, at 13 (1977), *Leg. Hist.* at 601 (emphasis added). This language is particularly important, because a section 103(k) order, like a MSHA enforcement order, frequently does result in the withdrawal of miners through closure of an affected area. In contrast, a POV notice, by itself, cannot result in withdrawal or closure.

Accordingly, given the plain meaning of section 105(d), its relationship to section 104, and the Act’s legislative history, we conclude that a POV notice cannot be treated as a citation or order under the Mine Act.¹⁰

D. An operator may obtain Commission review of a POV notice during the contest of a related withdrawal order issued pursuant to section 104(e).

The Commission and the courts have consistently concluded that once jurisdiction has attached, section 105(d) unambiguously sets forth a broad grant of Commission authority to direct “other appropriate relief.” *North Am. Drillers*, 34 FMSHRC 352, 356 (Feb. 2012). Thus, “where the statute creates Commission jurisdiction, it endows the Commission with a plenary range of adjudicatory powers to consider issues, to make findings of fact and conclusions of law, and to render relief – in short, to dispose fully of cases committed to Commission jurisdiction.” *Drummond Co.*, 14 FMSHRC 661, 674 (May 1992); *see also Kaiser*, 10 FMSHRC at 1171; *Climax Molybdenum Co. v. Sec’y of Labor*, 703 F.2d at 452.

In the recent *Brody* decision, we held that in exercising our jurisdiction over section 104(e) withdrawal orders, the Commission may address a challenge to the validity of the POV rule underlying the withdrawal orders. 36 FMSHRC at 2035. The same is true for the instant case. Because the Commission has jurisdiction to review the section 104(e) withdrawal orders, its section 105(d) power to direct “other appropriate relief” grants us the requisite authority to address Pocahontas’ challenge to the POV notice in the context of those orders. *See Leg. Hist.* at 1080 (explaining that POV notices are reviewable before the Commission once a section 104(e) withdrawal order has issued).

¹⁰ Having concluded that we have no jurisdiction to directly review the POV notice received by Pocahontas, we do not reach its argument that it was deprived of procedural due process in this case because it could not immediately contest the POV notice. That argument can be raised by Pocahontas in a challenge to a section 104(e) withdrawal order involving a specific factual situation. We note that in *Brody* we concluded that an operator may obtain a hearing on a POV notice after it has received a section 104(e) withdrawal order and be afforded due process. 36 FMSHRC at 2044. We further note that, as evidenced by its numerous motions to reschedule or stay the hearings in the instant or related section 104(e) dockets, Pocahontas’ own actions delayed the adjudication of the very issue it sought review of here.

Therefore, the validity of POV Notice No. 7219153 is properly the subject of the proceedings containing the section 104(e) withdrawal orders and may be heard by the Commission during the contest of those orders.¹¹

IV.

Conclusion

For the reasons set forth herein, we conclude that the Commission does not have jurisdiction under section 105(d) to review a direct challenge to a POV notice independent of a section 104(e) withdrawal order. Accordingly, we affirm the Judge. This contest proceeding is dismissed for lack of jurisdiction.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

¹¹ As previously explained, the validity of the subject POV Notice was properly challenged and considered by a Commission ALJ alongside its contest of two related section 104(e) withdrawal orders in Docket No. WEVA 2014-395-R. *See* n.6, *supra*.

Commissioner Althen, concurring:

I concur with the majority in result only. I reach that result through a markedly different path.¹ Based upon the following considerations, I would find the validity of a POV determination is not justiciable unless and until MSHA issues a section 104(e) withdrawal order within the statutorily prescribed ninety day period.²

There is, of course, a strong presumption that agency action is reviewable. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977) (“*Abbott Labs.*”). However, that presumption is not absolute.

Principles of justiciability limit the types of administrative agency actions amenable to review. To be subject to review, the claimant’s dispute must be justiciable – that is, *inter alia*, the controversy must have ripened into a dispute concerning a final decision that has a direct and immediate impact upon the complainant. *Abbott Labs.*, *supra*. This element of justiciability serves “to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Id.* at 143-49.

In *Abbott Labs.*, the Court described ripeness as a flexible concept implicating consideration of (1) whether the matter was in a posture amenable to judicial review and (2) the hardship upon the parties stemming from withholding judicial consideration. The Court identified these factors, stating that “[t]he problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Id.* at 149.

The Court provided additional guidance regarding principles of the fitness for review in *Bennett v. Spear*, 520 U.S. 154 (1997).

As a general matter, two conditions must be satisfied for agency action to be “final”: First, the action must mark the “consummation” of the agency’s decisionmaking process, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which “rights or obligations

¹ I dissented in *Brody Coal Co.*, 36 FMSHRC 2027 (Aug. 2014), in which the Commission found that MSHA’s POV regulation is facially valid by holding that MSHA (1) did not violate the Administrative Procedure Act by failing to provide notice or opportunity to comment on the specific pattern criteria created by the regulation, and (2) does not deny due process by placement of an operator in POV status without having proved any S&S violation. Those issues are not before us in this case.

² In discussing mootness, the majority finds this case is not moot and, therefore, “remains justiciable.” Slip op. at 5 n.6. I agree in the sense that if the case were justiciable in the first instance, it would not now be moot.

have been determined,” or from which “legal consequences will flow.”

Id. at 178 (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

In *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), the Court again addressed factors related to ripeness for review. There, the Sierra Club challenged a Land and Resource Management Plan developed by the United States Forest Service. The Plan established logging goals but did not permit any specific logging activities. The Court found the case was not justiciable:

[T]he provisions of the Plan that the Sierra Club challenges do not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm. . . . [T]hey do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations.

Id. at 733 (citations omitted).

Following these precepts, federal courts have assiduously applied the principles of ripeness for review in considering the availability of judicial review of agency decisions. *Texas v. United States*, 523 U.S. 296, 300 (1998) (“A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’”), quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580–581 (1985) (quoting 13A Wright, Miller, & Cooper, *Federal Practice and Procedure* § 3532, at 112 (1984)); *National Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 809 (2003) (the regulation did “not create ‘adverse effects of a strictly legal kind,’ which we have previously required for a showing of hardship.”); *Joshi v. NTSB*, 791 F.3d 8, 13 (D.C. Cir. 2015) (“Before we may consider the agency’s action a final ‘order,’ the action must “determine rights or obligations or give rise to legal consequences”) (quoting *Safe Extensions, Inc. v. F.A.A.*, 509 F.3d 593, 598 (D.C. Cir. 2007)); *Minnesota Public Utilities Comm’n v. FCC*, 483 F.3d 570, 582–583 (8th Cir. 2007) (“The order only suggests the FCC, if faced with the precise issue, would preempt fixed VoIP services. Nonetheless, the order does not purport to actually do so and until that day comes it is only a mere prediction.”); *Meredith v. FMSHRC*, 177 F.3d 1042, 1047 (D.C. Cir. 1999) (“We have held repeatedly and across agency contexts that an order will be considered final to the extent that it ‘imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process.’”) (quoting *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C.Cir.1995) (quoting *State of Alaska v. FERC*, 980 F.2d 761, 763 (D.C.Cir.1992)).

Mindful of these principles, I turn to the first prong of *Abbott Labs.*, *supra.*, the ripeness of the issue for judicial determination. I conclude that an agency decision to designate an operator as a “pattern violator” does not impose any immediate obligations upon an operator.

Without doubt, a POV determination may have – indeed, is likely to have – serious legal consequences for an operator. However, such consequences arise if and only if the operator commits an S&S violation within 90 days following the determination. Whether the POV determination will affect an operator in a “concrete way” depends upon whether the operator commits an S&S violation within 90 days following the issuance of the notice of the determination. Consequently, a POV determination, standing alone, does not impose any new legal obligations or sanctions upon an operator.³

There is no doubt that the POV determination of which an operator receives “notice” is final from the standpoint of the agency. There is no appeal within MSHA from the POV determination. Review and reversal by the Commission is the only recourse, and an S&S violation within 90 days will result in issuance of a section 104(e) withdrawal order followed by the chain of 104(e) orders. However, the critical point here is that the heightened sanction does not apply immediately and concretely to future S&S violations.

Regarding the second prong of *Abbott Labs., supra.*, the hardship upon the parties, it would be disingenuous to ignore the reality of mine safety enforcement. One may reasonably infer that MSHA inspectors pay especially close attention during an inspection of an alleged “pattern violator.” Moreover, MSHA frequently issues S&S citations to virtually every operator. Therefore, once an operator has received notice of a POV determination, it very likely will receive an S&S citation within 90 days and experience the adverse consequences from the POV determination.

However, in considering hardship in the context of reviewing the agency determination, I also weigh the extent of hardship flowing from a delay of review until the issue has ripened into a concrete dispute with legal consequences. In this respect, within 90 days of issuance, a disputed POV determination will either fall by the wayside or ripen into a concrete and justiciable dispute.⁴ I do not dismiss the “hardship” of each day during which an operator is on a chain of

³ Senator Schweiker’s statement that when a POV Notice is issued “nothing has happened yet” goes to justiciability. *Legis. Hist.* at 1080. As the District of Columbia Circuit has observed: “Ordinarily, a claim that a challenge to an agency’s final legal position must await an enforcement proceeding is analyzed under the ripeness doctrine’s requirements that issues be fit for review and (in some cases) that deferral of review would pose significant hardship on the complaining party.” *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010).

⁴ The Commission has jurisdiction to grant declaratory relief if, “one or both of the parties have taken steps or pursued a course of conduct which will result in an ‘imminent and inevitable litigation, provided the issue is not settled and stabilized by a tranquilizing declaration.’” *Mid-Continent Res., Inc.*, 12 FMSHRC 949, 955 (May 1990), *quoting Bruhn v. STP Corp.*, 312 F. Supp. 903, 906 (D. Colo. 1970), *quoting* Borchard, *Declaratory Judgments* 57 (2d ed. 1941); *North American Drillers, LLC*, 34 FMSHRC 352 (Feb. 2012). In light of the annual issuance of literally tens of thousands of S&S citations, an operator might argue, unsuccessfully in light of the majority’s decision, that issuance of an S&S citation within 90 days is “inevitable” and delay serves no purpose. In this case, however, the operator neither sought a declaratory judgment nor proffered evidence that a section 104(e) withdrawal order is inevitable following an adverse POV determination.

withdrawal orders. However, an operator fearing the commencement of such chain during the 90-day period may begin immediately to review the asserted basis for the POV determination and marshalling facts, evidence, and arguments to rebut the basis of the POV determination.

In summary, prior to initial issuance of a section 104(e) withdrawal order, the impact of a POV determination is conditional. A dispute over the validity of the determination will either become moot or ripen into a concrete controversy within 90 days. For these reasons, I would find the operator's notice of contest to the POV determination filed prior to issuance of a section 104(e) withdrawal order does not present a justiciable controversy.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

February 22, 2016

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

v.

DRILLING AND BLASTING
SYSTEMS, INC.

Docket No. SE 2012-510-M

Before: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). At issue are two citations the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued on consecutive days to Drilling and Blasting Systems, Inc. (“D&B”), alleging that the contractor violated 30 C.F.R. § 56.7012.

The regulation, which states that “[w]hile in operation, drills shall be attended at all times,” is interpreted by the Secretary of Labor to require that a miner remain at the controls of an operating drill at all times, which was not the case in either of the cited instances here. The Administrative Law Judge refused to apply the Secretary’s interpretation, found that he had failed to meet his burden of proving violations, and vacated both citations. 35 FMSHRC 1453 (May 2013) (ALJ).

The Commission granted the Secretary’s petition for discretionary review. For the following reasons, we affirm in result the Judge’s decision vacating the citations.

I.

Factual and Procedural Background

A. D&B Drilling Procedures at Issue

In its contract operations, D&B uses 22 drills, primarily throughout North Carolina, South Carolina, and Georgia. In March 2012, it was drilling blast holes at Lucky Stone Corporation’s crushed and broken granite quarry in Pittsboro, North Carolina.

At the Lucky Stone Quarry, D&B was using an Ingersoll Rand DM30 drill, which is relatively large, is hydraulically operated, and trams on tracks similar to a bulldozer. The steel used in the drilling is contained in a mast structure, 30 to 40 feet in length, located in front of the

cab. The controls to the drill are located in an enclosed cab at the rear of the drill. Gov't Ex. 4, at 2 (photograph of drill).

Prior to starting the drill each day, the D&B drill operator, who usually worked alone, would conduct a preshift examination of the drill, particularly the drill steel and safety switches. After starting to drill a hole, a D&B drill operator would not remain in the drill's cab the entire time. The operator had other assigned responsibilities that he could not accomplish from inside the cab of the drill. Those duties included checking the surrounding ground conditions, which can change rapidly and destabilize a drill, possibly to such an extent that the drill could go over the mine's high wall. The drill operator would also check the drill's engine and compressor for leaks and other malfunctions.

B. The Two Citations

MSHA Inspector Cecil Worrell was conducting a regular inspection of the Lucky Stone Quarry on the evening of March 14, 2012, when he observed the D&B drill operator outside of the drill cab while the drill was in operation. At the time, the operator was walking towards the drill from a distance of approximately 18 feet. Worrell issued the first citation, No. 8720235, alleging that the drill was not being "attended" in violation of section 56.7012. The citation states that "[a] miner may suffer fatal injuries in the event the steel and/or bit becomes hung in the hole causing the steel to fragment under pressure." Because of language barriers with the drill operator, Inspector Worrell spoke by telephone with the drill operator's foreman to have the foreman instruct the operator that he had to always remain inside the cab of the drill, so as to be within arm's reach of the controls in the event of such an occurrence. Gov't Ex. 1.

Nevertheless, when Worrell continued his inspection of the quarry the next morning, he again observed the drill operator outside the cab of the drill while it was operating. This time the operator was sitting in the cab of a pickup truck that was parked approximately 20 feet from the drill facing away, before he left the truck and returned to the drill. Consequently, Worrell issued another citation, No. 8720237, almost identical to the one he issued the previous day. Gov't Ex. 3, at 1, Gov't Ex. 4 (pictures of truck and drill).

MSHA later proposed total penalties of \$1,080 for the two citations. D&B contested the assessment and the underlying citations on the ground that its operator was "attending" the drill from outside of the cab within the meaning of that term as it used in section 56.7012.

At the subsequent hearing, Inspector Worrell explained that he understood the purpose of section 56.7012 is "[t]o prevent accidents and situations from occurring." Tr. 31. He stated that he had never operated a drill, and was aware of no reason why a drill operator would need to leave the cab. He maintained that while MSHA had issued no written guidance interpreting "attended" with respect to a drill to mean within arms-reach of its controls, he recalled an MSHA Mine Academy instructor stating as much at a training class in 2008 or 2009.

The drill here had an automatic sensor to shut the drill down when it was under duress (Tr. 176-78, 210), and Worrell acknowledged that if drill steel gets hung up in a hole, the drill is supposed to stop. His concern, however, was that if the drill did not automatically shut down, the drill steel could fragment under pressure, explode, and spray steel shrapnel that could prove fatal should it strike any miner in the vicinity of the drill. He discussed having viewed the aftermath of

such a fragmenting incident where he was previously employed, at Ararat Rock Products in Mt. Airy, NC. There, according to Worrell, the drill operator had left the drill running while he left to use a portable restroom 300 yards away, across the pit (and thus was safely out of the range of the resulting shrapnel).

Worrell stated that a warning that fragmenting was occurring would “probably” be produced by the steel slowing down and then stopping, which would signal the miner at the drill’s controls to immediately shut the drill down. Tr. 51, 67. He estimated that it would have taken “several seconds” for the drill operator here, when he was 18 feet away from the drill, to get to the controls and shut the drill down in such an event. Tr. 33.

Four witnesses testified for D&B – Foreman Solin Hernandez (drill operator for 8 years), Operations Director and Safety Manger, Kirt Murray (16 years’ experience; drill operator and trainer), Brent Taylor (owner of D&B and drill operator from age 15), and Paul Earl, Jr. (expert witness on mechanical engineering and drilling). These witnesses testified, *inter alia*, that (1) drills are stable when in operation and are not designed for the operator to stay in the cab during operation; (2) they had never seen or heard of any fragmenting event as described by Inspector Worrell; (3) if a bit fragmented it would be contained underground; (4) MSHA had regularly inspected D&B’s drilling operations for years and never applied Inspector Worrell’s interpretation; (5) under “Best Practices,” drillers are instructed to monitor ground conditions constantly; (6) Inspector Worrell’s interpretation of the standard previously had been rejected by an MSHA Field Office Supervisor; (7) it is necessary for the drill operator to check and perform maintenance and carefully observe ground conditions while the drill is operating; and as a result, (8) the Inspector’s interpretation would create significant hazards for drilling operations.

C. Judge’s Decision

The Judge concluded that the term “attended,” as used in section 56.7012 was ambiguous on its face, as “[e]ither of the interpretations proposed [by the parties] could be envisioned.” 35 FMSHRC at 1460. She also found that the definition of “attended” in 30 C.F.R. § 56.2 (the definition section for Part 50) was ambiguous and dependent upon circumstances.¹ Nonetheless, she declined to defer to the Secretary’s interpretation that the term requires that a drill operator remain within arms-length of the drill controls, holding that the Secretary’s interpretation was erroneous in two respects and thus not worthy of deference. First, the Judge found the Secretary’s interpretation to be erroneous because in 2010, after an MSHA inspector had cited D&B for a violation of section 56.7012 at another mine, the inspector’s supervisor vacated the citation after speaking with D&B’s owner, who persuaded him that the contractor’s practice of having its operators leave the controls of drills was permissible under the regulation. *Id.* Second, the Judge found that the Secretary’s interpretation was erroneous because it would lead to “extraordinarily dangerous results.” *Id.* Considering the testimony provided by D&B’s representatives and weighing it against Worrell’s, the Judge concluded that a drill operator would be better able to attend to critical safety matters, such as ground control, and to every aspect of the performance of the drill, from outside the cab of the drill than from within. *Id.* at 1460-61.

¹ 30 C.F.R. § 56.2 defines “attended” to mean the “presence of an individual or continuous monitoring to prevent unauthorized entry or access.”

The Judge instead adopted D&B's interpretation of "attended" as permitting a drill operator to be anywhere within the blasting area where holes are being drilled. The Judge held that the Secretary had failed to carry his burden of proof, vacated both citations, and dismissed the case. *Id.*

II.

Disposition

The Secretary contends the Judge erred when she failed to accept the Secretary's interpretation of section 56.7012 as requiring the drill operator to be within immediate reach of the drill's controls while the drill is in operation. According to the Secretary, this is his authoritative interpretation of the standard, and thus due deference, regardless of any earlier interpretation that may have been used by an MSHA field supervisor. The Secretary maintains that the Judge also erred in concluding that the Secretary's interpretation would lead to dangerous results, in that any safety and operational issues that can only be addressed away from the drill's controls need not be the responsibility of the drill operator, but instead can be accomplished by a second miner assigned to the drill. The Secretary submits that his interpretation of "attended" in the regulation is consistent with accepted definitions of the term, while the interpretation applied by the Judge is not. Finally, the Secretary asserts that even if the Judge did not err in failing to defer to the Secretary's interpretation, she incorrectly concluded that the Secretary did not meet the burden of proof for the second citation, given that the Judge did not address evidence that the drill operator was sitting in a truck that was parked facing away from the drill.

D&B responds that the Judge correctly ruled that the Secretary's interpretation was erroneous and therefore not entitled to deference, in that it was inconsistent with the language of the standard. D&B also contends that there is sufficient evidence in the record to support the Judge's ruling that the drill operator was attending the drill at the time of the second citation.

The Commission permitted the filing of an amicus brief by the National Stone, Sand and Gravel Association ("NSSGA"), a trade association for the crushed stone, sand, and gravel industry. NSSGA submitted a brief supporting the Judge's determination that the Secretary's interpretation of "attended" was plainly erroneous and not entitled to deference. It argues that to defer to the Secretary's interpretation would necessitate sweeping changes in the drilling industry that would be financially detrimental and extraordinarily dangerous.

A. The Secretary's Interpretation that "Attending" a Drill Requires Drill Operators to Remain Within Arms-Reach of Drill Controls Is Plainly Erroneous.

We agree with the Judge and the parties that the term "attended" as it appears in section 56.7012 and section 56.2 is ambiguous with respect to the issue presented here. The standard requires that "[w]hile in operation, drills shall be attended to at all times." But the regulation is silent with regard to where the drill operator must be located to be considered to be "attend[ing]" an operating drill.

Section 56.2 defines "attended." As stated earlier, it provides that "[a]ttended means presence of an individual or continuous monitoring to prevent unauthorized entry or access."

Notably, however, the requirement in section 56.7012 that drills be “attended” was in section 56.7012 long before section 56.2 included a definition of “attended.”

In 2004, MSHA moved numerous definitions previously appearing in six separate subparts of Part 56 to section 56.2, to make them applicable to Part 56 in its entirety as long as they were consistent with definitions set forth in specific subparts. The revision moved “attended” and nine other definitions without change from Subpart E - Explosives to section 56.2. 69 Fed. Reg. 38,837, 38,838 (June 29, 2004). The definition of attended in section 56.2, therefore, originated as specifically applicable only to Subpart E of Part 56, “Explosives,”² and does not consider or address where an operator must be located in relation to a drill in order to be “present” while it is in operation. Therefore, the issue before us is whether we agree with or must defer to the Secretary’s interpretation that the regulation requires that an operator maintain a stationary presence in the cab of the drill when it is operating.

Ordinarily, we must defer to the agency’s interpretation of its own ambiguous regulation. *See Auer v. Robbins*, 519 U.S. 452 (1997). However, deference is inappropriate if the agency’s interpretation is not reasonable or when it is “plainly erroneous or inconsistent with the regulation” (*id.* at 461), or “when there is reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter.” *Christopher v. SmithKline Beecham Corp.* ___ U.S. ___, ___, 132 S. Ct. 2156, 2166 (2012) (internal quotations omitted) (citing *Auer*, 519 U.S. at 462). Here, for the reasons set forth below, we find the Secretary’s interpretation is plainly erroneous.

The Secretary, relying on the testimony of Inspector Worrell, argues that mine safety is furthered when the drill operator has constant “control” over the drill, which the Secretary contends can only be accomplished by having the drill operator physically at the controls in the cab of the drill. According to the Secretary, the drill operator should remain there in order to be able to immediately shut down the drill in the event of an emergency. PDR at 7 & n.3.³

² Thus, the portion of section 56.2 allowing attendance through “continuous monitoring” appears to have specific applicability to standards involving the storage of explosives (for which it was originally intended) and to be essentially irrelevant to this case. *See, e.g.*, 30 C.F.R. § 56.6133(a)(3) (powder chests must be “[l]ocked or attended when containing explosive material”); 30 C.F.R. § 56.6202(a)(7) (“[v]ehicles containing explosive material” must be “[a]ttended or the cargo compartment locked, except when parked at the blast site and loading is in progress”).

³ The Secretary also argues that, “[t]o prevent unauthorized entry of or access to the drill, a person must be within immediate reach of the cabin of the drill.” S. Reply Br. at 6. The Secretary points to no evidence in the record to support this assertion. On the other hand, D&B witnesses consistently testified that a drill operator would have a better view of the area immediately around the drill from outside of its cab than from within the cab at the controls. Tr. 105, 123, 162, 209. Further, the Secretary contends that the evidence of the drill operator being in the cab of the truck parked facing away from the drill demonstrates that the Judge erred in concluding that the operator was “attending” the drill. PDR at 11-12. Inspector Worrell,

(continued...)

The evidentiary record in this case, however, is replete with testimony, credited by the Judge, that a drill operator must accomplish a number of other safety-related tasks away from and outside of the cab of the drill. Foreman Hernandez testified that it is only from outside of the cab of the drill that ground conditions can be completely observed, and those ground conditions can change rapidly due to drilling and weather, affecting the drill's jacks and ultimately leading to a loss of drill stability. Tr. 110-11, 113-14, 144-45. Clearly this is information the drill operator needs to be aware of in order to head off emergency situations.

The Judge also credited Safety Manager Murray's testimony that a drill operator can best learn of and respond to problems arising with the drill, such as its oil and hydraulic lines leaking and those involving its compressor, by examining the drill from outside of the cab. 35 FMSHRC at 1456, 1460; Tr. 180-81. Murray also testified that leaving the drill cab permits the drill operator to hear any unusual noises from the belts and pumps that might indicate a potential problem. Tr. 174-75. In addition, the Judge credited Brent Taylor, D&B's long-time owner and chief executive officer, who testified that it is industry practice for drill operators in this country to remain outside of the cab of the drill much of the time the drill is in operation. 35 FMSHRC at 1458, 1460, Tr. 254-55.

In stark contrast, the Judge entirely refused to credit Inspector Worrell on the subject of safe drilling practices, taking into account Worrell's lack of experience in drilling. 35 FMSHRC at 1455 n.2, 1458, 1460 (citing Tr. 14, 32, 34). The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

We see no reason to disturb the Judge's credibility determinations here. Whereas, as noted by the Judge, D&B's witnesses all had many years of experience in drilling operations or the physics of drilling (35 FMSHRC at 1460), Worrell stated that he had never operated a drill and had passed on the opportunity to do so. Tr. 45. Even more importantly, Worrell testified that he was not aware of any reason a drill operator would need to leave the controls of the drill. Tr. 31. As explained at the hearing, however, there are a number of reasons why a drill operator would need to leave the cab to ensure a drill's safe operation. *See* 35 FMSHRC at 1455-59.⁴

³ (...continued)

however, could not state how long the operator was facing away from the drill, and the drill operator departed the truck and walked towards the drill upon Worrell's arrival. Tr. 80-82. Without evidence of how long the drill operator turned away from the operating drill, it is impossible to determine whether that would contradict the evidence establishing that the operator was otherwise present at the drill to prevent unauthorized access to it.

⁴ The Secretary's fallback position is that mines and drilling companies can assign a second miner to the tasks outside of the cab, in order that the operator can remain at the controls in the event of an emergency. PDR at 8. As we explain herein though, the Secretary failed to put on sufficient evidence to demonstrate why this is necessary. Moreover, NSSGA contends that if this were required, "mine operators and contractors would be forced to change decades of previously accepted safety, management, and personnel practices." NSSGA Br. at 17-18.

According to the citations, and expounded upon at some length by Inspector Worrell in his testimony, the drill operator needs to be able to instantaneously respond in the event drill steel begins to fragment. The Secretary contends that his interpretation of the regulation as contained in the inspector's citations and testimony in the hearing below, and as litigated by the Secretary in this case, is due deference as a reasonable interpretation. The Judge, however, entirely refused to credit Inspector Worrell regarding the prospect of drill steel fragmenting. 35 FMSHRC at 1455 n.2, 1460. We again see no error, given the inspector's lack of background in drilling.

The Judge specifically refused to give weight to Worrell's claim to have witnessed the aftermath of a drill fragmenting and the pieces exploding outward at the Ararat Rock mine, and we see no reason to disturb that finding either. The Judge concluded that Worrell was being evasive regarding the extent to which he was familiar with the details of the incident. *Id.* at 1455 n.2, 1460. Because the Judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

A review of even the few details of the incident on which Worrell was clear further supports the Judge's decision to refuse to give weight to Worrell's testimony regarding the Ararat Rock incident. Worrell described the drill steel there as "worn pretty bad." Tr. 63. In contrast, he stated that the D&B "drill and the steel were both in good condition," that he "had no issue with the integrity of the drill or the steel," and thus an incident such as the one described having occurred at Ararat Rock was unlikely to occur. Tr. 39.⁵

The Secretary attempted to justify Worrell's concern about the prospect of fragmenting steel by having him discuss an MSHA Fatalgram about an accident involving drill steel. Tr. 35-38; Gov't Ex. 7. The Judge rightly discounted the Fatalgram because it was based on a miner suffering fatal injuries while working to change drill steel. 35 FMSHRC at 1460. There is no evidence here that D&B ever intended to change the drill steel while the drill was operating without someone at the controls of the drill.⁶

In addition to refusing to credit any part of Worrell's account that drill steel can fragment, the Judge credited the contrary testimony of each of D&B's four witnesses, none of whom had ever heard of drill steel fragmenting as the result of the steel getting hung up in the ground as Worrell described. 35 FMSHRC at 1460; Tr. 120, 197, 258. One of those was D&B's expert

⁵ In addition, Worrell explained that the miner at Ararat Rock had left the drill running while he went some 900 feet away. Tr. 89. D&B's Hernandez testified that if a D&B drill operator had to travel 100 feet or more from the drill, he would shut the drill down. Tr. 153-54.

⁶ Nevertheless, at the hearing the Secretary argued that the accident was relevant because it shows the general need for a miner to be at the drill controls to stop the drill in the event of an emergency. The Fatalgram itself, however, does not go that far. It states only that while drill steel is being changed, mine operators should ensure that drill controls are in "easily accessible locations." Gov't Ex. 7.

witness in mechanical engineering and drilling, Paul Earl, Jr., who testified that never in his 50 years in the industry had he heard of drill steel fragmenting, and that the citations written by Worrell were based on a “completely erroneous” theory. Tr. 239, 248.

The Judge was justified in crediting the testimony of the operator’s witnesses experienced with drilling activities, and the testimony of the operator’s expert witness, as against the testimony of one inspector who had neither training nor experience with drilling operations. The Judge relied on testimony regarding the safety advantages of not requiring fixed stationing in the cab, the absence of any history of the type of incident described by the inspector, the lack of any enforcement history, and the different positions taken by MSHA in prior matters.⁷ When we put those factors together with the fact that the Secretary’s interpretation, based on the opinion of a single, inexperienced inspector, is not the most natural reading of the safety standard, there plainly is no basis for deference.

In light of the foregoing, based on the record in this case we decline to defer to the Secretary’s interpretation that “attended” in section 56.7012 means that a miner must be constantly at the controls of an operating drill. Such a reading is contrary to credited, competent testimony that exiting a cab advances safety, and that it is common practice within the industry for drill operators to do so. This leads us to conclude that this is an instance in which the agency’s interpretation of that standard, as supported by the evidence it presented at the hearing, is plainly erroneous.

B. Substantial Evidence Supports the Judge’s Determination that the Drill Operator was Attending the Drill.

In concluding that the Secretary’s interpretation of the standard is unreasonable, we agree with the Judge that the “operator’s interpretation of ‘attended’ [is] logical” (35 FMSHRC at 1461), and accordingly, we adopt it for purposes of this case. *See Twentymile Coal Co.*, 36 FMSHRC 2009, 2013 (Aug. 2014) (rejecting the Secretary’s interpretation of an insulation standard as unreasonable and adopting the operator’s interpretation). The operator defines “attended” here as “being within the area where the drilling is being done so that the drill operator can monitor the area for changing ground conditions destabilizing the drill jacks, malfunctioning of the pressured hoses, overheating, leaking, or other complications.” 35 FMSHRC at 1459.

Applying this standard to the facts presented here, the Judge concluded:

The Secretary has presented no evidence that the driller was not attending to his drill on either occasion cited here within the meaning of the standard as I have found. In the first instance the evidence is solely that he was 18 feet away from the drill

⁷ MSHA’s position as to this regulation has not been consistent. As the Judge noted, in 2010 an inspector issued a citation at another D&B quarry within the same MSHA region based on D&B’s practice of having the drill operator outside the cab when the drill was in operation. After D&B discussed its practice with the Field Office Supervisor, MSHA vacated the citation, finding that D&B was not in violation of the standard. 35 FMSHRC at 1457, 1460.

walking towards it. There is nothing that can be gleaned from that information indicating he was not observing the positioning of the drill or monitoring the ground conditions. Likewise, there was an adequate explanation provided by the Respondent as to why he would be in the pickup truck located within the blasting zone during drilling operations. By contrast the Secretary offered no evidence that he was not doing so.

Id. at 1461.

Substantial evidence⁸ supports the Judge's conclusion that the drill was attended on March 15.⁹ The Secretary did not meet his burden of showing that the operator failed to attend the drill (under the interpretation of "attend" that we adopt herein).¹⁰

Applying this interpretation, record evidence reflects that it would only have taken the drill operator a few seconds to get from the pickup truck (parked 20 feet away) to the cab of the drill, in case of an emergency. Tr. 33 (when drill operator stood 18 feet from the drill, in the event of an emergency it would take several seconds for him to get to the controls of the drill). In addition, one of the operator's witnesses, Murray (who had worked as a drill operator, director of operations, and safety manager), testified that the driller operator might have been sitting in the pickup truck to fill out the drill log, which must be completed for every hole drilled (Tr. 195, 214-15), or that he might have been getting ready to put water in the drill (which is why the truck was backed up to the drill). Tr. 143, 149-50 (testimony of supervisor that the drill operator was pumping water from his truck to the drill in order to reduce the dust), 215.

⁸ 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)).

⁹ Because the Secretary did not include an appeal of the Judge's evidentiary finding regarding the first citation issued on March 14, we do not address that issue.

¹⁰ This is somewhat understandable, given that the focus of the Secretary's case had been his insistence that to "attend" the drill, the drill operator must remain in reach of the drill's controls. Thus the inspector merely testified that the drill operator would not have been able to shut down the drill from the nearby pickup truck. Tr. 71-72.

Accordingly, we affirm in result the Judge's conclusion that the Secretary did not meet his burden of proof that the operator violated section 56.7012 on March 15, 2012.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision to vacate Citation Nos. 8720235 and 8720237.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

February 24, 2016

UNITED STEELWORKERS, LOCAL
NO. 5114, ON BEHALF OF MINERS

v.

HECLA LIMITED

Docket No. WEST 2012-466-CM

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). At issue is a claim for compensation for miners under the fourth sentence of section 111 of the Act.¹ This is a matter of first impression.

United Steelworkers, Local No. 5114 (“United Steelworkers”) brought the compensation claim in response to a failure by Hecla Limited to comply with an amendment to a section 103(k) order.² That failure caused miners to work underground during a period they should have been withdrawn. The Judge applied the statutory language to the amendment, and concluded that compensation was owed to 19 miners who, during the eight days between issuance of and compliance with the amendment, worked when they should have been withdrawn. 36 FMSHRC 3345 (Dec. 23, 2014) (ALJ); 37 FMSHRC 243 (Feb. 4, 2015) (ALJ). United Steelworkers

¹ The fourth sentence of section 111 states:

Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated.

30 U.S.C. § 821.

² Section 103(k) states in relevant part that, “[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the . . . mine.” 30 U.S.C. § 813(k).

contends that the statutory language applies to the entire section 103(k) order, and that compensation should be paid to the 218 miners idled by the order during the 19 months between issuance and termination of the order.

We conclude that the Judge correctly determined the compensation available under the fourth sentence of section 111.

I.

Factual Background

The relevant facts are undisputed. On November 16, 2011, a rock burst³ occurred in the 54 Ramp and 5900 main haulage travelways of an underground lead, zinc and silver mine, the Lucky Friday Mine, owned by Hecla. The Department of Labor's Mine Safety and Health Administration ("MSHA") issued section 103(k) Order No. 8605614, requiring withdrawal of miners from the affected area. MSHA subsequently modified the order several times to allow limited activity in the affected area. Amendment 3, issued on November 30, 2011, required the installation of stress gauges in the 5900 main haulage drift.⁴ Amendment 5, issued on December 6, 2011, in part required Hecla to monitor those stress gauges at the start and end of each shift, and to withdraw miners from the affected area in the event of detectable movement or cracking (i.e., geological stress) in the main haulage travelways.

On December 14, 2011, a second rock burst occurred in the 5900 pillar. Shortly after miners were withdrawn from the area, MSHA issued section 103(j) Order No. 8605622, which was then amended to a section 103(k) order. The order prohibited activity in all underground areas of the mine, including those addressed in Order No. 8605614. Order No. 8605622 was subsequently modified to allow access for repairs and abatement.

On December 21, 2011, MSHA issued a citation alleging that Hecla "worked in the face of" Order No. 8605614 by failing to perform the last stress gauge reading prior to the second rock burst. The citation notes that, if the reading had been taken, "it may have indicated high levels, which would have removed miners from the 2nd rock burst." 36 FMSHRC at 3350 n.10. The parties ultimately reached a settlement regarding this citation.

MSHA terminated both section 103(k) orders on June 12, 2013, upon determining that all related cited conditions had been abated.

³ A "rock burst" is "[a] sudden and often violent breaking of a mass of rock from the walls of a tunnel, mine, or deep quarry, caused by failure of highly stressed rock and the rapid or instantaneous release of accumulated strain energy. It may result in closure of a mine opening, or projection of broken rock into it, accompanied by ground tremors, rockfalls, and air concussions." Am. Geological Institute, *Dictionary of Mining, Mineral and Related Terms*, 464 (2nd ed. 1997).

⁴ A "drift" is "[a]n entry, generally on the slope of a hill, usually driven horizontally into a coal seam." *Id.* at 169.

II.

Procedural History

In December 2011, Hecla contested the two section 103(k) orders. United Steelworkers filed its compensation claim the following month. The compensation claim noted that Hecla had been cited for working in violation of Order No. 8605614, and sought compensation for all miners idled by the order between its issuance and termination.

The issue in Hecla's contest proceeding was whether MSHA acted in an arbitrary or capricious manner by maintaining Order No. 8605614 after Order No. 8605622 was issued, given that the later order encompassed all underground areas of the mine. The Judge noted testimony from MSHA inspectors that, while elements of the earlier order had been superseded, dangerous conditions still remained in the affected area. The Judge concluded that MSHA's decision to "spotlight" a particularly dangerous area that still required work was not arbitrary or capricious. 36 FMSHRC 2749, 2754 (Oct. 29, 2014) (ALJ). Hecla had argued that, because the later order made it impossible to comply with the earlier order, Order No. 8605614 was superseded, mooted and/or terminated when Order No. 8605622 was issued. The Judge noted that such arguments would be relevant in the related compensation claim, but found that they were not determinative in the contest matter. *Id.* at 2753 n.8, 2754 n.10.

After the Judge issued his decision in the contest proceeding, the parties filed motions for partial summary decision in the compensation proceeding, regarding all elements of the claim except the final dollar amount. In its motion, United Steelworkers clarified that its claim was brought under the fourth sentence of section 111, and arose when the operator failed to take the stress gauge readings required by Order No. 8605614.

The Judge issued an order detailing the scope of compensation available under the fourth sentence claim. 36 FMSHRC at 3354. The Judge concluded that Amendment 5 issued on December 6, 2011 was the relevant "order" with a nexus to the compensation claim. He reasoned that MSHA issued the citation for the violation of the section 103(k) order for Hecla's failure to monitor the stress gauges, which amendment 5 required. *Id.* at 3350. Accordingly, he concluded that compensation began on December 6, 2011, when the amendment was issued, and ended on December 14, 2011, when Hecla could no longer comply with the monitoring requirement of the amendment due to the issuance of Order No. 8605622. *Id.* at 3351. The Judge held that 19 miners were entitled to compensation because they worked in the affected area between Hecla's failure to take the reading and the withdrawal of miners after the second rock burst, and because they were working underground when they would otherwise have been withdrawn if Hecla had taken the stress gauge reading. *Id.* at 3353. Based on the Judge's order and the parties' stipulations, a final decision was issued ordering a total payment of \$13,150.48 to 19 miners. 37 FMSHRC at 245.

United Steelworkers filed a petition for discretionary review, which the Commission granted. In its petition, United Steelworkers claims the Judge erred by focusing on the amendment and limiting compensation to miners who worked between the triggering event (the failure to comply with the requirement to monitor the stress gauges), and the second rock burst, rather than fully compensating all miners idled by Order No. 8605614.

III.

Disposition

Section 111 provides a “graduated scheme of increasing compensation commensurate with increasingly serious operator conduct.” *Local Union 1261, District 22, UMWA v. Consolidation Coal Co.*, 11 FMSHRC 1609, 1613 (Sept. 1989), *aff’d*, 917 F.2d 42 (Oct. 1990). This scheme is both remedial and limited in nature, in order to balance the competing interests of miners and mine operators. The first two sentences provide compensation for time actually idled, not to exceed four hours, to all miners working a shift or scheduled to work the next shift when a section 103, 104 or 107 order is issued (“shift compensation”). The third sentence provides compensation, not to exceed one week, to miners actually idled by a section 104 or 107 order issued for a failure to comply with a mandatory standard. The fourth sentence provides that, “if an operator fails to comply with a withdrawal order issued under sections 103, 104, or 107, miners who otherwise would have been withdrawn are entitled to full compensation at their regular rates of pay, in addition to pay received for work performed after issuance of the order, until such time as the order is complied with, vacated, or terminated.” *Id.* at 1612-13.

Pursuant to the statutory language, compensation under the fourth sentence of section 111 involves three elements: (1) a triggering event – a violation, failure or refusal to comply with a section 103, 104 or 107 order; (2) the entitlement – full compensation in addition to pay received for all miners who would have been withdrawn or prevented from entering as a result of the order; and (3) the period of compensation – beginning with the issuance of the order and ending when the order is complied with, vacated, or terminated.

In the context of a failure to withdraw miners in violation of a section 103(k) order, the fourth sentence of section 111 entitles miners who worked in the face of the order to double compensation, for the period between the issuance of the order and withdrawal (compliance) or legal re-entry (vacation or termination). Here, the triggering event was a failure to comply with an amendment to a 103(k) order’s affirmative requirement to monitor stress gauges, rather than a direct violation of an order to withdraw. We find that the Judge properly determined the scope of compensation in this unusual circumstance, by focusing on the language, purpose, and unique elements of a fourth sentence compensation claim.

The first consideration is the determination of which order was violated when Hecla failed to monitor the stress gauges. The violation occurs “[w]henver an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act. . . .” The parties disagree as to whether the “order” with which Hecla failed to comply was Order No. 8605614, or Amendment No. 8605614-05. As discussed below, the Judge properly concluded that the amendment is the relevant “order” for determining the scope of compensation.

The Commission has held that there must be a causal nexus between the compensation sought and the designated order. *Local Union 781, District 17, UMWA v. Eastern Associated Coal Corp.*, 3 FMSHRC 1175, 1178 (May 1981) (finding that miners idled while a section 103(k) order was in place were not entitled to compensation, because they were idled pursuant to

a collective bargaining agreement rather than the order); *see also Local Union 1889, District 17, UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317, 1321-22 (Sept. 1986).

This causal nexus must do more than simply link the order to some form of lost pay. It must connect the order to the specific type of compensation provided by the sentence of section 111 under which compensation is sought. Shift compensation is only available to miners who were working or scheduled to work, but were withdrawn because the relevant order was issued. *Consolidation Coal*, 11 FMSHRC at 1616. Third sentence compensation similarly is “keyed to idlements resulting from section 104 or 107 withdrawal orders issued ‘for a failure of the operator to comply with any mandatory health or safety standards.’” *Local Union 2333, District 29, UMWA v. Ranger Fuel Corp.*, 10 FMSHRC 612, 620 (May 1988). Fourth sentence compensation, therefore, must also be “keyed” to the specific circumstances addressed therein; the relevant order must be connected to the violation, failure or refusal to comply which resulted in miners working when they should have been withdrawn.

The parties agree that this fourth sentence compensation claim arose due to Hecla’s failure to monitor stress gauges, and that if the stress gauges had been monitored at the proper time, miners would likely have been withdrawn due to detectable ground movement that could pose a danger to miners.⁵ The requirement to monitor stress gauges was created when Amendment 5 was issued, so it was a failure to comply with that requirement which resulted in miners continuing to work when they should have been withdrawn. Amendment 5 has the causal nexus to the circumstances entitling miners to compensation under the fourth sentence of section 111.

We reject United Steelworkers’ argument that the amendment cannot be an “order” because it is not an independent issuance and does not require withdrawal. We have previously held that a modification can support a compensation claim. *Local Union 1810, District 6, UMWA v. Nacco Mining Co.*, 11 FMSHRC 1231, 1236-37 (July 1989). Moreover, Amendment 5 does require the withdrawal of miners when high levels of geological stress are detected. Each sentence of section 111 provides for compensation in specific circumstances, and “order” must be interpreted consistently with that purpose.

The second consideration under the fourth sentence is determining the miners entitled to compensation. In this respect, the fourth sentence provides “. . . all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued . . .”

⁵ The failure to comply and its effect are documented in Citation No. 8565565. We note that while the relevant failure to comply was contained in a citation in this instance, a formal MSHA enforcement action is not necessary to establish a fourth sentence compensation claim. It is the violation, failure or refusal to comply with an element of a section 103, 104 or 107 order which gives rise to the claim. That triggering event may be established through an MSHA enforcement action or by other evidence of the operator’s failure or refusal to comply with the order.

The Judge correctly found that compensation was available to those miners who worked in the affected area after Hecla failed to monitor the stress gauges. The fourth sentence provides compensation to miners who would have been withdrawn if the order had been complied with, but instead performed work. 30 U.S.C. § 821 (miners who “would have been withdrawn . . . as a result of such order” are entitled to additional compensation beyond “pay received for work performed”). In other words, it compensates those miners who would not have been working but for the violation, failure or refusal to comply. If Hecla had complied by taking the required reading, miners working in the area very likely would have been withdrawn at that time. Instead, Hecla failed to take the reading, and the miners working in the area were not withdrawn until the second rock burst occurred. The Judge correctly limited compensation to those 19 miners who worked in the area, and thus were exposed to the hazard of another rock burst, when they should otherwise have been withdrawn pursuant to Amendment 5.

United Steelworkers argues that fourth sentence compensation also extends to all 218 miners idled as a result of Order No. 8605614 issued on November 16, 2011. Such an interpretation is not consistent with the fourth sentence, which provides for compensation where there has been a failure to comply with a withdrawal order (or, under the circumstances of this case, where there has been a failure to comply with an order and compliance would have resulted in withdrawing miners), and miners have been paid for work performed. The text provides compensation for miners who *were working* when they would otherwise have been withdrawn. *See Consolidation Coal*, 11 FMSHRC at 1613. This is consistent with the legislative history, which states that “where an operator failed to withdraw miners after the issuance of a withdrawal order, the miners *who worked despite the order* were entitled to their compensation for such work, and the compensation they would have been entitled to under this section if they had in fact been withdrawn.” S. Conf. Rep. No. 95-461, at 59 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1337 (1978) (emphasis added). Moreover, the first three sentences of section 111 already provide compensation to miners actually idled by a withdrawal order.⁶ Providing (potentially quite extensive) idlement compensation through the fourth sentence is inconsistent with the structure of section 111.

The third and final consideration under the fourth sentence is the period of compensation. In relevant part, the sentence provides compensation “. . . for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated”

Amendment 5 is the relevant “order” for calculating compensation. United Steelworkers asserts that the commencement date for compensation should be the date of the original order, November 16. We have held, however, that Hecla violated Amendment 5 issued on December 6. Consequently, the compensation period is properly considered to have begun when the

⁶ Hecla has represented to the Commission that miners actually idled by Order No. 8605614 were entitled to, and received, the proper shift compensation.

amendment was issued on December 6, 2011.⁷ While the date of compliance is less obvious, we confirm the Judge's determination that the compensation period ended at approximately 9:00 p.m. on December 14, 2011.

Compliance takes different forms in different contexts: for example, an operator may have to complete abatement, fulfill an affirmative requirement, and/or withdraw miners. The context here is a failure to comply, resulting in miners working when they should have been withdrawn. The simplest way to resolve a failure to comply is to resume compliance. Following this logic, the Judge reasoned that Hecla complied (or rather, ended its state of non-compliance) at 9:00 p.m. on December 14, 2011, when all miners were withdrawn from the affected area and when underground activity was prohibited by section 103(j) Order No. 8605622 so that the requirement to monitor stress gauges fell away.

United Steelworkers contends that the Judge's finding as to the date of compliance was precluded by his holding in the contest proceeding, and is not supported by the record. We find that both arguments rely on an assumption that Amendment 5 is not the relevant "order" for compensation purposes. Accordingly, we reject them.

United Steelworkers claims that in the contest matter the Judge effectively affirmed MSHA's determination that Order No. 8605614 was not fully abated until June 12, 2013, and therefore cannot conclude in the compensation matter that compliance occurred on December 14, 2011.⁸ The issue in the contest proceeding was whether the Secretary acted in an arbitrary or capricious manner by maintaining Order No. 8605614 in its entirety after December 14, 2011. The Judge did not (nor did he have any reason to) address compliance with Amendment 5 specifically. He was free to do so in the compensation proceeding. *See Ranger Fuel Corp.*, 10 FMSHRC at 620-21 (finding that a Judge could address causal nexus arguments in a compensation claim related to an uncontested citation, because the Judge would not have addressed the issue in an enforcement proceeding); *cf. Faith Coal Co.*, 19 FMSHRC 1357, 1365 (Aug. 1997) (noting that *res judicata* is inapplicable where the claims involved are not identical). A finding that Order No. 8605614 was not terminated until June 12, 2013 does not preclude a finding that the relevant amendment was complied with, for compensation purposes, on December 14, 2011.

⁷ Obviously, if Hecla had violated some other aspect of the relevant order, the commencement date could be different. For example, if Hecla failed to withdraw miners working in dangerous conditions and such failure was viewed as non-compliance with Order No. 8605614's requirement to ensure safety by withdrawing miners, the beginning date for compensation could be November 16, 2011. However, the parties agree that the "failure to comply" which triggered this claim was the failure to take stress gauge readings as required by the Amendment 5, not a failure to ensure miner safety as required by the order.

⁸ United Steelworkers also argues that the Judge was precluded from adopting Hecla's argument that Order No. 8605622 superseded, mooted or terminated the earlier order, because the Judge had already rejected those defenses in the contest matter. However, the Judge specifically noted that the defenses were non-determinative in the contest matter, and might be relevant to the compensation claim. 36 FMSHRC at 2753 n.8, 2754 n.10.

United Steelworkers argues that, as a factual matter, compliance was not achieved on December 14, 2011, because Hecla continued to work to abate conditions associated with Order No. 8605614 after that date. It is undisputed that all steps necessary for full compliance for the order *as a whole* was not fully achieved by December 14, 2011. However, it is also clear that the violation relevant to this compensation proceeding – the requirement to monitor stress gauges in Amendment 5 – fell away on December 14, 2011, when Order No. 8605622 prohibited all underground activity. As discussed above, the date of compliance is not based solely on the impossibility of continuing to monitor stress gauges, but also on the withdrawal of the 19 miners.

IV.

Conclusion

The fourth sentence of section 111 is intended to provide double compensation to miners who actually worked when, if not for the violation, failure or refusal to comply which triggered the compensation claim, they would otherwise have been withdrawn or prevented from entering the affected area. Consistent with this purpose, the Judge properly focused on Amendment 5 as the “order” with the appropriate nexus to the compensation claim, and limited compensation to those miners who, during the period between issuance of, and compliance with, the amendment, worked when they would otherwise have been withdrawn due to hazardous conditions caused by Hecla’s failure to monitor the stress gauges. Accordingly, we affirm the Judge’s decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

February 25, 2016

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

v.

REX COAL COMPANY, INC.

Docket Nos. KENT 2010-956
KENT 2010-990
KENT 2010-1087

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation and order to Rex Coal Company, Inc. after MSHA investigated a fire at the operator’s C-5 Mine. A Commission Administrative Law Judge upheld the citation, which alleged a violation of a reporting requirement.¹ He also upheld the order,

¹ 30 C.F.R. § 50.10 requires that:

The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving:

- (a) A death of an individual at the mine;
- (b) An injury of an individual at the mine which has a reasonable potential to cause death;
- (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
- (d) Any other accident.

For the purposes of section 50.10, the term “accident” includes, “[i]n underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery.” 30 C.F.R. § 50.2(h)(6).

which alleged a violation of a preshift examination standard.² 35 FMSHRC 2377, 2378-79, 2398-99 (Aug. 2013) (ALJ).

Rex Coal filed a petition for discretionary review, which we granted.³ We affirm the Judge's decision and conclude that: (1) the reporting violation is supported by substantial evidence; (2) the record evidence does not mitigate Rex Coal's penalty assessment for the reporting violation; and (3) the preshift violation is supported by substantial evidence.

I.

Factual and Procedural Background

The fire occurred on November 26, 2009, which was Thanksgiving Day. Only two miners, Billy Joe Clem and foreman Anthony Coots, were working underground, and a security guard was on duty at the surface. Coots arrived at the mine before Clem. He testified that he conducted a preshift examination, placing his first preshift date, time and initials ("DTIs") at 4:45 a.m. 35 FMSHRC at 2406; Sec'y Ex. 26. He placed additional DTIs at 4:55, 5:02, 5:08, and later. 35 FMSHRC at 2406. Thereafter, Coots met Clem at the surface, and the two miners headed underground to begin the shift. After doing some work with Clem, Coots went to the #3 tailpiece to install skirting, which required burning holes in the metal. While he was working on the tailpiece, a carbon monoxide alarm went off, and the guard called Coots for help shutting down the alarm. Coots traveled to the surface, shut off the alarm, and went back underground. *Id.* at 2380, 2384, 2385.

No later than 10:45 a.m., Coots encountered an orange glow and heavy smoke around the #3 tailpiece. At that point, Coots knew there was a fire. *Id.* at 2380, 2384, 2387. After attempting to put it out, he began to search for Clem, working his way back and forth across all six entries on foot until he reached the surface. This took about 40 minutes. Once he reached the surface, Coots called his father, who was a foreman at another mine, and Rex Coal's bookkeeper, Joe Reece, to tell them what was happening. *Id.* at 2380, 2384, 2385-86, 2389.

Coots' father and a few other miners arrived soon after Coots' call and began preparing to enter the mine and search for Clem. Before they went underground, Clem called out to the surface on the mine phone. Coots answered the phone, told Clem that there was a fire, and instructed him to get to the intake. Coots and the other miners then went underground, picked up Clem, and put the fire out. *Id.* at 2380, 2384-86.

During these events, Coots never contacted MSHA. *Id.* at 2382, 2386. Although the Judge found that Rex Coal employee Lewis Blevins may have tried to contact the agency around

² 30 C.F.R. § 75.360(b) requires that "[t]he person conducting the preshift examination shall . . . test for methane and oxygen deficiency" in several locations, including "areas where work or travel during the oncoming shift is scheduled."

³ The Commission did not grant review of another order affirmed as written in the Judge's Decision: Order No. 8401220 alleged a violation of 30 C.F.R. § 75.1501(a) for failure to have a responsible person in attendance when miners were working underground.

11:54 a.m., MSHA officials heard about the fire on a news report. They immediately sent inspectors to the mine to investigate. During MSHA's accident investigation, Inspectors Arthur Jackson and Charles Ramsey interviewed Coots and traveled underground to the accident site. MSHA also took into custody the Solaris multi-gas detectors used by Coots, Clem, and Mine Superintendent Tim Johnson. These instruments, which are referred to as "spotters," monitor the concentrations of certain gases in the atmosphere and are used to perform methane checks during preshift examinations. 35 FMSHRC at 2400, 2403. Carla Marcum, a geologist in MSHA's roof control division, downloaded stored information from these spotters. However, Clem's spotter did not download properly. After analyzing the spotter data, Marcum determined that Coots had not turned on his spotter until 5:10 a.m. at the earliest on the day of the fire – that is, 25 to 30 minutes after Coots entered his first DTI initials in the mine. *Id.* at 2400-02.

Based on the results of its investigation, MSHA issued the citation and order at issue in this case. Citation No. 8401221 alleges a violation of 30 C.F.R. § 50.10, which requires the operator to contact MSHA within 15 minutes if an unplanned mine fire has burned for more than 10 minutes. The citation stated that MSHA was not immediately notified of the fire. MSHA also issued Order No. 8355742. This order alleges a violation of 30 C.F.R. § 75.360(b), which requires the preshift examiner to test for methane and oxygen deficiency as part of the preshift examination. The preshift order was issued because Coots' first DTIs were placed at 4:45 a.m., but the spotter data as interpreted by Marcum showed that his spotter was not turned on until 5:10 a.m., making it impossible for Coots to have checked all of the areas he said he had examined for methane. *Id.* at 2398-99.

The Judge upheld both violations. He found that Rex Coal violated section 50.10, and that the violation involved high negligence because the operator knew or should have known to contact MSHA when a fire burned for over 10 minutes, and there were no mitigating circumstances. The Judge also found that the violation was significant and substantial ("S&S").⁴ In light of these findings, he determined that the Secretary's proposed penalty of \$18,271 was justified and assessed the penalty in that amount. *Id.* at 2387-91.

The Judge also concluded that Rex Coal violated section 75.360(b) because the Secretary provided credible evidence that the operator did not test for methane and oxygen during the preshift examination. He found Rex Coal's evidence less credible than the Secretary's evidence. Additionally, the Judge found that the violation involved high negligence because Coots knew or should have known that the spotter was not on. He also determined that the violation was S&S and an unwarrantable failure to comply.⁵ The Judge assessed the proposed, specially-assessed penalty of \$44,600. *Id.* at 2406-10.

⁴ 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."

⁵ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

II.

Disposition

A. Citation No. 8401221 – The Reporting Citation

1. Whether the Judge’s finding of a violation is supported by substantial evidence.

Rex Coal argues that this citation should not have been issued. According to the operator, for Coots to have gone to the surface to call MSHA instead of searching for Clem would have been futile because, if the fire had been spreading, Clem would have died before MSHA was prepared to respond to the accident. It also asserts that calling the guard and asking him to report the fire would have violated section 50.10 because the guard is not an agent of the operator. Finally, Rex Coal claims that the greater hazard defense applies to this citation.

We review this citation under the substantial evidence standard. “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)). The Commission has also 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).

Section 50.10, read together with the definition of “accident” in section 50.2(h)(6), requires mine operators to notify MSHA within 15 minutes if an unplanned fire has burned for more than 10 minutes. Rex Coal does not dispute that there was a fire, that Coots knew about the fire, that the fire was not put out within 10 minutes of the time Coots learned of its existence, and that no attempt to contact MSHA was made until 11:54 a.m., more than an hour after Coots discovered the fire at or before 10:45 a.m. All of these uncontroverted findings are supported by substantial evidence in the record.

Because Rex Coal did not notify MSHA within the 15-minute time frame set out by section 50.10, a violation has been established. While we acknowledge that Coots was in a difficult position when he discovered that the belt was on fire and did not know where Clem was, the operator’s argument poses a false choice between going to the surface to call MSHA and searching the mine for Clem. Although the Judge correctly found that the security guard was not an “agent” of the operator,⁶ he determined, quite sensibly, that MSHA was unlikely to reject a

⁶ According to section 3(e) of the Mine Act, an “agent” of the operator is “any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine.” 30 U.S.C. § 802(e). There is no evidence in the record that the security guard’s job involved any of these functions.

notification of a fire simply because it came from a security guard instead of a member of mine management. The Judge also properly found that the guard could also have contacted other company officials who could have called MSHA. 35 FMSHRC at 2388. Section 50.10 imposes an affirmative duty on the operator to report accidents immediately within 15 minutes, and Rex Coal failed to do this.

Rex Coal further asserts before the Commission that the citation should be vacated because it has proven the elements of the greater hazard defense.⁷ However, Rex Coal did not present the greater hazard defense before the Judge. Although the elements of the greater hazard defense are closely intertwined with the evidence that the operator put on before the Judge, there is no reference to the defense in the prehearing pleadings, the hearing transcript, or the posthearing briefs. Nor was the defense argued anywhere in the record. Thus, the defense was not “presented below in such a manner as to obtain a ruling.” *Gray v. North Star*, 27 FMSHRC 1, 6 (Jan. 2005) (quoting *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320 (Aug. 1992)). Consequently, the Commission will not consider it on appeal.⁸

The fact of violation has been established by uncontroverted evidence, and the operator’s arguments do not constitute grounds for overturning the citation. Accordingly, we affirm the Judge’s decision that the operator violated 30 C.F.R. § 50.10.

⁷ To invoke the greater hazard defense, the operator must prove all three of the following elements: (1) the hazards of compliance are greater than non-compliance; (2) alternative means of protecting miners are unavailable; and (3) a modification proceeding under section 101(c) of the Mine Act would not have been appropriate. *Westmoreland Coal Co.*, 7 FMSHRC 1338, 1341 (Sept. 1985) (citing *Penn Allegh Coal Co.*, 3 FMSHRC 1392 (June 1981); *Sewell Coal Co.*, 5 FMSHRC 2026 (Dec. 1983)). In order to prove that there were no alternative means of protecting miners available, the operator must show that other means of compliance were at least considered. *Westmoreland*, 7 FMSHRC at 1342.

⁸ Moreover, even if the Commission were to consider the argument, the record shows that the operator has not established the greater hazard defense. The Judge found that alternate means of protecting miners were available because Coots could have called out to the guard and instructed him to either report the matter to MSHA or contact a member of mine management who could report the incident. 35 FMSHRC at 2388. This finding shows that the hazards of compliance were not greater than the hazards of noncompliance; setting the notification process into action by calling the guard would have allowed Coots to continue his search for Clem while still complying with the law. There is also no evidence that other means of compliance were considered. Coots testified that it never occurred to him to call out to the guard because he was focused on finding Clem. Tr. 208.

2. Whether the Judge disregarded mitigating evidence in his penalty assessment.

Rex Coal argues that the Judge erred in his penalty assessment by disregarding mitigating evidence, including statements made by the inspectors and special circumstances on the day of the fire. Although Rex Coal complains about the alleged harshness of the penalty assessed for violating section 50.10, it does not focus on the specific factors to be considered in assessing a penalty. In any event, as discussed below, the Judge properly determined that mitigation was not warranted.

According to Rex Coal, statements by Inspectors Jackson and Ramsey show that they approved of Coots' decision to search for Clem instead of contacting MSHA. Rex Coal claims that this calls into question the credibility of the inspectors' negligence and gravity designations and MSHA's proposed penalties for all of the citations issued in relation to the accident. The operator stresses Jackson's statement that "I do not have a problem with what [Coots] did." Tr. 84. The operator also points to a statement by Inspector Ramsey as evidence that MSHA approved of Coots' actions: "Okay. Well, Mr. Coots, again, we appreciate your time and realize—hate that you went through what you did, and we appreciate your efforts and what you—what you did first of all to take care of the safety of the mine." Tr. 182.

The Judge found that in context, the inspectors' comments do not show "endorsement of Coots' actions or a belief that he acted correctly." 35 FMSHRC at 2389. After reviewing the record, we find that the Judge's conclusions about the inspectors' statements are supported by substantial evidence. As the Judge points out, immediately after saying that he did not have a problem with what Coots did, Jackson stated that, "I have a problem because he didn't do what he was required to do." 35 FMSHRC at 2389 n.13 (quoting Tr. 84). Jackson's testimony suggests that he would have had no problem with Coots searching for Clem if he had first notified the guard of the fire, his own location, and his plan to search for Clem. Tr. 80-81. It does not indicate that Jackson approved of Coots' failure to contact the guard or MSHA. *See* Tr. 80-85. Ramsey's statement was taken from an interview transcript and presented with little context beyond the fact that it was made at the end of one of Ramsey's interviews with Coots. Tr. 181-82. A reasonable factfinder could certainly conclude that Ramsey's comment was not intended to convey his support for all of Coots' actions on the day of the fire.

The operator's second mitigation argument is that Clem "did the right thing" by searching for Coots, and that his decision to search for his fellow miner should mitigate the severity of the penalty, or even justify vacating the citation. PDR at 23. The Judge addressed this argument and properly concluded that Coots' decision to search the mine for Clem instead of contacting MSHA was negligent in spite of Coots' good intentions. The Judge correctly identified the root of the problem as the operator's poor staffing choices on the day of the fire. *Id.* at 2388. These staffing choices put two miners in a dangerous situation: working separately underground; outside of close contact with the surface or each other; cutting with torches; working on a holiday when the rest of mine management is harder to contact; and without an emergency plan appropriate to the circumstances or available staff. These deviations from a normal workday put Coots and Clem in a position where it was difficult to comply with the law and get help in an emergency.

In *Wolf Run Mining Co.*, the Commission discussed the importance of strictly adhering to emergency plans and MSHA regulations in the “difficult and frantic” moments after a mining accident. 35 FMSHRC 3512, 3518 (Dec. 2013). The Commission also pointed out that an emergency plan should be self-executing in order to account for accidents that occur after business hours or on holidays. *Id.* at 3519 n.10. Although Coots found himself in a difficult situation on the day of the fire, he did not take the necessary steps to deal with the situation, which suggests that he had not been prepared to deal with it. Because a rescue team cannot assemble until it knows about an emergency, it is imperative to follow the law and notify MSHA immediately so that help can arrive as quickly as possible. Coots knew that he could use the mine phone to contact the guard at the surface. By not calling out to the surface to let the guard know what was going on and where he was going, and to instruct the guard to make the necessary calls to get help, Coots imperiled both himself and Clem.

The Commission’s Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i).⁹ *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984)). We find that the Judge properly considered the penalty factors set out in section 110(i). As a result, we uphold the Judge’s penalty assessment of \$18,271 for Citation No. 8401221.

B. Order No. 8355742 – The Inadequate Preshift Order

Rex Coal argues that Order No. 8355742, the preshift violation, is not supported by substantial evidence. The operator claims that the Judge improperly credited MSHA’s method of determining what time Coots’ spotter was turned on during the day of the fire, and erroneously disregarded evidence that undermines the accuracy of the time adjustment methods used by MSHA geologist Carla Marcum.

We review this order under the substantial evidence standard. In addition, the resolution of the issues involving this order depends heavily on credibility determinations. A Judge’s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge “has

⁹ Section 110(i) sets forth the six criteria to be considered in the assessment of penalties under the Act:

[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).

an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff’d sub nom., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

When the Judge considered MSHA’s time adjustment method, he credited Marcum’s testimony and found that her calculated times were accurate. Marcum’s testimony about her training and experience was specific and credible, and the times she arrived at using the time adjustment method are consistent with the record evidence and witness testimony. In contrast, the Judge did not find Coots’ testimony to be credible. Coots’ credibility suffered because his testimony about the time he entered the mine contradicted the times that he told the inspectors during the investigation that he entered the mine and placed his first DTIs. It also contradicted the DTIs that he placed in the mine on the day of the fire. 35 FMSHRC at 2406; Tr. 204; Sec’y Ex. 26.

Rex Coal argues that Coots’ spotter experienced “time drift,” making it impossible for Marcum’s time adjustment method to accurately determine when Coots’ spotter was first activated on the morning of the fire. In support of this argument, the operator introduced an MSHA study conducted after the Upper Big Branch disaster as evidence that a phenomenon known as “time drift” makes the clocks on Solaris spotters inherently unreliable. This study was done on multi-gas detectors recovered from the Upper Big Branch disaster. However, it does not show that the clocks on all or even most Solaris spotters are unreliable and can “drift” randomly. Res. Ex. 1 at 3. Instead, the study shows that erratic time readings were an anomaly found in only one of the many Solaris spotters recovered after the accident. Res. Ex. 1 at 10.

The operator also lists all of the first shift starting times from the printout of Coots’ spotter, which varied widely. According to the operator, because the activation times showed so much variance even though Coots worked the same shift each day, Coots’ spotter had experienced “time drift” and did not keep accurate time. The Judge considered this evidence and found it unpersuasive because the operator did not present any evidence beyond Coots’ testimony to verify that Coots actually arrived at the mine and turned on his spotter at the same time every day. 35 FMSHRC at 2407-08. The Judge did not find Coots’ testimony credible, and nothing else in the record makes it more likely than not that Coots arrived at the mine and turned on his spotter at the same time every day. In light of these considerations, the Judge’s conclusion that Coots’ spotter did not experience “time drift” is supported by substantial evidence.

Finally, the operator argues that the data retrieved from Clem’s spotter, as opposed to Coots’ spotter, undermines the Secretary’s theory about when Coots turned on his spotter. The operator points out that Marcum’s time adjustment method shows that Clem’s spotter was turned on at 5:15 a.m., which is 20-25 minutes before Clem arrived at the mine. Tr. 199; Res. Ex. 3 at 6. According to the operator, this shows that the Secretary’s time calculation method is fundamentally inaccurate and shows that Marcum simply “disregarded” evidence that undermined her theory. At the hearing, however, Marcum testified that she could not use the information she downloaded from Clem’s spotter because there was something wrong with the spotter itself. Tr. 105-07. In his opinion, the Judge credited Marcum’s testimony about the

problems with Clem's spotter. 35 FMSHRC at 2408. The Judge also relied on Marcum's experience and training when he determined that there was no reason to doubt her testimony that the information from Clem's spotter was not usable. *Id.*

The record provides no basis for overturning the Judge's credibility determinations for either witness. As a result, we find that the Secretary adequately proved that Coots' spotter was not turned on until 5:10 a.m., well after Coots began his preshift examination. The Judge's decision with regard to Order No. 8355742 is supported by substantial evidence. Accordingly, we affirm the Judge's decision that the Secretary has established a violation of 30 C.F.R. § 75.360(b).

III.

Conclusion

We affirm the Judge's decision upholding Citation No. 8401221 and Order No. 8355742 in all respects.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710

February 1, 2016

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

v.

APOGEE COAL COMPANY, LLC

Docket No. WEVA 2014-632
A.C. No. 46-08939-335027

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 5, 2014, the Commission received from Apogee Coal Company, LLC (“Apogee”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on November 7, 2013, and became a final order of the Commission on December 9, 2013. MSHA records also indicate that Apogee received a delinquency notice dated January 23, 2014. The operator asserts that it failed

to timely contest the proposed assessment due to a “clerical error,” but does not provide any details as to the alleged error. The only justification offered is that the failure to timely file occurred as a “result of inadvertence or mistake.” This assertion was made by Apogee’s counsel, without any supporting affidavit or declaration by a person with direct knowledge of the alleged “inadvertence or mistake.” Although the Secretary does not oppose the motion to reopen, he states that the operator did not file the motion to reopen until one month after it had received the delinquency notice. The operator does not offer any explanation for this delay.

We deny the operator’s motion to reopen because the operator has failed to establish good cause to justify reopening. Specifically, we find relevant the absence of any explanation for the failure to contest the proposed assessment other than an unverified claim that it was the “result of inadvertence or mistake.” This statement, by itself, is insufficient to constitute good cause for reopening. First, it lacks any description of the alleged “inadvertence or mistake.” The phrase “inadvertence or mistake” is a legal conclusion which merely parrots grounds for granting relief from a final judgment, as contained in Rule 60(b)(1) of the Federal Rules of Civil Procedure. In order to consider a motion to reopen a proposed assessment by MSHA which has become a final order because of the operator’s failure to timely contest the proposed assessment, the Commission must be informed of the facts and circumstances which constitute the alleged “inadvertence or mistake.” *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010); *see also, Eastern Assoc. Coal Co.*, 30 FMSHRC 392 (May 2008) (holding that operator’s “conclusory statement that its failure to timely file was due to ‘clerical error’ does not provide the Commission with an adequate basis to justify reopening”).

Second, the allegation of “inadvertence or mistake” is a statement by Apogee’s counsel, who has no direct knowledge of the facts and circumstances. As the Commission noted in *Higgins Stone*, “[a]ffidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen.” 32 FMSHRC at 34.

We also find relevant Apogee's failure to provide any explanation for why it took over 30 days to file the motion to reopen upon receiving the delinquency notice. *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009) (finding relevant the amount of time that has passed between the operator's receipt of a delinquency notice and the operator's filing of its motion to reopen.); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17.

Therefore, we deny the motion to reopen.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

February 10, 2016

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of THOMAS MCGARY and RON
BOWERSOX

v.

THE MARSHALL COUNTY COAL CO.,
McELROY COAL CO., MURRAY
AMERICAN ENERGY, INC., and
MURRAY ENERGY CORPORATION¹

Docket No. WEVA 2015-583-D

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY: Jordan, Chairman; Young and Cohen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On December 22, 2015, the Commission issued a direction for review of an Administrative Law Judge’s November 18, 2015 decision in the captioned proceedings. The direction for review granted the petition filed by the Secretary of Labor as well as the joint petition for review filed by The Marshall County Coal Company, McElroy Coal Company, Ohio County Coal Company, Consolidation Coal Company, Harrison County Coal Company, Monongalia County Coal Company, Marion County Coal Company, Murray American Energy, Inc., and Murray Energy Corporation (referred to collectively herein after as “the respondents”).

¹ Additional captions in these cases are listed in Appendix A to this order.

These proceedings concern complaints that the respondents interfered with the rights of miners to make safety complaints to MSHA pursuant to section 103(g) of the Mine Act.² The Secretary alleges that respondents announced to miners that if they contacted MSHA with a safety complaint, they needed to provide that complaint to mine management as well.

In her November 18, 2015 decision, the Judge concluded that the Secretary demonstrated that the respondents had in fact interfered with miners' statutory rights in violation of section 105(c) of the Mine Act.³ As a remedy, the Judge ordered that the respondents do the following: cease and desist from violating section 105(c); rescind their policy requiring that miners provide notice to management about any complaint made pursuant to section 103(g); rescind any adverse action that has been taken against any miner as a result of that policy; post a notice detailing a miner's right to make complaints pursuant to section 103(g); and for respondents' CEO Robert Murray to personally read a statement notifying miners of their section 103(g) rights. In addition, the Judge assessed a civil penalty of \$30,000 for each of the five violations found pursuant to her authority under section 110(i), 30 U.S.C. 820(i).

On December 18, 2015, the respondents filed a motion to stay the effect of the Judge's decision during the pendency of the appellate proceedings. They request that the Commission

² Section 103(g) provides miners with the right to make anonymous safety complaints to MSHA. 30 U.S.C. § 813(g). It states:

Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

³ Section 105(c) provides that "no person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . ." 30 U.S.C. § 815(c).

stay the Judge's orders during the Commission review process, as well as during any appeal of the Commission's decision to a United States Court of Appeals. The Secretary does not oppose the request for a stay pending a final decision of the Commission; however, the Secretary opposes the request for a stay during any subsequent appeal to a Court of Appeals.

In *Sec'y of Labor ex rel. Price and Vacha v. Jim Walter Res., Inc.*, 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay must satisfy the factors in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Those factors include: (1) likelihood of prevailing on the merits of the appeal; (2) irreparable harm if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. A stay constitutes "extraordinary relief." *Id.* The burden is on the movant to provide "sufficient substantiation" of the requirements for the stay. *Stillwater Mining Co.*, 18 FMSHRC 1756, 1757 (Oct. 1996).

With respect to the civil penalty, the Commission has recognized that "economic loss does not, in and of itself, constitute irreparable harm." *UMWA on behalf of Franks v. Emerald Coal Res.*, 35 FMSHRC 2373, 2374 (Aug. 6, 2013) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). However, the Secretary has not opposed the request to stay the civil penalty, and will not be prejudiced by a stay pending appeal. Accordingly, we grant a stay of the payment of the civil penalty.

Furthermore, we conclude that the remedial measures ordered by the Judge are consistent with the public interest. However, we are mindful of the uniquely personal nature of one aspect of the remediation ordered by the Judge, and the fact that the stay is not opposed by the Secretary. In recognition of these additional considerations in this case, we have decided to grant a stay of the portion of the Judge's order requiring Mr. Murray to read the prepared statement. With the exception of the specific aforementioned aspects of the relief ordered in the November 18, 2015 decision, the motion is denied.

The motion to stay during a subsequent appeal of a Commission decision is also denied as being premature.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

Commissioners Nakamura and Althen, concurring in part and dissenting in part:

Except for that portion of the motion that requests a stay during any future appeal to a circuit court, neither the Secretary nor miners (represented by the United Mine Workers of America) filed an objection to the stay motion. For that reason we would grant it, except for the portion that would grant a stay during any future appeal.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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

Appendix A

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of RICK BAKER and RON
BOWERSOX

v.

OHIO COUNTY COAL CO.,
CONSOLIDATION COAL COMPANY
MURRAY AMERICAN ENERGY, INC.,
AND MURRAY ENERGY CORPORATION

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of ANN MARTIN and RON
BOWERSOX

v.

HARRISON COUNTY COAL CO.,
CONSOLIDATION COAL COMPANY
MURRAY AMERICAN ENERGY, INC.,
AND MURRAY ENERGY CORPORATION

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of RAYMOND COPELAND and RON
BOWERSOX

v.

MONONGALIA COUNTY COAL CO.,
CONSOLIDATION COAL COMPANY
MURRAY AMERICAN ENERGY, INC.,
AND MURRAY ENERGY CORPORATION

Docket Nos. WEVA 2015-584-D
WEVA 2015-585-D
WEVA 2015-586-D
WEVA 2015-587-D

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on behalf
of MICHAEL PAYTON and RON
BOWERSOX

v.

MARION COUNTY COAL CO.,
CONSOLIDATION COAL COMPANY
MURRAY AMERICAN ENERGY, INC.,
AND MURRAY ENERGY CORPORATION

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

February 10, 2016

UNITED MINE WORKERS OF AMERICA
(UMWA), on behalf of MARK A. FRANKS

v.

Docket No. PENN 2012-250-D

EMERALD COAL RESOURCES, LP

UNITED MINE WORKERS OF AMERICA
(UMWA), on behalf of RONALD M. HOY

v.

Docket No. PENN 2012-251-D

EMERALD COAL RESOURCES, LP

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket Nos. PENN 2013-305
PENN 2013-306

EMERALD COAL RESOURCES, LP

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY: Young, Cohen, and Althen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and involve complaints of discrimination filed by the United Mine Workers of America (“UMWA”) on behalf of Mark A. Franks and Ronald M. Hoy pursuant to section 105(c)(3) of the Mine Act. After a hearing on the merits of the complaints, a Commission Administrative Law Judge concluded that Franks and Hoy demonstrated by a preponderance of the evidence that they had been discriminated against as a result of their participation in activities protected by the Mine Act and in violation of section

105(c).¹ 35 FMSHRC 1696 (June 2013) (ALJ). The Judge ordered backpay for the complainants.² *Id.* at 1707.

Emerald then petitioned the Commission for review of the Judge's decision, which the Commission granted. On review, a majority of the Commission affirmed the Judge's decision in result. 36 FMSHRC 2088 (Aug. 2014). Emerald then appealed the decision to the United States Court of Appeals for the Third Circuit. For the reasons articulated below, the Third Circuit vacated the Commission's decision and remanded the cases to the Commission for further analysis.³

The Commission's decision to affirm the Judge's decision, in result, was a split decision. 36 FMSHRC 2088 (Aug. 2014). Commissioners Young and Cohen voted to affirm on the grounds that substantial evidence supported the Judge's conclusion that Emerald *discriminated* against Franks and Hoy in violation of section 105(c) of the Mine Act. *Id.* at 2103. Chairman Jordan and Commissioner Nakamura voted to affirm the Judge's decision after concluding that Emerald *interfered* with the protected statutory rights of the miners in violation of section 105(c). *Id.* at 2119. Commissioner Althen voted to vacate the decision of the Judge. *Id.* at 2144.

The Third Circuit concluded that the two concurring opinions presented "conflicting rationales" to support the finding that Emerald violated section 105(c) of the Mine Act, and therefore, the Commission failed to provide a majority rationale that was "amenable to review."

¹ Section 105(c)(1) provides that "[n]o person shall discharge *or in any manner discriminate against* or cause to be discharged or cause discrimination against *or otherwise interfere with the exercise of the statutory rights of any miner . . .*" 30 U.S.C. § 815(c)(1) (emphasis added).

² The Judge noted that the UMWA had presented an interference theory in its post-trial brief, 35 FMSHRC at 1701 n.3, but she analyzed the case under traditional discrimination standards. *See* 35 FMSHRC at 1702 (citing *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981)).

³ As a result of the Commission's decision that Emerald violated the Mine Act, the Secretary of Labor subsequently filed petitions for assessment of civil penalty pursuant to sections 105 and 110 of the Mine Act. The proposed penalties were \$20,000 each, for a total penalty of \$40,000. The petitions were assigned to the Judge. The parties filed joint stipulations addressing the penalty criteria and the Judge assessed the total penalty of \$40,000. Unpublished Order (October 29, 2014) (Docket No. PENN 2013-305 et al).

Emerald petitioned the Commission for review of the Judge's civil penalty decision. However, no two Commissioners voted to grant the petition. Emerald then appealed the Judge's decision to the Third Circuit. The Third Circuit consolidated the civil penalty cases with the cases involving Franks and Hoy's complaints of discrimination.

Emerald Coal Res. v. Hoy, 620 Fed. Appx. 127, 129, 132 (3rd Cir. 2015) (citation omitted). However, the Court further concluded that because “four of five [Commissioners] agreed that the Mine Act was violated and relief was appropriate, [it] believe[d] the agency should have a chance to explain its reasoning.” *Id.* at 133. Therefore, the Court vacated and remanded the Commission’s decision, noting that it was not expressing an “opinion as to how the Commission may decide the discrimination or interference issues or whether it should remand the case to the [Judge] to conduct the interference analysis in the first instance” *Id.*

We have elected to remand these consolidated proceedings to the Judge “to conduct the interference analysis in the first instance.”

Accordingly, these captioned matters are hereby remanded for further proceedings consistent with the decision of the Third Circuit. On remand, the Judge may reopen the record to receive briefs concerning the elements of a claim of interference under section 105(c)(1), the application of the law to the facts in the record, appropriate remedies under the Mine Act, and other issues the Judge may deem appropriate.⁴

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

⁴ On September 30, 2015, the Commission received a letter from the Secretary of Labor requesting “the opportunity to brief the question of whether proof of discriminatory intent is required [for claims of interference under section 105(c)].”

Chairman Jordan and Commissioner Nakamura, dissenting:

In the Commission's initial decision affirming the Judge in result, we set forth an analysis for evaluating interference claims brought pursuant to section 105(c) of the Mine Act. 36 FMSHRC 2088, 2108 (Aug. 2014). After applying this standard to the evidence in the record, we concluded that Emerald interfered with Franks' and Hoy's protected rights, in violation of section 105(c). *Id.* at 2119. Consistent with that opinion, we would not remand the case to the judge for an analysis of an interference claim under the Mine Act.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

February 12, 2016

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

v.

BCJ SAND & ROCK, INC.

Docket No. WEST 2015-7M
A.C. No. 04-05547-357447

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 2, 2014, the Commission received from BCJ Sand and Rock, Inc. (“BCJ”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on August 4, 2014, and became a final order of the Commission on September 3, 2014. BCJ asserts that its employees managing MSHA matters did not notify management of the proposed penalties and that it was unfamiliar with the contest procedures. BCJ also notes that the motion to reopen was filed less than 30 days

after the penalties became final orders of the Commission. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed BCJ's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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

Commissioner Cohen dissenting:

My colleagues have concluded that BCJ Sand and Gravel has established cause to reopen the captioned proceeding. I dissent because I believe that BCJ's excuse for its failure to timely contest the proposed assessment is contradicted by the record evidence, and raises factual questions which should be resolved by the Chief Administrative Law Judge.

BCJ contends that it failed to timely file, in part, because its employees neglected to notify management when it received the proposed assessment in the mail. The motion to reopen includes an affidavit from BCJ President Brad Slender, which states that he was unaware that the mine received the proposed assessment because he works at the main office in Santa Rosa, California, approximately 160 miles away from the mine site in Oroville, California. R. Ex. B.

However, the record before the Commission includes a United States Postal Service tracking receipt which reflects that the proposed assessment was actually mailed to Santa Rosa, California (the location of Mr. Slender's office) and was received and signed for by an individual with the initials "B.S."

In light of this evidence, I have to question the operator's representation that mistakes at the Oroville mine site contributed to the failure to timely file. The U.S. Postal Service tracking receipt raises factual questions which need to be resolved by an administrative law judge before the Commission can decide whether to reopen the penalty assessment. Accordingly, I dissent, and would remand the case to the Chief Administrative Law Judge for fact-finding on the motion.

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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February 19, 2016

JONES BROS MFG, INC.

v.

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

Docket No. CENT 2015-386-RM
Order No. 8860641; 02/10/2015

BEFORE: Jordan, Chairman; Young and Cohen, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On May 4, 2015, the Commission received from Jones Bros. MFG, Inc., (“Jones”) a motion seeking to reopen an imminent danger withdrawal order that had been issued pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a).

Under section 107(e)(1) of the Mine Act, an operator who wishes to contest an imminent danger order under section 107(a) may request review by the Commission no later than 30 days after being notified of such order. Commission Procedural Rule 9 allows the Commission to extend the filing time for a document for good cause shown. 29 C.F.R. § 2700.9(a). The rule allows the Commission to grant motions for extensions of time after the designated filing time has expired if the party requesting the extension can show, in writing, the reasons for its failure to make the request before the filing deadline. 29 C.F.R. § 2700.9(b).

The section 107(a) order that Jones seeks to contest was issued on February 10, 2015. Hence, the deadline for contesting it under section 107(e)(1) was March 12, 2015. Also on February 10, Citation No. 8860642 was issued for the same condition, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a). Jones asserts that it received the proposed assessment for the section 104(a) citation around April 22, 2015, and contested the citation on April 29, 2015. Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the section 104(a) citation was timely contested and has been docketed as Docket No. CENT 2015-0382, A.C. No. 41-02925-377834. Jones asserts that it intended to contest the section 107(a) order as well, but had no experience in contesting citations prior to this inspection and was not aware of the 30-day filing deadline for section 107(a) orders. The operator avers that it has been informed of the proper filing deadlines by its counsel and now understands the procedures that must be followed. The Secretary does not oppose the request to reopen.

¹ This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Relying on Rule 60(b) of the Federal Rules of Civil Procedure, we have observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, appropriate proceedings on the merits may be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). We find that the same considerations apply to the order here under Commission Procedural Rule 9. Having reviewed Jones' request and the Secretary's response, in the interest of justice and judicial economy, we therefore construe Jones' motion to reopen as a motion for an extension of time under Commission Rule 9, find that Jones has shown good cause for us to extend the time to contest the order at issue, and extend the deadline to file an application for review of the imminent danger withdrawal order.

Jones is instructed to file an application for review within 30 days of the date of this order, to be followed by further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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February 19, 2016

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

v.

KENAMERICAN RESOURCES, INC.

Docket No. KENT 2015-549
A.C. No. 15-17741-380586

BEFORE: Jordan, Chairman; Young and Cohen, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 3, 2015, the Commission received from KenAmerican Resources, Inc. (“KenAmerican”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

¹ This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 11, 2015, and became a final order of the Commission on June 10, 2015. KenAmerican asserts that the person who normally handles its MSHA contests was out of the office for a serious medical issue in May of 2015, and an employee who was unfamiliar with the proper contest procedure sent the contest to MSHA's payment center in St. Louis, Missouri, instead of the Civil Penalty Compliance Office in Arlington, Virginia. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed KenAmerican's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

February 19, 2016

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

v.

UNITED STATES STEEL
CORPORATION

Docket No. LAKE 2015-544-M
A.C. No. 21-00282-377786

Docket No. LAKE 2015-545-M
A.C. No. 21-03352-377788

BEFORE: Jordan, Chairman; Young and Cohen, Commissioners¹

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On June 17, 2015, the Commission received from United States Steel Corporation (“U.S. Steel”) a motion seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).²

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

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

¹ This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

² Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2015-544M and LAKE 2015-545-M; both captioned United States Steel Corporation, and involving similar procedural issues. 29 C.F.R. § 2700.12.

good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were delivered on April 6, 2015, and became final orders of the Commission on May 6, 2015. U.S. Steel asserts that it timely contested the penalties, but sent the contests to MSHA's Payment Center in St. Louis, Missouri, instead of MSHA's Civil Penalty Compliance Office in Arlington, Virginia. The operator has since retrained its personnel. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed U.S. Steel's request and the Secretary's response, in the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 19, 2016

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

v.

CASTLE VALLEY MINING, LLC

Docket No. WEST 2015-184
A.C. No. 42-02335-359669

BEFORE: Jordan, Chairman; Cohen, and Nakamura, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 25, 2014, the Commission received from Castle Valley Mining, LLC (“Castle”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

¹ This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 4, 2014, and became a final order of the Commission on October 6, 2014. Following receipt of Castle's motion to reopen, the Commission issued a deficiency letter on July 16, 2015, and Castle filed a revised motion to reopen on August 25, 2015. Castle asserts that it timely mailed the contest form via U.S. First Class Mail and provided an affidavit to that effect. Additionally, Castle has agreed to send all future contest forms via certified mail. The Secretary does not oppose the request to reopen, but notes that MSHA's Civil Penalty Compliance Office has no record of receiving a contest form for this case. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Castle's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Robert F. Cohen, Jr.
Robert F. Cohen Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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February 19, 2016

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

v.

S.M. LORUSSO & SONS, INC.

Docket No. YORK 2015-105-M
A.C. No. 19-00076-378923

BEFORE: Jordan, Chairman; Young and Cohen, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On June 23, 2015, the Commission received from S.M. Lorusso & Sons, Inc. (“Lorusso”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

¹ This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 21, 2015, and became a final order of the Commission on May 21, 2015. Lorusso asserts that its Safety Director was out of the office for knee surgery in April and May of 2015, and the mine did not have anyone take over his responsibilities while he was out of the office. Lorusso states that, as a result, the contest paperwork for this citation was not mailed to MSHA until after the assessment became a final order. Lorusso has included a note from the safety director's doctor with its motion to reopen. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Lorusso's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen Jr., Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 2, 2016

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

v.

LONE MOUNTAIN PROCESSING, INC.,
Respondent.

LONE MOUNTAIN PROCESSING, INC.,
Contestant,

v.

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 2014-817
A.C. No. 15-17234-359230

Mine: Huff Creek No. 1

CONTEST PROCEEDINGS

Docket No. KENT 2014-441-R
Citation No. 8386694;03/19/2014

Docket No. KENT 2014-442-R
Citation No. 8386695;03/19/2014

Docket No. KENT 2014-443-R
Citation No. 8386696;03/19/2014

Huff Creek No. 1
Mine ID 15-17234

DECISION APPROVING SETTLEMENT

Before: Judge Simonton

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike paragraphs three and four from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission.

The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have considered the provided specific factual explanations for the agreed upon settlement per sections 110(i) and 110(k) of the Act.

Background

This docket contains three citations issued following a fatal rock burst accident on August 6, 2013 at the Respondent's Huff Creek mine. The rock burst occurred in a retreat mining section¹ 1640 feet below the surface and killed Continuous Miner Operator Mr. Lenny Gilliam and seriously injured two other miners.

On March 19, 2014, MSHA Inspector Charles Ramsey issued three citations and orders for alleged violations of the mine's roof control plan. Collectively, the citations allege that the Respondent: 1) failed to respond to core data that indicated increased pressure; 2) deviated from the mine's standard retreat mining protocol by advancing beyond the "gob-shadow effect"; and 3) continued retreat mining despite the occurrence of a burst/bump incident on the morning of the fatal accident.

On December 11, 2015, the parties submitted a joint settlement motion and requested an order approving the settlement agreement. In summary, the parties proposed removing the unwarrantable failure designation from Citation/Order Nos. 8386694 and 8386695, reducing the negligence from high to moderate for Citation No. 8386694, and vacating Citation No. 8386696. The parties also agreed to reduce the total monetary penalty from \$148,893.00 to \$75,000.00.

Within the original motion, the parties provided a brief four paragraph summary of the factual basis for the proposed modifications. After reviewing the proposed settlement motion and the mine's accident and roof fall history, the court requested additional information supporting the proposed modifications.

The Respondent timely filed a detailed rebuttal of the primary factual allegations contained in Citation Nos. 8386694 and 8386695. In summary the Respondent contends that: 1) the limited core data available did not indicate hazardously rigid floor or roof conditions; 2) the pillars in place at the accident area had been designed to support the roof even without the benefit of the "gob shadow effect"; and, 3) the bump incident alleged by the inspector was a circuit breaker "knock" on the continuous mining machine rather than a structural burst/ bump.

The parties also affirmed that the Secretary had modified the text of Citation Nos. 8386694 and 8386695 on November 25, 2015 to conform to deposition statements that

¹ Retreat mining is the process of removing coal support pillars in underground seams that have previously been mined on a room and pillar pattern. The process involves planned roof collapses as the support pillars are removed. The National Institute for Occupational Safety and Health (NIOSH) has stated that unplanned collapses and rock bursts are an inherent risk of the process.

contradicted some sections of the original citation.² In response to the court's request for the Secretary's position on the Respondent's technical arguments, the Secretary stated that, "The Secretary believes that the Court could find Respondent's technical arguments to be persuasive."

Analysis

Commission Procedural Rule 31 provides that a "proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion," and expressly requires a party seeking the approval of a settlement to submit "[f]acts in support of the penalty agreed to by the parties." 29 C.F.R. § 2700.31(b) (3).

Accepted as true, the Respondent's filings indicate that the operator substantially adhered to the MSHA approved roof control plan and standard geotechnical monitoring procedures. At the same time, the parties' filings also imply that retreat mining can lead to violent outbursts even when an operator complies with all MSHA required protocols. Indeed, MSHA had noted prior to the accident that the risk of rock bursts below 1,000 feet becomes increasingly likely and that with certain depths and risk factors,

No combination of currently available mining sequences, administrative procedures, or monitoring techniques can be relied upon to reduce the risk posed by coal bursts during pillar recovery to an acceptable level.

MSHA PIB P12-10, 4³ (agreeing with portions of February 2010 NIOSH report⁴ on deep cover retreat mining).

Although the Respondent was retreat mining 1640 feet below the surface when the accident occurred, the Respondent appears to have done so with at least the tacit permission of MSHA inspectors. Specifically, the Respondent has stated within the original settlement motion that,

... its approved roof control plan was suitable for the mining conditions and that on the day of the accident two MSHA inspectors were present on the 006 MMU and did not issue any violations. The MSHA inspectors were aware that the operator was closing out with the middle pillar. The operator contends that two weeks prior to the accident, MSHA conducted a six month review

² The parties did not specifically detail or provide a copy of the November 15, 2015 textual modifications within the original settlement motion. Counsels are advised to provide a complete record of all formal modifications in future settlement motions.

³ <http://publish.generationhub.com/document/2012/07/12/MSHA%20July%2011%20Pillar%20PIB.pdf>

⁴ http://www.cdc.gov/niosh/mining/UserFiles/works/pdfs/Report_on_Coal_Pillar_Recovery_under_Deep_Cover_02-10.pdf

of the operator's roof control plan, including an inspection of the mine roof and found that the roof control plan was suitable for the mining conditions and that the mine roof presented no hazards.

Jt. Settlement Mot., 4.⁵

Regardless of MSHA's enforcement actions in the lead up to the 2013 accident, in October 2011 a large retreat mining roof collapse entrapped mining equipment at the Huff Creek mine, putting the Respondent on specific notice of the dangers of deep cover retreat mining. Additionally, a rib collapse in a retreat mining section 1760 feet below ground fatally injured Mr. Jimmy Carmack at the Respondent's nearby Clover Fork No. 1 Mine in June 2010.⁶ The Respondent could not have considered this fatality an isolated accident as MSHA records indicate that twenty coal miners died from 2000 to 2010 in retreat mining roof collapse/rock burst incidents.⁷ Indeed, after the massive Crandall Canyon retreat mining collapse killed six miners and three rescue workers in 2007, the February 2010 NIOSH report stated that retreat mining has historically caused 25 percent of roof fall fatalities while only accounting for 10 percent of the country's coal production.⁸

Nevertheless, the Secretary has sole responsibility for formulating and enforcing safety regulations to protect miners. The court is hopeful the Respondent will rigorously follow the risk matrix outlined in the MSHA June 30, 2015 Deep Cover Coal Burst Assessment PIB, including the advisement to "not min(e) in the areas of greatest risk." MSHA PIB 15-03, Control Techniques.

For the purposes of evaluating the requested modifications, the court must examine the facts submitted and the Secretary's enforcement practices as they existed at the time of the accident. The Respondent's filings indicate that the operator attempted to comply with all existing MSHA protocols and the Secretary has affirmed that the proposed modifications are consistent with his enforcement responsibilities. Accordingly, the proposed modifications are **APPROVED** as set forth below.

⁵ The Secretary has only responded to the Respondent's factual submissions with a standard boilerplate statement that, "While the Secretary does not necessarily agree with Respondent's position, he recognizes a legitimate factual and legal dispute and believes settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act."

⁶ <http://www.msha.gov/FATALS/2010/FTL10c38.asp>

⁷ <http://www.msha.gov/fatals/fabc.htm>

⁸ http://www.cdc.gov/niosh/mining/UserFiles/works/pdfs/Report_on_Coal_Pillar_Recovery_under_Deep_Cover_02-10.pdf

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
KENT 2014-817			
8386694	\$70,000.00	\$25,000.00	Modify 104(d)(1) Citation to a 104(a) Citation Reduce Negligence from “High” to “Moderate”
8386695	\$70,000.00	\$50,000.00	Modify 104(d)(1) Citation to a 104(a) Citation
8386696	\$8,893.00	\$0.00	Vacate
Total	\$148,893.00	\$75,000.00	

ORDER

The motion to approve settlement is **GRANTED**, the citations contained in these dockets are **MODIFIED** as set forth below, and Lone Mountain Processing, Inc. is **ORDERED** to pay the Secretary of Labor the sum of **\$75,000.00** within 30 days of this order.⁹ Accordingly, Contest Dockets KENT 2014-441-R, KENT 2014-442-R, and KENT 2014-443-R are **DISMISSED**.

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

⁹ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

February 8, 2016

SCOTT D. MCGLOTHLIN,
Complainant,

v.

DOMINION COAL CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. VA 2014-233-D
NORT-CD-2013-04

Mine: Dominion No. 7
Mine ID: 44-06499

DECISION ON RELIEF
AND
FINAL ORDER

Before: Judge Feldman

This matter is before me based on a Complaint of Discrimination brought by Scott D. McGlothlin against Dominion Coal Corporation (“Dominion”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (“Mine Act” or “the Act”). This Decision on Relief follows a summary decision on liability, issued on June 11, 2015, resolving the liability at issue without the need for an evidentiary hearing. *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ). The summary decision on liability, based on an undisputed chronology of events, held that Dominion violated the anti-discrimination provisions of section 105(c)¹ by interfering with McGlothlin’s right to pay protection under 30 C.F.R. Part 90 when Dominion reduced McGlothlin’s pay after McGlothlin sought a determination concerning his eligibility for Part 90 protection.² *Id.* at 1264-1266. The decision on liability is incorporated by reference.

¹ Section 105(c)(1) provides, in relevant part:

No person shall . . . in any manner discriminate . . . or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101

30 U.S.C. § 815(c)(1).

² Under 30 C.F.R. Part 90, a miner determined to have evidence of the development of pneumoconiosis must be given the opportunity to work in a less dusty area of a mine without loss of pay.

I. Issues

The goal of this proceeding is to award McGlothlin the relief that will make him whole. *See Clifford Meek v. Essroc Corp.*, 15 FMSHRC 606, 617 (April 1993) (citations omitted). The wages lost by McGlothlin are easily ascertainable by multiplying his reduction in pay by the period of his loss. The question of reimbursement of McGlothlin's attorney fees is a different matter. Given the demonstratively duplicative and excessive attorney fees sought to be reimbursed, the dispositive question is whether the Commission is compelled to direct such reimbursement simply because the respondent mine operator found liable in a 105(c)(3) proceeding has agreed to pay legal fees deemed unreasonable. Section 105(c)(3) states, in pertinent part:

. . . [in] granting such relief as [the Commission] deems appropriate, [the Commission shall award] . . . a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) *as determined by the Commission to have been reasonably incurred by the miner.* . . .

30 U.S.C. § 815(c)(3) (emphasis added).

II. Background

The Decision on Liability ordered the parties to confer in an attempt to reach an agreement on the specific relief to be awarded. The parties were given two options: 1) to file individual petitions on relief if the parties could not agree on a relief proposal; or 2) to file a joint petition on relief if Dominion could agree to the relief proposed by McGlothlin. *Id.* at 1265-66. The parties did neither.

Rather, on September 2, 2015, the parties filed a Joint Motion to Dismiss McGlothlin's complaint based on the parties' proposed settlement. The parties' Joint Motion to Dismiss was predicated upon McGlothlin's agreement that "the parties jointly move the Court to dismiss all claims in this action with prejudice," in exchange for Dominion's agreement to pay the relief sought by McGlothlin's counsel on his behalf, including reimbursement of their claimed attorney fees. *Jt. Mot. to Dismiss*, at 2 (Sept. 2, 2015). Specifically, Dominion agreed to pay McGlothlin back pay of \$45,942.61, in addition to \$88,975.48 in reimbursed attorney fees for approximately eight weeks (331.1 hours) of claimed legal services provided by Evan Smith of the Appalachian Citizens' Law Center ("ACLC"), and Tony Oppedard, as private counsel. *Confidential Settlement Agreement*, at 2 (Sept. 2, 2015).

ACLC is the preeminent non-profit organization providing free legal representation to coal miners regarding matters arising under the Mine Act, including complaints of discrimination. ACLC is funded by foundations, donations, and attorney fees recovered during the course of its litigation. *Financials*, APPALACHIAN CITIZENS' LAW CTR., <http://appalachianlawcenter.org/financials/> (last visited February 12, 2016). The principals of ACLC are Stephen A. Sanders, who has more than 20 years of experience that includes representation of miners in 105(c) discrimination cases, and Wes Addington, who also specializes in mine safety litigation. *Staff and Board*, APPALACHIAN CITIZENS' LAW CTR.,

<http://appalachianlawcenter.org/about-us-3/staff/> (last visited February 12, 2016). Tony Opegard is a sole practitioner with over 35 years of experience specializing in mine safety matters, including representation of numerous 105(c) complainants. Response to Order to Show Cause, Ex. 1 at 1 (Jan. 13, 2016).

As previously noted, section 105(c)(3) authorizes the Commission to “grant[] such relief as it deems appropriate” including monetary relief and reimbursement for reasonable attorney fees, when the Commission determines, based upon “findings of fact,” that discrimination has occurred. 30 U.S.C. § 815(c)(3). To determine the appropriate relief to be awarded, longstanding Commission case law has recognized the utility of bifurcating decisions on liability and decisions on relief in section 105(c) proceedings.³ Bifurcation preserves Commission resources by avoiding the unnecessary development of a record regarding the appropriate relief to be awarded in cases where the discrimination complaint is dismissed after an evidentiary hearing on liability. *See, e.g., Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820 (Aug. 2012), *aff’d Metz v. FMSHRC*, 532 F.App’x 309, 2013 WL 3870733 (3d Cir. 2013). Although bifurcated decisions on liability are not final, in that they are not ripe for Commission appeal until a decision on relief is rendered, the decision on liability is a final disposition on the merits with respect to liability. Thus, absent a petition for discretionary review filed with the Commission, a mine operator that is found liable in a decision on liability following a hearing is collaterally estopped from denying liability in a related civil penalty proceeding.

The parties may not mutually agree to vitiate a post-adjudication decision on liability through a mutual agreement that both insulates a mine operator from the adverse history of a 105(c) violation, and releases the operator from the resultant civil penalty liability that must be imposed as a consequence of that violation. 30 U.S.C. §§ 814(a), 815(a); 29 C.F.R. § 2700.44(b). To hold otherwise would render Commission decisions on liability in bifurcated 105(c) proceedings as advisory opinions that are analogous to decisions by non-binding alternative dispute resolution bodies that may be disregarded at the whim of the parties.

³ *See, e.g., Sec’y of Labor o/b/o Lopez v. Sherwin Alumina, LLC*, 36 FMSHRC 730 (Mar. 2014) (ALJ Bulluck) (decision on liability requesting a follow up petition for relief from the parties); *Descutner v. Newmont USA*, 34 FMSHRC 2838 (Oct. 2012) (ALJ Barbour) (decision on liability), and *Descutner v. Newmont USA*, 35 FMSHRC 504 (Feb. 2013) (ALJ Barbour) (decision on relief); *Jeanlouis v. Morton Int’l*, 25 FMSHRC 536 (Sept. 2003) (ALJ Feldman) (decision on liability), and *Jeanlouis v. Morton Int’l*, 25 FMSHRC 673 (Nov. 2003) (ALJ Feldman) (decision on relief); *Womack v. Gramont W. US*, 25 FMSHRC 235 (May 2003) (ALJ Feldman) (decision on liability), and *Womack v. Gramont W. US*, 25 FMSHRC 469 (Aug. 2003) (ALJ Feldman) (decision on relief); *Gawthrop v. Triplett Bros. Excavating*, 17 FMSHRC 64 (Jan. 1995) (ALJ Feldman) (decision on liability), and *Gawthrop v. Triplett Bros. Excavating*, 17 FMSHRC 359 (Mar. 1995) (ALJ Feldman) (decision on relief); *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171 (Feb. 1999) (ALJ Hodgdon) (decision on liability), and *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 377 (Mar. 1999) (ALJ Hodgdon) (decision on relief); *Meek v. Essroc Corp.*, 13 FMSHRC 1970 (Dec. 1991) (ALJ Fauver) (decision on liability), and *Meek v. Essroc Corp.*, 14 FMSHRC 518 (Mar. 1992) (ALJ Fauver) (decision on relief), *aff’d Meek v. Essroc Corp.*, 15 FMSHRC 606 (Apr. 1993).

Additionally, allowing the parties to agree to release the mine operator from its 105(c) transgression is contrary to the deterrent goals of the Mine Act.

Furthermore, the parties' September 2, 2015, Joint Motion to Dismiss was problematical because it conflated the concepts of motions to approve settlement and petitions for relief. There is a significant substantive distinction between determining post-adjudicative relief in bifurcated proceedings through a motion to approve settlement, as the parties suggest, and through a traditional petition for relief. In exercising oversight over motions to approve settlement, the authority of a Commission judge is limited to only approving or denying the settlement terms, as the judge lacks the authority to impose his terms, rather than those proposed by the parties. Thus, giving effect to the parties' proposed settlement would preclude the Commission from exercising its statutory authority to award only attorney fees that have been "reasonably incurred by the miner." In contrast, the appropriate relief to be awarded in this matter must be determined in a decision on relief. As such, the issue of the appropriate monetary relief remains committed to the sound discretion of the judge. *Sec'y of Labor o/b/o Maxey v. Leeco, Inc.*, 20 FMSHRC 707 (July 1998).

Consequently, on October 21, 2015, the parties' September 2, 2015, Joint Motion to Dismiss was denied. At that time, the parties were instructed that, regardless of whether they styled any future agreements on relief as a joint petition, or as a motion to approve settlement, their proposed agreement would be construed as a joint petition for relief. 37 FMSHRC at 2514. McGlothlin's counsel were also instructed to submit fee petitions supporting their requested attorney fee reimbursement. *Id.*

In response to the denial of the parties' initial proposed settlement, on November 11, 2015, the parties submitted a revised Joint Motion to Approve Settlement. In an attempt to rectify the previously-submitted terms for relief in which Dominion sought to absolve itself of liability, the parties stated that their proposed terms now "include[] Dominion's waiver of its right to appeal this Court's Decision on Liability." *Jt. Mot. to Approve Settlement*, at 2 (Nov. 11, 2015). At that time, ACLC and Opegard submitted separate fee petitions reflecting a total of \$112,465.48 for legal services. For the purpose of settlement, the parties also reiterated their proposals to both compensate McGlothlin with back pay of \$45,942.61 and to reimburse ACLC and Opegard a total of \$88,975.48 in attorney fees.⁴ *Confidential Settlement Agmt.*, at 2 (Nov. 11, 2015).

⁴ ACLC and Opegard initially claimed \$88,975.48 in total legal fees and expenses based on a reported total expenditure of 331.1 hours of legal services billed at rates of \$200.00 per hour for ACLC, and \$350.00 per hour for Opegard. *See Confidential Settlement Agmt.*, at 2 (Sept. 2, 2015). Upon being required to support the legal fees claimed, ACLC and Opegard subsequently submitted separate fee petitions that sought a total of \$112,465.48 in total legal fees and expenses based on the same total of 331.1 hours of legal services billed at rates of \$225.00 per hour for ACLC, and \$500.00 per hour for Opegard. Despite their fee petitions, to resolve this discrepancy, on January 13, 2016, ACLC and Opegard clearly represented that they are seeking a total of \$88,975.48 based on the hourly rates for their services as initially claimed, regardless of whether the parties' proposed settlement terms were approved. *Resp. to Order to Show Cause*, at 2-3.

In response to the parties' November 11, 2015, resubmitted settlement motion, on December 21, 2015, ACLC and Oppegard were ordered to show cause:

- Why the [\$200.00 and \$350.00] hourly rates for ACLC and Oppegard, respectively, are reasonable;
- Why the total 331.1 hours claimed for legal services are reasonable;
- Why the services rendered were necessary and not duplicative, given the fact that many of the fees are based on individual reimbursement to each attorney for calls and emails to each other, and for the reading and reviewing of filings in this matter; and
- Why either ACLC or Oppegard could not have solely and competently represented McGlothlin, as 105(c) discrimination cases are within each attorneys' area of expertise.

Order to Show Cause, 37 FMSHRC ___, slip op. at 4 (Dec. 21, 2015) (ALJ).

ACLC and Oppegard responded to the Order to Show Cause on January 13, 2016.

A. Commission Authority to Direct Reimbursement

As an initial matter, in response to the order to show cause, McGlothlin's counsel objected to Commission oversight of the relief to be awarded in this 105(c) discrimination proceeding. Specifically, McGlothlin's counsel stated:

Mr. McGlothlin's counsel first seek to clarify the posture of the case. Counsel have not petitioned your Honor for fees. *We believe the Commission lacks the authority to review the attorneys' fees portion of the parties' settlement.* Counsel for Mr. McGlothlin object to Commission review of their undisputed fees, and specifically, their hours and rates, which were agreed to as a compromise between the parties.

The parties' tendered settlement should be summarily approved as it provides Mr. McGlothlin with all the relief available under the Mine Act. *It is not necessary for your Honor to engage in an analysis of what attorneys' fees are reasonable.* Dominion Coal today confirmed that it has no objection to the hourly rates or hours incurred.

Resp. to Order to Show Cause, at 1-2 (Jan. 13, 2016) (emphasis added).

I am troubled by the dismissive approach taken by McGlothlin's counsel with respect to the Commission's role in ensuring that only reasonable and necessary attorney fees are reimbursed pursuant to the direction of section 105(c) of the Mine Act. While mine operators may be willing to acquiesce to the reimbursement of attorney fees ultimately deemed excessive,

the Mine Act sets the parameters for the Commission's award of relief in discrimination matters.⁵ In this regard, section 105(c)(3) states, in pertinent part:

. . . [in] granting such relief as [the Commission] deems appropriate, [the Commission shall award] . . . a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) *as determined by the Commission to have been reasonably incurred by the miner*. . . .

30 U.S.C. § 815(c)(3) (emphasis added). The appropriate relief to be awarded in discrimination matters is committed to the sound discretion of the judge, which, of course, is subject to appellate review by the Commission. *Sec'y of Labor o/b/o Ribel v. E. Assoc. Coal Corp.*, 7 FMSHRC 2015, 2027 (Dec. 1985), *rev'd on other grounds* 813 F.2d 639 (4th Cir. 1987); *see also Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390 (March 1993); *Maxey*, 20 FMSHRC at 707. McGlothlin's counsel should not be allowed "to seek the benefits of a favorable judicial decision" on liability, but yet avoid the Commission's exercise of discretion in determining the reasonableness of the relief to be awarded "through an artful attempt at dismissal of the case long past the eleventh hour." *Suntharalinkam v. Keisler*, 506 F.3d 822, 829-30 (9th Cir. 2007) (citations omitted).

In the final analysis, the parties' reliance on the significance of their agreed-upon terms is misplaced. The Commission has acknowledged that its authority to review the propriety of settlement motions conferred in section 110(k) of the Act extends to settlement agreements arising under section 105(c) of the Act. 30 U.S.C. § 820(k); *Maxey*, 20 FMSHRC at 707. In view of the case law and the Commission's statutory mandate, the parties' agreement on reimbursement does not alter the Commission's responsibility to exercise its delegated authority to determine the reasonableness of the relief to be awarded in this proceeding. At the risk of stating the obvious, agreed-upon terms, whether in motions for approval of settlement, or petitions for relief, are a condition precedent for the Commission's consideration of whether such terms are reasonable and should be approved. The Commission routinely approves or denies such agreements. Thus, while the parties' agreement is relevant, it is not dispositive.

B. Confidentiality

Not only have the parties sought to circumvent the Commission's consideration of the reasonableness of their proposed terms of relief, the parties have also requested that their

⁵ The scope of this decision is limited to the reimbursement of attorney fees that should be authorized under the Mine Act. Obviously, nothing herein precludes Dominion from paying McGlothlin's counsel attorney fees higher than those awarded in this proceeding. However, courts should not give effect to proposed agreements proffered during proceedings that contravene the purpose of the litigation. *See, e.g., Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) (defendant's agreement to pay higher legal fees to plaintiff's counsel in exchange for an agreement on the merits that is favorable to the defendant). Here, the parties' initial September 2, 2015, proposal impermissibly sought to relieve Dominion of liability for its discriminatory conduct.

proposed relief remain confidential. This request was denied in a November 18, 2015, order as public disclosure of the parties' proposed terms is required in instances where the parties' proposed terms of relief, including attorney fees, are either disputed, or not approved by the judge. 37 FMSRHC 2676 (Nov. 2015) (ALJ); *see, e.g., Pendley v. Highland Mining Co. and James Creighton*, 37 FMSHRC 2226 (Sept. 2015) (ALJ). Furthermore, the parties do not have an unfettered right to confidentiality. Commission decisions are public documents that should be available for public review. Confidentiality, which necessitates concealment from the public, should be narrowly approved, for example, in instances where disclosure threatens proprietary interests. Rather, Commission findings of operator liability and the relief to be awarded to litigants in a Mine Act proceeding deserve to see the light of day. Public disclosure fosters the Mine Act's goal of deterring similar discriminatory acts. Disclosure also furthers the Commission's ability to determine if proposed legal fees are reasonable through a comparative analysis of past awards.⁶

III. McGlothlin's Relief

A. Back Pay and Incidental Expenses

In awarding relief to section 105(c) discriminatees, "[t]he Commission endeavors to make miners whole and to return them to their status before illegal discrimination occurred." *Clifford Meek*, 15 FMSHRC at 617 (citations omitted). In doing so, the Commission has stated that monetary relief is awarded "to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of [the discrimination]." *Sec'y of Labor o/b/o Dunmire v. N. Coal Co.*, 4 FMSHRC 126, 143 (Feb. 1982).

The Decision on Liability noted that McGlothlin's back pay should be computed based on the difference in the compensation paid to McGlothlin and the compensation that he is entitled to as a Part 90 miner, plus interest, and reimbursement for any other relevant incidental expenditures. 37 FMSHRC at 1265-66. The parties propose that the amount of relief to be awarded to McGlothlin should be \$45,942.61. This amount constitutes the difference in the compensation that was paid to McGlothlin, and the compensation that he was entitled to as a Part 90 miner between period June 2013 and April 2015, when McGlothlin's employment with Dominion ceased, in addition to incidental expenses incurred.

The total \$45,942.61 relief proposed is reasonable, as it is readily supported by the difference in hourly pay that McGlothlin was due as a Part 90 miner during the relevant 22 month period, plus a reasonable amount of claimed additional incidental expenses.

⁶ I am aware of only two recent Commission cases that specify the attorney fees reimbursed to ACLC and Opegard pursuant to the fee shifting provisions of section 105(c)(3). *See Pendley*, 37 FMSHRC at 2229 (awarding Opegard and Addington of ACLC a total of \$84,125.15 in attorney fees); *Howard v. Cumberland River Coal Co.*, 32 FMSHRC 1923 (Dec. 2010) (ALJ) (awarding Opegard and Addington a total of \$124,174.00 in attorney fees). Apparently, the attorney fees awarded to ACLC and Opegard in the majority of other recent 105(c)(3) cases in which they have appeared have not been made public.

B. Reimbursement of Attorney Fees

Section 105(c)(3) sets forth two requirements for the reimbursement of attorney fees. Namely: 1) that an order be issued “sustaining the complainant’s charges”; and 2) that the attorney fees sought to be awarded have been “reasonably incurred.” 30 U.S.C. §815(c)(3); *E. Assoc. Coal Corp.*, 7 FMSHRC at 2025. Dominion’s liability having been determined, the focus of this inquiry shifts to the reasonableness of the attorney fees sought to be reimbursed. In addressing the issue of reasonable attorney fees, courts look to the lodestar standard, which requires the multiplication of an attorney’s reasonable hourly rate by the reasonable number of hours expended. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551-52 (2010); *Blum v. Stenson*, 465 U.S. 886 (1984). ACLC and Oppedard bear the burden of establishing that the hourly rates charged are reasonable and that the legal services provided by them were necessary and non-duplicative. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

1. Reasonable Hourly Rate

With respect to hourly rate, “an attorney’s usual billing rate is presumptively the reasonable rate, provided that this rate is ‘in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.’” *Covad Comm’n Co. v. Revonet, Inc.*, 267 F.R.D. 14, 29 (D.D.C. 2010) (citing *Kattan ex rel. Thomas v. D.C.*, 995 F.2d 274, 278 (D.C. Cir. 1993)). A reasonable hourly rate, however, must be one that is adequate to attract competent counsel in the relevant legal market, but yet does not produce a windfall to that attorney. *Blum*, 465 U.S. at 894-95.

As noted above, ACLC is seeking compensation at an hourly rate of \$200.00 per hour, and Oppedard is seeking compensation at an hourly rate of \$350.00 per hour. In situations “where there is only a relatively small number of comparable attorneys, like here, an adjudicator can look to prior awards for guidance in determining a prevailing market rate.” *B&G Mining, Inc. v. Dir., Office of Workers’ Comp. Programs*, 522 F.3d 657, 664 (6th Cir. 2008). With regard to ACLC’s claimed reimbursement at a rate of \$200.00 per hour for the work performed by Evan Smith, recent cases have awarded ACLC attorneys between \$200.00 and \$250.00 per hour. *See, e.g., Howard*, 32 FMSHRC at 1923; *Pendley*, 37 FMSHRC at 2229; *see also* Resp. to Order to Show Cause, Ex. 2 (Jan. 13, 2016) (listing black lung benefits cases in which Smith was awarded attorney fees of \$225.00 and \$250.00 per hour). Considering ACLC’s expertise in the field of 105(c) discrimination cases, I find that ACLC’s claim for an award of compensation at rate of \$200.00 per hour is reasonable.

With regard to Oppedard’s claimed reimbursement, I am cognizant that Commission judges have, in the past, granted Oppedard’s claims for reimbursement of attorney fees at rates ranging from \$400.00 to \$500.00 per hour, presumably based on Oppedard’s superior expertise in 105(c) discrimination matters. *See, e.g., Howard*, 32 FMSHRC at 1923; *Pendley*, 37 FMSHRC at 2229. However, it is important to distinguish between aspirational hourly rates that attorneys may seek from private clients from those that should be awarded pursuant to the fee shifting provisions promulgated by Congress in section 105(c) of the Mine Act.

It is the reasonable rate, rather than the aspirational rate, that should govern, for it is axiomatic that “[h]ours that are not properly billed to one’s client also are not properly billed to one’s adversary pursuant to statutory authority.” *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980). In other words, if it is unreasonable to charge a private client an excessive hourly rate for legal services, then an adversary may not be ordered to reimburse this improper hourly rate pursuant to a federal statute. Charging a miner, a private client, between \$400.00 and \$500.00 per hour for Oppegard’s services in 105(c) proceedings is blatantly unreasonable and unrealistic, even if a miner could afford such rates.

However, I find that Oppegard’s current claim for an award of a somewhat lower compensation rate of \$350.00 per hour is reasonable. I believe that this additional \$150.00 per hour above the \$200.00 hourly rate sought by ACLC adequately compensates Oppegard, as contemplated by the Mine Act, for his level of experience in representing miners in Commission proceedings. I also believe that attorney fee rates ranging from \$200.00 to \$350.00 per hour are sufficient to attract capable legal representation for miners bringing discrimination complaints on their own behalf.

2. Reasonable Hours, Duplication of Services and Multiple Attorneys

With regard to the reasonable number of hours expended, hours may be deemed unreasonable if they are duplicative, wasteful, or merely excessive. *Hensley*, 461 U.S. at 424. On this point, in *Hays v. Leeco, Inc.* Judge Koutras explained:

In *Johnson v. Georgia Highway Express, Inc.*, [488 F.2d 714, 720 (5th Cir. 1974)], the Fifth Circuit Court of Appeals stated “If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted.” Likewise, in *Copeland v. Marshall, supra*, at 641 F.2d 891, the D.C. Circuit Court of Appeals, stated “. . . where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time.” See also *Charles v. National Tea Co.*, 488 F. Supp. 270 (D.C. W.D. La. 1980), where the court cited *Johnson v. Georgia Highway Express, Inc., supra*, and stated at 488 F. Supp. 276 that “The time of two (2) lawyers in a courtroom when one would do, may obviously be discounted.”

13 FMSHRC 670, 690 (Apr. 1991) (ALJ) (PDR denied), *rev’d on other grounds* 965 F.2d 1081 (D.C. Cir. 1992). Such duplication of efforts “inevitably occurs when lawyers hold conferences, call each other on the phone, write each other letters and memoranda, or when several lawyers bill for reading the same document received from the defendants or the court.” *Chavez v. Mercantil Commercebank, N.A.*, 2015 WL 136388, at *4 (S.D. Fla. Jan. 9, 2015). In *Hays*, Judge Koutras determined that legal fees sought by both Oppegard and Stephen Sanders, who is

currently Director of ACLC, were duplicative, and only awarded fees to one attorney.⁷ *Hays*, 13 FMSHRC at 694.

a. McGlothlin's Representation by Multiple Attorneys

As noted above, ACLC and Oppegard are seeking reimbursement for 331.1 hours of combined legal services, which equates to approximately two months of five-day work weeks. In support of their dual fee petition, counsel for McGlothlin rely on the fact that it is not uncommon for multiple attorneys to appear on behalf of parties in Mine Act proceedings. *See* Resp. to Order to Show Cause, Ex. 1. This assertion begs the question whether such services are reimbursable. Of course, services by multiple attorneys are reimbursable, provided that they are necessary and non-duplicative. For example, different elements of litigation, such as trial work, discovery, and briefing, may be divided among several attorneys, so long as their efforts are not duplicative. However, the sum of the parts cannot be greater than the whole. By way of illustration, billing for two fully-qualified attorneys who appear at an eight hour deposition, may not be multiplied by a factor of two resulting in a requested reimbursement for 16 hours, if only one attorney conducts the deposition. Although the deposition tasks may be shared, the total amount billed should not exceed eight hours.

In this regard, as previously noted, hours not properly billable to a client are not billable to an adversary through a fee shifting statute such as section 105(c) of the Mine Act. *Copeland*, 641 F.2d at 891. It is implausible that a miner would retain multiple law firms, who are each a competent representative, and yet agree to incur duplicate legal fees as a consequence of dual representation. Simply put, the appearance of multiple attorneys does not, in and of itself, provide a basis for multiplication of fees.

b. Complexity of Representation

In support of their dual fee petition, counsel for McGlothlin also rely on the purported novelty and complexity of this case to justify the number of hours sought to be reimbursed. Resp. to Order to Show Cause, at 14-17. Their novelty and complexity argument is belied by ACLC and Oppegard's dual participation in previous proceedings. In *Pendley*, over the objection of the respondent's counsel that the fees sought were both excessive with regard to the hourly fee claimed and duplicative, the judge awarded ACLC Deputy Director Wes Addington and Oppegard a total of \$84,125.15, including expenses, for a combined total of 214.2 hours of legal work. 37 FMSHRC at 2231. Unlike the present case, which was decided by summary decision, *Pendley* was decided after a hearing on the merits. To support the award of dual attorney fees, the judge credited counsel's assertion that the *Pendley* case was "novel" and determined that it "presented a fairly complex and unique set of facts." *Id.* at 2227.

⁷ The Commission denied Leeco Inc.'s petition for discretionary review of the initial decision. However, on appeal the D.C. Circuit reversed and remanded Judge Koutras's underlying decision on liability. 965 F.2d 1081 (D.C. Cir. 1992). On remand, the parties reached a settlement, which was apparently approved by the Commission. *See* 1992 WL 533506 (FMSHRC Oct. 21, 1992).

Given the arguments in *Pendley*, the present case is not the first case where McGlothlin's counsel relied on novelty to justify their requested award of dual attorney fees. In any event, the dispositive law in this case was not extraordinarily difficult, in that it only required application of the plain language of section 105(c) that mine operators may not "interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations." 30 U.S.C. § 815(c)(1). As discussed in the Decision on Liability, McGlothlin was transferred to a lower-paying job during the pendency of his pertinent medical evaluation. 37 FMSHRC at 1261. Specifically, McGlothlin prevailed because the irrefutable evidence reflected that he was transferred to a lower paying position on June 3, 2013, during the pendency of his Part 90 evaluation, which spanned from April 30 to June 6, 2013. *Id.* at 1263. Consequently, when viewed in context, counsel's current assertion that this case warrants dual attorney fees based on its novelty and complexity is unpersuasive.

Moreover, McGlothlin's counsel's assertion that case complexity, as a general proposition, necessitates dual representation is further belied by their pattern of appearing as co-counsel in numerous section 105(c) discrimination cases in recent years.⁸ *See, e.g., Pendley v. Highland Mining Co.*, 37 FMSHRC 2226 (Sept. 2015) (ALJ Andrews); *Shemwell v. Armstrong Coal Co., Inc.*, 36 FMSHRC 2352 (Aug. 2014) (ALJ McCarthy); *Sec'y of Labor o/b/o Riordan v. Knox Creek Coal Corp.*, 36 FMSHRC 1050 (Apr. 2014) (ALJ Moran); *Shemwell v. Armstrong Coal Co., Inc.*, 35 FMSHRC 726 (Mar. 2013) (ALJ Feldman); *Sec'y of Labor o/b/o Flener v. Armstrong Coal Co., Inc.*, 34 FMSHRC 1658 (July 2012) (ALJ Simonton); *Sec'y of Labor o/b/o Green v. D&C Mining Corp.*, 33 FMSHRC 243 (Jan. 2011) (ALJ Harner); *Gray v. North Fork Coal Corp.*, 33 FMSHRC 2495 (Oct. 2011) (ALJ Rae); *Howard v. Cumberland River Coal Co.*, 32 FMSHRC 983 (Aug. 2010) (ALJ Hodgdon); *Sec'y of Labor o/b/o Wilder v. Private Investigation and Counter Intelligence Servs., Inc., et al*, 33 FMSHRC 1667 (July 2011) (ALJ Gill).⁹

⁸ In the current case, ACLC and Oppegard's dual representation apparently was initiated by Oppegard's suggestion that he and ACLC represent McGlothlin collaboratively. Confidential Settlement Agmt., Ex. A at 5 (Nov. 11, 2015).

⁹ ACLC and Oppegard have jointly appeared in numerous 105(c)(2) cases brought by the Secretary. *See, e.g., Sec'y of Labor o/b/o Riordan v. Knox Creek Coal Corp.*, 36 FMSHRC 1050 (Apr. 2014) (ALJ Moran); *Sec'y of Labor o/b/o Flener v. Armstrong Coal Co., Inc.*, 34 FMSHRC 1658 (July 2012) (ALJ Simonton); *Sec'y of Labor o/b/o Wilder v. Private Investigation and Counter Intelligence Servs., Inc., et al*, 33 FMSHRC 1667 (July 2011) (ALJ Gill); *Sec'y of Labor o/b/o Green v. D&C Mining Corp.*, 33 FMSHRC 243 (Jan. 2011) (ALJ Harner). It is well-settled based on long-standing federal appellate and Commission case law that private attorneys are not entitled to any attorney fees in cases brought by the Secretary pursuant to section 105(c)(2) of the Mine Act. *See E. Assoc. Coal Corp. v. FMSHRC* 813 F.2d 639, 644 (4th Cir. 1987); *see also Sec'y o/b/o Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327, 1339 n.6 (Aug. 1987) (citing *Maggard v. Chaney Creek Coal Co.*, 9 FMSHRC 1314, 1322 (Aug. 1987) (Commission holding recognizing the Fourth Circuit's decision in *Eastern Associated*, that no attorney fees may be awarded to private attorneys in section 105(c)(2) proceedings)). Thus, given *Eastern Associated*, and its Commission progeny, it is noteworthy that private counsel may
(continued...)

c. Propriety of Submitted Fee Petitions

Having concluded that McGlothlin's counsel's reliance on the appearance of two attorneys and on the purported complexity of the case, do not, alone, justify the reimbursement sought for 331.1 hours of attorney fees, the focus shifts to whether the hours claimed for reimbursement are duplicative. The dual fee petitions submitted by ACLC and Opegard present the hallmarks of duplicative legal services created by the appearance of two attorneys when one would suffice.

As noted above, both ACLC and Opegard are eminently qualified to represent discrimination complainants in Mine Act proceedings. Yet a substantial amount of the hours claimed for reimbursement by ACLC and Opegard are for duplicative services, which results in an effective claimed hourly rate of \$550.00 per hour (\$200.00 per hour for ACLC plus \$350.00 per hour for Opegard). As a representative sample of duplicative entries in their respective fee petitions, both ACLC and Opegard billed for time spent on telephone calls with each other (see, as examples, fee petition entries for 3/27/14, 4/1/14, 4/25/14, 7/21/14, 7/30/14, 9/30/14, 10/1/14, 10/20/14, 1/6/15, 1/7/15, 1/21/15, 1/26/15, 2/12/15, 3/18/15, 4/21/15, and 6/12/15). The fee petitions of both counsel also reflect billings for time spent drafting and reading emails between one another (see, as examples, fee petition entries for 7/29/14, 9/21/14, 10/6/14, 10/16/14, 10/23/14, 10/24/14, and 1/8/15), by both counsel for participation in conference calls with the court (see, as examples, fee petition entries for 7/30/14, 10/28/14, and 2/12/15), meetings with McGlothlin (see, as examples, fee petition entries for 10/7/14 and 1/7/15) and depositions (see, as examples, fee petition entries for 1/13/15, 1/14/15, and 1/15/15). Additionally, both counsel billed for time spent reviewing the same document (see, as examples, fee petition entries 7/21/14, 10/1/14, 10/10/14, 10/29/14, 11/7/14, 11/17/14, 1/6/15, 1/21/15, 1/23/15, 4/28/15, 5/12/15, and 6/12/15). Such claims can only reasonably be reimbursed under the Mine Act for the efforts of one attorney, rather than twice for the duplicative efforts of both counsel.

In addition to the duplicative nature of McGlothlin's counsel's fee petitions, claims for reimbursement by both the author and editor of a brief are also problematical (see, as examples, fee petition entries for 9/9/14, 9/17/14, 9/18/14, and 9/19/14; 2/18/15, 2/24/15, 3/17/15, and 3/18/15; 4/24/15, 4/28/15, and 5/1/15). Initially, such claims raise the question of whether reimbursement to the author of the brief is appropriate if the author's efforts were inadequate by virtue of the need for significant editing. Moreover, claims for reimbursement for exchanges of

⁹ (...continued)

not collect legal fees from complaining miners in cases brought by the Secretary on the miners' behalf, either in adjudicated section 105(c)(2) proceedings, or in 105(c)(2) proceedings resolved through the Commission's approval of settlement terms. *See Dunmire*, 4 FMSHRC at 143 (monetary relief is awarded "to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of [the discrimination]"). In other words, a complaining miner is not made whole if he is under the mistaken belief that he is personally liable for legal services deemed, by law, to be unnecessary. Simply stated, monetary relief awarded by the Commission to complaining miners in section 105(c)(2) cases may not be shared with private counsel.

edits between the author and editor are self-serving in that it is impossible to evaluate whether the purported edits were necessary.¹⁰

In sum, I find that 89.55 hours of the total 331.1 hours claimed for reimbursement by ACLC and Opepgard, based on redundant fee petition entries, are “duplicative, wasteful, or merely excessive.” *See Hensley*, 461 U.S. at 424. As such, I find that a total of 241.55 hours were reasonably billed by ACLC and Opepgard. Filings in this proceeding, as well as counsel’s respective fee petitions, reflect that ACLC has served as lead counsel. Accordingly, billed time by both ACLC and Opepgard that is deemed duplicative shall only be credited to ACLC. Thus, with respect to the total 241.55 hours credited, I find that 210.25 hours were reasonably billed by ACLC, and that 34.3 hours were reasonably billed by Opepgard for services that were not duplicative, such as his efforts with regard to FOIA and discovery. Consequently, applying the lodestar standard, ACLC and Opepgard are entitled to a fee reimbursement totaling \$54,055.00, computed at \$200.00 per hour, and \$350.00 per hour, respectively.

In addition, McGlothlin’s counsel are seeking a total of \$4,165.48 in incidental expenses. I find that Opepgard’s \$990.66 in claimed expenses incurred through his attendance at depositions and meetings to be duplicative. Consequently, \$3,174.82 in incidental expenses shall be reimbursed. In sum, **I find a total attorney fee reimbursement, including incidental expenses, of \$57,229.82 to be reasonable** under section 105(c) of the Mine Act.

As a final matter, it is “always difficult and sometimes distasteful” when courts are called upon to evaluate the reasonableness of attorney fees. *Johnson*, 488 F.2d at 720. I would have preferred that the fee petitions filed by McGlothlin’s counsel were reasonable, negating the need for my intervention. I also regret the parties’ repeated requests for approval of confidential settlement terms, despite the fact that the parties were ordered to submit petitions for relief. It is

¹⁰ Although the reimbursements sought shall be reduced due to duplicity, it is noteworthy that ACLC and Opepgard presented fee petitions containing “block billing.” Block billing is the practice of “lumping together multiple tasks into a single entry of time without separating tasks into individual blocks or elaborating on the amount each task took.” *Chavez*, 2015 WL 136388, at *4 (citations and quotations omitted). By way of example, Opepgard’s fee petition includes the following entry for January 19, 2015:

[fn.10 cont’d]

Talk with Alicia re: Tim Thompson interviewing employees after depositions were completed; make notes of conversation; review Judge Feldman’s written order granting our motion to quash the subpoena for Sheila Keiser; draft e-mail to Evan re: subpoenaing witness for deposition; review Evan’s e-mail to Hardy & Wickline re: notes from Avery Stollings’s notebook.

Confidential Settlement Agmt., Ex. A at 22 (Nov. 11, 2015). The practice of block billing makes fee petitions difficult to review, especially in instances where more than one attorney is seeking reimbursement.

unfortunate that the parties' posture in this matter has resulted in an undue delay of the payment of monetary relief to McGlothlin.

In the final analysis, the issue in a 105(c) proceeding is not the amount of reimbursement a mine operator is willing to pay. Rather, the issue is whether the amount of reimbursement the Commission is being requested to direct a mine operator to pay under its delegated statutory authority is reasonable. I decline to legitimize a pattern of dual representation that may have resulted in the recovery of duplicative and unnecessary attorney fees under color of authority of the fee shifting provisions of 105(c) of the Mine Act. *See Blum*, 465 U.S. at 894-95.

ORDER

In view of the above, consistent with the June 11, 2015, Decision on Liability, which held that Dominion Coal Corporation violated the anti-discrimination provisions of section 105(c) of the Mine Act:

1. **IT IS ORDERED** that Dominion Coal Corporation pay Scott D. McGlothlin **\$45,942.61** less pertinent federal, state, and local taxes, as compensation for lost wages and incidental expenses **within 45 days of this Decision**;
2. **IT IS FURTHER ORDERED** that Dominion Coal Corporation pay Scott D. McGlothlin's attorneys, Appalachian Citizens' Law Center, Inc. and Tony Oppegard, via a joint check, **\$57,229.82 within 45 days of this Decision** as reimbursement for attorney fees and the attorneys' incidental expenses;¹¹
3. **IT IS FURTHER ORDERED** that Dominion Coal Corporation shall post the June 11, 2015, Decision on Liability in this matter at all of its active mines for 60 consecutive days from the date of this Decision in conspicuous, unobstructed places where notices to employees are customarily posted; and
4. **IT IS FURTHER ORDERED** that Dominion Coal Corporation expunge any reference to this discrimination proceeding, if any, from McGlothlin's employee records, and that Dominion Coal Corporation is prohibited from providing any negative references that would interfere with McGlothlin's ability to obtain future employment.

¹¹ Although I believe the calculated division of the reimbursable legal services of ACLC and Oppegard to be just and adequate, ACLC and Oppegard are free to divide this total as they see fit.

IT IS FURTHER ORDERED that the Decision on Liability, 37 FMSHRC 1256 (June 2015) (ALJ), and the Decision on Relief constitute the final disposition of this discrimination proceeding. Upon timely satisfaction of the relief ordered above, the captioned discrimination proceeding in Docket No. VA 2014-233 **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

February 11, 2016

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

v.

BUZZI UNICEM USA,
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. LAKE 2015-329-M
A.C. No. 12-00064-373314

Mine: Lone Star Industries

DECISION

Appearances: Michele A. Horn, Esq., U.S. Department of Labor, Office of the Solicitor,
1244 Speer Boulevard, Suite 216, Denver, Colorado, for Petitioner

C. Gregory Ruffennach, Esq., Ruffennach Law, 1629 K Street, N.W.,
Suite 300, Washington, D.C. 20036, for Respondent

Before: Judge Barbour

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, *et seq.* (1979) (the “Mine Act”), the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”) alleges that Buzzi Unicem USA (“Buzzi”) violated 30 C.F.R. § 56.14100(b), a mandatory safety and health standard for the nation’s metal and nonmetal mines. The Secretary further alleges that the violation was a significant and substantial contribution to a mine safety hazard (“S&S” violation¹) and that it was caused by Buzzi’s high negligence and unwarrantable failure to comply with a mandatory health or safety standard. The Secretary proposed a specially assessed penalty of \$5,300.00 for the violation.

¹ An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S “if, based upon 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.” *Cement Div., Nat’l Gypsum Co.* 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary 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 will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Secretary petitioned the Commission to assess the penalty as proposed. The company answered denying the violation occurred, or if it did, stating that the proposed penalty and S&S and unwarrantable failure designations were inappropriate. The Commission's Chief Judge assigned the case to the court, which directed the parties to engage in discussions to determine if the alleged violation could be settled. The parties were unable to reach a settlement, and the case was set for hearing and tried in Greencastle, Indiana, on October 14, 2015.

I. STIPULATIONS

1. Buzzi Unicem USA ("Buzzi Unicem") engages in quarrying and cement manufacturing at the Lone Star Industries facility ("facility") in Putnam County, Indiana.
2. Buzzi Unicem's operations affect interstate commerce.
3. The area of the facility where the contested citation was issued is subject to the jurisdiction of the [Mine Act].
4. Buzzi Unicem is an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the area of the facility where the contested citation of these proceedings was issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.
6. Eric Reno was, at the time the citation was issued, an authorized representative of the . . . Secretary of Labor assigned to MSHA, and was acting in his official capacity when issuing the citation. . . .
7. The citation . . . was properly served upon Buzzi Unicem as required by the Mine Act.
8. The citation . . . may be admitted into evidence for the purpose of establishing its issuance but not for the truthfulness or relevancy of any statements asserted therein.
9. The pre-operation reports, which the parties have exchanged and intend to introduce into evidence, are authentic and may be admitted into evidence.
10. The certified copy of the MSHA Assessed Violation History reflects the history of the 17 citation issuances at the Mine for 15 months prior to the date of the citation at issue and may be admitted into evidence without objection by Buzzi Unicem.
11. The penalty assessed in this docket will not affect the ability of Buzzi Unicem to remain in business.
12. Buzzi Unicem demonstrated good faith in abating the alleged violation in a timely manner.

JX-1; Tr. 15-17.

II. BACKGROUND

1. The Mine and the Inspection

The Lone Star Industries mine is a cement plant located just outside of Greencastle. Tr. 20. Buzzi uses numerous pieces of mobile equipment at the mine for production and cleanup and maintains a system for preoperative examinations of mobile equipment prior to their use at the mine. Tr. 24, 118. Employees check for defects and deficiencies in the equipment during preoperative exams and may take any piece of equipment out of service by tagging it out if they believe they have identified a safety hazard. Tr. 31, 120. Management officials then perform their own inspection of the equipment to determine whether a hazard exists. Tr. 121. The equipment is put back into service if management officials determine that a hazard does not exist. Tr. 121. During one such preoperative exam on September 22, 2014, an employee at the mine identified what he believed to be a safety hazard on a John Deere 317 skid steer (a type of front-end loader) and included the following comment on his preoperative exam form: "Tagged out for moving on its own with operator not touching controls." Tr. 48; GX-5.

MSHA maintains a phone number that a miner can call to report a hazardous condition. Tr. 22. The miner has the option of giving his or her name or remaining anonymous. Tr. 23. The miner's message is reported to the MSHA district manager, who will then send an inspector to the mine to investigate the complaint, maintaining the complainant's anonymity if the miner prefers. Tr. 23. On September 24, 2014, MSHA received a hazard complaint from an anonymous caller. Tr. 21. MSHA subsequently learned that the caller was the same employee who had tagged the John Deere 317 out of service on September 22. Tr. 23. MSHA Inspector Eric Reno² spoke to the anonymous caller and conducted an investigation that day at the mine in response to the complaint. Tr. 20-21. The caller told Reno that the skid steer was creeping and lurching on its own when he removed his hands from the controls, even though it should have remained motionless if it were functioning properly. Tr. 21-22. The caller continued that after he reported the defect and tagged the equipment out of service, mine management asked him to continue operating the still defective equipment, using a parking brake to stop it if necessary. Tr. 21.

During the investigation at the mine, Reno spoke with miners and management officials and made a skid steer operator test the John Deere 317 five or six times so that Reno could observe the alleged safety defect. Tr. 33, 36-37. As a result of the investigation, Reno found that the skid steer did not stop when the skid steer operator took his hands off the controls and concluded that this condition was hazardous to miners working near the skid steer and that Buzzi had known of the condition and failed to correct it. Therefore, he cited Buzzi for a violation of mandatory safety standard 56.14100(b), which requires that, "Defects on any equipment . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b). Because he also found the alleged violation was S&S and the result of

² Reno testified that he had worked for MSHA for about three years, prior to which he had four to five years of experience performing various tasks in an underground mine. Tr. 18-19.

the company's unwarrantable failure to comply with the standard, he issued the citation pursuant to section 104(d)(1) of the Act.³ 30 U.S.C. § 814(d)(1).

2. The Equipment and the September 22 Tag-Out

Inspector Reno testified that Buzzi have roughly five or six skid steers at the mine. Tr. 24, 35. The John Deere 317 skid steer that is the subject of the hazard complaint is used for cleaning and maintenance and is the only one of its type at the mine. Tr. 25, 111. When used for cleaning, the equipment can scoop up piles of material with a bucket. Tr. 25. When used in tighter areas, another miner may shovel or sweep piles of material into the bucket, which may be raised or on the ground. Tr. 25-26. A miner performing cleanup may place himself directly in front of the bucket or on the side depending on the pile being cleaned and the area in which he or she is working. Tr. 26.

The skid steer functions through the use of foot pedals and levers on each side of the individual operating the equipment. Tr. 28. The foot pedals control the bucket and the levers (there are two) control the movement of the vehicle. Tr. 28. To move the equipment forward or backward, an operator pushes both levers in the direction he or she wishes to go. Tr. 28. Turning is accomplished by moving only one lever forward at a time. Tr. 29. When operating skid steers in the past, Reno would personally keep his hands in close proximity to the levers while the skid steers were stopped, in case he had to move the equipment forward or backward. Tr. 54. Douglas Bumgardner, an hourly worker at the mine who previously operated the skid steer at issue, testified that he typically keeps his hands on the controls when he is in the skid steer, unless he is attempting to use the parking brake. Tr. 78. According to Bumgardner, the skid steer cannot move faster than five miles per hour, even when the levers are at full throttle. Tr. 77. Brad Davis, the safety manager at the mine, testified that the maximum speed allowed for mobile equipment at the mine is to two to three miles per hour. Tr. 124.

The skid steer does not have a traditional brake as one might find on an automobile. Tr. 29. Instead, it is designed to stop when an operator removes his or her hands from the controls, and the levers return to a neutral position. Tr. 29-30. However, if the skid steer is on a steep grade, it may not be enough to release one's hands from the controls to bring the machine to a halt. Tr. 52. In such a situation, the operator may have to keep pressure on the levers in a neutral position to stop the skid steer. Tr. 52. In addition, the skid steer has an emergency brake that can

³ Section 104(d)(1) of the Act states, in pertinent part:

“If . . . an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that . . . such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. 30 U.S.C. § 814(d)(1).

halt its movement. Tr. 29. Bumgardner later added that the machine will also shut off automatically when a miner removes his or her seat belt. Tr. 79-80.

On September 22, 2014, the John Deere 317 was tagged out of service by an employee for defectively moving without the operator's control. Tr. 32. John Brennan, a yard supervisor at the mine, inspected the machine and acknowledged the defect, but did not believe it to be a hazard. Tr. 93. Brennan asked a mechanic at the mine, Jon Seniour, to examine the equipment and attempt to fix it. Tr. 94. Seniour determined that some of the parts on the machine were worn out, but he did not feel comfortable in his ability to fully repair the equipment. Tr. 107-08. However, he nonetheless told Brennan that the machine was safe to put back into service. Tr. 94-95, 108. Brennan received a follow-up opinion from the safety manager at the mine, Brad Davis. Davis also thought it would be safe to return the machine to service. Tr. 96. As a result, the company returned the machine to service the same day and instructed the operator who reported the defect to use the skid steer's parking brake to stop it. Tr. 33, 96.

According to Reno, Buzzi runs three shifts, and the skid steers operate on all shifts. Tr. 35. Reno stated that it is very common to be task trained on the use of skid steers, because numerous individuals operate them over the course of every shift, seven days a week. Tr. 32. After it was returned to service, the John Deere 317 was freely available for use to all task trained miners. Tr. 35. However, in spite of this common use, Reno discovered from his conversations with mine management and employees that the company had not disclosed the equipment's safety defect to anyone other than the operator who tagged out the machine, either individually, in a meeting, or on a bulletin board, and had not instructed anyone other than that operator to use the parking brake to stop the equipment. Tr. 35-36.

Buzzi has five other skid steers at the mine, but several were out of service at the time of Reno's inspection. Tr. 24, 97-98. Brennan testified that there were at least two more available, on September 22. Tr. 97-98. However, he also admitted he had to borrow one from the other side of the plant, because the lack of operational skid steers had placed the company "in a little bit of a jam." Tr. 98.

III. THE CITATION

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8843406	9/24/2014	56.14100(b)

The citation states:

While inspecting the John Deere 317 . . . it was found that the machine will continue to creep when the operator removes his hands off the controls and the machine is in the neutral position. The machine was tested on level ground at high rpm's and low rpm's and it was found that the drive train was still engaged in the neutral position and the machine would still move forward under it's [sic] own power. This machine was tagged out on 09/21/2014 for this hazard and it was found by mine management to not be a hazard and placed back into service with

instructions given to the operator to activate the parking brake whenever the machine is stopped. This machine is used daily at the mine in multiple areas of the mine for maintenance and clean-up purposes. After discussions were held with miners at the mine site, it was found that the machine is operated around other people, in some cases miners standing in front of the bucket shoveling material into it, and it is not common practice to activate the parking brake in this situation. Mine management did not address or instruct any other miners at the mine site of the condition of this machine nor set a plan to have the machine looked at by a trained mechanic. With continued practice operating this machine with the hazardous condition, it would be reasonably likely for an accident to occur that could result in lost workdays or restricted duty type injuries. This violation is an unwarrantable failure to comply with a mandatory standard. . . .

GX-1. The citation was abated by bringing in an outside contractor to replace multiple parts. Tr. 46. Specifically, the company installed new springs and rollers to replace defective parts. Tr. 109.

Inspector Reno first observed the violative condition when he asked an operator to test the equipment for him around five or six times on a variety of surface grades and RPM settings, both with the bucket raised and lowered. Tr. 37-38, 63. The tests revealed that in all scenarios the equipment would continue to “creep” when the operator removed his hands from the controls. Tr. 38. The equipment “may have jerked a little bit,” but it did not lurch or “lunge forward” as the anonymous complaint had alleged. Tr. 39. To stop the equipment’s movement, an operator would have to maintain tension on the controls in order to keep the levers situated in a neutral position. Tr. 40. The equipment did not move when the parking brake was on. Tr. 62.

Reno believed that this condition posed a safety hazard to miners because of the presence of numerous distractions at the mine and the practice of miners standing in close proximity to the equipment to shovel material into the bucket, sometimes in tight areas. Tr. 40, 147. Reno feared that if a skid steer operator became distracted by loud noises at the facility or an incoming call over the radios or cell phones miners carry with them⁴ the operator could remove his or her hands from the levers. This in turn could cause the skid steer to collide with a miner performing clean-up duties in a tight area, and either pinch that miner into a corner or cause him or her to stumble into some other hazard. Tr. 40-41, 147-48. Due to dusty conditions at the mine, Reno also believed that a miner could remove his or her hands from the levers while sneezing. Tr. 41. Reno speculated that an individual distracted by a sneezing fit could have his or her hands off the levers for ten seconds, causing the machine to move approximately two inches in the process. Tr. 53. Additionally, Reno noted that there was significant foot traffic in the area, which increased the risk of an accident occurring. Tr. 41.

Reno was asked during the hearing how fast the equipment moved. He responded, “It wasn’t consistent. At times it would be slower; at times it would be faster.” Tr. 39. As a follow-

⁴ Brennan confirmed that several miners wear radios or walkie-talkies, and that several use cell phones on the job even though they are instructed not to. Tr. 100-02, 104.

up question, Reno was asked, “At the fastest, do you have an estimation about how fast it moved?” Reno responded, “It probably moved every bit of an inch [every] three to five seconds.” When asked by the court to repeat his answer, Reno again replied that “it would creep anywhere from an inch to more every three to five seconds it was moving.” Tr. 39. When confronted with the fact that one inch every five seconds translates to approximately one-hundredth of a mile per hour, Reno clarified that his measurement of one inch per three to five seconds was an average rather than a maximum range. Tr. 145. However, he did not specify approximately how much faster the skid steer could have moved when there was no pressure on the controls. Bumgardner later testified that according to his observation, the equipment moved 1 inch every 5 to 10 seconds. Tr. 81. Brad Davis, the safety manager at the mine, observed the equipment move one inch every five seconds. Tr. 121. Reno agreed the skid steer was the slowest mobile equipment at the mine. Tr. 61-62.

Reno designated the violation as S&S, because the machine was used daily, the company had no immediate plans or schedule to fix the defect, and the condition would probably get worse as the springs inside weakened and eventually broke. Tr. 44, 142-43. Reno thought the potential use of the equipment in dark and dusty mills, and the practice of miners standing in very close proximity to the machine while performing clean-up work increased the likelihood of injury. Tr. 44-45. He also testified that miners could sustain injuries by bumping into other equipment in order to avoid the moving skid steer. Tr. 70-71. As a result, Reno found that the violation was reasonably likely to result in injury.

In regard to the type of injury that could be reasonably expected, Reno testified that the machine is “very heavy” and the tires alone can weigh up to 300 pounds. Tr. 27. If the tires ran over a miner’s foot, they could break his or her toes. Tr. 44. Jon Senour, a mechanic at the mine, added that the machine weighs somewhere between 3,000 to 6,000 pounds. Tr. 114. Reno also observed that the skip steer scoop has edges that could leave a bruise, and possibly scrape a miner, causing bleeding. Tr. 27. Reno explained his S&S designation by noting that broken bones, bruises, or lacerations would result in lost workdays or restricted duty. Tr. 45. These conclusions were partially informed by Reno’s experiences colliding with the scoop of a skid steer in the past, although not from the machine colliding into him. Tr. 27, 64. Reno admitted that he did not have training or experience evaluating the impact of slow-moving equipment. Tr. 62.

Reno designated the violation as an unwarrantable failure and a result of high negligence because the company was aware of the condition. It tagged the skip steer out of service, but then chose to return it to service and to notify only one miner out of 175 employees of the defect.⁵ Tr.

⁵ Brennan confirmed that the company was aware of the defect. Tr. 97. He added that there are 50 skid steer operators at the mine and that individuals operate skid steers on all four shifts, twenty four hours a day, seven days a week. Tr. 99-100. Brennan then confirmed that he did not reach out to these operators about the defect even though the skid steer was available for anyone on site to use once it was put back into service. Tr. 42, 45. While testimony revealed that at least one other miner, Bumgardner, may have known about the condition at the time, management officials did not inform him about the condition and would not have had any reason to know that he was aware of the condition, as he never mentioned any hazard or defect in a preoperative exam report. Tr. 90.

42, 45. Additionally, Reno was troubled that Buzzi had no concrete plan to make repairs at the time. Tr. 42.

All four of the company's witnesses, which included Douglas Bumgardner, an hourly employee who operated the skid steer, Jon Senior, an hourly employee who attempted to repair the equipment, John Brennan, a yard supervisor, and Brad Davis, the mine's safety manager, testified to their belief that the cited condition did not pose a safety hazard because the skid steer moved so slowly. Tr. 83, 93, 108, 121. Davis felt the movement of the vehicle, at a speed of roughly one inch per five seconds, was so minimal that it was "almost unrecognizable."⁶ Tr. 121. Brennan added, as further support for his belief that the condition did not pose a hazard, that there were still three ways to stop the machine even with the defect, and that every skid steer operator at the mine is familiar with those methods from their task training. Tr. 93-94, 104-105. He also testified that he approved returning the equipment back to service once he got a follow-up opinion from both Senior and Davis that it was safe to do so. Tr. 94-96.

In response to Reno's concerns about miners being struck by the machine while shoveling material into its bucket, Bumgardner noted that while it is common to have two person cleaning operations, the miner shoveling material into the bucket will typically stand to the side of the skid steer rather than directly in front of it, and never with his or her back to the machine. Tr. 78-79, 89. However, Davis admitted that miners work in front of the John Deere 317 when doing maintenance and cleanup, and that the machines are operated daily and frequently during the day. Tr. 130, 133. Bumgardner testified that he had never operated the machine inside the plant and could not think of any place inside where he would have to use it. Tr. 88-89.

As for Reno's concerns that the condition of the skid steer would deteriorate over time and therefore was reasonably likely lead to injury, Bumgardner testified that he had noticed this condition existing for a couple months prior to the citation, and that it did not get worse during this period. Tr. 81-82. Senior added that the machine is 15 years old, and that its performance had deteriorated very little in that time. Tr. 154. Therefore, he did not expect significant deterioration before the skid steer was repaired. Tr. 154.

Brennan testified that he had called a John Deere "sales mechanic" on September 22, within two hours of his inspection of the skid steer. Tr. 95. According to Brennan, the sales mechanic indicated that he would only be able come to the plant toward the end of the week, due to a busy workload. Tr. 95. Brennan conceded that there was no specific date for repairs and no purchase order issued. Tr. 152. However, he expected the sales mechanic to arrive by September 25, and the skid steer to be repaired in a timely manner following that. Tr. 152-53. Davis testified that his decision not to talk to all skid steer operators about the John Deere 317 defect rested on the assumption that Brennan would have a John Deere mechanic come to the mine and fix the equipment shortly. Tr. 139. He believed that the defect did not pose a safety hazard at the time

⁶ During cross-examination, the Solicitor stated, "You didn't eliminate completely the possibility of an injury from this condition; correct?" Davis replied, "No ma'am." The Solicitor continued, "You just thought that if there was an injury, because the equipment was moving so slowly, it probably wouldn't be a life-threatening injury, correct?" Davis answered, "Correct, ma'am." Tr. 132-33. However during redirect examination, Davis stated that he believed there was no possibility of injury of any kind. Tr. 138.

and that it would not get worse within the period of time it would take the John Deere employee to arrive, but that if it did, someone would identify the problem in a preoperative exam so that the issue could be dealt with then. Tr. 139-40.

IV. LEGAL ANALYSIS

1. Fact of the Violation

Section 56.14100(b) states, “Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” Buzzi contends that the Secretary has not met his burden to prove that the defective condition on the John Deere 317 had reached the point where it adversely affected the safety of the company’s employees or created a “hazard to persons,” primarily due to the slow speed of the vehicle and the uncommonness of operators removing their hands from the controls. Resp’t Br. at 5, 7. The court disagrees.

In interpreting section 56.9002, a defunct predecessor to section 56.14100(b), the Commission explained “that the language ‘affecting safety’ has a wide reach and that ‘the safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach.’” *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) (citing *Allied Chemical Corp.*, 6 FMSHRC 1854, 1858 (Aug. 1984)). The Commission also noted that it is appropriate when dealing with this standard to evaluate the evidence in light of what a “reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.” *Id.* (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1614, 1617-18 (Sept. 1987)). In the S&S context, the Commission recognized that the word “hazard” denotes “a measure of danger to safety or health.” *Nat’l Gypsum*, 3 FMSHRC at 827, 827 n.7.

While the defective spring and roller system in the John Deere 317 skid steer may not have had a “major” or “immediate” impact on safety, the court finds that it did create a clear measure of danger to the safety of miners, which is all that the wide reaching standard requires. A reasonably prudent person, familiar with the mining industry and the broad protective purpose of the standard, would have taken the skid steer out of service immediately in order to meet the protection intended by the standard.

With the significant foot traffic in the area that Inspector Reno observed and miners working in very close proximity to the skid steer for cleaning and maintenance, the court accepts that even a slow moving defective vehicle could pose a safety hazard. Tr. 41, 54. The record makes clear that the overwhelming majority of employees at the mine were unaware of the defective condition. Tr. 97, 99-100. A distracted skid steer operator who had not been alerted to the risks of leaving the controls unattended on level ground could take his or her hands off the levers, which in turn could lead to one of the accidents Reno listed, including the scenario where a wheel would roll over a miner’s foot. Tr. 44, 114. Indeed, such accidents were possible even if operators typically kept their hands on the controls. Miners on the ground who had not been alerted to the hazard were also exposed to an increased risk of injury, because they were more likely to be inattentive around the defective skid steer.

Buzzi also argues that the company had timely arranged for a repair at the end of the week, thereby satisfying the cited standard's requirement that defects be corrected "in a timely manner to prevent the creation of a hazard to persons." Resp't Br. at 6 n.3. However, it is undisputed that the company returned the equipment into service without any specific date set aside or purchase order issued for repairs. Tr. 152. Under these circumstances, the court finds that Buzzi did not satisfy the timeliness requirements of the standard and that the Secretary has met his burden for proving the violation.

2. S&S and Gravity

The court finds that the Secretary did not establish a reasonable likelihood that the hazard contributed to by the defective skid steer would result in an injury or illness of a reasonably serious nature. The primary consideration leading to this finding is the defective vehicle's extraordinarily slow rate of movement. Inspector Reno initially testified, and subsequently reiterated, that "[a]t the fastest," the machine would "creep" at a rate of one inch per three to five seconds, which translates to approximately one-hundredth of a mile per hour.⁷ Tr. 39. Bumgardner and Davis observed similar rates of movement. Tr. 81, 121. Based on these consistent testimonies, the court finds that the vehicle was moving approximately one inch every five seconds.

The court further finds that this rate of movement would not be reasonably likely to lead to an injury, as required by the third step of the *Mathies* analysis, as it would give even inattentive miners on the ground enough time to avoid contact if the skid steer slowly moved their way. *Mathies*, 6 FMSHRC 1, 3-4. While miners do sometimes work in close proximity to the skid steer while cleaning, Bumgardner credibly testified that those miners would have no reason to work with their backs to the machine, and would typically stand to the sides of the vehicle. Tr. 79. Such miners could easily move out of the way if the skid steer began to creep.

It is also unlikely that an operator would remain distracted long enough to allow the vehicle to run into a miner. Reno conceded that the machine would move approximately two inches during a ten second sneezing fit, which this court considers to be a minimal distance. Tr. 52-53. Longer distractions causing greater movements are far too speculative to form the basis of an S&S finding.

The Secretary argues that the evaluation of reasonable likelihood should be made assuming continued mining operations, and that the safety defect would get worse with continued operation. Sec'y Br. at 6-7. However, the court credits Bumgardner's testimony that this defective condition had existed for at least two months and that it had not gotten worse in

⁷ When called back to the stand for rebuttal testimony, Reno later stated that this estimate was an average rather than a maximum range, and that there was no consistency to the vehicle's rate of movement, but he never clarified how much faster the vehicle could move with the controls in the neutral position. Tr. 143, 145. It would be highly speculative to conclude from this testimony that the vehicle could have moved significantly faster in neutral, especially when the Secretary did not dispute Bumgardner's or Davis's testimony that the machine was only capable of moving between two to five miles per hour when the levers were at full throttle. Tr. 77, 121.

that period. Tr. 81-82. Given that timeline, the court does not find it likely that this condition would deteriorate significantly enough with continued mining operation to make an injury reasonably likely. Therefore, the S&S finding must be vacated.

While the violation has been found to be non-S&S, the court must further make a gravity finding with the understanding that the gravity and S&S nature of a violation are not synonymous. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (explaining “the focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.”) Inspector Reno detailed a plausible series of injuries that could result from the hazardous defect, ranging from less serious scrapes and bruises to the more serious threat of broken bones, crushed by the weight of roughly 300 pound tires. Tr. 27. Given this range of possibilities, the court finds the violation to be moderately serious, as an injury could reasonably be expected to lead to lost workdays and restricted duty.

3. Negligence and Unwarrantable Failure

Reno designated the violation as an unwarrantable failure to comply with a health or safety standard and cited Buzzi under section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1); GX-1. However, as the Commission has explained, “[t]he statutory language of section 104(d)(1) expressly makes a significant and substantial finding a prerequisite for the issuance of a section 104(d)(1) citation.” *Youghiogeny & Ohio Coal Co.*, 10 FMSHRC 603, 608 (May 1998). Since the court is vacating the S&S finding, it must also vacate the unwarrantable failure finding and modify the 104(d)(1) citation to a 104(a) citation.

This court however finds Buzzi highly negligent just as the Secretary alleges. The Commission has previously found high negligence when an operator had actual knowledge of the violative condition and failed to act. *Deshetty, emp. by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994). According to the Commission, the real “gravamen of high negligence is that it ‘suggests an aggravated lack of care that is more than ordinary negligence.’” *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015) (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). Buzzi indisputably had actual knowledge of the violative condition when the defective skid steer was tagged-out of service on September 22. Tr. 93. And while the company did ask multiple individuals to examine the equipment after it was tagged out and did discuss repairs with a John Deere representative (facts that Buzzi argues should mitigate its negligence), the company failed to act with sufficiently reasonable care when it returned the skid steer into service without notifying more employees of the defect and without scheduling a specific date for repairs. Tr. 42-45; Resp’t Br. 12-15.

Buzzi claims it was only minimally, if at all, negligent primarily because it had a good faith and reasonable belief that the condition was not hazardous. Resp’t Br. 12-15. As evidence of the good faith and reasonableness of its belief, Buzzi cites to the slow speed of the vehicle, the lack of prior citations for this specific issue which could have put the company on notice that greater efforts were required, and the fact that the condition was never mentioned in a preoperative exam in the two months prior to the September 22 tag-out. Resp’t Br. 12-15.

As the court has already found the cited condition to be a violation at even minimal speeds, the slow speed of the vehicle does not affect Buzzi's awareness of the facts constituting the violation. Instead it bears on the gravity and S&S nature of the violation. Similarly, the lack of prior citations under this standard would only be material if the facts of the violation, by themselves, were not enough to put the company on notice that greater compliance efforts were required. However, the court has found that the defect itself was sufficient to do just that. Finally, Buzzi's failure to identify the condition for at least two months through regular preoperative exams is a failure of the preoperative exam system rather than evidence that it was reasonable to think no hazard existed. This is especially true because Buzzi employees are required by their company to identify defects, and not just safety hazards, in their preoperative exam reports, and at least one Buzzi employee testified that he failed to do either when he first noticed this defect. Tr. 86, 90; RX-1 at 2.

V. OTHER CIVIL PENALTY CRITERIA

The parties stipulated that the company exhibited good faith in abating the violation and that the penalty assessed will not affect Buzzi's ability to remain in business. JX-1 at 2. However the Secretary subsequently argued in his post-hearing brief that the company did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation, because it returned the defective equipment back into service before the defect was repaired. Sec'y Br. at 15. Since the parties already stipulated to Buzzi's good faith abatement efforts, the court accepts that finding. If the Secretary is arguing that Buzzi demonstrated good faith in abating the violation after it was cited, but that it did not demonstrate good faith in achieving rapid compliance after it learned of the violation, the court has taken that argument into consideration in its negligence finding.

The company characterizes itself as a "mid-sized operator," while the Secretary classifies the mine as a "large cement plant," employing approximately 175 persons. Sec'y Br. at 1, 14; Tr. 90; Resp't Br. at 15. The court accepts that while the subject mine is large, the company as a controlling entity is "mid-sized." At hearing, the Secretary characterized Buzzi's violation history in the 15 months preceding the violation at issue as "moderate to moderately light." Tr. 155; GX-7. The company further clarified at hearing that the Secretary's print-out of previous violations included some violations originally cited in 2008 and 2009 that were not assessed until a delayed settlement for a backlog case, and that clearly fell outside the 15 month period. Tr. 156. The court, having taken all of this into consideration, concludes that the company has a moderately light violation history.

VI. PENALTY

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8843406	9/24/2014	56.14100(b)	\$5,300.00	\$634.00

The court has found that the violation is moderately serious, that an accident was unlikely, and that the violation was due to the company's high negligence. The Secretary proposed a penalty of \$5,300.00, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$634.00 is appropriate. The court has departed from the

proposed penalty because it has found the likelihood of injury to be much lower than the Secretary alleged.⁸

ORDER

In view of the conclusions and findings set forth above, within 30 days of the date of this decision, the S&S finding **SHALL BE VACATED**, Citation No. 8843406 **SHALL BE MODIFIED** to change the type of action from a 104(d)(1) citation to a 104(a) citation and to reduce the likelihood of injury from “reasonably likely” to “unlikely,” and the company **SHALL PAY** a civil penalty in the amount of \$634.00. Upon payment of the penalty, this proceeding **IS DISMISSED**.⁹

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

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/rd

⁸ The Secretary’s originally proposed penalty was also based on a special assessment pursuant to section 100.5 of the Secretary’s Part 100 regulations. 30 C.F.R. § 100.5(a). The Secretary relied on Buzzi’s awareness of the violation and the need for effective deterrence in justifying its special assessment. Sec’y Br. at 13; Tr. 46. However these factors have been taken into account in the court’s negligence and gravity determinations.

⁹ 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

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
303-844-5267/FAX 303-844-5268

February 12, 2016

RESOLUTION COPPER MINING LLC,
Contestant

v.

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

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

v.

RESOLUTION COPPER MINING LLC,
Respondent

CONTEST PROCEEDING

Docket No. WEST 2013-319-RM
Citation No. 8596049; 11/28/2012

Resolution Mine
Mine ID 02-00152

CIVIL PENALTY PROCEEDING

Docket No. WEST 2013-299-M
A.C. No. 02-00152-309931

Resolution Mine

DECISION ON REMAND

Before: Judge Manning

These cases are before me upon a notice of contest filed by Resolution Copper Mining LLC (“Resolution”) and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve Citation No. 8596049 issued at the Resolution Mine for an alleged violation of 30 C.F.R. § 57.19076. The Resolution Mine is an underground copper mine that was in the development stage at the time the citation was issued. The copper ore deposit is about 7,000 below the surface.

On April 19, 2013, I issued a decision vacating the citation on the merits. 35 FMSHRC 1072. The Secretary appealed my decision to the Commission. On October 28, 2015, the Commission reversed my decision, determined that Resolution Copper violated the safety standard, and remanded the case to me for a determination whether the violation was of a significant and substantial (“S&S”) nature. 37 FMSHRC 2244, 2252.

I have not set forth a detailed description of the facts in this remand decision because the facts are accurately set forth in my decision and the Commission’s decision. Nevertheless, a brief outline of relevant facts is helpful in understanding the S&S issue.

The personnel conveyance at issue was designed from scratch specifically for transporting miners and includes multiple safety features. (Tr. 110-112). The conveyance is connected to a rope attachment structure which is, in turn connected to a hoist rope used to raise and lower the conveyance. (Tr. 195). A “crosshead” situated above the rope attachment structure travels on two winch ropes which extend from the surface to the Galloway, a multi-level work platform suspended by four winch ropes. (Tr. 40, 86; Ex. P-3, p. 5). The crosshead, which is connected to the conveyance while traveling between the surface and the Galloway, guides the conveyance down the shaft, preventing it from moving from its zone of travel. (Tr. 44). The enclosed personnel conveyance has a reinforced tapered top and bottom. (Tr. 108, 223-224). Miners traveling in the conveyance are able to communicate with the hoist operator via a bell system, as well as by voice. (Tr. 116). The hoist which raises and lowers the conveyance is equipped with a Programmable Logic Control system, which automatically controls the speed of the conveyance based on its location in the shaft, and an Obstruction Control System which prevents collisions with any known obstructions in the shaft, such as safety doors. (Tr. 58-59, 70, 180).

When these cases were first before me, the issue was whether the conveyance Resolution Copper was using to lower miners into the mine was a bucket, as that term is used in section 57.19076. The standard simply provides that “[w]hen persons are hoisted in buckets, speeds shall not exceed 500 feet per minute and shall not exceed 200 feet per minute when within 100 feet of the intended station.” For the reasons set forth in my decision, I determined that the conveyance was not a bucket and, as a consequence, the speed limits set forth in the safety standard did not apply. On review, the Commission disagreed with my conclusion and held that the conveyance was a bucket so that the speed limits set forth in the safety standard applied.

The Commission remanded the case to me “to determine whether to affirm the inspector’s S&S designation.” 37 FMSHRC 2252. Upon remand, I encouraged the parties to reach an amicable settlement of the S&S issue and gave them sufficient time to do so. Because the parties were unable to reach a settlement, I gave the parties the opportunity to brief the issue. The Secretary elected to not file a brief. Resolution Copper filed a brief with several attachments.

In addition to challenging the citation at issue in these cases, Resolution Copper filed a petition for modification with the Secretary. The petition for modification case was proceeding at the same time as the present cases. Administrative Law Judge Richard M. Clark of the Department of Labor conducted the evidentiary hearing in the modification proceeding and his decision was appealed to the Assistant Secretary for Mine Safety and Health.¹ After I issued my decision, the Assistant Secretary issued a decision granting the petition for modification in part with conditions. In essence, the decision allows Resolution Copper to operate the personnel conveyances at speeds greater than 500 feet per minute as long as it meets rather detailed and rigorous standards, as specified in the decision. (Resolution Br. on Remand, Ex. B).

¹ Judge Clark initially determined that the personnel conveyance was not a bucket. On appeal, the Assistant Secretary ruled that only the Commission has the authority to make such a determination and he remanded the case back to Judge Clark. On remand, the judge granted unconditionally the petition for modification. (Resolution Br. on Remand, Exs. A & B).

I. SIGNIFICANT & SUBSTANTIAL

For reasons that follow, I find the violation was not S&S.² The Commission, on review, found that a violation of the cited standard had occurred. 37 FMSHRC 2252. I find that, while a discrete safety hazard existed, the Secretary did not meet his burden of establishing that there was a reasonable likelihood that the hazard contributed to would result in an injury.

A discrete safety hazard existed. Inspector Lunsford designated the citation as S&S, noting in the body of the citation that hoisting persons in the bucket at speeds up to and including 1200 feet per minute, which exceeds the maximum allowable speed of 500 feet per minute, exposes the persons to serious bodily injuries should an incident occur. The Commission, on review, in describing the testimony of the Secretary's expert, Thomas Barkand, stated that "after testifying about how guided rope conveyances have a lesser degree of control, [Barkand] subsequently testified about how, in the event of a strike, the kinetic energy transfer would injure miners." 37 FMSHRC 2248. Notably, record evidence established that, in the event of a collision, the increased speeds at which the conveyance was cited for traveling would have resulted in 5.8 times the amount of kinetic energy being released than if the bucket were traveling at the 500 feet per minute maximum speed set forth in the mandatory standard. (Tr. 234, 253). I am bound by the Commission's decision and agree that a discrete safety hazard existed.

I also note the finding of the Assistant Secretary of Labor for Mine Safety and Health that Resolution's use of technology to help mitigate the likelihood of the bucket colliding with an obstruction did not completely neutralize the risk created by the added kinetic energy that would be released in the event the bucket did collide with a shaft obstruction while traveling at speeds higher than allowed by the mandatory standard. (Resolution Br. on Remand, Ex. B p. 20). He remanded the modification proceeding to Judge Clark to further develop a factual record on this issue as well as other issues. *Id.* at pp. 30-33.

The Secretary has not met his burden of establishing that there was a reasonable likelihood that the hazard contributed to would result in an injury. The Secretary bears the "burden of proving each alleged violation by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30

² An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary 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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

FMSHRC 872, 878 (Aug. 2008) (ALJ) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”) I reach my conclusion based on the lack of evidence provided by the Secretary regarding the third S&S factor, the evidence provided by the operator regarding the steps taken to prevent any collisions, and evidence that any “collision” would most likely involve only a glancing strike.

This case came to me in an unusual manner. At the request of the parties, the court did not conduct a hearing. Rather, the parties agreed to be bound by the evidence produced at the hearing on Resolution’s petition for modification of the cited standard before Judge Clark. The Secretary did not call the issuing inspector to testify at the modification hearing and, instead, called only Thomas Barkand. In reaching my initial decision that the conveyance was not a bucket, I relied entirely on evidence produced at that hearing. The Secretary did not offer evidence on the S&S factors at that hearing because S&S issues were not before Judge Clark. The Secretary also declined to brief the S&S issue on remand in the present case and did not seek to reopen the record so that he could introduce additional evidence to address S&S issues.

Following the remand of this case to the undersigned, the court contacted the parties to discuss how the case should proceed if a settlement of the S&S issue could not be reached. The parties represented to the court that they “propose[d] to agree to the facts of significance to the [S&S] issue through stipulation or otherwise (sic), and submit simultaneous written argument on [their] respective positions[.]” (E-mail from Laura Beverage, Counsel for Resolution Copper Mining, LLC, to Jason Grover, Counsel for the Secretary of Labor, and Judge Richard Manning (Dec. 3, 2015) (included in the official record)). However, no such stipulations or agreed upon facts were ever filed with the court. Instead, the operator filed a brief on remand, while the Secretary declined to file a brief but, instead, rested on the record. While the Commission has observed that an experienced MSHA inspector’s opinion that a violation is S&S is entitled to substantial weight, *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998), there is no testimony in the record from the issuing inspector. Rather, the only testimony offered by the Secretary at the modification hearing was that of Barkand who was not present at the time the citation was issued and did not address the S&S factors in his testimony.

Although Barkand testified and the operator’s witnesses agreed that more kinetic energy would be released if the rope guided personnel conveyance struck an obstruction while traveling at speeds in excess of the standard’s maximum allowable speed of 500 feet per minute, Barkand acknowledged that he did not know if the increase in speed increased the *potential for a collision*. (Tr. 140, 234, 266).

The testimony presented by both parties makes clear that two types of potential obstructions could exist in the normal path of the personnel conveyance, those that are known and those that are not anticipated. Known obstructions would include doors that are sometimes closed within the shaft, while unanticipated obstructions would include ventilation tubing that was installed in the shaft to provide fresh air underground. The operator’s witnesses offered substantial testimony regarding the hoist’s Obstruction Control System and Programmable Logic Control which automatically slow down and stop the conveyance from colliding with any known obstructions in the shaft. (Tr. 59, 73-80, 180, 184-187; Ex. P-17). The Secretary did not offer any evidence disputing the capabilities of these safety systems. I find that, given the presence of

these systems, it was unlikely that the personnel conveyance would collide with one of the known obstructions in the normal travel area of the conveyance. While Barkand stated that the conveyance could collide with an unknown obstruction that entered the normal travel area of the conveyance, he offered next to no testimony on how that would occur and only opined that “I’m not sure where [the obstruction would come from], you know. There’s a lot of scenarios or possibilities[.]” (Tr. 267). I cannot accept Barkand’s general and speculative statement that there are “a lot of scenario’s and possibilities” without more support.

The personnel conveyance was unlikely to travel outside of its normal travel area. Thomas Goodell, the mine’s general manager for underground development, explained that the increase in speed would not make the conveyance move out of its normal zone of travel. (Tr. 44, 135). While Goodell and Ryan Gough, the manager of product services for Cementation, the contractor charged with sinking the shaft and operating and maintaining the hoist, both explained that buckets can and do move side to side as a result of rope oscillation during the mucking cycle, the mine never hoists persons while it is engaged in mucking and they have not observed the personnel conveyance swing at any speed. (Tr. 91-93, 133-134, 197). Given the lack of sideways movement of the personnel conveyance, it was unlikely to move outside of its normal travel area and collide with some obstruction.

While the operator’s witnesses acknowledged that it is impossible to entirely rule out the possibility of a collision, Gough testified that it would take something catastrophic for that to occur. (Tr. 137-138, 201, 232).

The Commission has explained that the “reasonably likely” requirement set forth in *Mathies* does not require the Secretary to prove that an injury was “more probable than not.” *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but, rather, that the hazard *contributed to* by the violation will cause an injury. *Musser Engineering, Inc.* and *PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (emphasis added).

The hazard described in the citation is that the personnel conveyance used by Resolution would be an accident in which someone would be injured. The issue is whether the speeds used by Resolution contributed to this hazard in a way that made such an accident reasonably likely. For the reasons set forth above, I find that the Secretary did not establish this element of the Commission’s S&S test. Resolution had in place a number of significant safety measures that make such an accident unlikely. These measures protected miners from potential collisions with anticipated obstructions in the shaft no matter what speed the conveyance was traveling. In addition, there was only speculative evidence as to whether any unanticipated objects in the shaft would contribute to an accident in which miners would be injured because of the higher speed of the conveyance.³

³ The evidence establishes that the most likely unanticipated obstruction in the shaft would be a ventilation tube that separated from the anchors that attach it to the side of the shaft. Such an event was unlikely and would most likely result in a glancing strike rather than a

(continued...)

As stated above, the modification hearing before Judge Clark did not specifically address S&S issues. Nevertheless, in the unlikely event that the multiple safety systems described above failed and the conveyance collided with a significant object in the shaft, such as a closed door, any miners in the conveyance would suffer injuries of a reasonably serious nature.

For the reasons set forth above, the S&S designation in Citation No. 8596049 is vacated.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The Secretary did not present evidence as to Resolution's history of previous violations. Information at MSHA's website indicates that Resolution received one non-S&S citation in the 15 months prior to the issuance of the subject citation. Information at MSHA's website also indicates that Resolution employed about 48 people in the fourth quarter of 2012 and employees worked a total of about 193,000 hours in 2012. As a consequence, Resolution was a medium-sized operator using the Secretary's penalty point system in section 100.3 as a guide. (30 C.F.R. § 100.3; Exhibit A to Penalty Petition). The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon its ability to continue in business.

I affirm all the determinations of Inspector Lunsford except with respect to S&S. An injury was unlikely but if an injury did occur it would likely be permanently disabling. One person was affected by the violation. Resolution's negligence was moderate. Applying my findings, the Secretary's penalty point system at section 100.3 yields a penalty of \$100, taking good faith abatement into consideration. Although this penalty point system is not binding on me, I find that a reduction of the penalty from \$207 to \$100 is appropriate in this instance.

³ (...continued)

collision. There was no showing that such a glancing strike was reasonably likely or that such an event would result in injuries at all, much less injuries of a reasonably serious nature. (Tr. 145-46, 223, 265).

III. ORDER

Citation No. 8596049 is **MODIFIED** to delete the significant and substantial designation and to reduce the gravity to “unlikely.” In all other respects the citation is affirmed. Resolution Copper Mining, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$100 within 30 days of the date of this decision.⁴

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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⁴ Payment should be sent to the 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

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

February 22, 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of LAWRENCE D. HAGENE,
Complainant

v.

PRAIRIE STATE GENERATING CO.
LLC, and GMS MINE REPAIR &
MAINTENANCE, INC.,
Respondents

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. LAKE 2016-101-D

Lively Grove Mine
Mine ID: 11-03193

DECISION DENYING TEMPORARY REINSTATEMENT

Appearances: Travis Gosselin, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, on behalf of the Complainant.
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, on behalf of Respondent Prairie State Generating Co., LLC.
R. Lance Witcher, Esq., Ogletree, Deakins, Nash, Smoak & Stewart PC, St. Louis, Missouri, on behalf of Respondent GMS Mine Repair & Maint., Inc.

Before: Judge Feldman

This matter is before me based on an application for temporary reinstatement filed by the Secretary of Labor on December 8, 2015, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”), as amended, 30 U.S.C. § 815(c)(2), against Prairie State Generating Co., LLC (“Prairie State”) and GMS Mine Repair & Maintenance, Inc. (“GMS”), on behalf of Lawrence D. Hagene. Hagene was employed by GMS as a contract electrician. GMS is a contractor performing services at Prairie State’s Lively Grove Mine. Section 105(c)(2) of the Mine Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of a miner’s employment pending the full resolution of the merits of his discrimination complaint. A hearing was held in St. Louis, Missouri, on February 9, 2016.¹ The parties’ post-hearing briefs were filed on February 17, 2016.

¹ Commission Rule 45(c) provides that a temporary reinstatement hearing shall be held within ten calendar days following Prairie State’s December 8, 2015, hearing request. 29 C.F.R. § 2700.45(c). The hearing in this matter was delayed due to the holidays, scheduling conflicts of counsel, and the significant January 23, 2015, snowstorm and resulting travel disruptions.

I. Statement of the Case

This temporary reinstatement proceeding is analogous to a preliminary hearing. 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 reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2) (emphasis added). Courts and the Commission have concluded that the “not frivolously brought” standard in section 105(c)(2) is satisfied when there is a “reasonable cause to believe” that the discrimination complaint “appears to have merit.” *Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000) (citations omitted). Thus, 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 o/b/o Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738 (11th Cir. 1990).

Hagene last worked for GMS during the second shift from 3:00 pm to 11:00 pm on September 3, 2015. Tr. 66-67. Late in that shift, at approximately 10:30 pm, a roof fall significantly damaged a 995 volt trailing cable of a continuous miner. Tr. 67. While troubleshooting the damaged trailing cable, Hagene affixed an approved laminated warning tag and lock to the cathead of the damaged cable at the power center. Tr. 72, 75. However, in preparation to leave at the end of his shift, Hagene replaced his approved personal warning tag with a makeshift warning note on a discarded wax-like piece of white paper, and removed his personal lock from the cathead, thus enabling him to take his personal tag and lock with him when he departed the mine. Tr. 78-81; Resp. Ex. 2. Hagene was suspended the next day on September 4, 2015, and ultimately terminated on September 8, 2015, for his failure to ensure that the damaged trailing cable was continuously locked and tagged out of service. Tr. 99, 110. Hagene was terminated by GMS after Prairie State informed GMS that it would no longer allow Hagene to work at its Lively Grove Mine. Tr. 110-11.

At the hearing, the Secretary acknowledged that “the question in this proceeding is essentially whether or not putting the tag on [the damaged trailing cable] was a protected activity and whether the termination was motivated by that protected activity.” Tr. 32. Similarly, in his brief, the Secretary asserts that Hagene was terminated as a consequence of his purported protected activity, identified by the Secretary as Hagene’s “place[ment of] a tag on the cathead of the damaged cable warning [other miners] that the cable was a serious safety hazard.” Sec’y Br., at 11-12. In other words, the Secretary contends that Hagene was terminated “for flagging the hazard.” Tr. 168; 170. The Secretary further asserts in his brief that Hagene also engaged in protected activity when he “removed the continuous miner from service after discovering that its trailing cable was damaged” and when he “informed his Section Supervisor about the damaged cable.” Sec’y Br., at 11. Finally, the Secretary contends that Hagene was the victim of disparate treatment because another contract electrician, who also plugged the damaged cable into the power center, was not disciplined. *See id.* at 17-18.

In contrast, the Respondents maintain that Hagene did not, in essence, “flag enough.” In this regard, the Respondents contend that Hagene was terminated for failing to follow company policy, which requires that damaged equipment, such as a high-powered defective trailing cable,

must be effectively locked and suitably tagged out of service without interruption. *See* Prairie State Br., at 6, 18-19.

With regard to the Secretary's assertion that Hagene's removal of the continuous miner from service was a motivating factor in his termination, it is significant that the Respondents did not object to Hagene's removal of the trailing cable's cathead from the power center because the damaged trailing cable rendered the continuous miner unusable. Tr. 30-32. In fact, energizing the damaged cable had tripped circuit breakers, causing a loss of power in a substantial portion of the mine. Tr. 45. Thus, although Hagene's removal of the continuous miner from service constitutes protected activity, any suggestion by the Secretary that Hagene's termination could have been motivated by its removal is indisputably frivolous. In addition, as discussed below, there is no evidence of disparate treatment as it was only Hagene who violated the company's lock out/tag out procedure.

The Secretary has the burden of demonstrating that his application for temporary reinstatement has not been frivolously brought. 29 C.F.R. § 2700.45(d). However, the Secretary has failed to identify any protected activity that can serve as a basis for Hagene's temporary reinstatement. To the contrary, as discussed below, the evidence reflects that Hagene was terminated for his failure, by his own admission, to protect miners from the significant hazards posed by an energized high-powered continuous miner trailing cable by insufficiently locking and tagging it out after it sustained damage. Accordingly, the Secretary's application for Hagene's temporary reinstatement must be denied.

II. Findings of Fact

As previously noted, Hagene was employed by GMS as a contract electrician at Prairie State's Lively Grove mine site. GMS is a contractor providing staffing and performing services at the Lively Grove Mine. There are three production shifts at the Lively Grove Mine: 7:00 am to 3:00 pm, 3:00 pm to 11:00 pm, and 11:00 pm to 7:00 am. Tr. 85. Hagene worked the second shift, 3:00 pm to 11:00 pm. Tr. 66-67. The Lively Grove Mine follows a "hot seat" procedure, whereby miners must remain in the mine until they are relieved by their replacement in the oncoming shift. Tr. 67. It is not uncommon for miners to wait past the end of their shift to be relieved by the oncoming miner. Under such circumstances, these miners are paid overtime. Tr. 85.

During Hagene's shift on September 3, 2015, at approximately 10:30 pm, the Joy Continuous Miner lost power when a rock fall occurred, damaging its trailing cable. At the time of the roof fall, the continuous miner was under unsupported roof. Soon thereafter, Hagene was summoned to the power center to troubleshoot the damaged cable by metering each phase of the cable to ground to determine the nature and location of the damage. Tr. 69. The power center was located four crosscuts from the continuous miner. Tr. 70.

Before work could be done on the damaged cable, the continuous miner had to either be moved out from under unsupported roof, or timbers had to be installed around the continuous miner's location. Tr. 144. In an attempt to move the continuous miner out from under unsupported roof, Hagene initially energized the continuous miner, at which time the operator

was able to move the continuous miner approximately two feet before the breaker was tripped and power was lost. Tr. 75. After power was restored, the operator made a second attempt to move the miner, again causing a loss of power. Tr. 77.

Throughout the entire troubleshooting process, unless Hagene was plugging in the cable cathed in an attempt to enable the continuous miner to be moved, Hagene tagged and locked out the cable with his personal lock and tag. Tr. 72, 75. Hagene acknowledged that a failure to do so would expose him and other miners in proximity to the power center or cable to potential injury from shrapnel from an exploding breaker or burns from the damaged cable. Tr. 86. When the lock was affixed to the cathed, the miner could not be re-energized until Hagene removed his lock. Tr. 79-80, 93, 96.

At about 11:50 pm, after two attempts to move the continuous miner had failed, Hagene removed his personal lock and tag from the cable cathed in preparation to depart the mine to return home, despite the fact that he had not encountered his “hot seat” replacement, Caleb Bowsher, on the section. Tr. 136. Bowsher was also employed by GMS. Tr. 101. Hagene did not want to leave his personal tag and lock on the cathed after the end of his shift, as they could only be removed by him personally, or with his authorization. Tr. 87. Consequently, Hagene replaced his personal lock and tag with a makeshift tag made of discarded paper. Tr. 78-81; *see* Resp. Ex. 2. Hagene testified that he wrote with a black permanent marker “Danger, 2 phases grounded, do not plug up” on the piece of paper, and affixed the paper to the cathed with a piece of wire. Tr. 78. The makeshift tag attached to the cathed by wire could be easily removed and did not prevent the cathed from being plugged in. Tr. 79-80. Hagene testified that he then left the power center and walked to the tool sled to retrieve an approved company danger tag, which he intended to affix to the cable cathed. Tr. 82, 90. Hagene claims that he did not want to leave his personal lock and tag on the cathed while fetching an approved company danger tag in case he was called out of the mine in the interim. Tr. 86-87.

Before Hagene reached the tool sled, he received a radio call, summoning him back to the power center. Tr. 90-91. When he returned, Bowsher and Prairie State shift supervisor, Jeremy Coleman, were present at the power center. Tr. 91. Bowsher was in the process of plugging the cathed into the power center, which again tripped the breakers causing an interruption of power in the mine. Tr. 91. Coleman, holding the makeshift tag, told Hagene “This is unacceptable.” Tr. 91. Hagene reportedly responded to Coleman, saying that he had left the makeshift tag on the cathed because no work was being performed on the cable, and because the mine’s lock out/tag out policy for shift changes only required miners “to take and put a tag on it [with] the description of the hazard.” Tr. 90.

Both Hagene and the Respondents agree that miners had raised the issue of the mine’s lock out/tag out policy during shift changes at an August 2015 safety meeting. Tr. 88-90; 201-02. Given the mine’s “hot seat” procedure, miners raised concerns about the need for “community locks” that can be used to replace the personal locks and tags of miners departing at the end of their shift. Tr. 67; 87-90. Although the issue of community locks illustrates the importance of the continuity of locking and tagging out damaged equipment, at the meeting, mine management opined that the current policy requiring miners who had installed locks and tags to wait for their “hot seat” replacement was not a problem that needed to be addressed. Tr. 90.

The following day, on September 4, 2015, Hagene was informed by mine management that he was suspended and under investigation for a violation of the mine's lock out/tag out policy. Tr. 100-01. On September 8, 2015, Hagene was informed by GMS management that he had been terminated from work at the Lively Grove Mine. Tr. 110.

III. Procedural Framework

As previously noted, unlike a trial on the merits, in a discrimination complaint brought by the Secretary, where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of a temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. § 2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Rule 45(d) provides:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent 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 its decision in *Jim Walter Res., Inc., v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the court noted the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the court stated:

The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' – an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are not insubstantial or frivolous.'

920 F.2d at 747 (emphasis in original) (citations omitted).

While the Secretary is not required to present a prima facie case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of a discrimination claim to determine if the evidence at this stage satisfies the "not frivolously brought" standard. As a general proposition, to demonstrate a prima facie case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in safety related activity protected by the Mine Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Sec'y o/b/o Pasula v.*

Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (Oct. 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Thus, identification of a miner's protected safety related activity is *the essential element* of a successful discrimination complaint.

IV. Disposition

As a threshold matter, the evidence in this preliminary temporary reinstatement proceeding must be viewed in a light most favorable to Hagene because it is not the judge's duty to resolve conflicts in testimony at this preliminary stage of the proceedings. *Sec'y o/b/o Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). While resolution of credibility conflicts goes beyond the scope of this proceeding, Hagene's own testimony fails to demonstrate that he engaged in any relevant protected activity. In fact, his decision to leave the cable cathead unattended with merely a makeshift tag, in and of itself, was hazardous. By way of illustration, Hagene testified:

Counsel: Now, you also said that there are dangers with this cable being plugged in if there's a short in it?

Hagene: Yes.

Counsel: I believe your testimony was that the power center could blow up, or an employee could be burned, or there could be shrapnel if a breaker exploded and the shrapnel would fly?

Hagene: Correct.

Counsel: So despite those – and you said that you locked it out when you were first apprised of the problem with the continuous miner, you locked it out because you didn't know what was happening and you wanted to make sure that you didn't get injured?

Hagene: That is right.

Counsel: Yet, rather than waiting as you're supposed to for the next crew to come on and have that conversation with Caleb Bowsher, who himself could be subject to blowing up, shrapnel, or being burned, you chose to just write a note on the back of a piece of paper, a piece of garbage, that was left on the transformer? Is that correct?

Hagene: Yes.

Counsel: Because you wanted to go home?

Hagene: [inaudible]

Judge: Excuse me, that was a yes, Mr. Hagene?

Hagene: Yes it was, Your Honor.

Judge: Okay. Thank you.

Counsel: And that was because you wanted to go home?

Hagene: That was because I was not—he did not relieve me at the proper time.

Counsel: So rather than use a proper lock, rather than use a proper tag, rather than try and find [Bowsher] or radio him to tell him, hey, this is dangerous over here, you better be concerned about it, you wanted to go home?

Hagene: I put the note on there because of safety issues.

Tr. 145-47. Thus, the thrust of the above-quoted testimony is that Hagene conceded that the priority he gave to his desire to go home, rather than to his responsibility to await his replacement from the oncoming shift for the purpose of directly communicating the details of the hazard, exposed Bowsher, the oncoming electrician, to injury.

Hagene asserts that he believed that company safety policy permitted him to remove his lock at the end of his shift, as long as a danger tag was attached to the cathead, regardless of whether Hagene's replacement on the oncoming shift had arrived. Tr. 90. On the other hand, Prairie State maintains that its relevant policy was to both lock and tag out during shift changes. Tr. 202, 208. Prairie State's desire to see that its lock out procedure is followed is evidenced by its December 12, 2010, Lock Out/Tag Out Standard Operating Procedure (SOP) memo, which states "**WHEN IN DOUBT, LOCK IT OUT!!**" Gov. Ex. 3, at 2 (emphasis in original).

The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (citations omitted). Rather, Commission judges must "analyze the merits of a mine operator's alleged business justification for the challenged adverse action." *Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). A mine operator's interest in seeing that damaged high-powered cables are properly tagged and locked out is self-evident. Whether Hagene's apparent failure to properly tag and lock out warranted his termination is not an appropriate matter for the Commission to decide.

Thus, the extent to which Hagene violated company policy goes beyond the scope of this proceeding, unless it is being used by the Respondents to mask their discriminatory intent, an

ulterior motive not demonstrated by the facts of this case.² In this regard, in determining whether or not a mine operator is attempting to mask discriminatory intent, the Commission looks to factors such as hostility or animus, or disparate treatment. *Chacon*, 3 FMSHRC at 2510.

With regard to animus, as previously noted, the Respondents did not object to Hagene's removal of the trailing cable's cathead from the power center because the damaged trailing cable rendered the continuous miner unusable, and energizing it caused a loss of power in a substantial portion of the mine. Tr. 30-32. With regard to disparate treatment, although both Hagene and Bowsher were initially under investigation, Bowsher was not disciplined because he did not violate the mine's lock out/tag out policy. Thus, there are no circumstantial indicia that can be relied upon by the Secretary to infer a discriminatory motive. In the final analysis, Hagene's failure to adequately lock and tag out a damaged 995 volt trailing cable cannot be reasonably construed to constitute protected activity under the Mine Act.

Additionally, it is noteworthy that the mandatory standard in 30 C.F.R. § 75.512 requires that "potentially dangerous . . . electrical equipment . . . shall be removed from service until such condition is corrected." Given the Secretary's failure to identify any relevant protected activity, I need not address whether Hagene's failure to ensure that the damaged trailing cable remained continuously locked and tagged out of service until it is repaired constitutes a violation of section 75.512, which may provide an additional basis for the disciplinary action taken by the Respondents in this matter. *See also* 30 C.F.R. § 75.511.

² The Secretary apparently desires the Commission to determine whether Hagene's conduct was "adequate enough." On this point, the Secretary argues:

Putting aside the question of whether Hagene's actions were the best means of addressing the hazard associated with the damaged cable, the evidence demonstrates that Hagene took affirmative steps to identify and flag a hazard.

Sec'y Br., at 18. Absent evidence of an underlying discriminatory motive, the determination of whether Hagene's "affirmative steps" adequately addressed the hazard is for the mine operator, not the Commission, to decide.

ORDER

In view of the above, considering the evidence in a light most favorably to the Secretary, the Secretary has failed to identify any protected activity that can serve as a basis for the grant of the application for Hagene's temporary reinstatement. Consequently, the Secretary's temporary reinstatement application must be deemed to have been frivolously brought.

Accordingly, **IT IS ORDERED** that the Secretary's application for temporary reinstatement of Lawrence D. Hagene **IS DENIED. IT IS FURTHER ORDERED** that the temporary reinstatement proceeding in Docket No. LAKE 2016-101 **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 29, 2016

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

v.

MACH MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2011-518
A.C. No. 11-03141-248113

Docket No. LAKE 2012-861
A.C. No. 11-03141-296483

Mine: Mach #1 Mine

DECISION

Appearances: Daniel McIntyre, Esq., United States Department of Labor, Office of the Solicitor, Denver, Colorado, for the Secretary.

David Hardy, Esq., Hardy Pence, PLLC, Charleston, West Virginia, for the Respondent.

Before: Judge Andrews

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Mach Mining, LLC, (“Mach,” or “Respondent”) at its Mach #1 Mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act”). There were originally five dockets as part of this proceeding. However, three of them, LAKE 2011-422, LAKE 2011-977, and LAKE 2012-808, have fully settled, and LAKE 2011-518 and LAKE 2012-861 have partially settled.¹ Tr. 4, 5.² At issue in this proceeding are the six remaining citations, and the proposed assessment of civil penalties totaling \$14,706.00. A hearing was held on October 23, 2014 in Evansville, Indiana at which

¹ A Decision Approving Settlement was issued for LAKE 2011-422, LAKE 2011-977, LAKE 2012-808, Citation No. 8424247 of LAKE 2011-518 and Citation Nos. 8436394, 8445204, 8445218, 8445222, 8445228, 8445233, and 8444830 of LAKE 2012-861 on October 29, 2014.

² Here and hereinafter, the official transcript of the hearing from October 23, 2014 is abbreviated as “Tr.”

time the parties presented testimony and documentary evidence. After the hearing, the parties submitted post-hearing briefs.³

I. STIPULATED FACTS

The parties have agreed to the following stipulations:

1. Mach Mining, LLC (“Mach”) was at all times relevant to these proceedings engaged in mining activities at the Mach #1 Mine located in or near Johnson City, Illinois.
2. Mach’s mining operations affect interstate commerce.
3. Mach is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the “Mine Act”).
4. Mach is an “operator” as that word is defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the Mach #1 Mine (Federal Mine I.D. No. 11-03141) where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to §105 of the Act.
6. On the dates the citations in these dockets were issued, the issuing MSHA coal mine inspectors were acting as a duly authorized representatives of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing MSHA citations.
7. The MSHA citations at issue in these proceedings were properly served upon Mach as required by the Mine Act.
8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance.
9. Mach demonstrated good faith in abating the violations.
10. In 2010 the Mach #1 Mine produced 5,795,493 tons of coal and its controlling entity produced 7,912,241 tons of coal.
11. In 2011 the Mach #1 Mine produced 7,226,500 tons of coal and its controlling entity produced 10,846,269 tons of coal.
12. The penalties proposed by the Secretary in this case will not affect the ability of Mach to continue in business.

JX 1.⁴

³ The Secretary’s Post Hearing Brief is abbreviated as “SPHB.” Mach Mining’s Post Hearing Brief is abbreviated as “RPHB.” Respondent’s Response Brief is abbreviated as “RRB.”

⁴ The Joint Exhibit is abbreviated as “JX.” The Government’s exhibits are abbreviated as “GX.” The Respondent’s exhibits are abbreviated as “RX.”

II. LAKE 2011-518: CITATION NO. 8427074

a. Summary of the Evidence

On January 28, 2011, MSHA Inspector Larry Morris⁵ (“Inspector Morris” or “Morris”) inspected the Mach #1 Mine. Tr. 16. He was originally called by his supervisor, Mike Rennie (“Supervisor Rennie” or “Rennie”), to investigate a fire on the mine’s surface. Morris and Rennie went to the mine together. Tr. 16.

While at the mine site, Morris noticed a violation of a safeguard issued on January 2, 2009 that required all persons being transported on all mobile equipment to keep their extremities within the structural support (bed) of the vehicle. GX 4. Morris testified that the safeguard was issued in order “[t]o prevent people from getting injured by having parts of their bodies outside of the structural confines of the equipment they were being transported in.” Tr. 19. Morris was aware of the safeguard when he was inspecting Mach #1 Mine in 2011. Tr. 20.

Morris saw two miners sitting on the tailgate of a truck leaving the slope of the mine with their legs hanging off the back of the tailgate. Tr. 21. Another truck exited the mine approximately 30 feet behind the first truck. Tr. 25. Supervisor Rennie also observed both miners with their feet hanging off, and Morris discussed the matter with him. Rennie sent Morris to issue the violation to the supervisor, while Rennie attended to the fire. Tr. 42, 43. Morris testified that the miners “were sitting on the tailgate and their knees were right at the end of the tailgate with their legs hanging down off the tailgate.” Tr. 23, 24. He observed that the miners’ legs were hanging vertically from the truck, and their thighs and buttocks were on the tailgate. Tr. 24, 26. Both miners were sitting in the back of the truck with their legs hanging out and looking directly at Morris as he approached the truck. Tr. 32-35, 38.

Morris did not interview either of the two miners whose legs he saw hanging off the bed of the pickup truck. Tr. 29, 30. But, he had a conversation with Foreman Johnny Dotson (“Foreman Dotson”), the driver of the truck, when he went to see him to issue the violation. Tr. 34. Morris walked up to a few feet from the driver’s side of the truck after he saw the miners with their legs hanging off the end of the truck. Tr. 103, 115, 116. He testified that when the tailgate is down the bumper is underneath it and you cannot reach the bumper. Tr. 24, 117. Morris further testified that when the tailgate is down, he considered it to be a part of the bed of the truck. Tr. 45. He stated the photograph marked as Exhibit RX 2 was an accurate illustration of a tailgate in the down position. Tr. 46, 47. Morris did note that some trucks used to have a chain hooked across the back of the sides of the bed instead of the device shown in that photograph. Tr. 48.

⁵ Morris was a Coal Mine Inspector and accident investigator for MSHA, and has also worked as a conference and litigation representative. Tr. 12, 13. He has worked for MSHA for approximately eight years and was in the mining industry for an additional 32 years. Tr. 12, 14. He attended 26 weeks of training and also underwent on-the-job training, learning from experienced inspectors and specialists. Tr. 15.

Inspector Morris memorialized his observations in handwritten notes recorded at the time of the inspection:

Mike Rennie (FOS/MSHA) & myself were standing approx 100 feet from the slope mouth when 2 pick up trucks/mantrips came up the slope approx 30 feet apart. Two miners in the front truck were sitting in the back of the truck bed with their legs hanging out over the rear bumper. I walked over to where the truck was being parked & told the miners that they must keep their legs inside the body of the truck. I told the foreman Johnnie Dotson, also the driver of the front truck that I was issuing a citation on the safeguard in force at this mine regarding this situation.

GX 3, pp 4, 5.⁶

Morris issued a 104(a) Citation, No. 8427074, to Foreman Dotson at 1640 hours. Section 8 of the citation read, in pertinent part:

Two miners were observed coming out of the mine in the slope, riding in the back of a pickup truck/mantrip, sitting in the bed of the truck with their legs hanging out of the back of the truck bed. There was another pickup truck/mantrip following approximately 30 feet behind the front truck.

The Standard, 30 CFR § 75.1403, was cited 13 times in two years at the mine.

Morris determined that the violation was Significant and Substantial (“S&S”), that an injury was reasonably likely, and such injury could reasonably be expected to be permanently disabling. He marked the citation as two miners affected, and the negligence as high. Termination of the citation was at 1642 hours, when the miners were removed from the truck.

GX 2.

Morris also testified the truck, with the miners’ legs dangling off the back, would have traveled over various potholes. Tr. 25, 26. Morris did not see the potholes on the day of the inspection but knew of the potholes from previous experience. Tr. 36, 37. If a miner were to fall from the truck, an injury could be permanently disabling or even fatal. Tr. 26. Morris testified that if the truck in front had stopped, the truck following only 30 feet behind would not have much stopping distance. Tr. 25. Morris marked the condition as resulting from high negligence because Foreman Dotson was driving the pickup truck. Tr. 27, 52. The initial action was listed as

⁶ Respondent objected to the admission of the notes of the Inspectors on the basis that such notes can only be used to refresh the recollection of the witness. However, an Inspector’s notes written at the time of the inspection are not so limited. These recordings of observations and actions taken are relevant to the violations cited and are admissible as evidence into the official record. At the hearing, notes of the Inspectors in the Government’s exhibits were admitted.

safeguard number 6674671 dated January 2, 2009, and Morris testified this safeguard put the mine on prior notice. Tr. 27; GX 2, 4.

Robert Darrell Shaw⁷ (“Shaw”) testified for Respondent. Shaw, a shuttle car driver at the Mach mine, was one of the two people whom Morris observed with his feet hanging out of the truck. Shaw stated that a crew of 11 people was working outby. Tr. 52. At the end of their shift, he was riding in the back of a Dodge Ram truck. Tr. 53, 54. The crew rode in the back of the truck and they all had their “spots”. There was no tailgate on the truck; there was a tailgate when they went to the work site, but none when they came back. Tr. 53. Shaw was sitting with his right foot on top of the bumper and his left foot folded underneath him. Tr. 59, 60. He said that he would never ride with his legs hanging out of the truck, and that he remembered his position on the day of the inspection because it is how he sat every day. Tr. 61. Shaw rode in a truck like that at least two times a day, but sometimes he would be inside the pickup. Tr. 70. He saw somebody come up and talk to Dotson but did not know who it was. Tr. 65, 66. Chris Wilson⁸ (“Wilson”) sat across from Shaw, and Wilson was sitting in the same position as Shaw, except that his feet were in opposite positions. Tr. 63–65. Wilson also sat like that every day. Tr. 65.

Wilson testified he was working on the same crew as Shaw on the day of the inspection. Tr. 88. Foreman Dotson was the crew’s supervisor. Tr. 88. All 11 crew-members were in the truck, with six riding in the quad cab and five in the back. Tr. 88, 89, 92. Wilson was in the rear right of the truck’s bed, and Shaw was sitting directly across from him. Tr. 93; RX 7. The two were facing each other. RX 7. Wilson’s left foot was on the bumper and his right foot was in the bed of the truck. Tr. 99, 100. Wilson also testified there was no tailgate when they got back. Tr. 101. Wilson testified that he does not normally sit with his legs hanging over the bed of the truck because of potential harm. Tr. 100, 102. He also testified that most of the time the trucks had tailgates. Tr. 108. Wilson recalled that Shaw’s back was to the Inspector and Shaw would not have been able to see the Inspector run up to the truck. Tr. 106, 107.

b. Contentions

The Secretary contended the Respondent violated the January 2, 2009 safeguard requiring people being transported in a vehicle to keep their extremities within the vehicle’s structural support. Specifically, the Secretary alleged that Inspectors Morris and Rennie witnessed two miners sitting on the tailgate of a truck with their legs hanging off the tailgate’s back. The miners could be injured by a fall or by the second truck being unable to avoid a fallen miner. The Secretary further contended the violation was the result of Respondent’s high negligence, since it was unacceptable to permit the cited behavior after receiving the safeguard. The Secretary argued that feet on the bumper would violate the safeguard. The Secretary also argued the

⁷ At the time of the hearing, Shaw had worked at the Mach mine for almost 8 eight years. Tr. 50. He was an hourly worker there. Tr. 51. He was a certified miner for the State of Illinois, and is able to drive a scoop and tram a pinner. Tr. 50, 51. He was not a roof bolter. Tr. 51.

⁸ Chris Wilson was employed by Mach for almost eight years. Tr. 85. He worked as a coal miner for Willow Lake before working for Mach. Tr. 86. He worked for almost 14 years in the mining industry, and held a certification from the State of Illinois. *Id.*

Respondent's witnesses were not credible, and the Court should uphold the citation as issued. For this citation, the Secretary proposed a penalty of \$5,080.00.

The Respondent contended that Citation No. 8427074 should be vacated because the Secretary bears the burden of proof but has not rebutted the operator's testimony and a violation of Safeguard No. 6674671 has not been proven. The Respondent cited *Bethenergy Mines Inc.*, 14 FMSHRC 17, 25 (Jan. 1992) in which the Commission held that a safeguard must be narrowly interpreted so that the Secretary's authority to require a safeguard and the operator's right to fair notice of what the safeguard requires is balanced. Respondent argued that the safeguard does not define "structural support" and also does not define what it means to keep extremities within the "structural support". The miners were resting their feet on the rear bumper which according to Respondent is part of the "structural support" of the vehicle. They did not face any additional danger by having their feet on the bumper, and there was an absence of clarity regarding the bumper. Respondent also argued that no person other than the inspector claimed to have seen the miners riding on the tailgate, and that the inspector did not make an effort to interview the miners. The Respondent also contended the Secretary failed to call any witnesses to corroborate Morris's version of the events in contrast to the two hourly employees that it called who consistently testified. In the Respondent's opinion, the present case is a "quintessential equipoise" case. The Respondent also contended that any negligence of the miners in having their feet on the bumper is not attributable to the operator, and the absence of notice regarding the bumper is a mitigating factor. Also, the Foreman was driving and there was no testimony he could see the miner's feet on the bumper. The negligence should be reduced from high and the significant and substantial designation should be removed.

c. Analysis

30 C.F.R. § 75.1403, "Other safeguards", provides:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Under 30 C.F.R. § 75.1403, the operator was required to follow the safeguard Inspector Bobby Jones issued on January 2, 2009. That safeguard read:

On 1/02/2009 a Dodge pickup truck was observed heading toward the slope collar with 7 miners riding in the bed of the truck. Two of the seven miners were sitting on the tailgate with their legs hanging outside of the structural support (bed) of the Pick up [*sic*] truck. This is a notice to provide safeguards requiring all persons being transported on all mobile equipment to keep their extremities within the structural support of the vehicle.

GX 4.

While the Secretary bears the burden of proving the citation by a preponderance of the evidence, I find that Morris's testimony was credible and the Secretary presented sufficient evidence to meet his burden. Morris credibly testified that he witnessed the two miners' legs outside the bed of the truck, which was in violation of the January 2, 2009 safeguard. The Secretary also pointed to Shaw and Wilson's testimony wherein each miner stated they placed one of their feet on the bumper of the truck, and even this constituted a violation of the safeguard, which required that all miners' extremities remain within the truck.

No strain of interpretation is required to understand the safeguard at issue. The safeguard is not at all vague, indefinite or uncertain as to its meaning. It requires that miners keep their extremities within the bed of a pickup truck. The safeguard, as written, identifies the truck bed as the structural support of that type of vehicle. It is striking that what was observed by Inspector Bobby Jones in January 2009 was identical to what was observed by Inspector Morris two years later. In each instance two miners were sitting on the tailgate with their legs hanging out. It is compellingly clear that the operator would be on notice that a repeat of this behavior would be a violation. Simply put, Respondent disregarded the safeguard that was in effect.

The Secretary also contended that the testimony of the Respondent's witnesses was not credible. Both Shaw and Wilson testified to the effect that the tailgate was on the truck at the beginning of the trip, but was off the truck for the trip out. Not established or even explained by any evidence were the circumstances, the reasons or by whose direction the tailgate was removed by or on January 28, 2011. For example, no work order for this change to the truck or even testimony by a person responsible for or conducting this work is of record. And, Wilson also testified that *most of the time* the trucks had tailgates. Just when the truck tailgates were on or off the trucks was not clearly established. Respondent failed to corroborate the testimony of the miners regarding the removal of the tailgates.

That Shaw had excellent recollections about that ride on that day out of the thousands of his rides in and out of the portal is contradicted by his conflicting testimony that the crew rode in the back of the truck and all had "spots", whereas in further testimony he said that he was not always in the back of the truck but sometimes inside the pickup. Also, Shaw's testimony was vague on whether he saw an Inspector come up to the truck and talk to Foreman Dotson. But Wilson testified that Shaw's back was to the Inspector and Shaw would not have been able to see the Inspector approach the truck.

In contrast, Inspector Morris directly observed the truck from the time it exited the slope until it parked, discussed with Supervisor Rennie what they were observing, and recorded what he saw in his notes. Approaching and arriving only a few feet from the truck, Morris was in a position to clearly see the miners and how they were riding on the tailgate with their legs-both legs-hanging down vertically. Morris also pointed out that with the tailgate down the bumper would be covered and it would not be possible for the miners to rest their feet on it. Morris considered the tailgate in the down position to be a part of the bed of the truck.

The plain language of the safeguard has the word "bed" in parentheses to define "structural support." It is clear that the purpose of the safeguard was to ensure that miners kept their extremities within the bed of the truck. Whether the lowered tailgate is viewed as a *part of*

or as an *extension of* a truck bed, this is a reasonable interpretation of what constitutes the “bed” of a truck and hence “structural support” for the purposes of the safeguard. The rear bumper is not mentioned in the context of either “bed” or “structural support”, and for the purposes of the safeguard there was no need to include it. Indeed, in the instant case, it is not necessary to determine and does not matter whether the rear bumper is considered a part of the “structural support” of a pickup truck.

I place the greatest weight on the evidence presented by the Secretary. The testimony of Inspector Morris, his contemporaneously written notes, and the citation as issued are all very consistent. The probative value of this evidence outweighs the uncorroborated recollections of Respondent’s witnesses. Shaw and Wilson agreed in their recollections that somehow the truck tailgate had been removed just before they rode out from their work site. While it is well established that the pickup trucks at this mine did have tailgates, just when and for what time period the tailgates were not installed is not clear. I find the testimony of Inspector Morris to be credible. I do not find the agreed upon memories of Shaw and Wilson, with no other support, to be credible. It was not necessary for the Secretary to call any other witness to corroborate Morris’s testimony.

Since both Morris and Supervisor Rennie observed the violation, there was also no reason to interview any miners. That no one else *claimed* to have seen Shaw and Wilson riding on the tailgate ignores the fact that there were six miners in the cab and three other miners in addition to Shaw and Wilson present in the bed of the truck. At least one of the miners in the crew was well aware of the presence of an MSHA Inspector and the reason the Inspector approached the truck. This miner verbally made a threat to Morris, which Morris recorded in his inspection notes:

A miner, later identified as Travis Curry, heard me talking to Mr. Dotson & told his buddy that he “can’t wait to meet some of these people out in public.”

I told Mr. Dotson that he needed to get control of his people because that was a threat made against me & that I was a Federal representative working in the capacity of my duty.

I then informed Mike Rennie and Steve Miller (FOS/MSHA) of this incident.

They told me they would handle it.

GX 3, pp. 5, 6.

Whether anyone else *claimed* to see Shaw and Wilson sitting on the tailgate is not relevant.

Respondent’s equipoise argument rests on the proposition that where the evidence presented by the parties is found to be “equally convincing” the doctrine of equipoise would lead to the conclusion that the Secretary had failed to carry the burden of proof. *See, Dana Mining Co.*, 33 FMSHRC 2295, 2300-01 (Sep. 2011) (CALJ), and *Excel Mining, LLC*, 35 FMSHRC 2604, 2622 (Aug. 2013) (ALJ). However, the Secretary’s evidence is found credible whereas Respondent’s attempt to dispute the observations of the inspector failed. From the analysis

discussion above, it follows that I do not find the evidence in this case to be “equally convincing”. Accordingly, the doctrine does not apply here.

I find the citation was validly issued.

This violation was determined to be Significant and Substantial. The S&S designation of a violation is derived from section 104(d)(1) of the Act, which describes such a violation as one “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

[i]n 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.

Mathies Coal Co., 6 FMSHRC 1, 3, 4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Powder, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Powder, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

The Secretary “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574.

The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In support of the determination that the violation was S&S, the Secretary argued that if the miners were to fall off of the truck, they could either be injured in the fall itself or by the second truck following closely behind. Moreover, the Secretary contended that the violation was reasonably likely to result in a permanently disabling injury since the second trucks' speed could have prevented it from being able to avoid hitting a miner if one or both were to fall.

The Respondent argued that the citation was not S&S because the miners did not face any additional danger by having their feet on the bumper than if they would have had their feet a few inches closer to the cab. I do not find this to be persuasive because I credit the inspector's testimony that the miners were seated on the tailgate and could not have had their feet on the bumper. By having their feet outside of the structural support of the truck, they were more likely to fall out of the truck and thus more likely to sustain injuries.

The first prong of the *Mathies* test was satisfied because the January 2, 2009 safeguard was violated, as discussed *supra*⁹. The second prong of the *Mathies* test was satisfied since the condition presented a discrete safety hazard, namely, that the miners did not have their feet within the bed of the truck and could have fallen or bounced out. The third prong of the *Mathies* test was satisfied because the hazard contributed to would result in an injury. If either of the miners fell out of the truck, they would be injured from the impact with the surface and/or from being hit by the second truck. The fourth prong of the *Mathies* test was satisfied in that such injury would be serious in nature. Whether as a result of the fall from the tailgate, or by coming into contact with the second truck following so close behind, the injuries could be at least permanently disabling.

I find the S&S designation was correct.

When considering the question of negligence of a mine operator, I am not bound by the Secretary's Part 100 regulations; however, those regulations may be useful as guidance. *White County Coal, LLC*, 37 FMSHRC 2568 (Nov. 17, 2015)(ALJ); *See also Brody Mining, LLC*, 37 FMSHRC 1687, at 1701-1704 (Aug. 2015). Negligence is defined by 30 C.F.R. § 100.3(d) as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." A mine operator is held to a high standard of care. Further, "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. MSHA finds high negligence to exist when "[t]he operator

⁹ Although Respondent did not make the argument that safeguards are not mandatory safety standards, it should be noted that they have been found to satisfy this first element of *Mathies*. *See, e.g. Wolf Run Mining*, 31 FMSHRC 306 (Feb. 26, 2009)(ALJ).

knew or should have known of the violative condition or practice, and there are no mitigating circumstances.”

The Secretary argued that the violation was the result of Respondent’s high negligence, and that once Respondent received Safeguard No. 6674671, it was unacceptable for the Respondent to permit the cited behavior. The Secretary contended this violation was the result of a deliberate choice of a miner, and that Foreman Dotson contributed to it. The Secretary further argued that Foreman Dotson was responsible for his passengers’ safety during the ride, and that the hazard was obvious since Inspector Morris and Supervisor Rennie observed it from 100 feet away.

The Respondent argued that the absence of clarity and notice regarding the bumper mitigated the negligence. The Respondent also argued that the negligence of the miners in keeping their feet on the bumper is not attributable to the operator. The Respondent noted that the crew foreman was driving the lead vehicle and that there was no testimony indicating that he could see the miners’ feet on the bumper.

I have found that the bumper is irrelevant and the responsible person was Foreman Dotson who did not testify and hence there could not be any direct testimony whether he could see his miner’s feet in any position before or during the trip. More important is the unanswered question of any action taken by Foreman Dotson to insure all extremities of the crew members were inside the bed of the truck *before* the ride began.

I find that no mitigating circumstances have been established. First, the operator knew or should have known of the violative practice. As set forth above, the Safeguard was clear and provided notice that extremities must remain inside a vehicle. The truck itself was being driven by Foreman Dotson who was responsible for his crew’s safety, which included insuring that the extremities of his riders were inside the bed of the truck at all times. The negligence of the foreman is attributable to the operator.

As pointed out above, I am not bound by the Secretary’s definitions of negligence, and in this instance even if some mitigating circumstance were shown I would find high negligence. This is because the practice of riding seated on the tailgate of a truck over uneven terrain with lower legs hanging down outside of the tailgate is inherently very dangerous. In my opinion Respondent ignored the Safeguard, took no steps to prevent this hazardous practice, and as a result the required standard of care to protect miners simply did not exist in this case.

Accordingly, I affirm this citation as written.

d. Penalty

The penalty assessed by the Commission is based on the six criteria in section 110(i) and the deterrent purpose of the Mine Act. *Wade Sand & Gravel Company*, 37 FMSHRC 1874, at 1876, 1877, (Sep. 2015); *See also Westmoreland Coal Co.*, 8 FMSHRC 491 (Apr. 1986). While penalties are independently assessed *de novo*, MSHA’s Part 100 regulations may provide useful

guidance. *Orica Nelson Quarry Serv.*, 35 FMSHRC 3004, 3014 (Sept. 2013) (ALJ); *Liggett Mining, LLC*, 33 FMSHRC 1702, 1717 (July 2011) (ALJ).

I have found that the violation was serious, S&S and reasonably likely to result in permanently disabling injuries to two miners. The operator was highly negligent, since the easily understood safeguard had been in effect for two years and was ignored by the foreman in charge of the crew. The parties have stipulated that the penalty would not affect the operator's ability to remain in business and there was demonstrated good faith in abating the violation. The penalty appears appropriate to the stipulated size of the business, and on this record the violation history is essentially the safeguard issued in 2009. Therefore, I find that the monetary penalty should be \$5,080.00, as proposed.

III. LAKE 2012-861: CITATION NO. 8420533

a. Summary of the Evidence

MSHA Inspector Jeff Adams¹⁰ ("Inspector Adams" or "Adams") conducted an E01 general inspection of the Mach #1 Mine on June 27, 2012. Tr. 277. He had previously inspected the Mach #1 Mine twice and had also been there several times for training. Tr. 277, 278. On that day, he was inspecting the areas away from the main portal; the bleeder fans, the pumps, and the area near the Gob Hill equipment. Tr. 278.

Adams was inspecting a turbine water pump approximately 18 feet above the ground. Tr. 279. During the inspection he issued the citation because he saw hand rail pipes on the ground. Tr. 279. Upon further inspection, he saw that the broken pipes were from the handrail that had surrounded the turbine pump. Tr. 279. Some additional piping remained, but was broken. Tr. 279. Six pieces of the handrail had fallen off, three of which were on the ground and, he thought, three were on the landing by the pump. Tr. 279. Two sections were broken away from the upright post and only some were still present. Tr. 281. Adams testified these would not support a miner's weight. Tr. 281; GX 6. The area was regularly accessed; it contained an oil tank that needed to be filled manually by hoisting a five-gallon bucket up to the tank with a rope. Tr. 281. Adams estimated that the five gallon bucket weighed about 35 pounds. Tr. 282. Adams stated that a person would have to hang over the edge in order to reach out and hoist one of the buckets up to the tank. Tr. 283. He said that while it would take some strength to be able to hoist the bucket up, it would probably just take one miner to do it. Tr. 283, 284.

The cited area was about five miles away from the mine, and there were no Mach employees regularly assigned to that facility. Tr. 286. Other than a county or township road right

¹⁰ Jeff Adams was an MSHA surface specialist. Tr. 275. A surface specialist takes care of all strip mines and surface properties, which are surface mines and surface components of underground mines. Tr. 275. He holds an associate's degree and a bachelor's degree in industrial education. Tr. 275. He has worked for MSHA for seven years. Tr. 275. Before working for MSHA, he spent 26 years working at Galatia Mine, including three years underground. Tr. 276. At the time of the inspection on June 27, 2012, Adams was an underground inspector in Hillsboro, Illinois. Tr. 277. He subsequently became a surface specialist. Tr. 277.

next to the location, the area was isolated. Tr. 286. One miner would be affected because one person would be required to do the routine work in the area. Tr. 285. The only time someone would be in the area would be if the person was there to check on a problem or to service the pump. Tr. 287. This would include filling the oiler. Tr. 287.

Adams did not know how the pump was monitored and was not aware that it was monitored from a computer five miles away. Tr. 287. He also did not try to determine the last time that a Mach employee was at the site, and did not have any firsthand knowledge of when a Mach employee would have seen the condition. Tr. 288. But, he believed Respondent was required to regularly maintain the area. Tr. 289.

Because the condition could lead to an 18-foot fall, Adams determined that an injury was reasonably likely to occur. Tr. 282. He also determined that it could be a permanently disabling injury or even a fatal injury. Tr. 282. He concluded the violation as S&S because so many pieces had been broken off and because the rail could give way if someone leaned against it. Tr. 283.

Adams assessed the violation as the result of moderate negligence since someone should have been aware that many of the handrail pieces had been broken off. Tr. 284. However, he did not know how long the condition existed. Tr. 287, 288. In his opinion, the condition was the result of a vibration and that it was something that happened gradually over time. Tr. 284. Based on his experience, he estimated that it took a lot of force for the breakage to occur. Tr. 284, 85.

In his notes, Adams wrote that six sections of the handrails had broken off due to excessive vibration caused by a failing pump bearing and two sections were broken away from the upright posts. Three of the sections were on the ground adjacent to the ladder and three were on the elevated walkway next to the pump. A person has to regularly access the pump to manually fill an oil reservoir, and the two sections broken away from the upright posts would give way if leaned against. GX 7, pp. 6-10.

Adams issued a 104(a) Citation, No. 8420533, to Respondent at 110 hours. Section 8 of the citation reads:

The handrails on the elevated walkway providing access to the turbine pump beside the bleeder fan were not being maintained in good condition. Six sections of the handrail had broken off due to vibration and two sections were broken away from the upright posts. Management locked the access gate to the elevated walkway to prevent entry.

The safety standard, 30 CFR § 77.205(e), had been cited two times in two years.

The violation was marked S&S, reasonably likely to cause a permanently disabling injury to one person, and the result of moderate negligence. The citation was terminated at 1600 hours when the handrails were repaired.

GX 5.

Norman Quertemous ¹¹(“Quertemous”), a maintenance manager for Mach, traveled with Adams during the June 27, 2012 inspection. Tr. 290. He would normally accompany the inspector to the turbine pump as part of his job duties. Tr. 290.

Quertemous testified that no employee was assigned to the area where the turbine pump was located. Tr. 291. Barry Butler, a Mach maintenance foreman, conducted an installation check at the facility monthly. Tr. 291. According to Quertemous, Butler was a competent and meticulous examiner. Tr. 292. If Butler found anything, he would either notify management immediately or fix the problem himself if he was able to do so. Tr. 292. Quertemous believed that Butler had done a good job in identifying hazards during his monthly inspections. Tr. 294.

Quertemous concluded that the damage to the rail was caused by a “bearing down” in the pump resulting in a violent shaking. Tr. 292, 293. Based on his experience, Quertemous believed that harmonics in the steel shook the rail apart quickly, and that it took one to three days to bring it down. Tr. 293. But, he was not able to determine whether the condition was present during Butler’s last examination of the area. Tr. 293. Respondent took prompt measures to repair the railing. Tr. 295.

Quertemous also testified a computer in central supply monitored this area. Tr. 294, 295. The computer monitored the current on the pump, but did not monitor vibrations. Tr. 296. If there was a problem, the superintendent could send someone to take care of it. Tr. 295. The person checking would either be the maintenance chief or the superintendent. Tr. 295.

b. Contentions

The Secretary contended that Citation No. 8420533 was issued for violating 30 C.F.R. § 77.205(e) because the Respondent did not maintain the handrails on the elevated walkway at a turbine pump in good condition. The Secretary argued the citation should be affirmed as written, because a miner who needed to fill the oil tank, and who needed to rely on the handrails for support to do his job, would be affected. The Secretary also contended the S&S designation was correct, since the cited condition presented a safety hazard, a fall, to miners who regularly accessed the elevated area during the course of mining. Further, a fall of 18 feet would cause permanently disabling or possibly a fatal injury. Respondent should have been aware of the condition since it takes a large amount of force and a long period of time for handrails to break. Therefore, Respondent was moderately negligent. The Secretary proposed a penalty of \$1,530.

The Respondent contended that Citation No. 8420533 should be vacated, or, in the alternative, the S&S designation should be removed and that the moderate negligence should be reduced. Respondent also contended that a platform is not an elevated walkway and the area around the turbine pump should not be found to be a walkway, and hence not covered by the

¹¹ Norman Quertemous retired from Mach Mining on March 31, 2014. Tr. 257. He worked in mining for 42 years, including nine years for Mach. Tr. 257. At Mach, Quertemous worked as a maintenance manager, and in this position he helped with a variety of tasks. Tr. 258. Quertemous also worked as an instructor at Southeastern Illinois College, teaching electrical retraining, annual refresher training, and safety courses. Tr. 258.

safety standard. Respondent also argued that no employee was assigned to the location at issue and since one hourly employee only visited the site on a monthly basis, the operator did not have notice that the handrails were broken. Further, the area was remote, injury was unlikely, and the citation should not be S&S. The Respondent also argued that before the inspection, the mine pump had a bad bearing that caused the platform to violently shake and also caused damage to the rails. The Respondent further noted that Adams did not dispute that the condition could have been caused by a vibration from a bad bearing in the pump and that Quertemous said that the condition could have been caused over the course of one to three days.

c. Analysis

The safety standard cited provides:

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary toeboards shall be provided.

30 C.F.R. § 77.205(e).

In support of its contention that the citation was valid, the Secretary argued that the miner who needed to fill the oil tank, and who needed to rely on the guardrails to do his job, would have been affected.

In support of its contention that the citation should be vacated, the Respondent argued that 30 C.F.R. § 77.205(e) regulates “elevated walkways” and not “platforms” and that a “platform” is not an “elevated walkway.” The Respondent cited *Alan Lee Good*, 23 FMSHRC 995 (Sept. 2001), in which the Commission vacated a citation where the Secretary alleged that a platform was a “walkway” after interpreting a similar metal/non-metal standard. In that decision the Commission determined:

A “walkway” is defined in the dictionary as “a passageway used or intended for walking . . . a passageway in a place of employment . . . designed to be walked on by the employees in the performance of their duties.” *Webster’s Third New Int’l Dictionary Unabridged* 2572 (1993). A “passageway” is defined as “a way that allows passage to or from a place or between two points.”

Alan Lee Good, at 999 (footnote omitted). Respondent acknowledged that in a different case, another ALJ found that a platform that is accessed every day for examinations was a “walkway,” *Boart Longyear Co.*, 34 FMSHRC 2715, 2722, 2724 (Oct. 2012) (ALJ), but this ALJ’s analysis was distinguishable from the Commission’s. The Respondent pointed out that in *Oil-Dri*, 34 FMSHRC 458 (Feb. 2012) an area in question was a “travelway” since it was “used as a means for miners to go to and from one area of the mine to another.” *Oil-Dri*, at 461. The Respondent argued that the present case is factually different than *Oil-Dri*, and that because of the differences the area in question at Mach should not be found to be a “walkway.”

I do not find this argument to be persuasive. Even using the definition from *Alan Lee Good*, the surface area in the instant case would be considered a walkway and therefore governed by 30 C.F.R. § 77.205(e). This is because the Commission in *Alan Lee Good*, citing *Webster's Third New Int'l Dictionary*, stated that a walkway is a passageway in a place of employment designed to be walked on by the employees in the performance of their duties. That is the case here since miners use the elevated surface area as a passageway in a place of employment; it is used when miners need to climb up and walk to the pump assembly and perform maintenance including filling the oil tank.

I am also not persuaded that the specific nomenclature for the elevated area constructed to provide access to the turbine pump is important. Certainly it is an elevated area that must be accessed and walked on to perform required periodic maintenance. It is a "way" that allows passage to or from a place, the turbine pump and any associated equipment. The pertinent language of the standard is "Crossovers, elevated walkways, elevated ramps, and stairways". While the term "platforms" was not included, there is nothing to suggest the named areas were considered all inclusive. An elevated structure, however named, accessed by miners and walked on to go to or from a place to perform their duties fits neatly into the safety standard. This is because the intent of the safety standard is to require the handrails to be well maintained in such elevated areas, rather than to precisely describe the surface area to be protected.

Having found that the area falls under the regulation, it is apparent from the evidence that the handrails were not kept in good condition. Several parts of the handrail had fallen to the ground and what remained could not support a miner. A total of six pieces had fallen off and two sections had broken away from their supporting upright post. With these conditions present a miner would be 18 feet off the ground while working on the pump or filling the oiler without the protection of solid, well maintained handrails. The three photos taken by Adams show a ladder type access to the walkway around the vertical turbine, visibly broken and missing rails, and pieces on the ground, just as he described in his testimony and notes. GX 6, 7. The Respondent violated 30 C.F.R. § 77.205(e) because the rails should have been securely in place to protect miners from falling.

I find the citation was validly issued.

Regarding the S&S designation, the Secretary argued that the cited condition presented a discrete safety hazard to miners in that they could fall 18 feet from the platform. The Secretary also argued that this fall would cause a permanently disabling or possibly fatal injury, and that it could affect many different people, including non-employees, because it was next to a township road and accessible by anyone passing through. Further, the Secretary stated that a miner regularly accessed the platform during the course of mining. Furthermore, in order to properly fill an oil tank used for the turbine pump, a miner was required to lean over the handrail and the edge of the platform, which would require support.

The Respondent argued that the parties agreed that the area was remote and that the platform was rarely visited. The Respondent also argued that there were handrails around most of the platform and that the area was only accessed during the day. The Respondent cited *Rivco Dredging Corp.*, 10 FMSHRC 1195, 1199 (Sept. 1988) (ALJ) and argued that violations in remote areas are less likely to be S&S. Similarly, the Respondent cited *Arcata Readimix*, 17

FMSHRC 816, 820 (May 1995) (ALJ) and *Carmeuse Lime, Inc.*, 29 FMSHRC 266, 271 (Mar. 2007) (ALJ). The Respondent also contended the Secretary did not offer any evidence that trespassers had entered the area and that Adams acknowledged that the area was remote, even though it was near a road. The Respondent also argued that the Secretary did not present evidence that miners would haul buckets of oil onto the platform and specifically did not present evidence that this had occurred in the area with the broken railing. Ultimately, the Respondent argued that the various factors made an injury unlikely and thus the citation should not be S&S.

The four elements of *Mathies* and the controlling case law have been set forth above in the analysis of the first citation. This will not be repeated, except as needed for clarity, in this decision.

I find that the violation was properly designated S&S. First, as discussed *supra*, there was an underlying violation of a mandatory safety standard. Second, there was a discrete safety hazard in that a miner could fall while working 18 feet off the ground to fill the oiler or work on the pump without adequate handrails in place; this would be the case regardless of how oil is brought up to the tank. Third, there was a reasonable likelihood that the hazard contributed to will result in an injury. It is reasonably likely that a miner's fall from the elevated walkway would cause an injury. Finally, it is reasonably likely that the injury in question would be of a reasonably serious nature, because a fall from that height would be at least permanently disabling if not fatal. The *Mathies* criteria have been met.

That the area was remote does not affect this gravity determination, because the area was regularly accessed by a miner. While the parties address whether outside people could also access the area because it was near a public road, a determination on this is not necessary. A miner, given his duties, was likely to be in an elevated area without well maintained protective handrails. This by itself, as discussed, allows me to find the citation was properly designated S&S.

I have discussed negligence and the duty of care required of an operator in the first citation, above. Here, the Respondent's position was that the damage to the handrails occurred quickly, as a result of a bad bearing in the pump that caused violent shaking, and the operator was not on notice of the condition of the handrails. The Secretary's position was that the damage occurred over a longer period of time, and the operator should have been aware of it considering the monthly maintenance visits.

The flaw in Respondent's argument was that at the time the bad bearing was repaired, the damage would already have occurred and should have been readily visible to and reported by the foreman or the miner making the repairs. Respondent also argued the monthly access to the pump was by an hourly employee, not an agent of the operator. However, Respondent's witness retired Maintenance Manager Quertemous testified that the person performing the monthly checks was a Maintenance *Foreman*. This would suggest a supervisory position, rather than a rank and file employee. Respondent's argument on notice appears incorrect.

The flaw in the Secretary's argument was that Inspector Adams in his testimony could not clearly articulate that it was more likely than not the handrail damage had been present long

enough for the next monthly check to have discovered it. He was only able to opine that the breakage happened gradually, over time, since a lot of force would be required. His opinion is simply too vague to be accorded controlling weight.

Notwithstanding that the time of breakage cannot, on this record, be accurately determined, the operator is held to a high standard of care, and is responsible for the safety of miners. The standard of care in this case is somewhat mitigated by the infrequent access to the area, which is in a remote location. There is remote monitoring of the turbine pump, but apparently not for vibration and shaking, and the length of time the bad bearing could have existed is unknown. The record does not contain the dates on which the monthly checks were made nor is there evidence of the date a bad bearing was discovered and repaired. Weighing these factors, I find the negligence should be reduced to low.

d. Penalty

The penalty is assessed *de novo* pursuant to section 110(i) of the Mine Act. The parties stipulated to the size of the mine, that the proposed penalties would not affect the ability of Mach to remain in business, and that Mach demonstrated good faith in abating the violation. The violation was S&S, and the working environment around the elevated pump assembly without protective handrails was a serious safety concern. However, the history of previous violations was not an important factor, and the negligence was reduced to low. Considering all of the relevant factors and the change to the citation, I find the monetary penalty should be reduced to \$700.

IV. LAKE 2012-861: CITATION NO. 8442233

Respondent did not contest the fact of a violation of the approved ventilation plan. Tr. 303. The issues remaining are whether the violation was S&S and whether the negligence was moderate. RRB 14-16.

a. Summary of the Evidence

On June 11, 2012, MSHA ventilation specialist Michael A. Pritchard¹² (“Inspector Prichard” or “Prichard”) conducted an E02 inspection¹³ at the Mach #1 mine. Tr. 299, 323, GX

¹² Michael Pritchard worked as a health specialist for approximately two-and-a-half years, and has been with MSHA for over five years. Tr. 298. He possessed a bachelor’s degree in general engineering and a master’s degree in mining engineering. Tr. 298, 299. He had worked as a mining engineer in the coal industry for 25-30 years. Tr. 299.

¹³ An E02 inspection is a five-day spot inspection of a mine’s ventilation. Tr. 300. A mine is placed on a spot inspection schedule based on the amount of methane it liberates in a 24-hour period. Tr. 300.

8. He was accompanied by a company representative, Johnny Robertson,¹⁴ (“Superintendent Robertson” or “Robertson”) Tr. 300, 301, 312. Pritchard had previously inspected the Mach #1 mine a couple dozen times. Tr. 300.

During the inspection, Inspector Pritchard issued a citation in the MMU-002 section of the mine because there was only 5,490 cfm of air at the end of a line curtain that was supplying air to the continuous mining machine. Prichard testified this was approximately 78% of the requirement of 7,000 cfm, or 1,510 cfm less than required. Tr. 301, 302, 314, 315, 325, GX 16, p. 13. At the time this condition was discovered, Respondent was in the process of extracting coal with the mining machine in the #2 right, #195 crosscut. Tr. 302, 303, GX 8. This condition was likely caused by a disruption in the line curtain. Tr. 318. Periodically, shuttle car operators will knock a line curtain out of place with their equipment, but Pritchard did not know whether it happened frequently. Tr. 317. Other problems could have occurred with the curtain that would require it to be re-hung, moved, or have a “skirt” added to get it closer to the floor. Tr. 318. Pritchard had seen line curtains disrupted in a matter of seconds. Tr. 318, 319. He could not say exactly what had happened to disrupt the curtain in the cited area. Tr. 318. However, he knew it was ultimately corrected by adjusting the curtain. Tr. 316, 318.

Inspector Prichard testified that under the mine’s ventilation plan 7,000 cubic feet per minute (cfm) of air was required to be delivered to continuous miners when they were extracting coal. Tr. 301, 302, GX 16. This air requirement was placed in the ventilation plan because of the volume of air discharged from miners’ scrubbers; ideally the same amount of air should be delivered by the ventilation system as was discharged from the scrubbers. Tr. 303. A scrubber is a device that gathers dust-laden air from the face while the miner is cutting coal and traps it in a flooded bed screen. Tr. 304, 307, 328. The relatively clean air is then discharged from the scrubber. Tr. 304. The scrubber requires at least 7,000 cfm of air and if it does not receive sufficient fresh air, it will re-use air that has already been scrubbed. Tr. 304, 307, 308, 324. The scrubbers cannot remove 100% of the dust in the air and, as a result, the recirculated air also contains dust. Tr. 304, 305, 308, 324, 325.

Inspector Pritchard did not know how efficient the scrubber was and never looked up the technical specifications, but he knew it was not 100% effective because no machine can be. Tr. 324-325. Even if the scrubber was 99% effective, there would still be a build-up of dust over time to a dangerous level. Tr. 329. Constant recirculation would result in a build-up of dust in the air which miners then breathe, resulting in pneumoconiosis, or black lung. Tr. 304, 305, 308, 310. Prichard further testified that the amount of time necessary for a miner to develop black lung varies by individual. For some miners it can take many years and for susceptible individuals it might take a few months; he was aware of cases of miners in West Virginia suffering from black lung in their early 20s. Over a long enough period of time, any miner exposed to coal dust will develop black lung, a debilitating and even fatal disease. Tr. 310, 311.

¹⁴ Johnny Robertson was the superintendent of the Mach #1 Mine. Tr. 330. All personnel reported to him. Tr. 330. He was retired at the time of the hearing. Tr. 331. He had 32 years of underground mining experience. Tr. 331. He held various MSHA certifications and was a certified instructor. Tr. 333.

Inspector Pritchard took the reading showing insufficient air volume while the continuous miner machine and its scrubber were turned off. Tr. 321, 328, 329. He conceded at hearing that if the scrubber was on, it would increase the air volume. Tr. 321. He also conceded that the anemometer had a margin of error of plus or minus 10%, or 700 cfm of air for a required finding of 7,000 cfm. Tr. 321, 322, 326, 327. If the reading had been 6,300 cfm, Pritchard would have been reluctant to write a citation because it would be in the margin of error. Tr. 328. But here, the margin of error might be as low as 549 because of the actual, measured reading of 5,490 cfm of air. Tr. 327, 328. Prichard was told by the mine foreman that the minimum amount of air was present when the shift started in the morning. He saw nothing to refute the foreman's statement. Tr. 315, 316.

Inspector Pritchard testified that he designated the citation as "Reasonably Likely" to result in "Permanently Disabling" injury or illness because of the risk of black lung from dust exposure. He determined three miners would be exposed to this condition, including the miner operator and the two shuttle car operators in the area. Tr. 308–310. Prichard pointed out that when the airflow dropped below 7,000 cfm, the shuttle operators were exposed to air with a higher dust concentration than what would normally occur. Tr. 309. With continued mining and continuous exposure the consequence is black lung, a debilitating disease. Tr. 310. The miner operator, as a best practice, should stand on the intake side and away from the discharge on the scrubber but he sometimes had to move to avoid shuttle cars. Tr. 319, 320. Pritchard did not know where the miner operator was located while the machine was operating in the instant matter. Tr. 320, 321. He also conceded he was not a health specialist or black lung expert. Tr. 324, 326.

While in the mine, Pritchard conducted an imminent danger run and checked the air at the last open crosscut and found no methane and no imminent danger. Tr. 312, 313, 322, 323. He also checked the continuous miner, air velocity (even in the belt air), methane monitors, and other equipment and found no violations. Tr. 313, 314. The only condition he found was the condition he cited. Tr. 314, 323.

Inspector Prichard's notes confirm that multiple checks were made and were good, with no violations observed except for the line curtain air reading at #2 right, crosscut #195. GX 9. There, the air velocity was 5490 cfm when the #3A miner was loading coal. *Id.*, pp. 8, 9. There was dust visible in the air, and with continued mining activities there would be elevated levels of respirable dust caused by insufficient fresh air to the scrubber. *Id.*, pp. 10, 11. He also wrote that the negligence was moderate since the foreman said he measured 8150 cfm at the start of the cut. *Id.*, p. 11.

On June 11, 2012, at 1250 hours Inspector Pritchard issued a 104(a) Citation, No. 8442233, to Respondent. Section 8 of the citation reads as follows:

The approved ventilation plan is not being followed on the Headgate #6 unit (MMU-002). When measured, the quantity of air at the end of the line curtain supplying ventilation to the company number 3A continuous mining machine was found to be 5,490 cfm; the approved ventilation plan requires a minimum of 7,000 cfm (page 8, ventilation). The affected

mining machine was extracting coal in the #2 right (crosscut #195) at the time of the inspection.

Standard 75.370(a)(1) was cited 23 times in two years at the mine.

Pritchard determined the violation was S&S, injury or illness was reasonably likely to be permanently disabling to two persons, and the negligence was moderate. The violation was terminated at 1305 hours after the line curtain was adjusted raising the quantity of air to 7,350 cfm.

GX 8.

Former Superintendent Johnny Robertson testified he traveled with Pritchard during the spot inspection at issue. Tr. 333, 340. The mining faces were at crosscut 195 on a three-entry longwall development panel when Pritchard wrote the instant citation. Tr. 334-336, 342. Robertson testified he saw Pritchard take the air reading leading to the citation. The miners were operating and taking the coal to the tailpiece of the feeder for transport outside. Tr. 337. Robertson asked the miner operator to shut off his machine so Pritchard could work. Pritchard then went behind the curtain area and took his reading. Pritchard found that the area was a bit low, around 5,490 cfm of air. Tr. 342. The scrubber ran at 8,000 cfm of air, so the plan required between 7,000 and 9,000 cfm. Tr. 352. Ensuring at least 7,000 cfm of air in the entry allowed the intake air to satisfy the demands of the scrubber and prevent air coming from the return side. Tr. 352, 353. Robertson testified this presented a low hazard to the miners. Tr. 353.

Robertson also testified that problems usually occur at the intake area where shuttle cars run through the curtain. Tr. 346. He believed the cited condition was caused by a shuttle car hitting the line curtain, which was pulled loose when a loaded shuttle car went through the curtain. Tr. 347, 348. He stated a shuttle car may also pull a curtain out at the bottom, because it was hung with nails. Tr. 355. Shuttle car operators were warned about the danger of knocking down a curtain. Tr. 348. Robertson also testified that a drooping curtain would look different than a tight curtain and would be obvious. Tr. 354, 355.

Robertson told the miner not to load, and then he and the section boss went to tighten the wing curtain coming through crosscut 194 to get more air. Tr. 343, 346. When a curtain is not tight, it will droop and allow air to pass it, rather than forcing the air to the face. Tr. 346. Once the curtain was tightened, the air increased to over 7,000 cfm. Tr. 346, 347. This was the only action needed to terminate the condition and it only took around 15 minutes. Tr. 347.

Robertson testified the section boss said the air reading was 8,000 cfm when he started the cut. Tr. 348, 349. Robertson could not tell how long before the citation that the boss had started the cut. Tr. 349. However, he believed that the danger posed by this violation was very low because the miner operator would keep himself in fresh air and keep the continuous miner turned off until the shuttle cars were ready to load coal. Tr. 350, 351, 353. Robertson also testified that the continuous miner operator would move around in the area where the cuts were made while working, but he would know that the intake air was the proper place to start. Tr. 357.

Robertson also testified that there were three shuttle cars on the section that day and stressed that each had an enclosed cab with air conditioners installed. Tr. 337, 338, 345, 360. While three cars were present, only two were actually operating. Tr. 345, 346. The air conditioners had air filtering systems on them. Tr. 338, 360. Robertson believed these air conditioners offered protection to the miners and made the hazard they faced by the cited condition low. Tr. 339, 353. However, he did not know if the filters were certified to remove respirable dust. Tr. 360, 361.

b. Contentions

The Secretary contended that the violation was S&S, since the violation must be considered in the context of continued normal mining operations. Based on the particular facts surrounding this violation, the test under the third element is met, since there was a reasonable likelihood that the hazard contributed to would cause injury. The Secretary also contended that the violation was the result of Respondent's moderate negligence, because Respondent should have exercised heightened diligence and been aware of the condition since curtains hit by shuttle cars is a regular occurrence happening periodically during a shift and obvious to anyone in the area.

Respondent argued that the violation of the cited standard was not S&S because the Secretary has failed to prove the third element of *Mathies*. Respondent contended there was not a reasonable likelihood that the hazard contributed to will result in injury. Respondent also contended that the Inspector did not conduct airborne dust sampling, and no evidence was presented that 78% of the required ventilation was unable to remove harmful dust and gas when the scrubber fan was off. Respondent argued that the shuttle car operators were protected by air conditioned cabs, and the miner operator was protected because he was standing in clean intake air. Respondent also contended it should not be found to be negligent since the condition was caused by an hourly shuttle car operator. Further, there were mitigating circumstances; all of the ventilation controls and dust sprays were working, there were no other violations on the section, and the problem occurred quickly with no notice to the operator.

c. Analysis

The cited standard, 30 C.F.R. § 75.370(a)(1) "Mine ventilation plan; submission and approval", provides the following:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.

30 C.F.R. § 75.370(a)(1).

Regarding the first element of S&S, the Respondent did not contest the fact of the violation of the safety standard.

The second element of a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation was met. Inspector Pritchard credibly testified that the low air volume would cause the scrubber to recirculate discharged air in order to meet its capacity. Tr. 304, 307, 308, 324. Pritchard testified that this dust in the air would contribute to the miners' exposure to the danger of occupational lung disease. Tr. 304-305, 308, 310. I do not find credible the testimony of Robertson that the danger presented by the violation was very low. The reason is that the facts and circumstances surrounding the violation must be viewed in the context of continued mining operations.

Respondent cited *Peabody Coal Co.*, 17 FMSHRC 26 (Jan. 1995) to support its contentions that the hazard contributed to would not result in injury and hence the Secretary failed to prove the third element of S&S. However, in *Peabody*, the testimony of the Inspector was equivocal on the hazard of dust recirculation from inadequate airflow. In the instant case Inspector Prichard credibly testified that the low air volume would cause the scrubber to recirculate discharge air, that this recirculated air would contain dust, and with sufficient time exposure to dust would lead to occupational lung disease. Prichard's testimony was not equivocal, and hence not the same as the testimony the Commission found unresponsive in *Peabody*. Further, the Commission did not set a binding rule that dust exposure from air recirculation or inadequate ventilation cannot result in an S&S citation. Instead, the Commission held that the facts presented and the Inspector's testimony, as evaluated by the judge, are the determining factors.

Respondent also noted that in *Peabody* the Commission considered that air measurements were not made while the continuous miner and scrubber were operational, which could increase the ventilation through the line curtain. However, the ventilation plan in effect at the Mach #1 Mine specified the minimum cfm behind the line curtain must be 7,000 without the scrubber operating. GX 16, p. 13. Therefore, there was no need to measure with the scrubber operating. If such a measure is important, it should have been included in the mine's ventilation plan.

Neither the safety standard nor any authority cited by Respondent requires airborne dust sampling to be conducted by an Inspector when a violation of 30 C.F.R. 75.370(a)(1) is discovered. Inspector Prichard observed dust visible in the air, measured the quantity of air as 5,490 cfm at the line curtain, and determined that the inadequate air was reasonably likely to result in permanently disabling injury or illness affecting two people. In his notes, Prichard recorded that injury was reasonably likely with the continuation of mining activity and exposure to elevated levels of respirable dust caused by insufficient air being supplied to the scrubbers. GX 9, pp. 9-11. Further, there was no need for the Secretary to present evidence that the ventilation present was unable to remove dust and gas. The 7,000 cfm air requirement was not met and a hazard was created that was reasonably likely to result in injury or illness.

Other arguments of Respondent, that the shuttles had air conditioned cabs - that all other ventilation and dust controls were functioning at the time, and that the miner operator would stand in clean intake air - are not compelling. Even if so, these measures would be irrelevant. The fact that additional safety measures are in place does not mean dust poses no risk to miners; there are additional precautions that are required *because of* the significant danger of respirable dust. See, *Buck Creek Coal, Inc., v. Federal Mine Safety and Health Admin.*, 52 F.3d 133, 136 (7th Cir.

1995). Even if other safety measures are in place, insufficient air volume still contributed to the hazard of visible dust in the air and exposure to respirable dust would still be a hazard to miners. Therefore, the arguments do not undermine the S&S designation.

It is important also to recognize the effect of *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) on the third prong of *Mathies*. In that case, the Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury.” *Id.* at 1281. Importantly, it stated that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission also emphasized the well-established precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.*, (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). Two cases cited by Respondent were issued well before the Commission’s decision in *Musser*, and need not be discussed.

In short, the question is not whether the particular violation here would result in miners suffering black lung disease, but instead that the hazard contributed to by the violation would result in black lung disease. As discussed, the cited condition contributed to the hazard of coal dust exposure. Inspector Pritchard credibly testified that this hazard, given sufficient time, will result in black lung disease. Tr. 304-305, 308, 310. I find the Secretary has carried his burden, and the third prong of *Mathies* was met.

The fourth and final element that the Secretary must establish is that there was a “reasonable likelihood that the injury in question will be of a reasonably serious nature.” Pritchard credibly testified that black lung can be a debilitating, even fatal disease. Tr. 310-311. Therefore, the fourth prong of *Mathies* is also met, and the cited condition was properly designated S&S.

The Secretary argued that Respondent’s actions constituted “moderate” negligence. Specifically, the Secretary argued that a miner striking a line curtain was a regular occurrence and therefore Respondent should have exercised heightened diligence and checked periodically during the shift. Further, the Secretary argued that the condition would be obvious because a loose curtain would look different than a tight curtain.

Respondent contended the condition occurred quickly, caused by an hourly shuttle car employee, and hence there was no notice to the operator. Further, all other ventilation controls were working, and there were no other violations on the section.

The Secretary’s arguments have more merit. There was a Section Foreman in that area of active mining. Shuttle cars hitting line curtains are a regular occurrence and certainly could happen periodically during a shift. The visible dust in the air should have prompted the Section Foreman to make a quick check to determine the reason. The loose curtain would have been obvious, and a simple air measurement would have quickly shown that the air was not at the required velocity. Superintendent Robertson’s testimony was consistent with that of Inspector Pritchard that loaded shuttle cars did hit and pull loose line curtains and a drooping curtain would be obvious. The Section Foreman had both the opportunity and the means to discover and correct

the problem, since adjusting the curtain took only a few minutes. Therefore, Respondent should have known the air supply to the continuous miner was not sufficient and did not meet the requirement of its own ventilation plan.

Inspector Prichard was told by the Foreman, and he recorded in his notes, that the measurement was 8,150 cfm at the beginning of the cut. This was the mitigating circumstance he found, and he marked the negligence as moderate. I find no other mitigating circumstance. While hitting and displacing a line curtain can happen quickly, this does not relieve the Section Foreman of making sure the ventilation remains adequate during the extraction of coal. That other ventilation controls were working and there were no violations in other areas of the section is not relevant to the duty of care to the miners working in the affected section where the ventilation was not at the required minimum and there was a violation. The obvious condition of the curtain and the ease with which it was repaired underscores the conclusion that it should have been found and corrected by management through its Section Foreman. I find the negligence was moderate.

d. Penalty

The discovery of visible dust in the context of insufficient air movement through the mining section during coal extraction does not meet the requirement of the mine's own approved ventilation plan and under continued mining operations is a serious safety concern. I have found that the violation was S&S and reasonably likely to result in permanently disabling injuries to two miners. The operator was moderately negligent, since the only credible mitigating circumstance was the single pre-shift air check by the Section Foreman. The parties have stipulated that the penalty would not affect the operator's ability to remain in business and there was demonstrated good faith in quickly abating the violation. The penalty appears appropriate to the stipulated size of the business, and the violation history is not so egregious as to warrant an increased penalty. Therefore, I find the monetary penalty should remain \$2,678.00 as proposed.

V. LAKE 2012-861: CITATION NO. 8445042 & CITATION NO. 8445043

a. Summary of the Evidence

On June 21, 2012, MSHA Inspector Eddie Kane¹⁵ ("Inspector Kane" or "Kane") inspected the Mach #1 Mine. He had inspected the mine several times in the past. Tr. 198. Kane inspected two Fletcher dual boom roof bolter machines, Nos. 2 and 4, both in the same section of the mine. Tr. 199, 206, 207. Roof bolter machines drill through shale and slate, which contain a high amount of silica. Tr. 201. The amount of silica would vary depending on the type of rock, but in Respondent's mine there would be at least 5% silica.¹⁶ Tr. 219. Silica is a fine, dusty

¹⁵ Eddie Kane had been a special investigator for one year and previously worked as a regular inspector for five years. Tr. 196,97. Before MSHA, Kane spent six and a half years in the mining industry. Tr. 197. He had a BS degree in business administration, and also had extensive training Tr. 197. He was certified to "run dust" but he was not a health specialist and there was no such thing as a dust specialist. Tr. 221, 222.

¹⁶ Rock dust used in the mine must be below 1% silica. Tr. 219.

powder, like little shards of glass. Tr. 201. The roof bolter machines each had two dust collection systems to remove this dust from the air and store it in a collection box. Tr. 200-203, 207. Referring to GX-18, a picture of a similar roof bolter machine, Kane explained that the systems suction dust from the drills and bring it back to the collection box to eliminate it from the mine atmosphere. Tr. 200, 201.

Referring to the two citations he issued, he observed dust behind the filters of the system, and the seals on the outer doors were not glued down and were separated from the metal doors. Tr. 199, 200. On bolter No. 2 there was high silica dust behind both filters and both door seals were worn out and leaking. On bolter No. 4, there was high silica dust behind one filter, and both door seals were worn out and leaking. Tr. 220, 237-239.

The unglued, worn and leaking door seal rings did not properly seal the collection boxes allowing normal mine air to be drawn into the system and this can cause the drill pods to lose suction. Tr. 207, 208, 231, 232. As soon as he opened a door, the seal ring just flopped over. Tr. 218. He also noticed a little bit of buildup of dust where the door was supposed to be sealed. Tr. 215. One bolter operator told Kane that the condition had existed for two or three days and that he had spoken to the mechanic about it. Tr. 216, 230, 244, 245, 251-253. He was told the parts were not available for a fix right on the spot. Tr. 217. Kane testified the condition of the door seals should have been caught during the weekly permissibility checks. Tr. 252. The dust collection systems were required to be checked daily as part of the dust parameter checks to make sure the system was functioning. Tr. 214, 215, 241, 242, 251. However, Kane conceded that if the parameter checks were done indicating adequate suction, the condition of the doors did not affect the integrity of the system. Tr. 227-30, 250, 254, 255.

Kane was worried that when the machine was turned off, back pressure in the collection box would blow dust out through the areas where the door seals were inadequate and put dust in the air. Tr. 208, 224, 225, 232. Kane had seen this “burp” of dust back into the air when a bolter was shut down. Tr. 218, 224, 225. Kane did not ask the bolter operator to start the machine and turn it off to test if the back pressure blow out would occur. He did not want to expose miners to the hazard. Tr. 225.

Each dust collection box contained a filter. Tr. 202, 203. Referring to GX 19, Kane explained the black rim on the filter¹⁷ will not seal if drill dust is not cleaned out of the box Tr. 203, 204. The filters should screw down to a good, snug fit against the back metal wall of the box so that nothing can get past the gasket. Tr. 204. Behind or after the filters is the exhaust or clean area of the collection boxes. Tr. 203, 205, 206. Dust comes into the box, is collected, and clean air is then pushed out of the exhaust area to the muffler at the back of the machine. Tr. 202, 205, 206. Respondent was required to keep dust out of the exhaust area, which should be clean with only air that had passed through the filter. Tr. 208, 232, 233.

Kane found dust in the exhaust or clean area of three of the four collection boxes. The dust itself was located in a small trench just behind the filter. Tr. 233. Dust in the exhaust area could be caused when a filter is installed without first cleaning out the collection box. Tr. 204,

¹⁷ This is the gasket on the filter. Tr. 233.

234, 239, 243. The dust in the collection box would be pushed back into the trench and get between the filter gasket and the structure of the equipment. Tr. 234, 235, 239, 243. When the dust is not cleaned out of this trench the filter gasket will not seal and will allow dust to leak into the exhaust and be continuously expended into the mine atmosphere when the machine is operating. Tr. 204, 233, 235, 243, 250.

Kane testified miners would be working in the area of the expelled exhaust. Tr. 209. These miners would be exposed to the danger of silicosis, or pulmonary fibrosis. Tr. 209. It is the non-visible dust that is much smaller than a pinhead that is the most dangerous and causes silicosis, which is why the system is required to be maintained clean and free of dust. Tr. 209, 210, 211. Contracting these diseases would depend on the exposure time, but it can take as little as five to ten years. Tr. 209, 210, 223. Eventually, exposure would definitely lead to silicosis. Tr. 213, 214. He believed the condition would be permanently disabling because it would block the lungs and was related to renal failure and cancer. Tr. 214. A miner could live several years with silicosis, but eventually it would cause death. Tr. 214.

Kane testified the issues with dust in the exhaust areas and the inadequate door seals were unrelated; one did not cause the other. Tr. 212, 213, 230, 231, 237, 242. There would be two distinct ways the dust would enter the atmosphere. Tr. 213. The only common causes between the two conditions were poor maintenance of the equipment and sloppiness in changing the filters. Tr. 212.

Kane marked the citations as reasonably likely to result in permanently disabling injury. Tr. 213, 214. He made this determination based on NIOSH and CDC information regarding silicosis. Tr. 213, 218, 219. He marked the citations as affecting two miners because there were roof bolters and utility men in the area. Tr. 218.

Kane believed that Respondent's behavior exhibited moderate negligence with respect to the two citations at issue. Tr. 217. It would take time for the door seals to deteriorate to the condition he found. Tr. 216. However, Kane recognized that the bolter operators were a bit younger and may not have understood the problem.

Inspector Kane's notes show he was conducting an E01 inspection of the day active production equipment on MMU 002. When he came to roof bolter No. 2 he found leaking and worn out seals on both doors and dust behind the filters. He wrote that the condition was obvious when the boxes were opened. The bolter operator stated he had asked for new gaskets. Based on the amount of dust behind the filters and the deterioration of the gaskets he determined the condition had lasted 2 to 3 days. Kane also wrote that the condition would allow high silica dust to become airborne, and this would be reasonably likely to cause permanently disabling injuries from silicosis. GX-12, pp. 10-13.

Kane then wrote about the same conditions on roof bolter No. 4, except there was dust behind the left side filter only. The condition was obvious and should have been found by the mechanics and bolter operators. He again determined that the conditions appeared to have existed for 2 to 3 days, and that high silica dust would become suspended and reasonably likely to cause permanently disabling injuries from silicosis. GX-12, pp. 14-16.

At 1130 hours Inspector Kane issued a 104(a) Citation, No. 8445042, to Respondent. Section 8 of the citation reads as follows:

The dust collection system of the Fletcher roof bolter #2 is not being maintained. Both dust box seals are worn out and leaking and there is high silica dust behind the filters. This condition will cause high silica dust to become suspended in the air when the system is ran [sic].

At 1155 hours Kane issued citation No. 8445043, for a substantially similar condition on another bolter. Section 8 of that Order, Condition or Practice, reads as follows:

The dust collection system of the Fletcher roof bolter #4, located on MMU 002, is not being maintained. Both dust box seals are worn out and leaking and there is high silica dust behind one filter. This condition will cause the high silica dust to become suspended in the air when the system is ran [sic].

Kane marked both of the violations as S&S, reasonably likely to be permanently disabling to two persons, and moderate negligence. On both he recorded that Standard 72.630(b) was cited 12 times in two years at the mine. Both citations were terminated the next morning after new door gaskets were installed and the dust was removed from behind the filters.

GX 10, 11.

Former Maintenance Manager Norman Quertemous (“Quertemous”) was travelling with Kane when the two citations were issued. Tr. 260. Quertemous had worked with Fletcher roof bolters for 30 years and had worked with the two roof bolter machines at issue here since the time they were manufactured. Tr. 261, 262. He explained the suction system works by pulling air near the drill pod and sending it through a hose down to the dust tank’s cyclone. There, the bigger material settles out to the bottom of the tank while the finer material goes into the filter before the air is exhausted out to the muffler. Tr. 265. Hourly employees on every shift examined the dust boxes when they do dust parameter checks and clean their boxes. Tr. 268, 269.

Quertemous agreed that the door seals had deteriorated and that glued portions had detached in places. He also agreed that the seals were attached all the way around the doors when the machine first came from the factory. Tr. 271, 272. He believed the condition of the seals, along with the vacuum inside the box, would allow outside air into the dust box. Tr. 262. This condition would be obvious during a parameter check because there would be a short circuit back to the blower, with less sucking at the drill head. Tr. 262, 263. If the machine was not pulling enough air, then the bolter operator was at risk. Tr. 264. In that case, the vacuum gauge would not be in the green and the bolter operator would report the condition to management. Tr. 263, 264. If there was some leakage through the dust box doors but the gauge remained green, then that leakage would be insignificant. Tr. 264. The leakage through the doors would be clean air that would go to the exhaust. Tr. 264, 265. Quertemous could not say how long the dust box door seals had been compromised. Tr. 268, 269. He did not recall anyone telling him the condition had been reported to management. Tr. 268.

Quertemous disagreed with the assertion that back pressure would cause air to burp back out through the doors when the machine was turned off; he had never in his career seen it happen. He testified that a 50 horsepower motor created the vacuum, and when the power is cut off the weight of the rotor would make the motor coast down and the vacuum in the tank collapse slowly. Tr. 260, 261.

Quertemous testified there could be several reasons for dust settling behind the filter; a hole in the filter, a torn filter gasket, and dust contamination caused when changing the filter. Tr. 266, 267. He believed the most likely reason was when they changed the filters. Tr. 268. Quertemous explained the change process as follows: You take the wing nut off, pull the filter out, get a new filter, and shove the new filter in. He further explained if you are not “really, really, really,” careful when you shove it in to screw the nut back down you could push dust back up in there. Tr. 267, *see also* GX-19. He had seen this before, and the bolter men were trained to be cautious.

Quertemous testified a compromise of the filter gasket allows dust to get through to the clean side of the system, and the dust would exhaust into the atmosphere. Tr. 269, 270. He also testified that filter gasket damage could be a hazard. Tr. 270. He had been told exposure to that dust causes silicosis, and did “absolutely” understand the filter systems were important. Tr. 270, 271.

b. Contentions

With respect to Citation Nos. 8445042 and 8445043, the Secretary argued that Respondent violated 30 C.F.R. § 72.630(b) since the roof bolter dust collectors were not maintained in permissible and operating (functional) condition. Further, section 72.630 incorporates Part 33 of the regulations which require an operator to maintain the machines as they were approved by MSHA. All four dust box door seals were worn out and leaking. Of the four boxes on the two roof bolting machines, three had dust behind the filters. The secretary contended the violations were S&S because there was a reasonable likelihood that the exposure to dust created by the condition of the collectors will eventually result in injury, silicosis, and this would be at least permanently disabling. The Secretary further argued the operator was moderately negligent because the door seals had been damaged for two to three days and a mechanic had been notified but the condition had not been corrected. In addition, the dust that was found behind the filter gaskets can also compromise the purpose of the filters by allowing dust to get past the filter gasket to the clean side. Dust on the clean side will be blown out and suspended in the mine atmosphere when the machine is in operation. The Secretary proposed a penalty of \$1,944.00 for each citation.

Respondent argues that it did not violate the cited standard, and that both citations should be vacated because the Secretary did not prove the dust collection systems were not permissible and inoperable allowing respirable dust to enter the atmosphere. Further, Respondent argues the S&S designation should be deleted since the “burp” of dust out of the doors was not proven, no dust samples were collected, the filter gaskets were not damaged, and the ventilation system was operating properly. Respondent also contends there was no negligence, since the miners are taught to carefully install filters and clean out boxes to avoid allowing dust to get behind the

filter, there was no notice of dust behind the filters or the worn door seals, and proper examinations had been performed on the roof bolter machines.

c. Analysis

The cited standard, “Drill dust control at underground areas of underground mines”, provides the following:

Dust collectors. Dust collectors shall be maintained in permissible and operating condition. Dust collectors approved under Part 33—Dust Collectors for Use in Connection with Rock Drilling in Coal Mines of this title or under Bureau of Mines Schedule 25B are permissible dust collectors for the purpose of this section.

30 C.F.R. § 72.630(b)

This safety standard contains two requirements. The first is that dust collection systems must be maintained in “permissible” condition. The second is that the systems must be maintained in “operating” condition.

Permissibility under Part 33 requires that dust collection systems be maintained as MSHA approved them, based on testing and the issue of a certificate of approval. *Tri County Coal, LLC*, 34 FMSHRC 3255, 3274-3275 (Dec. 2012) (ALJ). In *Tri County*, dust was found behind the filters in the clean sides of the collection boxes, and there was also a hole in a hose that did not render the system inoperable. The judge found that the systems were not being maintained in permissible condition because the conditions found could not have conformed to the drawings and specifications upon which the approval certificate was based. *Id.* The systems were also not in operating condition because there should not have been any dust on the clean side of the filters. *Id.* In the instant case, the unglued and leaking door seals did not render the systems inoperable. But the door seals could not be found to be permissible, since they were not maintained in the same condition as existed when the equipment was approved by MSHA.

As to “operating” condition, in *Liggett Mining, LLC*, 33FMSHRC 1702 (July 2011) (ALJ), Judge Paez analyzed the language in section 72.630(b) and concluded that the plain use of the word “operating” was synonymous with “functional”, a word defined as “performing or able to perform its regular function”. *Id.*, at 1714, citing *Webster’s New Int’l Dictionary (Unabridged)* 921, 1581 (2002). In *Liggett Mining*, there was dust on the clean side of the machine indicating the filter was being bypassed and this evidence established the dust collection system was not performing its regular function. This was because the regular function of the system is to filter and contain dust before it reaches the clean side of the system. *Id.*, at 1714. In the instant case, three of the four filters were not performing their regular function since there was drill dust in the clean area behind the filters.

In *Mach Mining, LLC*, 37 FMSHRC 614 (Mar. 2015)(ALJ), Judge Paez again considered safety standard 72.630(b) and concluded the Secretary may demonstrate a violation of section 72.630(b) by proving *either* (1) that the dust collection system was not maintained as it had been

approved *or* (2) that the dust collection system was not in operating condition. The judge also found that in the context of section 72.630(b) the meaning of “permissible” is defined in accordance with Part 33 of the regulations. *Id.*, Fn 5. Recently, in *GMS Mine Repair*, 37 FMSHRC 2568, (Dec. 30, 2015) Judge Paez applied the same reasoning in determining that drill dust in the clean side of the systems revealed the dust collectors were not performing their regular function and proved the roof bolter machine was not being maintained in permissible *and* operating condition. *Id.*, at pp.7, 8.

I find the reasoning in these Commission ALJ decisions to be persuasive. As applied to the instant case the unglued, worn and leaking door seals could not be considered to be permissible since the equipment would not have been approved in that condition. Considering the integrity of the dust compartment, Inspector Kane credibly testified that the seals on the doors were worn out, no longer glued in place, not properly sealed against outside air and leaking. Respondent’s witness Quertemous also testified that the door seals had deteriorated and that glued portions had detached in places. He was present at the time the machines came from the factory and recalled the seals were properly attached all the way around the door. He further stated that the deteriorated condition of the seals would allow outside air into the collection boxes. The testimony of both witnesses well establishes that the door seals of all four collection boxes were not being maintained in permissible condition.

The clean areas of three of the four dust collection systems would not have been approved either. The presence of drill dust behind the filters in those clean areas could not have conformed to the specifications for the systems and would not have been present when the equipment was tested for approval. Kane credibly testified he found drill dust in trenches just behind the filters which could get between the filter gaskets and the metal of the boxes. This would allow drill dust to bypass the filters and be exhausted into the mine atmosphere. On this record there is no dispute that there was drill dust behind three of the four collection box filters. Roof bolter machine No. 2 had impermissible clean areas in both collection boxes, and roof bolter machine No. 4 had one impermissible clean area.

The three impermissible dust collection systems were also not being maintained in operating condition because the dust in the clean area would be exhausted into the mine atmosphere when the roof bolter machine was in use. It is not necessary to determine that the condition actually did cause drill dust to be exhausted into the area of active mining, but only that this would happen. The system was not performing its regular function because dust had reached the clean side of the filter system. Kane testified if the dust is not cleaned out of the trench the filter will not seal and will allow dust to leak into the exhaust and be continuously expended into the mine atmosphere when the machine was operating. Quertemous agreed any dust present on the clean side of the filter would go into the mine atmosphere. As a result, the drill dust found in the clean area behind the filters was sufficient to find Respondent failed to maintain three of the four dust collection systems in operating condition on the two roof bolter machines.

It follows, then, that I do not agree with Respondent’s contentions for vacating the citations. The arguments center on operating condition, citing an unrelated proceeding involving Respondent, *Mach Mining, LLC*, 35 FMSHRC 2827 (Aug. 2013) (ALJ). In that case, unlike the

instant proceeding, the citations alleging violations of section 72.630(b) *only* stated that the dust collection systems were not being maintained in *permissible* condition and the Secretary had made no attempt to prove the systems were not in permissible condition. *Id.*, at 2832. In *dicta*, considered wholly unnecessary to the holding, the judge suggested that proof the systems were not in *operating* condition required air readings, compliance with the Mine's Ventilation Plan, and visible dust in the air. *Id.*, at 2833, 2834. I do not agree with these suggestions in the context of the safety standard at issue, and in any event consider it inappropriate to rely on *dicta*.

Section 72.630 sets forth alternative methods of dust control: dust collectors, or water, or ventilation, or other approved method or device. Since dust collectors are used on Respondent's roof bolters, controlled by subsection (b), the use of water or compliance with the ventilation plan is not required and irrelevant to this decision. The enforcement of the safety standard does not require dust sampling. *Jim Walter Resources, Inc.*, 17 FMSHRC 1423, 1444-45 (Aug. 1995) (ALJ); *aff'd Jim Walter Resources, Inc., v. Sec'y of Labor*, 103 F.3d 1020, 1024 (D.C.Cir.1997). *See also* the regulation history, Air Quality Standards for Abrasive Blasting and Drill Dust Control, 59 Fed. Reg. 8318, 8322 (February 18, 1994). The argument that dust must be seen ignores the fact that silica dust can be measured in microns in size, invisible and dangerous as testified by Inspector Kane. Respondent also argued that the machines met the vacuum parameter checks and therefore were in operational condition. However, that the suction at the drill pods was most likely maintained despite the unglued, worn and leaking door seals is also irrelevant since the systems were otherwise violatively defective.

Respondent argued that the deteriorated door seals would not cause dust to blow out of the collection boxes when the roof bolter was shut off. Quertemous testified that in his 30-year career he had never seen this happen. He gave his opinion why this would not occur, essentially that the vacuum motor would shut down slowly. Inspector Kane testified he had seen this occur, but he did not elaborate on the circumstances surrounding any past incident. The Secretary did not offer any authority, such as MSHA or manufacturer testing or instructions, to support the purported back pressure "burp back" condition. However, it is not necessary to resolve this conflict in the evidence; I have determined that the dust collection systems were neither in "permissible" condition nor in "operating" condition.

After careful consideration of the evidence presented and Respondent's arguments, I find that the Secretary has met the burden of proof. Respondent violated 30 C.F.R. § 72.630(b) with respect to both Citation Nos. 8445042 and 8445043.

Inspector Kane found the gravity in Citation Nos. 8445042 and 8445043 as being "Reasonably Likely" to result in a "Permanently Disabling" injury to two persons and that the violations were S&S. In the event that silica dust was emitted from the dust collection system, it would result in silicosis and/or pulmonary fibrosis. Respondent's witness Quertemous also testified to his understanding that exposure to the dust causes silicosis. This condition can cause permanently disabling injuries to miners and eventually lead to death. Further, there were at least two miners working in the area of each roof bolter. Therefore, I agree and find that the gravity was properly marked as reasonably likely to cause permanently disabling injuries to two miners.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. § 72.630(b).

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – has also been met. The safety hazard of silica dust in the active mining section atmosphere from the roof bolter drills has been clearly identified. Inspector Kane credibly testified that the invisible, microscopic silica dust would be contained in the drill dust generated by roof bolting. While the amount was disputed, the fact of silica in the drill dust was not disputed. The hazard that contributed to the danger to safety was the drill dust found in the clean area of three of the collection boxes of the two machines. On operation of the machines, this would be expelled from the machine and become suspended in the air where miners were working.

Inspector Kane credibly testified that exposure to silica dust, over time, would result in injury and even, ultimately in death. Respondent's witness Quertemous evaded directly addressing the danger, but he did testify he had been told exposure to dust causes silicosis, and he understood the importance of the filter systems. The condition of the collection boxes had existed uncorrected for two to three days at the time of the inspection. It is not necessary for the Secretary to prove that the violations, the impermissible and non-functional dust collection systems, will result in injury. Rather, it is the contribution of these violative conditions to the exposure to silica dust and the injury due to silicosis and/or pulmonary fibrosis that is important. In the context of continued normal mining operations such exposure is very serious and reasonably likely to result in a disabling respiratory disease. The third element of the *Mathies* formula is met.

Due to the seriousness of silicosis, the fourth element is also met. I specifically find that both violations were S&S.

In its brief, Respondent argued that management did not know and should not have known about the cited conditions because the filters were installed by hourly employees. RPHB 11 and RRB 21 *citing Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000). It is generally true that the actions of a rank-and-file employee are not imputable to an operator. However, a person's actions are imputable to the operator when that person is charged with the responsibility for the operation of part of the mine. 30 U.S.C. 802(e). The Commission has previously found that rank-and-file miners are charged with the responsibility for the operation of part of the mine when assigned statutorily mandated responsibilities of the operator, like conducting examinations. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-195 (Feb. 1991); *see also Mettiki Coal Corp.*, 13 FMSHRC 760, 772 (May 1991). In the instant matter, Respondent's bolter operators, while rank-and-file employees, were charged with conducting pre-operational examinations of the roof bolter machines and their dust collection systems. As a result, those operators were acting as Respondent's agents, and their negligence is imputable to Respondent.

With respect to knowledge, Inspector Kane credibly testified that one of the bolter operators was aware of the broken door seals and had reported the condition to a mechanic. The problem was obvious as soon as someone looked inside the compartments, the seals would just flop over. Similarly, the dust behind the three filters was most likely pushed into place by a

miner when installing the filters. That miner should have been aware and cautious, based on the training provided. Quertemous testified the condition was most likely caused by changing the filters, and the bolter men were trained to be cautious. In addition, the dust behind the filters should have been caught on the weekly permissibility examination. Therefore Respondent knew, or should have known, that the dust collection system was not in either permissible or operable condition.

In its brief, the Secretary argued that Respondent's actions constituted "moderate" negligence. Specifically, the Secretary contended that the condition was obvious to anyone looking into the machine. Further, while the door seal condition was reported to a mechanic, it had not been corrected. In fact, it had existed for several days and for several cuts. The Secretary contended Respondent should have realized the dust collection systems were compromised and taken actions to correct the conditions. However, in the post hearing brief the Secretary did not suggest a mitigating circumstance to support the "moderate" determination. Considering the arguments advanced, this omission could be construed as a request for modification of both citations to high negligence.

In testimony, Inspector Kane observed that the bolter operators were a bit younger, which I take to mean inexperienced. Considering the testimony of Respondent's witness Quertemous that there was an awareness of the danger of pushing dust behind the filters and the bolter operators were trained to be cautious in changing the filters, their relative inexperience is not a mitigating circumstance. Notwithstanding, and despite the delay in correcting the door seals, at least one bolter operator did report the condition to a mechanic; essentially a request for repairs to be made. Therefore, I will not disturb the determination of the Inspector that the negligence was moderate.

I am aware that in the Sixth Circuit Court of Appeals decision in *Rex Coal Company, Inc., v. Secretary of Labor*, Case No. 14-4123 (October 29, 2015) (Unpublished) the Court noted that three citations were issued and three fines imposed where the same negligence resulted in the violation of three separate regulations. The Court commented that this appeared to be "piling on" and urged caution in the issuance of multiplicitous citations for the identical negligence. In *Rex Coal*, a single truck with inadequate brakes was involved, whereas in the instant case two separate roof bolter machines were each violatively defective and each was issued a single citation. Therefore, the concern for "piling on" is not applicable here.

d. Penalty

As in the discussion of the previous citation regarding dust in an active mining section, here the failure to properly maintain the two roof bolter dust collection systems raises serious safety concerns. Both of these violations were S&S and reasonably likely to result in permanently disabling injuries to two miners. I was able to find a mitigating circumstance and affirm the determination of moderate negligence. The violation history, while significant in the context of dust control, does not support an increased assessment. The remaining factors have been stipulated by the parties. The Secretary proposed a penalty of \$1,944 for each citation, and my independent assessment is that these amounts are appropriate.

VI. LAKE 2012-861: CITATION NO. 8445234

At the hearing, the Respondent did not contest the fact of the violation or, based on discussions at hearing regarding mitigation, the designation of moderate negligence. Tr. 190, 191. The Respondent argued only the designation of the violation as S&S. Tr. 191. *See also*, RPHB, RRB.

a. Summary of the Evidence

On June 27, 2012, Inspector Chad Meacham Lampley¹⁸ (“Inspector Lampley” or “Lampley”) inspected the Mach #1 Mine. Tr. 122. He had been to the mine numerous times in the past. Tr. 122-123. During the inspection, he found an inadequate guard at the drive of an 84-inch conveyor belt. Tr. 123. Referring to GX-17, he testified that a chain had been run through steel grating¹⁹ and draped across and hooked to a motor lift eyelet on the other side. Tr. 124, 125, 149. He explained the chain was not sufficient as a guard because it could easily be disconnected and dropped, or ducked under, and did not prevent any miner from going into the drive area during cleanup. Tr. 125, 127, 128, 145, 146. This area had rotating components; two drive roller assemblies with tension where the belts come around the rollers. Tr. 124, 125. Referring also to GX-14, a wider view of the area, Lampley further explained that the rotating assemblies are required to be guarded to prevent any miner from coming into contact with those moving parts. Tr. 126, 127. The guard is supposed to extend a sufficient distance from the parts to prevent contact, and be secure in place so that it could not easily fall off or be removed. Tr. 127. The belt area would be routinely accessed by miners for cleaning, Tr. 130, 135, and by the mine’s examiners each shift. Tr. 135. The area could also be accessed by general inside laborers, or if there was a problem by somebody going to see the belt running. Tr. 138.

Inspector Lampley testified that injury was reasonably likely because people would be coming through the area, a place where accumulations occur directly underneath or in close vicinity to the belt itself. Tr. 135, 150. A miner would have to get close and reach with a shovel underneath the belt and drive to clean that area. Tr. 149, 150. Depending on where one measured from the chain, the distance to the rotating parts was 4 to 6 feet. Tr. 143, 144. Lampley considered the hazard to be the ease of access by just unhooking the chain and going into the area to clean and coming in contact with the rollers. Tr. 124, 145, 146. Lampley further testified he marked injury as permanently disabling because a miner or his clothing could contact a pinch point, get caught in a roller, or be pulled into the rotating components and have a crushing injury or dismemberment. Tr. 124-126. Lampley also testified that many accidents, injuries and fatalities were caused by belt conveyors, rotating assemblies, and related equipment. Tr. 126, 136.

¹⁸ Inspector Lampley earned a BS degree from Southern Illinois University and had been with MSHA for about seven and a half years. Also, he had previously worked for about a year and a half for a coal company as a laborer and mechanic. Tr. 120, 121.

¹⁹ Exhibits GX 17 and GX 14 show the chain passed through a small piece of grating attached perpendicular to the structure.

Inspector Lampley marked the violation as “S&S” because of the frequency with which miners were exposed to the hazard and the history of injuries in the mining industry from pulleys and rotating parts. Tr. 137.

In his notes Inspector Lampley wrote that when walking the 84 inch conveyor belt toward the head with Jimmy Henderson he observed the drive was not adequately guarded to prevent miners from contacting the moving rollers. He saw that the guards there did not extend a sufficient distance to prevent miners from traveling into the hazardous area of the drive. A chain was installed at the two foot opening of the walkpath from the end of a guard to the motor; the location of the opening would allow miners performing cleaning easy access to where the hazards of the rotating drive existed and could cause permanently disabling injuries. GX-15, pp. 29-33.

At 1517 hours Inspector Lampley issued a 104(a) Citation, No. 8445234, to Respondent. Section 8 of the citation reads as follows:

The 84 inch belt conveyor drive is not adequately guarded to prevent miners from contacting the moving drive rollers. Guards do not extend a sufficient distance to prevent miners from traveling into the hazardous area. A two foot walkpath at the inby drive motor has a single chain installed from the end of the guard to the motor.

The safety standard 30 CFR § 75.1722(a) was cited two times in two years at the mine.

Lampley marked the violation as S&S, reasonably likely to be permanently disabling to one person, and moderate negligence. The citation was terminated at 1555 hours when metal guarding was extended to the drive motor.

GX 13.

Mine Manager Jimmy Henderson²⁰ (“Manager Henderson” or “Henderson”) testified for the Respondent. Tr. 152. He also observed the chain at the 84-inch belt drive area that had been put up to prevent a miner from accidentally getting in the hazard of a pinch point where the belts run around the drive pulley.²¹ Tr. 155-157, 160. Henderson had not seen that chain before and did not believe it was adequate guarding. Tr. 160, 178. He also testified the purpose of a guard was to prevent accidental contact. Tr. 164-165. A miner contacting the drive could get a piece of clothing caught and his arm pulled into a pulley. Tr. 165. Miners were occasionally injured and

²⁰ Jimmy Henderson was responsible for everything at the mine, including safety and production during his shift and maintenance of guards. Tr. 152–53, 170. He had extensive experience. Tr. 154, 187. He had traveled with inspectors when they expected guards in the past. Tr. 186.

²¹ The drive was located at the end of a 400-foot beltline that dumped onto the slope belt that takes the coal outside. Tr. 156. The drive operates a series of pulleys that move the belt. Tr. 156, 157.

killed by inadvertent contact with pulleys. Tr. 180. However, Henderson did not believe that miners would typically enter a chained off area because a chain could be used as a warning sign. Tr. 166, 179. He conceded that miners would sometimes cut corners. Tr. 180.

Manager Henderson testified that the belt drives are examined every shift, and there is a chance for cleaning to go on every shift. Tr. 160. Henderson had assigned miners to clean in the area around running belts in the past and had observed miners doing so. Tr. 175-176. Miners would clean the area with a 10 to 12 foot pancake shovel standing on the right side of the motor. They would not have to go under the chain. Tr. 176, 177. Henderson testified for someone to be hurt by the missing guard, they would have to walk up, take the chain off or go under or over the chain, walk four or five feet, and intentionally stick their arm out in between the belt and the pulley. Tr. 167. In his opinion, you could not be accidentally hurt by the chain being there and the guard missing. Tr. 168. The condition was abated promptly by removing the chain and welding a guard onto the drive perpendicular to the belt. Tr. 161, 164, 167.

b. Contentions

The Secretary contended that the violation was S&S since a miner behind the chain would be exposed to getting clothing or a body part in contact with the drive rollers causing crushing injuries or dismemberment. The area is regularly accessed for cleaning when the belt is running. One miner, examiner or cleaner, would be affected. The hazard created was reasonably likely to result in a permanently disabling injury that would be reasonably serious. The Secretary proposed a penalty of \$1,530.

The Respondent contended that the S&S designation should be deleted. The chain was a protective barrier making access to the belt drive difficult. A miner would have to remove or cross over or under the chain to approach the conveyor drive, and miners would not regularly be in the area protected by the chain. The Respondent argued the distance from the chain to the drive was 4 to 6 feet, the floor was not wet, and there was no need for miners to pass the chain to clean the area; therefore, injury would be highly unlikely.

c. Analysis

The safety standard, "Mechanical equipment guards" provides the following:

- a. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.
- b. Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.
- c. Except when testing the machinery, guards shall be securely in place while machinery is being operated.

30 C.F.R. § 75.1722.

I understand, of course, that Respondent here concedes the guarding was inadequate, and contests only the determination of S&S. However, to fully consider this issue, an understanding of the requirements for a “guard” is needed. The safety standard lists a number of types of moving machine parts that must be guarded, that the guard must be extended a sufficient distance from the pulleys to prevent a person reaching behind the guard becoming caught between the belt and pulley, and that the guard must be securely in place while machinery is operated. However, the term “guard” is not further defined in the regulation. The MSHA Program Policy Manual²² contains relevant details:

Guards installed to prevent contact with moving parts of machinery shall:

1. Be of substantial construction;
2. Be of such construction that openings in the guard are too small to admit a person’s hand;
3. Be firmly bolted or otherwise installed in a stationary position; and
4. Be of sufficient size to enclose the moving parts and exclude the possibility of any part of a person’s body from contacting the moving parts while such equipment is in motion.

Program Policy Manual, Volume V, Subpart R, Pages 155, 156.

Over thirty years ago the Commission provided guidance on an identically worded safety standard for guarding:

We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miner’s behavior cannot ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. *Secretary of Labor v. Thompson Brothers Coal Company, Inc.*, 5 FMSHRC 2094, 2097 (Sep. 1984).

The test is “reasonable possibility” of contact and injury. *Id.*

In the instant case, as clearly shown by the photograph GX 14 and the closer view GX 17, and by descriptions in testimony, the easily removed or circumvented chain did not in any meaningful way prevent access to moving machine parts via a two foot wide pathway from the work area. Cleaners, examiners, maintenance workers or others in this pathway would be in

²² The Program Policy Manual is an agency issue available to the public on the MSHA website. Although counsel for the Secretary referred to the Manual at the hearing, there was no need to offer it as an exhibit. All or any part of the Manual may be downloaded and/or printed.

close proximity to the open, exposed and *unguarded* pulley and belt readily visible adjacent to the end of the pathway. Respondent's exhibit RE 8 was marked to point to the pulley in question; when compared to GX 17 and GX 14 the same assembly is indicated. Considering the vagaries of human conduct, including inadvertent or accidental contact with this moving pulley and belt due to carelessness, inattention, stumbling or falling, the test of "reasonable possibility" of contact and injury is met.

Respondent contended the chain was a "protective barrier" or an "area guard" that would prevent miners from accessing a pinch point. I find the chain was neither. The ALJ decisions cited by Respondent do not support the argument, and in any event are not persuasive.²³ The entrance to the pathway between the structure and the motor was not completely screened off and the chain was not welded and padlocked and had no warning sign attached. Other decisions cited regarding distances between installed guards and moving parts do not apply here, since there was *no* guard between the end of the pathway and the exposed pulley and belt.

I credit the testimony of Inspector Lampley that miners would enter the area to clean up. He observed that miners often take expedient actions, even when such actions are not safe, and they would ignore the chain and not avoid the area behind the chain. He also testified that examiners are trained to find problem areas; therefore it was reasonably likely that an examiner or maintenance person would need to closely view the drive assembly if there was a problem. Respondent's witness Henderson testified that miners did enter the area to clean coal spillage, and he conceded that miners would cut corners. In this context, whether the cleaners were provided 12-foot long shovels does not matter; it is how and where shovels of any type would be used that makes a difference. In this case, there was no effective "barrier" or "area guard" to *prevent* access to moving machine parts by any miner.

Inspector Lampley found the gravity of the violation to be "Reasonably Likely" to result in a "Permanently Disabling" injury to one miner. I agree with these determinations and find each is supported by a preponderance of the evidence.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. § 75.1722(a). We begin the S&S analysis here with the second element of *Mathies*, whether there was a discrete safety hazard - that is a measure of danger to safety - contributed to by the violation. As discussed *supra*, the drive assembly, specifically the unguarded pulley and belt easily accessed from the pathway, could cause injuries if contacted. These exposed moving parts contributed to the danger of clothes or limbs coming into contact with the pulley and belt and the miner being pulled into the pinch point. Miners did enter the area on a regular basis to perform various assigned tasks, including the mine's examiners and those sent to clean the area around and under the belt. The violation contributed to the safety hazard of a miner in the area contacting the moving parts of the drive. Therefore, the second prong of *Mathies* was met.

²³ Respondent cited *Secretary v. Consolidation Coal*, 15 FMSHRC 1264, 1286-1287 (June 20, 1993) and *Secretary v. Overland Sand & Gravel*, 14 FMSHRC 1337, 1342 (August 3, 1992).

The third element of *Mathies* – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. Lampley and Henderson testified that a miner contacting moving equipment could be pulled into the machine and suffer crushing injuries or dismemberment. Both acknowledged that these injuries, and fatalities, did occur in the mining industry. With continued normal mining operations there was a reasonable likelihood that the hazard contributed to by the violation, being pulled into exposed and dangerous moving equipment would result in injury. The third prong of *Mathies* was also met.

The fourth element of the *Mathies* test – a reasonable likelihood that the injury in question will be of a reasonably serious nature - was also met. It is essentially uncontested that miners pulled into these moving assemblies would be crushed or suffer dismemberment. This would be, at least, permanently disabling and therefore of a reasonably serious nature. All four prongs of *Mathies* were met, and I find the determination of S&S to be correct.

d. Penalty

I affirmed the gravity and S&S findings, and again considering the six criteria as required by Section 110(i) including the lack of a significant history of this type of violation and the matters stipulated by the parties, I also affirm the penalty of \$1,530.00.

ORDER

It is **ORDERED** that Citations numbered 8427074, 8442233, 8445042, 8445043, and 8445234 are **AFFIRMED** as issued with civil penalties totaling **\$13,176**.

It is further **ORDERED** that Citation Number 8420533 is **MODIFIED** to reduce the negligence to **LOW** and the civil penalty to **\$700**.

It is further **ORDERED** that Mach Mining, LLC, **PAY** the Secretary of Labor the sum of **\$13,876.00** within 30 days of the date of this Decision.²⁴

Upon receipt of payment, this case is hereby **DISMISSED**.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

²⁴ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390.

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
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February 3, 2016

MICHAEL WILSON,
Complainant,

v.

JARROD FARRIS, DAVID TAYLOR,
& ROSS GLAZER,
Respondents.

DISCRIMINATION PROCEEDING

Docket No. KENT 2015-672-D
MSHA Case No. MADI-CD-2015-13

Mine: Parkway Mine
Mine ID: 15-19358

ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION

Before: Judge Moran

Summary of Order

In this Section 105(c)(3) action brought under the Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"), the Respondents have filed a Motion for Summary Decision regarding Michael Wilson's complaint of discrimination. Although discussed more fully *infra*, Wilson's Complaint can be fairly described in a nutshell.

On May 12, 2015, Wilson, a non-employee representative of miners at Armstrong Coal's Parkway Mine, while traveling underground with an MSHA inspector, asserts that three miners, whom he later determined to be employed as ram car drivers at the mine, approached an MSHA inspector and asked the inspector how they could get rid of him as a miners' representative and keep him off of mine property. Wilson contends that, by asking the MSHA inspector how to remove him as a miners' rep, the miners violated section 105(c) of the Mine Act. For this, Wilson seeks to have those miners take training in "miners' rights," including the rights of representatives of miners, and to be ordered to cease and desist from further interference with his rights as a miners' representative. Wilson stated that his complaint is against those three miners, adding expressly that it is not made against Armstrong Coal.

Because Wilson suffered no adverse action, an essential and required element of a section 105(c) complaint, his complaint, fully accepted for the purposes of this Order as factually accurate, fails to make out a prima facie case and therefore the Motion for Summary Decision must be granted and Wilson's Complaint must be dismissed.

Wilson's Complaint of Discrimination

To avoid any suspense or concerns that the preceding summary of Complainant Wilson's claim has been misconstrued, the full text of his June 18, 2015, complaint provides:

I am a non-employee 'representative of miners' at Armstrong Coal Company's Parkway underground mine. I worked for Armstrong at the Parkway mine from August 2009 until May 6, 2015. Since my employment with Armstrong Coal ended, I have continued to act as a 'representative of miners' at the mine.

On or about May 12, 2015, I traveled underground with a MSHA inspector. That same day, three ram car drivers from the unit approached MSHA Inspector Jeremy Walker and asked Walker how they could get rid of me as a miners' rep and keep me off of mine property.

These actions constitute interference with my rights as a 'representative of miners' under the Mine Act, and violate section 105(c) of the Act.

I will provide MSHA with the names of the ram car drivers on the unit and ask that the MSHA Special Investigator interview each of them. When it is determined which miners asked the MSHA inspector how to remove me as a miners' rep, I will amend my discrimination complaint to include their names.

I want each of these miners to be fined for violating section 105(c) of the Mine Act, and I want each of them to be required to take training – taught by MSHA personnel – in miners' rights under the Act, including the rights of 'representatives of miners'. I also want each of the miners to be ordered to cease and desist from interfering with my rights as a 'representative of miners'.

I am not filing this complaint against Armstrong Coal. I am filing it against the three ram car drivers individually.

Compl. of Discrimination Ex. A, at 2.

Respondents' Contentions in Support of Its Motion for Summary Decision

Respondents first contend that, in the context of discrimination claims, there is a significant distinction between words and actions, and that the words ascribed to the Respondents "cannot serve as the underpinnings of a claim of discrimination or interference." Resp'ts' Mem. Supp. Summ. Decision 5. Thus, Respondents argue that the "words," that is to say, the "speech," as "alleged in the complaint cannot constitute action as the term adverse action is used in § 105(c)." *Id.* at 7. That is the case because the exercise of speech in this instance was "communication' and not 'action' in the § 105(c) context." *Id.*

Beyond that, Complainant cannot show that any adverse action occurred against him from those words. In fact, Respondents note that Wilson did not even plead that there was any adverse action against him.¹ *Id.* As Respondents point out,

Complainant has totally failed to identify any adverse action that has befallen him as a result of that question. . . . Mr. Wilson does not claim that he was laid off, terminated, sanctioned, reassigned, demoted, removed from the mine, hampered in his movements throughout the mine, physically or economically threatened, or otherwise impacted in any way by the alleged question. He claims no lost wages.

Id. at 6.

Respondents urge that “even if the speech at issue in the instant matter could be deemed ‘action’ under the law, the legitimate and substantial reasons for Respondents’ alleged question to an MSHA representative far outweigh any harm² that Mr. Wilson perceives.” *Id.* at 7.

The Constitutional Dimension

Respondents note that restrictions on free speech have been consistently circumscribed as limited to the categories of “obscenity, defamation, fraud, incitement, and speech integral to criminal conduct,” with the inverse being that the “Constitution demands that content-based restrictions on speech be presumed invalid.” *Id.* at 7-8 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010); *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004)). Respondents’ central point is that “[w]hether the alleged question at issue in the case at bar be deemed an assertion (*i.e.*, overt speech) or an attempt to receive information from MSHA . . . , the United States Supreme Court is steadfast – that question may not be regulated.” *Id.* at 8. In this instance, the speech attempted to be silenced is the right of a miner to “question . . . an MSHA inspector about his rights under the Mine Act” and, as that is not within the limited categories of speech which can be restricted, such speech “must likewise be protected.” *Id.* at 8.

¹ Respondents assert that the Complainant has failed to plead an essential element of his discrimination and interference claims — namely protected activity. Citing Wilson’s Complaint at page 3, paragraph 11, they contend that “[a] close reading of Mr. Wilson’s complaint shows that, at best, he claims he was “underground with a [sic] MSHA inspector.” Mem. Supp. 6. From this, Respondents assert that Wilson never: “(a) articulates that he was engaged in protected activity at the time of the alleged utterance; (b) identifies what sort of activity he was then conducting; or (c) proffers a causal link or motivation between the alleged utterance, the protected activity, and any purported interference or discrimination.” *Id.* The Court rejects this argument. Wilson was engaged in protected activity *per se* by functioning as a miners’ representative on the day in question.

² In the Court’s view, Respondents also correctly point out, Wilson has not identified any articulated harm visited upon him from the question posed by the three miners to the MSHA inspector, and they take special note that his complaint fails to plead or identify any such harm. Mem. Supp. 7.

Respondents also cite to *UMWA, Local Union 9800 v. Secretary of Labor, MSHA or Thomas Dupree*, 3 FMSHRC 958 (Apr. 1981) (ALJ) (“*Dupree*”). Mem. Supp. 9-10. Involved there was a section 105(c) complaint alleging “that the Mine Safety and Health Administration (MSHA) or Thomas Dupree violated [that section] of the Mine Act by threatening a lawsuit against [the local UMWA union] in retaliation for the local notifying MSHA of alleged irregularities in inspections at Peabody Coal Company’s Riverview Mine.”³ *Id.* at 958.

As pertinent to this case, the judge, having found that Dupree, an MSHA inspector, was not speaking on behalf of MSHA when he threatened a lawsuit, then examined Dupree’s remarks to determine if they constituted a violation of section 105(c), and concluded that those remarks did not constitute interference with the exercise of the statutory rights of any miner, representative of miners.

Of significance to this proceeding, the judge also spoke of First Amendment implications, holding that “[g]rave questions involving the [F]irst [A]mendment protection of the right of free speech would be presented if [he were to] conclude[] that the Mine Safety Act authorized the Commission to punish . . . speech of the kind shown in this record.” *Id.* at 962. The judge noted, “It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny.” *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1975)).

As with this case, the complainant in *Dupree* sought disciplinary action for Dupree’s speech, which the judge characterized as communication, not action. Dupree’s speech, he determined, “was not physically or economically coercive, nor did it threaten such coercion,” and as such it was “‘communication’ and not ‘action’ and [therefore] entitled to rigorous [F]irst [A]mendment protection.” *Id.* at 962-63.⁴ Accordingly, in dismissing the case, the judge rejected construing “the Mine Safety Act in such a way that it would direct punishing the speech found herein to have taken place, even if possible under norms of statutory construction, [as it] would bring it in conflict with a most basic constitutional right.” *Id.* at 963.

³ As in this case, with this Court’s finding that Wilson was engaged in protected activity since he was acting as a miners’ representative at the time the miners inquired how they could get rid of Wilson as a miners’ representative, the judge in *Dupree* similarly found that the union’s notifying activities “were related to safety in the mine and therefore were protected under the Act.” *Dupree*, 3 FMSHRC at 961.

⁴ The judge also cited Thomas I. Emerson, *The System of Freedom of Expression*, 423-25 (1970), and quoted from Laurence H. Tribe, *American Constitutional Law* 582 (1978):

[G]overnment regulation *** aimed at the [communication] *** is unconstitutional unless government shows that the message being suppressed poses a “clear and present danger” constitutes defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the court has drawn to distinguish those expressive acts privileged by the [F]irst [A]mendment from those open to government regulation with only minimal due process scrutiny.

Dupree, 3 FMSHRC at 963 (first line alterations in original).

Respondents contend that “[m]aking pure speech such as that alleged by Complainant Wilson actionable under the Mine Act would undermine the very purpose of the Act, itself.” Mem. Supp. 10. Pointing to section 2(a) of the Mine Act, which identifies that “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner,” Respondents assert that Wilson’s claim

runs counter to this first priority of the Mine Act to suggest that a miner working in a dangerous, intensively regulated workplace could somehow be prohibited from asking an MSHA inspector – a lawful representative of the United States Department of Labor and a regulator of the workplace – about his rights in and affecting that workplace.

Id.

Making matters worse, the effect of attempting to silence Respondents’ speech is the adverse impact it will have on all miners because any

miner who [becomes] aware of the instant suit [will] think[] twice about speaking to MSHA about workplace concerns. If asking a simple question about one’s rights under the Mine Act is found to be enough to put a hardworking miner through the embarrassment, anxiety, expense, and risk of a Federal Mine Safety and Health Review Commission suit, then miners nationwide would be fools to ever speak up to MSHA.

Id.

Thus, Respondents contend that miners who have developed concerns about a miners’ representative at their mine will be intimidated from voicing those concerns. Such a chilling effect, Respondents maintain, runs counter to “the very purpose of the Mine Act.” *Id.* at 11.

Last, citing provisions such as section 103(g), the miner informant/witness secrecy provisions of 29 C.F.R. §§ 2700.61 and 2700.62, and section 105(c) itself, Respondents assert that the “Mine Act not only contemplates, not only permits, but encourages miners like Respondents to communicate with MSHA representatives, particularly inspectors.”⁵ Mem.

⁵ Respondents, observing that “[t]he Mine Act sets forth the circumstances under which a miner may be designated as a representative of miners with the assent of at least two of his/her miner peers,” argue that “just as it provides for the designation of representatives of miners, the Mine Act also recognizes that there are circumstances under which they may be removed.” Mem. Supp. at 11 (citing 30 C.F.R. § 40.1-.5).

On or about February 27, 2014, Complainant Michael Wilson ostensibly employed those provisions to have at least two of his fellow miners designate him as a representative of miners. But just as it provides for the designation of representatives of miners, the Mine Act also recognizes that there are circumstances under which they may be removed. 30 C.F.R. 40.5. Respondents’
(continued...)

Supp. 11-12. Thus, Respondents here “exercised their protected rights under the Mine Act to communicate with an MSHA representative.” *Id.* at 12.

Complainant’s Response

The Complainant begins by repeating his objection to the Court’s January 12, 2016, Order denying its motion for leave to take discovery:

Because discovery has not been allowed in this case, the Complainant does not have access to any statements taken by MSHA of the Respondents. Complainant is also not aware if a statement of the MSHA inspector in this case was taken or if a memorandum of interview was prepared. Without any discovery, Wilson only has access to his own statement in this case and to the statement of Brandon Shemwell, and thus, cannot fully and properly respond to Respondents’ instant motion.

Compl’t’s Resp. Opp’n Mot. Summ. Decision 2 (“Response”). As this issue has been decided, the Court proceeds to Complainant’s other contentions.

Protected Activity

Complainant alleges that he was engaged in protected activity at the time of the event in issue. The Court agrees that Wilson, simply by being a miners’ representative and acting as such at the time of the miners’ statements, was engaged in protected activity.⁶

⁵ (...continued)

alleged query about how they might go about exercising their rights to remove a representative of miners was no more a moment of discrimination and interference than were the conversations Complainant Wilson doubtlessly had with the miners who designated him as a representative or the communications he was required to have with MSHA administrators and mine operators to formalize his designation as a representative of miners. *See, e.g.*, 30 C.F.R. 40.2 and 40.3 (setting out various notifications a representative of miners must give to MSHA and operators upon designation). Whether they involve installing or removing a representative of miners, all such communications are simply the lawful operational outgrowths of the Mine Act. As such, they can never be actionable.

Mem. Supp. at 11. The Court would observe that, while it is easy to note now, in hindsight, at the time Part 40 was promulgated, no one apparently had the foresight to provide any procedure for those who wished to challenge the appropriateness of a miners’ representative continuing to serve in that role. In the Court’s view, this was a significant omission.

⁶ The Court was imprecise in its December 17, 2015, email response, cited by Complainant, when it remarked that “even assuming *arguendo* that everything in Wilson’s Summary of Discriminatory Action is true, it cannot constitute protected activity, for the

(continued...)

Adverse Action

Complainant contends that:

Respondents were attempting to have Wilson removed from the mine property and as a representative of miners in this case. Although the Respondents' attempt to have Wilson removed as a representative of miners and from the mine property was not successful, it nonetheless could be found to have tended to interfere with Wilson's rights as a miners' representative. The report of the Senate Committee provides that "[i]t is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion . . . , but also against the *more subtle forms of interference*, such as promises of benefits or *threats of reprisal*." S. Rep. No. 95-181 at 36, reprinted in Leg. Hist. at 624 (emphasis added).

Resp. 7.

These contentions mischaracterize what transpired. Respondents were not literally *attempting* to have Wilson removed. Rather, they were *inquiring* about the process to achieve that end. This is an important distinction. Complainant also glides over the fact that Wilson was not removed as the miners' representative. While Complainant *alludes* to the *more subtle forms of interference*, this ignores that the examples he cites — discharge, suspension, or demotion — did not occur, and no analogous *subtle form of interference* form is identified.

Complainant then posits that "[i]f the statutory rights of a representative of miners' are to be construed expansively under the Mine Act, then it follows that an action that interferes with a protected safety right is prohibited, whether the attempted action is successful or not." Resp. 8.

While the Court agrees that the statutory rights of a miners' representative are to be construed expansively, those rights are not limitless. Further, while it follows that an action that interferes with a protected safety right is prohibited, *there was no interfering action here* — the Respondents only inquired how they could get rid of Wilson as a miners' representative and keep him off of mine property.

Complainant next argues that in the context of Respondents' conversation with the MSHA inspector, "not all speech is accorded blanket First Amend[ment] protection [and that] [t]he Commission has repeatedly held that a person's speech can unlawfully interfere with a miner's or representative of miner's protected rights under the Mine Act," citing, among other cases, *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (Aug. 1982). Resp. at 8.

To be generous, *Moses v. Whitley* is of no value to the analysis of this case. In that case, the Commission addressed "whether an operator violates section 105(c)(1) by interfering with a miner's exercise of a protected right through coercive interrogation and harassment, and whether

⁶ (...continued)

purposes of a discrimination claim, under the Mine Act." Response at 3. As this Order, the only order addressing the motion for summary decision, makes clear, Wilson was engaged in protected activity. It is the adverse action element that the Court finds wanting.

an operator violates that section by discharging a miner on the suspicion or belief that he has exercised a protected right.” *Moses*, 4 FMSHRC at 1475. No coercive interrogation, harassment, or firing occurred here, nor could the inquiry by Respondents “logically result in a fear of reprisal [or] a reluctance to exercise the right in the future.” *Id.* at 1479. Thus, the facts in *Moses v. Whitley* simply are not translatable, nor otherwise at all instructive, to the matter at hand.

Complainant then addresses Respondents’ First Amendment arguments, pointing to *Pendley v. Highland Mining Co.*, 37 FMSHRC 301 (Feb. 2015) (ALJ),⁷ where an “Administrative Law Judge found that an hourly employee’s comments to a non-employee representative of miners constituted unlawful interference under the Mine Act.” Resp. 9. As with *Moses v. Whitley*, *Pendley* is not at all analogous. In *Pendley*, the judge found that the miners’ representative “faced interference with his walk-around rights, his right to examine books, and his right to make safety complaints.” 37 FMSHRC at 311. In contrast to the right to make an inquiry, as in this case, in *Pendley* the miners’ representative had his walk-around rights repeatedly interfered with by an individual who conducted himself in an intimidating manner. That individual had a multi-year feud with the miners’ representative. *Id.* at 312.

Complainant creates a straw man with his mischaracterization that the “Respondents’ ‘question’ wasn’t just about a theoretical right of the miners; it was specifically about how to interfere with Wilson’s rights under the Mine Act by having him removed as a miners’ rep and removed from mine property.” Resp. 8 n.4. In short, Complainant’s position is that *no questions at all* may ever be asked about the process for removal of a miners’ representative. As discussed further, below, Complainant’s contention would place miners’ representatives in an exalted, inviolable position.⁸

Complainant also points to *Secretary of Labor on behalf of Mark Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005), and the Commission’s comment that “[w]hether an operator’s question or comments concerning a miner’s exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act ‘must be determined by what is said and done, and by the circumstances surrounding the words and actions.’” Resp. 11 (quoting *Gray*, 27 FMSHRC at 8).

Borrowing dicta from *Gray* is not useful. *Gray* involved a section 105(c)(2) action and whether Gray was threatened by a supervisor and constructively discharged. The events also

⁷ It goes without saying that decisions by administrative law judges are not precedential. See *Tilden Mining Co.*, 36 FMSHRC 1965 (Aug. 2014); *Campbell Cty. Highway Dept.*, 36 FMSHRC 2579 (Sept. 2014) (ALJ); 29 C.F.R. § 2700.69(d).

⁸ At least the Complainant makes his position clear. He cites to the ALJ’s decision in *Pendley* in which the respondent “demanded the removal of Pendley as a miners’ representative, *which is a remedy beyond MSHA’s authority.*” Resp. 9 n.5 (quoting *Pendley*, 37 FMSHRC at 314) (emphasis added). Thus, Complainant asserts that “Respondents were likewise seeking an action for which there is no authority” — that is to say, according to Complainant, a miners’ representative occupies an unassailable position and *even asking questions* about it constitutes discrimination.

occurred in the context of federal grand jury investigation. As it relates to the Commission's analysis, its focus involved "[w]hether an operator's question or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act [with the Commission concluding that the question] must be determined by what is said and done, and by the circumstances surrounding the words and actions." *Gray*, 27 FMSHRC at 8. While Complainant asserts that it is necessary to have discovery concerning, among other lines of inquiry, the circumstances under which the miners made their inquiry, the four corners of Wilson's discrimination report demonstrate that is completely unnecessary.⁹ Resp. 11-12. Wilson's discrimination report provides the information necessary to answer the Commission's question.

Discussion

As pertinent here, the Commission's Procedural Rules, at 29 C.F.R. §2700.67(b), provides:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

As the Court noted in its recent Order Denying Complainant's Motion for Leave to Take Discovery, Complainant has asserted that "without taking depositions of the three respondents and the inspectors, th[e] case [would not be] ripe for summary decision because it will rest on speculative facts." *Wilson v. Farris*, No. KENT 2015-672-D, 2016 WL 197491, at *1 (FMSHRC Jan. 12, 2016). Respondents' opposition countered that Rule 67(b) merely provides examples of what may "typically be in a record ripe for summary decision, but those are not

⁹ From Respondents' very basic and legitimate inquiry about their own rights vis-à-vis those who act as miners' representatives, the fishing expedition would be on, as Complainant would delve into matters such as if the Respondents knew

anything about what Wilson did as a miners' rep or if they had seen him acting as a miners' rep. Wilson would also inquire if any of the Respondents had any concrete reason – other than being sympathetic towards Armstrong Coal – as to why they wanted him removed as a miners' rep and removed from the mine property. Wilson would also want to know whether Respondents first talked to any members of management at Armstrong Coal about having Wilson removed as a miners' rep and/or removed from the mine property.

Resp. 11-12. Effectively, if permitted, Complainant would be engaging in his own private sector investigation under the guise of discovery.

required if . . . the Court cognizes legal grounds from which to independently resolve the matter.” Resp. to Mot. for Leave to Take Discovery 1. Respondents added that discovery may not be used as an “ever-expansive fishing expedition” and, a related concern, they assert that allowing depositions under these circumstances would put them to inordinate expense. *Id.* at 2. Finally, Respondents made the point that “a complainant who initiates his own proceeding before the Commission is confined to the four corners of his complaint as it was presented to and investigated by MSHA.” *Id.* (citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991)).

In its order denying discovery, the Court stated:

Although [Rule 67(b)] speaks to summary decision, it does not grant to parties an unequivocal right to take discovery prior to the Court ruling on a motion for summary decision. Instead, the ruling on discovery is connected to the nature of the complaint. In section 105(c)(3) discrimination complaints in particular, per the Commission’s decision in *Hatfield*, such matters are confined to the miner’s complaint to MSHA.

Id. The Court concluded that “where such discovery will not alter the core facts nor materially change the basis of the discrimination claim, [it] would not only be an undue expense on the party burdened by it, but also a waste of time, [and under such circumstances] it should be denied.” *Id.* at 3.

In ruling upon Respondents’ Motion for Summary Decision, the Court works from the proposition that each of Wilson’s allegations in his complaint is taken to be true. Thus, the Court is left “only with the question of whether, as a matter of law, Complainant has alleged a cognizable claim of discrimination under section 105(c) of the Mine Act.” *Id.* at 4.

The analysis of any section 105(c)(3) complaint of discrimination must begin by taking into account both the Commission’s long-established grounds for establishing a *prima facie* case in such matters, per its decisions in *Pasula* and *Robinette*,¹⁰ and also by the measure of what issues may be considered in evaluating such complaints, per the Commission’s decision in *Hatfield*.¹¹

¹⁰ *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).

¹¹ Complainant contends that the Court’s statement that Wilson is limited to the grounds he brought before MSHA when he made his complaint is “baffling,” asserting that it “is totally immaterial to this case, particularly in light of the fact that the Court and Wilson have no idea at this point what any witness (other than Wilson and Brandon Shemwell) told MSHA during its investigation.” Resp. 14. As noted, the Court has already determined that Wilson, by virtue of his presence at the mine as a miners’ representative, was engaged in protected activity. However, the Court does not buy into the claim that there was any adverse action flowing from the miners’ entirely legitimate inquiry.

Given that this is a section 105(c)(3) matter, it makes sense to begin with the complaint itself and apply *Hatfield* before applying *Pasula* and *Robinette*. The full text of the complaint has already been reproduced, above. To refresh the reader's recollection, reduced to its core, Complainant, a non-employee representative of miners at Armstrong Coal's Parkway Mine, has asserted that while he was traveling underground with an MSHA inspector, three miners, later determined to be employed as ram car drivers at the mine, approached an MSHA inspector and asked the inspector how they could get rid of him as a miners' representative and keep him off of mine property. Wilson contends that, by the words of those miners, asking the MSHA inspector how to remove him as a miners' rep, they violated section 105(c) of the Mine Act.

In *Hatfield*, which also involved a section 105(c)(3) complaint of discrimination, the Commission clearly set the bounds for such actions:

The statutory scheme devised by Congress for addressing a miner's complaint of discrimination provides, pursuant to section 105(c)(2) of the Mine Act, that upon receipt of such a complaint the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission. . . ." 30 U.S.C. § 815(c)(2). Section 105(c)(3) of the Mine Act provides that, if the Secretary determines that no discriminatory violation has occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Thus, the statutory scheme provides to miners a full administrative investigation and evaluation of an allegation of discrimination, as well as the right to private action in the event that the administrative evaluation results in a determination that no discrimination has occurred. *See Gilbert v. Sandy Fork Mining Co., Inc.*, 9 FMSHRC 1327 (August 1987), *rev'd on other grounds*, *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989).

The written discrimination complaint filed by Hatfield with MSHA is general in nature and alleges no specific protected activities. The present record contains no indication that the matters alleged in the amended complaint were part of the case reported to and investigated by MSHA. Nor is there evidence in the record that the Secretary's determination that the Act had not been violated was based on matters contained in the amended complaint. If the Secretary's determination was based upon an investigation that did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.

Accordingly, we vacate the judge's Order of December 18, 1990, and remand this matter to the judge for a determination of this issue. The complainant should be afforded an opportunity to demonstrate that the protected activities alleged in the amended complaint were part of the matter that was investigated by

the Secretary in connection with Hatfield's initial discrimination complaint to MSHA.

Hatfield, 13 FMSHRC at 545-46.

While that decision was clear enough, *Secretary of Labor on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 27 (Jan. 2011), left no doubt about attempts to reach beyond the claims of discrimination made when a complaint is first filed before MSHA, as the Commission there observed that:

[t]he reference to "complainant" is an acknowledgment that the proceeding under section 105(c)(3) involves *the same alleged discriminatory conduct that prompted the miner's complaint to the Secretary under section 105(c)(2)*. The statute does not direct the miner to file a complaint under section 105(c)(3) because the miner has already filed a complaint.

Gray, 33 FMSHRC at 37 (emphasis added).

Armed with the understanding of the clear limitations for consideration in a section 105(c)(3) action, the Court moves to the application of the criteria applied to establish a *prima facie* case in all discrimination complaints.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2797-800; *Robinette*, 3 FMSHRC at 817-18; *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Thus, whether in the context of establishing a *prima facie* case, as well as in rebutting such a case, showing adverse action is a *sine qua non* for all discrimination claims. As explained above, Complainant has not established any adverse action.

Drastically, Complainant's stance is that *not even an inquiry* about how such a process could be initiated would be barred and sanctions must be applied.¹² The Court would also note that virtually every elected and appointed position in the United States, at the local, state, and federal levels, allows for the removal of anyone occupying such a position. If Complainant had his way, his position, as a miners' representative, would be unique, exempt even from inquiry.

¹² The complaint lodged against the three miners makes one think of George Orwell's novel *1984*, with the ram car drivers here guilty of a "thoughtcrime" and with the remedy sought here akin to the "re-education" room in the book's "Ministry of Love."

As noted, if the Court were to allow discovery, in addition to being unwarranted, it would effectively allow Complainant to conduct his own private special investigation. Having failed to establish any adverse action, it would be entirely inappropriate to saddle Respondents with the expense and time attendant to such discovery in Complainant's attempt to see if he can manufacture a claim, when the four corners of Wilson's complaint utterly fall short.

Accordingly, Respondents' Motion for Summary Decision is hereby GRANTED and Wilson's section 105(c)(3) Complaint is DISMISSED.

SO ORDERED.

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

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February 4, 2016

ELLIS & EASTERN COMPANY,
Applicant,

v.

SECRETARY OF LABOR, MINE
SAFETY AND HEALTH
ADMINISTRATION,
Respondent.

EQUAL ACCESS TO JUSTICE
PROCEEDING

Docket No. EAJA 2015-0003
Formerly CENT 2015-0451-M
A.C. No. 39-00008-351487 Z272

Mine: Sioux Falls Quarry

**ORDER AWARDING ATTORNEY FEES AND EXPENSES
FOR THE EAJA APPLICATION**

On December 21, 2015, I granted Ellis & Eastern Company’s (“E&E”) Application for attorney fees and expenses under the Equal Access to Justice Act (“EAJA”) in the amount of \$21,450.96, at a rate of \$200.00 per hour, for litigation expenses for the original action. E&E now requests an award in the amount of \$5,248.49 for attorney fees and expenses incurred while litigating the EAJA application itself. For the reasons stated below, E&E’s application is **GRANTED**.

The Supreme Court found in *Comm’r, I.N.S. v. Jean* that “Congress intended the EAJA to cover the cost of all phases of successful civil litigation addressed by the statute.” 496 U.S. 154, 166 (1990). Indeed, the Court reasoned that “[a]ny given civil action can have numerous phases. While the parties’ postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items.” *Id.* at 161-62; *See, e.g., Sullivan v. Hudson*, 490 U.S. 877, 888, 109 S.Ct. 2248, 2256, 104 L.Ed.2d 941 (1989) (where administrative proceedings are “necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded”). Cf. *Gagne v. Maher*, 594 F.2d 336, 344 (CA2 1979) (“[D]enying attorneys’ fees for time spent in obtaining them would ‘dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees’ ” under 42 U.S.C. § 1988), *aff’d* on other grounds, 448 U.S. 122 (1980). Therefore, in addition to awarding attorney fees and expenses for the original action, it is appropriate to also award attorney fees and expenses for litigating the EAJA application itself.

I reviewed the Affidavit of Jeffrey Sar and Exhibit A attached to the Application, which itemizes the time Attorney Sar spent litigating the EAJA Application, and I find that the time spent was reasonable given the issues before the court, and I find that the accompanying expenses reasonable as well. The rate of \$200.00 per hour was approved in the EAJA decision published on December 21, 2015, and is therefore justified. As such, E&E is entitled to a total of \$5,248.49 in attorney fees and expenses, as requested.

WHEREFORE, it is **ORDERED** that the Secretary of Labor pay a total of \$5,248.49 in attorney fees and expenses to E&E within 30 days of this order.

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

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February 4, 2016

SECRETARY OF LABOR, MSHA, on
behalf of **CHERYL GARCIA**,
Complainant,

v.

VERIS GOLD USA, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-905-DM
WE MD 14-16

Jerritt Canyon Mill Mine
Mine ID 26-01621

SUCCESSORSHIP BRIEFING ORDER

Before: Judge Simonton

This discrimination case is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Following the listed Respondent's repeated failure to participate in mandatory prehearing proceedings, the court entered a default order in favor of the Complainant, Ms. Cheryl Garcia, on September 21, 2015. At the court's request, the Secretary submitted a civil monetary penalty and personal damages claim on behalf of Ms. Garcia on October 9, 2015.

That same day, a different 105(c)(2) Complainant petitioned the Commission to add the current operator of the Jerritt Canyon Mill Mine, Jerritt Canyon Gold, ("JCG") as a successor in interest in a separate 105(c)(2) proceeding against Veris Gold USA.¹ On October 15, 2015, a Commission ALJ sought direction from the Commission on whether JCG should be added as a successor in interest in yet another discrimination claim against Veris Gold USA.² The Commission remanded *Lowe v. Veris* WEST 2014-614 to the ALJ for further consideration³ on January 12, 2016 and has not yet addressed the Motion to Reopen in *Morreale v. Veris* WEST 2014-793.

Before assessing any penalty or damages award in this docket, the court seeks to determine if any additional party should be added as a liable entity. Accordingly, the Secretary, the Respondent, and the Current Operator, JCG, are ordered to separately address the following issues:

- 1.) Is JCG liable as a successor in interest for the discrimination claims contained in this docket?

¹ *Morreale v Veris*, WEST 2014-793, October 9, 2015 Motion to Reopen

² *Lowe v. Veris*, 37 FMSHRC 2337 (October 2015)(ALJ Moran).

³ *Lowe v. Veris*, WEST 2014-614 January 12, 2016 Commission Order

- 2.) If the Secretary does not move to add JCG as a successor in interest, may the court add JCG *sua sponte* pursuant to Rule 21 of the Federal Rules of Civil Procedure?

BACKGROUND

The Chief Judge first assigned the associated Temporary Reinstatement proceedings to this court on June 24, 2014. The Respondent opposed the Secretary's application for Temporary Reinstatement and indicated that it had recently filed for Chapter 15 Bankruptcy protection. The court subsequently granted the Complainant's application for Temporary Reinstatement on July 16, 2014.⁴ The Secretary filed a formal 105(c)(2) discrimination complaint with the Commission on August 4, 2014. The court postponed the scheduled hearing on two separate occasions with assurances from both parties that additional time would aid settlement negotiations.

On June 11, 2015, the Respondent's bankruptcy counsel sent the Complainant a letter stating that Veris Gold USA would be liquidated through an asset sale and that no proceeds would be available to satisfy employee claims.⁵ On June 16, 2015, Respondent's previous counsel filed a Notice of Withdrawal stating that Veris Gold USA had instructed counsel to withdraw from this matter pending the Respondent's corporate dissolution. Squire Patton Boggs Notice of Withdrawal.

However, the Respondent did not provide the court with any documentation regarding the asset sale, update the court on the resolution of the Respondent's Chapter 15 U.S. bankruptcy proceedings, or attempt to withdraw their contest of the subject claim. On July 28, 2015, the Secretary forwarded an e-mail message from the Respondent's bankruptcy monitor counsel indicating that the Respondent did not intend to appear at hearing, as it no longer had any employees located in the United States. July 30, 2015 Boris Orlov e-mail.

On August 17, 2015, the court convened a previously scheduled prehearing teleconference. The Secretary participated in the conference but no representative for Veris Gold USA or the Jerritt Canyon Mill Mine appeared for the call. The court subsequently determined that the Respondent's failure to appear for the prehearing conference, communicate with the Secretary, or provide current contact information violated the court's prehearing order to maintain communication with opposing counsel and the court. On August 26, 2015, the court issued an Order to Show Cause Why a Default Order Should Not Be Entered pursuant to Commission Rule 2700.66.

As JCG assumed operation of the Jerritt Canyon Mill Mine in June 2015, the court distributed the Order to Show Cause to JCG counsel for record and notice purposes. The court made no findings whatsoever on JCG's potential liability for the claims at issue in this docket. Neither the Respondent, the Respondent's Bankruptcy monitor, nor JCG provided a substantive response to the Order to Show Cause. The court entered a Default Order in favor of the Complainant on September 21, 2015.

⁴ The court denied the Complainant's request for temporary economic reinstatement and also denied the Secretary's Motion for Reconsideration of the same issue on August 22, 2014.

⁵ June 11, 2015 Ernst and Young Letter.

LEGAL CONSIDERATIONS

The Secretary, the Respondent, and JCG are directed to address the nine factor successorship test announced in *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), aff'd in relevant part sub nom. *Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983). The court notes that it may take judicial notice of Commission and ALJ findings, bankruptcy filings, and public press releases relevant to JCG's assumption of mining operations at the Jerritt Canyon Mill Mine.^{6 7 8 9} *Union Oil*, 11 FMSHRC 289, 300 n.8 (March 1989)(judicial notice can be taken of the existence or truth of a fact or other extra record information that is not the subject of testimony but is commonly known, or can safely be assumed to be true).

⁶ *Lowe v. Veris*, WEST 2014-0614 October 15, 2015 Decision, 12 n. 9

⁷ Marianne K. McKown, *Veris Gold sells Jerritt Canyon*, Elko Daily Free Press (June 25, 2015), http://elkodaily.com/mining/veris-gold-sells-jerritt-canyon/article_9a84e5c1-c299-5179-8bc6-49f02d15e513.html.

“(Veris Gold USA) sold its Elko County gold mines Thursday to Jerritt Canyon Gold LLC, but most of the miners will remain on the job. The assets sold include the Jerritt Canyon facilities. . . . Jerritt Canyon Gold President and CEO Greg Gibson said the majority of the 250 Veris Gold employees at the site were hired. . . .”

⁸ *Morreale v. Veris Motion to Reopen*: June 11, 2015 Ernst and Young Letter, JCG State of Nevada Business Registration Filing.

⁹ <http://www.law360.com/articles/546363/gold-mining-company-veris-files-ch-15-to-shield-us-assets>

“As of March 31, Veris claimed assets worth approximately \$323 million and liabilities of about \$282 million, according to the filing. The company said it does not believe it will require any interim financing to maintain its operations during the case, based on its cash flow forecasts.

Also on Monday, Veris announced that the Supreme Court of British Columbia had granted its application for creditor protection under Canada's Companies Creditors Arrangement Act. The order also extends the protection to its subsidiaries, including Veris Gold USA Inc. and Queenstake Resources Ltd.

The company called the move “the most prudent and effective way to carry on business and maximize value for the company's stakeholders,” and said it will continue to explore restructuring alternatives, including reducing its obligations and operating costs, as it navigates the bankruptcy proceedings.

It also assured investors that its primary U.S. mining operation — the Jerritt Canyon mine in Elko County, Nevada — will continue producing gold during the case and currently has a positive cash flow.

In re: Veris Gold Corp., case number 14-51015, in the U.S. Bankruptcy Court for the District of Nevada.”

The briefing parties shall also address the Commission's ability to reinstate a miner to an operator's successor in interest. *Sec'y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394 (Mar. 1987), *aff'd sub nom., Terco v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987), *cert. denied*, 488 U.S. 818 (1988); *Simpson v. Kenta Energy*, 11 FMSHRC 770, 778 (May 1989).

The court notes that an asset purchaser's liability waiver does not necessarily protect a successor in interest from liability for employee claims adjudicated by a federal administrative body. *Lowe v. Veris*, January 12, 2016 Commission Order, 4 n.4 (citing *International Technical Products Corp.*, 249 NLRB 1301 (Jun. 1980)(holding that a company which purchased all of the assets of a predecessor company "free and clear of all liens, claims and encumbrances" pursuant to an order of a bankruptcy court could be held responsible for the predecessor's backpay liability under federal labor law); *Leiferman Enterprises, LLC*, 355 NLRB 364 (Aug. 2010), incorporating by reference 354 NLRB 872 (Oct. 2009), *aff'd sub nom. NLRB v. Leiferman Enterprises, LLC*, 649 F.3d 873 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012)); See also *Perma Vinyl Corp.* 164 NLRB No. 119(1967); *Golden State Bottling Co., Inc. v. N.L.R.B.* 94 S.Ct. 414 (1973).

Finally, the briefing parties shall address the ability of a Commission ALJ to independently join a party in interest. *Jones v. Federal Mine Safety and Health Review Com'n*, 827 F.2d 769, (U.S. Sixth Circuit Court of Appeals)(1987)(reversing Commission finding that ALJ could not add party *sua sponte* on grounds that joined party had adequate notice and suffered no undue prejudice); See also *Macke Laundry Service Co. of D.C.*, 190 NLRB No. 1 (1971)(finding that *sua sponte* joinder did not violate due process as the operational connections between companies were so intertwined that there was not an element of surprise to the Board's actions).

ORDER

The Secretary, the Respondent, and JCG are **ORDERED** to submit briefs on the issues outlined above no later than Monday, February 29, 2016.

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

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February 5, 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
On behalf of RICHARD B. HARRISON
Complainant

v.

MARION COUNTY COAL COMPANY,
and its successors
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2015-811-D
MORG-CD-2015-20

Mine I.D.: 46-01433

Mine: Loveridge No. 22

**ORDER DENYING RESPONDENT’S MOTION TO DISSOLVE ORDER GRANTING
JOINT MOTION FOR TEMPORARY ECONOMIC REINSTATEMENT**

On June 9, 2015, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) filed an Application for Temporary Reinstatement of miner Richard B. Harrison (“Harrison” or “Complainant”) to his former position with Consolidation Coal Co., now known as Marion County Coal Company (herein “Respondent”) at its Loveridge #22 Mine¹ pending final hearing and disposition of the case. Respondent requested a hearing on the Secretary’s Application and on June 26, 2015, I conducted a hearing in this matter. Pursuant to the Commission’s rules, on July 2, 2015, I issued a Decision and Order Reinstating Richard B. Harrison, effective immediately, to his former position at the mine at the same rate of pay, hours worked and with all benefits he was receiving at the time of his discharge.

Contrary to the Decision and order of reinstatement, Mr. Harrison was not immediately reinstated. Rather, on July 16, 2015, I received a Joint Motion to Approve Settlement Regarding Temporary Reinstatement from Respondent and the Secretary. This Motion provided for temporary economic reinstatement in lieu of physical reinstatement. This motion provided, *inter alia*, at paragraph 8, “**Economic reinstatement was proposed by the Respondent to minimize**

¹ This mine, located in Marion County, West Virginia, was purchased by Murray Energy Company. from CONSOL Energy, Inc. in December 2013 and its name has been subsequently changed to Marion County Coal Company.

any potential for disruption in the workplace while this case is pending. ...” (Emphasis supplied)
This Motion also provided:

5. Mr. Harrison’s period of economic temporary reinstatement will terminate upon a finding by MSHA that section 105(c)(1) has not been violated. Alternatively, if MSHA finds that the discrimination complaint has merit and causes a Complaint of Discrimination to be filed with the Review Commission, Mr. Harrison’s temporary reinstatement shall expire only after any decision or other similar order from the Federal Mine Safety and Health Review Commission becomes a final order that is not appealed by the Secretary or Respondent.

Because Mr. Harrison was not represented by counsel at that time,² I convened a conference call with the parties and Mr. Harrison to insure that Mr. Harrison was satisfied with temporary economic reinstatement pending the final outcome of his discrimination complaint made to MSHA. After he affirmed that he was satisfied and did not wish to be reinstated, on July 28, 2015, I issued an Order Granting Joint Motion for Temporary Economic Reinstatement. This Order specifically included paragraphs 5 and 8 noted above.

On January 19, 2016, Respondent filed a Motion to Dissolve Order Granting Joint Motion for Temporary Economic Reinstatement (“Motion to Dissolve”). On January 28, 2016, the Secretary and the Complainant filed oppositions to the Motion to Dissolve. In support of its Motion, Respondent asserts that the mine was idled until January 18, 2016,³ and Harrison has been placed in a better position than he would have been had he been reinstated. Further, Respondent asserts that it was informed that counsel for Harrison issued a comment to the media that Respondent placed Harrison on temporary economic reinstatement because it wanted to avoid “demonstrat[ing] [that] workers have rights they can use to speak out on the job”;⁴ and that Respondent wishes to avoid any appearance such is the case.

The Secretary and the Complainant oppose the Motion to Dissolve on the basis that Respondent has presented no evidence to support either dissolution or tolling. The Secretary’s Opposition recites many reasons why dissolution is not appropriate, all of which I find to have merit. In sum, I conclude that Respondent is not entitled to dissolution of my Order Granting Joint Motion for Temporary Economic Reinstatement.

Initially I note that Respondent itself sought economic reinstatement of Harrison rather than the physical reinstatement for the purpose of avoiding “disruption in the workplace”. Further it agreed that economic reinstatement would continue until either the Secretary declined to issue a

² Mr. Harrison is now represented by counsel.

³ No further details of this alleged mine idling were included in the Motion.

⁴ Respondent did not identify the source of the alleged comment by the Complainant’s counsel.

Complaint of Discrimination⁵ or until there was a final decision by the Review Commission or an appropriate Court of Appeals if the Respondent appealed an unfavorable decision by the Commission. The only justification for Respondent to now seek dissolution is that it has had a change of heart, as noted by the Secretary in his Opposition to the Motion to Dismiss, that was occasioned by the Complainant's counsel's alleged remarks to the media.⁶ It would thus appear that the Motion to Dissolve was in retaliation for such perceived remarks, whether true or not. Clearly, this is a totally insufficient basis for dissolution.

It is well settled Commission law that a valid settlement agreement cannot be reopened or altered unless there are grounds of fraud or mutual mistake. *United Mine Workers of America, Local Union 1769, District 22 v. Utah Power and Light Company*, 12 FMSHRC 1548, 1555 (Aug. 1990). Moreover, the Federal Rules of Civil Procedure, particularly Rule 60(b), do not provide a basis for Respondent's requested relief as there has been no mistake, inadvertence, fraud, misconduct or other applicable reason for relief. See also *Secretary of Labor (MSHA) o/b/o Juan G. Pena v. Eisenman Chemical Company*, 11 FMSHRC 2166, 1267-68 (Nov. 1989). In the instant case Respondent sought and agreed to temporary economic reinstatement and cannot now claim that it was mistaken so as to entitle it to dissolution of the settlement. Respondent, like all parties to a settlement, should be bound by all the terms it negotiated until the agreement is terminated by its terms.

Respondent's Motion to Dissolve is without merit and **IT IS HEREBY DENIED.**

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

⁵ The Secretary issued a Complaint on October 19, 2015, at WEVA 2016-48-D.

⁶ In this regard, I note that there have also been remarks to the media made by Respondent representatives since I issued my Decision on July 2, 2015, concerning this case.

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February 5, 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
On behalf of JESSE R. STOLZENFELS
Complainant

v.

MARION COUNTY COAL COMPANY,
and its successors,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2016-134-D
MORG-CD-2016-3

Mine I.D.: 46-01433

Mine: Loveridge No. 22

**ORDER DENYING RESPONDENT’S MOTION TO DISSOLVE ORDER APPROVIING
JOINT SETTLEMENT MOTION FOR TEMPORARY ECONOMIC REINSTATEMENT**

On December 10, 2015, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) filed an Application for Temporary Reinstatement of miner Jesse R. Stolzenfels (“Stolzenfels” or “Complainant”) to his former position with Consolidation Coal Co., now known as Marion County Coal Company (herein “Respondent”) at its Loveridge #22 Mine¹ pending final hearing and disposition of the case.

Respondent did not timely request a hearing on the Secretary’s Application . Rather, on December 22, 2015, I received a Joint Motion to Approve Settlement Regarding Temporary Reinstatement from Respondent, the Secretary and the attorneys for Stolzenfels. This Motion provided for temporary economic reinstatement in lieu of physical reinstatement. This Motion provided:

5. Mr. Stolzenfels’s period of economic temporary reinstatement will terminate upon a finding by MSHA that section 105(c)(1) has not been violated. Alternatively, if MSHA finds that the discrimination complaint has merit and causes a Complaint of Discrimination to be filed with the Review Commission, Mr. Stolzenfels’s temporary reinstatement shall expire only after any decision or other similar order from the

¹ This mine, located in Marion County, West Virginia, was purchased by Murray Energy Company. from CONSOL Energy, Inc. in December 2013 and its name has been subsequently changed to Marion County Coal Company.

Federal Mine Safety and Health Review Commission becomes a final order that is not appealed by the Secretary, Mr. Stolzenfels or Respondent.

On December 23, 2015, I issued a Decision and Order Approving Joint Settlement Motion for Temporary Economic Reinstatement. This Order specifically included the paragraph noted above describing how temporary economic reinstatement would terminate.

On January 19, 2016, Respondent filed a Motion to Dissolve Order Approving Joint Motion for Temporary Economic Reinstatement (“Motion to Dissolve”). On January 28, 2016, the Secretary and the Complainant filed oppositions to the Motion to Dissolve. In support of its Motion, Respondent asserts that the mine was idled until January 18, 2016,² and Stolzenfels has been placed in a better position than he would have been had he been reinstated. Further, Respondent asserts that it was informed that counsel for Stolzenfels issued a comment to the media that Respondent placed Stolzenfels on temporary economic reinstatement because it wanted to avoid “demonstrat[ing] [that] workers have rights they can use to speak out on the job”;³ and that Respondent wishes to avoid any appearance such is the case.

The Secretary and the Complainant oppose the Motion to Dissolve on the basis that Respondent has presented no evidence to support either dissolution or tolling. The Secretary’s Opposition recites many reasons why dissolution is not appropriate, all of which I find to have merit. In sum, I conclude that Respondent is not entitled to dissolution of my Decision and Order Approving Joint Settlement Motion for Temporary Economic Reinstatement.

Initially I note that Respondent did not request a hearing on the Secretary’s Application, thereby forgoing a contest of the Secretary’s Application. Rather it chose to join in a motion by the parties on temporary economic reinstatement. In the Joint Motion, Respondent agreed that economic reinstatement would continue until either the Secretary declined to issue a Complaint of Discrimination⁴ or until there was a final decision by the Review Commission or an appropriate Court of Appeals if the Respondent appealed an unfavorable decision by the Commission. The only justification for Respondent to now seek dissolution is that it has had a change of heart, as noted by the Secretary in his Opposition to the Motion to Dissolve, that was occasioned by the Complainant’s counsel’s alleged remarks to the media. It would thus appear that the Motion to Dissolve was in retaliation for such perceived remarks, whether true or not. Clearly, this is a totally insufficient basis for dissolution.

It is well settled Commission law that a valid settlement agreement cannot be reopened or altered unless there are grounds of fraud or mutual mistake. *United Mine Workers of America*,

² No further details of this alleged mine idling were included in the Motion.

³ Respondent did not identify the source of the alleged comment by the Complainant’s counsel.

⁴ This event has not occurred as MSHA has not yet concluded his investigation of Stolzenfels’s discrimination complaint.

Local Union 1769, District 22 v. Utah Power and Light Company, 12 FMSHRC 1548, 1555 (Aug. 1990). Moreover, the Federal Rules of Civil Procedure, particularly Rule 60(b), do not provide a basis for Respondent's requested relief as there has been no mistake, inadvertence, fraud, misconduct or other applicable reason for relief. See also *Secretary of Labor (MSHA) o/b/o Juan G. Pena v. Eisenman Chemical Company*, 11 FMSHRC 2166, 1267-68 (Nov. 1989). In the instant case Respondent agreed to temporary economic reinstatement and cannot now claim that it was mistaken so as to entitle it to dissolution of the settlement. Respondent, like all parties to a settlement, should be bound by all the terms it negotiated until the agreement is terminated by its terms.

Respondent's Motion to Dissolve is without merit and **IT IS HEREBY DENIED**.

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

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February 8, 2016

SCOTT D. MCGLOTHLIN,
Complainant,

v.

DOMINION COAL CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. VA 2014-233-D
NORT-CD-2013-04

Mine: Dominion No. 7
Mine ID: 44-06499

**ORDER DENYING COMPLAINANT'S
MOTION FOR INTERLOCUTORY REVIEW**

Before: Judge Feldman

Before me is a motion filed on February 5, 2016, by Scott D. McGlothlin's counsel requesting certification for the Commission's interlocutory review. Certification of a request for interlocutory review requires a showing that the request for review involves a novel question of law, and that immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 27.0076 (a)(1)(i). McGlothlin's counsel seek interlocutory review with regard to the question of: Whether the parties' proposed agreement on relief in a section 105(c)(3) proceeding, with respect to damages and reimbursement of attorney fees, precludes Commission evaluation of the reasonableness of the agreed upon relief.

Section 105(c)(3) states, in pertinent part:

. . . [in] granting such relief as [the Commission] deems appropriate, [the Commission shall award] . . . a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) *as determined by the Commission to have been reasonably incurred by the miner.* . . .

30 U.S.C. § 815(c)(3) (emphasis added).

Section 105(c)(3) provides that only reasonable attorney fees may be awarded to complaints' counsel. Attorney fees are awarded by order the Commission, through force of law, pursuant to the fee shifting provisions of section 105(c)(3). McGlothlin's counsel's assertion that their proposed agreement on relief precludes Commission review of the reasonableness of their claimed attorney fees is contrary to the plain statutory language. Moreover, it is well settled that the authority to review and approve proposed settlements in Commission cases has been delegated to the sound discretion of the Commission and may not be ceded to the parties'

because of their mutual agreement. The Commission has held that its delegated authority to approve settlements applies to proposed agreements offered in section 105(c) discrimination proceedings. *Sec'y of Labor o/b/o Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 707 (July 1998).

In fact, the Commission routinely considers requests for settlement terms proffered by the parties in Commission proceedings. Obviously, it is the parties' agreement that is the predicate for the exercise of the Commission's authority to approve their settlement terms. The suggestion that the Commission is obliged to accept settlement terms is anathema to the Commission's settlement oversight authority. McGlothlin's counsel's assertion cannot be reconciled with the relevant statutory language and case law. In short, the Commission's authority to review proposed agreements on relief in section 105(c)(3) proceedings is well established. Consequently, McGlothlin's counsel have failed to identify the requisite novel question of law necessary to grant their request for certification for interlocutory review.

With regard to the second element required for certification for interlocutory review, granting the review sought by McGlothlin's counsel will not materially advance the final disposition of this matter, as the Decision on Relief, which follows the Decision on Liability, 37 FMSHRC 1256 (June 2015) (ALJ), both of which constitute the final disposition of this discrimination matter, is being released concurrently with this Order. To grant interlocutory review at this juncture would delay, rather than expedite, the final disposition of this proceeding, which has now occurred.

Accordingly, **IT IS ORDERED** that McGlothlin's counsel's Motion for Interlocutory Review **IS DENIED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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February 16, 2016

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

v.

BRDARIC EXCAVATING, INC.,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 2012-313-M
A.C. No. 36-09216-289798

Docket No. PENN 2013-54-M
A.C. No. 36-09216-304156

Docket No. PENN 2013-55-M
A.C. No. 36-09216-304156

Mine: Buck Mountain Quarry

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION AND GRANTING SECRETARY OF LABOR'S MOTION FOR SUMMARY DECISION

Before: Judge Lewis

I. PROCEDURAL HISTORY

On February 22, 2012, Citation No. 8655952 was issued against Brdaric Excavating Inc. ("BEI") after John P. Brdaric Jr. ("Brdaric"), the Buck Mountain Quarry controller, refused to allow an MSHA inspector to enter the garage property, at 913 Miller Street, Luzerne, Pennsylvania, to conduct an inspection. Again, on May 14, 2012, MSHA was denied access to enter the garage property and Citation No. 8657882 was issued. On May 15, 2012, six citations were issued at the garage property for unsecured gas cylinders (8657883), no open flame warning (8657884), a blocked travel passageway (8657885), lack of electrical testing (8657886), an uninspected air compressor (8657890), and no recorded workplace examination (8657891).

Both parties filed motions for summary decision and a joint stipulation of facts on May 11, 2015. As part of the stipulations, the parties have agreed that if the Commission or a court of appeals determines that the garage is subject to MSHA jurisdiction, Citation No. 8657883, 8657884, 8657885, 8657886, 8657890, and 8657891 will be affirmed and assessed. Joint Stipulation. 73.¹ Conversely, if jurisdiction is not found, the aforementioned citations will be vacated. J.S. 74

¹ Joint Stipulations will hereinafter be cited as J.S. followed by the stipulation numbers.

II. STIPULATIONS

1. The citations at issue here involve conditions as they existed in February 2012 and May 2012. The parties agree that the following recitation of material facts accurately portrays conditions as they existed in 2012, unless otherwise stated.
2. Brdaric Excavating, Inc. is a corporation organized under the laws of Pennsylvania.
3. Until his death in September 2013, John P. Brdaric, Jr. was the sole shareholder of Brdaric Excavating, Inc.
4. Brdaric Excavating, Inc. provides excavation, site clearing, land grading, demolition, and related services to residential and commercial customers.
5. Brdaric Excavating, Inc. has a website at www.brdaricexcavating.com.
6. Until his death in September 2013, John P. Brdaric, Jr. was listed with MSHA as the controller of the Buck Mountain Quarry, a surface sandstone mine located in Luzerne County, PA.
7. Brdaric Excavating, Inc. is the operator of Buck Mountain Quarry, and has been the operator since March 2004.
8. Brdaric Excavating offers crushed stone, topsoil, clay, and other items from the quarry.
9. Brdaric Excavating delivers products from the quarry to customers' sites, or the customers can pick up material from the quarry.
10. Brdaric Excavating uses a variety of fixed equipment and vehicles at the quarry. Fixed equipment there includes conveyors, crushers, and screens. Vehicles include excavators, loaders, bulldozers, and a fuel truck.
11. Buck Mountain Quarry is a "mine" within the meaning of section 3(h) of the Mine Act, 30 U.S.C. § 802(h), and is therefore subject to the jurisdiction of the Mine Act.
12. Brdaric Excavating, Inc. has a non-coal surface mining permit from the Pennsylvania Department of Environmental Protection, Bureau of Mining and Reclamation, to operate Buck Mountain Quarry. The permit was issued on June 26, 1998.
13. Ronald A. Natt is an employee of Brdaric Excavating, Inc.
14. Ronald A. Natt is a mechanic who performed work at the Buck Mountain Quarry, in the garage, and other places.

15. Ronald A. Natt is the primary person who performs servicing and repairs on equipment and vehicles that Brdaric Excavating uses in the quarry, and for its non-quarry related activities.
16. Natt does most of that servicing and repair work in the quarry itself, using oil, parts, and equipment that are stored in the quarry.
17. Natt drives a Ford F750 pickup truck with a 14-foot auto-crane service body to the locations throughout the quarry where he performs servicing and repairs.
18. Natt also utilizes the pickup performing repair and maintenance on Brdaric Excavating equipment at non-quarry related sites when Brdaric Excavating is performing site work and/or demolition work.
19. The pickup truck contains Natt's tools, welding equipment, and other items, such as a grinder, all of which he uses when servicing and repairing equipment and vehicles in the quarry and outside the quarry.
20. The pickup truck is owned by Brdaric Excavating.
21. Several of Brdaric Excavating's other employees, including Jamie Fedor, Matthew Pacovsky, and Joseph Krogulski, spend at least a portion of their time working at the quarry.
22. Jamie Fedor was a quarry foreman in 2012 and drove her personal pickup truck throughout the quarry when she worked there.
23. Joseph Krogulski occasionally used welding equipment at the quarry; the equipment was stored on a pickup truck that Krogulski occasionally drove on quarry property.
24. Mr. Krogulski also performs non-quarry work for Brdaric Excavating at sites where Brdaric Excavating performs site work and demolition work.
25. Matthew G. Pacovsky is, and was during the relevant time frame, the safety director for Brdaric Excavating.
26. John P. Brdaric, Jr. also owned a garage located at 913 Miller Street, Luzerne, Pennsylvania.
27. The garage is a little over a mile away from the quarry, and the distance between the quarry and the garage can be driven in about five minutes.
28. The garage is not on the permitted area of the Buck Mountain Quarry site.

29. The garage is roughly 100 feet by 75 feet and includes work areas, a small office, and a bathroom. The work areas consist of four separate bays, accessed through three separate garage doors.
30. The garage is primarily used by mechanic Ronald Natt, although other Brdaric Excavating employees, including Joseph Krogulski and Matthew Pacovsky, also occasionally perform work there, either assisting Natt or doing their own work.
31. The garage is used to service and repair equipment and vehicles. Service includes oil changes, filter changes, chassis lubes, and hydraulic system service. State inspections for vehicles are also performed in the garage. Repair work in the garage includes repair to minor tools and saws.
32. The garage is also used to store oil, parts, air conditioning charging equipment, and other items.
33. An inventory of the garage's contents is attached as Joint Exhibit A.
34. The vast majority of the vehicles and pieces of equipment that are serviced and repaired in the garage are not used in the quarry, but instead are used for demolition, land grading, and similar jobs at customer sites.
35. The vast majority of the parts, oils, and equipment stored in the garage are not used to service and repair equipment and vehicles used in the quarry.
36. The vast majority of the machinery and equipment that is dedicated to the quarry and never used by Brdaric Excavating in its other businesses at remote sites is repaired and/or serviced at the quarry by Natt or Krogulski using their service trucks, and the parts, oils and filters required for this service/repair work are stored at the quarry.
37. From time to time Caterpillar and Commonwealth Equipment Company service quarry equipment on the mine site using their own service vehicles and tools.
38. Ronald Natt services and repairs some equipment and vehicles in the garage that are used in the quarry.
39. For example, according to Natt's deposition, Brdaric Excavating has "probably 15-20" Mack triaxle dump trucks that pick up materials at the quarry and deliver the materials to customer sites.
40. The dump trucks perform no other work at the quarry except to pick up mined materials from the quarry to be delivered to customer sites and to Brdaric Excavating's demolition and site work businesses.

41. The dump trucks are used for other, non-quarry related purposes as well when Brdaric Excavating is performing excavation or demolition work at customer sites.
42. Natt services and repairs the dump trucks in the garage, usually about every 2,000 miles, using parts and oils that are stored in the garage.
43. Parts and oils used to service the dump trucks are stored in the garage.
44. The dump trucks also receive their state inspections in the garage.
45. Natt keeps a written log of the important or major things that he works on.
46. A copy of the log is attached as Joint Exhibit B.
47. Entries for 2012 include the following:
 - On January 19, 2012, when the motor on a 988B wheel loader blew up at the quarry, Natt removed the motor and took it to the garage for repairs. He then took the motor back to the quarry to install it on the wheel loader.
 - On January 25, 2012, Natt replaced a rear axle on one of the dump trucks that are used to make deliveries from the quarry. The dump trucks are also used at off-site locations.
 - On January 27, 2012, Natt repaired a 2004 White Mack Granite dump truck in the garage; that truck is used to deliver materials from the quarry and is also used at off-site locations.
 - On January 28, 2012, Natt serviced a Granite 55 dump truck in the garage; that truck is used to deliver materials from the quarry and is also used at off-site locations.
 - On April 5, 2012, Natt serviced a Caterpillar 345 excavator in the garage; that excavator is used in the quarry as well as off-site locations.
 - On May 6, 2012, Natt serviced in the garage two 740 articulating Caterpillar trucks that are used in the quarry as well as at off-site locations.
48. The remaining entries for 2012 on Natt's log show that all remaining work was performed on non-quarry equipment either at the garage, or remote non-quarry sites, or was performed at the quarry utilizing Natt's service truck.
49. When Natt is working in the garage, he parks his Ford F750 pickup truck in the garage.

50. When the pickup truck needs servicing or repairs such as an oil change or tire change, Natt performs that work in the garage.
51. The Ford F750 pickup truck gets its state inspection in the garage as well.
52. The welding truck that Joseph Krogulski occasionally uses at the quarry is also serviced in the garage.
53. Jamie Fedor's personal pickup truck, which she drives on quarry property, has been serviced at the garage one or two times, and gets its state inspection there.
54. Brdaric Excavating stores air conditioning charging equipment in the garage that is used to charge vehicles used in the quarry.
55. The air conditioning charging equipment is also used to charge vehicles that are not used in the quarry.
56. John P. Brdaric, Jr. wrote to MSHA on February 28, 2012 regarding Citation #8655952 stating that the garage is not on mine property, that mine equipment is not serviced at the garage, and that the garage is not owned by Buck Mountain Quarry. The letter is misdated February 28, 2011.
57. Mr. Brdaric also related that MSHA had previously declined to exercise jurisdiction over the garage during Inspection #0899151 on February 28, 2008.
58. A copy of Mr. Brdaric's letter is attached as Joint Exhibit C.
59. A copy of MSHA's Inspection Report for Event #0899151 from February 28, 2008 is attached as Joint Exhibit D.
60. In addition to its quarry activities, Brdaric Excavating also performs demolition, land grading, and similar work at customer sites.
61. Brdaric Excavating employees who work at the quarry also perform work at customer sites.
62. Ronald Natt, for example, drives the Ford F750 pickup truck to customer sites to service and repair equipment and vehicles.
63. Natt does not know the amount of time he spends in the garage as compared to the time he spends at the quarry or at customer sites, and Brdaric being a family-owned business does not keep records of the work he does other than Mr. Natt's handwritten log.

64. Some of the vehicles and equipment that Brdaric Excavating uses in the quarry are also used at customer sites.
65. The Caterpillar 345 excavator, for example, is used in demolition work at customer sites.
66. In addition, the Mack triaxle dump trucks are used at customer sites to haul material.
67. On February 22, 2012, John P. Brdaric, Jr., denied MSHA inspectors access to the garage located at 913 Miller Street, Luzerne, Pennsylvania, on the ground that the garage was outside MSHA's jurisdiction.
68. On May 14, 2012, John P. Brdaric, Jr., denied MSHA inspectors access to the garage located at 913 Miller Street, Luzerne, Pennsylvania, on the ground that the garage was outside MSHA's jurisdiction.
69. 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 Act.
70. The individual whose signature appears in Block 22 of the citations at issue in this proceeding was acting in the official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
71. True copies of the citations at issue in this proceeding were served on Respondent as required by the Act.
72. The penalties at issue would not affect Brdaric Excavating's ability to remain in business.
73. If the Commission (or, if the matter is appealed, a court of appeals) determines that the garage located at 913 Miller Street, Luzerne, Pennsylvania, is within MSHA's regulatory jurisdiction, the parties agree that the citations in docket PENN 2013-55M (citations 8657883, 8657884, 8657885, 8657886, 8657890, and 8657891) and proposed penalties for that docket (\$875) should be affirmed and assessed. This stipulation is not intended to waive Brdaric Excavating's right to seek judicial review of any adverse decision on the jurisdictional question entered by the Administrative Law Judge or the Commission in an appropriate court of appeals.
74. If the Commission (or, if the matter is appealed, a court of appeals) determines that the garage located at 913 Miller Street, Luzerne, Pennsylvania, is not within MSHA's regulatory jurisdiction, the parties agree that the citations in docket PENN 2013-55-M (citations 8657883, 8657884, 8657885, 8657886, 8657890, and 8657891) should be vacated and that the proposed penalties for that docket should not be assessed. This stipulation is not intended to waive the Secretary's right to seek judicial review of any

adverse decision on the jurisdictional question entered by the Administrative Law Judge or the Commission in an appropriate court of appeals.

75. John P. Brdaric, Jr. died in September 2013.
76. Following John P. Brdaric, Jr.'s death, Brdaric Excavating's stock was evenly divided between his daughter, Jamie Fedor, and his son, John P. Brdaric III.
77. Ownership of the garage transferred to Jamie Fedor and John P. Brdaric III, also equally divided.
78. Brdaric Excavating continues to dispute MSHA jurisdiction over the garage.

J.S. 1-78.

III. CONTENTIONS OF THE PARTIES

The Secretary asserts that the garage at 913 Miller Street, Luzerne, Pennsylvania is a mine under Section 3(h)(2), 30 U.S.C. §802(h)(2), of the Mine Act, and it falls under MSHA's jurisdiction. Sec'y.'s Mot. Summ. Decision 6-14.² Specifically, the Secretary contends that the garage is a facility that is used to service and repair equipment used at Buck Mountain Quarry, which qualifies the garage as a mine. S.M.S.D. 6-11.

Conversely, Respondent argues that the garage is not subject to MSHA jurisdiction, but instead OSHA jurisdiction. R.M.S.D. 4. Respondent contends that the vast majority of machines serviced and repaired at the garage are not an integral part of extracting minerals or mining, so the garage should not be subject to MSHA jurisdiction. R.M.S.D. 18.

IV. DISCUSSION

A. Summary Decision Standard

Pursuant to Commission Rule 67(b) "a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

Here the parties have stipulated to all material facts, and summary decision is appropriate.

² Hereinafter, the Secretary's Motion for Summary Decision that was submitted on May 11, 2015 shall be abbreviated S.M.S.D, and Respondent's Motion for Summary Decisions that was submitted on May 11, 2015 shall be abbreviated R.M.S.D.

B. Findings of Fact and Conclusions of Law

Under the Mine Act, MSHA has jurisdiction over “each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce...each operator of such mine, and every miner in such mine.” 30 U.S.C. § 803. Section 3(h)(1)(C) defines a “coal or other mine” as:

lands, excavations...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...the milling of such minerals, or the work of preparing coal or other minerals.

30 U.S.C. § 802(h)(1)(C).

The Mine Act’s jurisdiction is broadly defined to include facilities and equipment to be used in mineral extraction and milling. *See* §802(h)(1)(C). At issue here is a facility. This facility is a garage that stored air conditioning charging equipment that is used to charge vehicles used in the quarry.³ J.S. 54. Other equipment, such as dump trucks, an excavator, a 988B wheel loader motor, and articulating caterpillar trucks were repaired at the garage. J.S. 47, 54. The welding truck used by BEI employee Joseph Krogulski, which is used occasionally at the quarry, is serviced at the garage. J.S. 32, 52. Further, the truck used by BEI employee Ronald Natt (“Natt”) to service equipment at the quarry is repaired and kept parked at the garage; and, Natt is the primary person who repairs and services equipment and vehicles BEI uses in the quarry. J.S. 15, 17, 49, 50. With the garage being used for storage and repairs of the aforementioned quarry equipment and vehicles, this garage satisfies the plain reading of a facility used in mineral extraction and milling because the vehicles and charging equipment are used at the quarry. Thus, the garage is a mine and subject to MSHA jurisdiction.

The undersigned finds the statute’s language to be clear and unambiguous. Therefore, the plain language reading is appropriate in applying the “unambiguously expressed intent of Congress.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984). Further analysis is consequently unnecessary.

Nonetheless, even when proceeding to the second prong of *Chevron*, MSHA jurisdiction over the garage is still appropriate. *Chevron U.S.A. Inc.* at 843. *Chevron*’s second prong asks “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* “Deference is accorded to ‘an agency’s interpretation of the statute it is charged with administering when that interpretation is reasonable.’” *Lone Mountain Processing*, 20 FMSHRC

³ Buck Mountain Quarry is a mine that offers crushed stone, topsoil, clay, and other items from the quarry. J.S. 6,8.

927, 937 (Sept. 1998) (citing *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994)). The Secretary's interpretation of the Mine Act should be affirmed when it is one of the "permissible interpretations the agency could have selected." *Lone Mountain Processing*, 20 FMSHRC at 937 (citing *Chevron*, 467 U.S. at 843; *Joy Techns., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 10th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997)).

The Secretary's interpretation is reasonable, considering the Act's legislative history. The Senate Committee stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978). The Secretary's interpretation also supports the general purpose of the Act "to promote safety and health in the mining industry." S. Rep. No. 181 at 1.

The Commission has previously affirmed the Secretary's broad interpretation of what constitutes a mine. For example, the Commission has held that items inside of a garage used primarily for a sand and gravel mine such as a stove, grinder, and cylinders are "mines" for purposes of jurisdiction. *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704 (Apr. 1994). While *W.J. Bokus* does not specifically reach the issue of jurisdiction for a garage, the Commission found that because miners worked in the garage and the cylinders, grinder, and stove were worked on by the miners or could affect the miners, these items were found to be mines. *Id.* at 708. Following the Commission's expansive finding that "the stove warmed the garage where miners worked and, thus, is an item of equipment used or to be used in mining," it logically follows that a garage that shelters miners from weather or other dangers would too be a facility used in mining. *Id.* at 708. The garage at issue—which stores and repairs quarry equipment—falls under the MSHA's jurisdictional reach.

Addressing the Respondent's argument that the distance between the garage and quarry of approximately one mile would preclude MSHA from exercising jurisdiction, this Court finds the distance to be minimal and in any case irrelevant to finding whether the garage is used in mineral extraction or milling. The Commission has found that a central supply shop that stored mining materials and supplies—although located at least one mile away from one of the operator's mines—was under MSHA jurisdiction.⁴ *Jim Walter Res.*, 22 FMSHRC 21, 26 (Jan 2000). Thus, the garage's distance of slightly more than one mile from Buck Mountain Quarry is not determinative of whether it would fall under MSHA jurisdiction.

The Respondent's primary argument is that the garage is only used occasionally for isolated repairs. However, the Commission has held that only *de minimis* uses would prevent services from being subject to the Act. *Otis Elevator Co.*, 11 FMSHRC 1896, 1900–01 (Oct.

⁴ The Central Supply shop was one mile from the closest mine site, six miles from two mines, and twenty-five miles from the farthest mine owned by Jim Walters Resources. *Jim Walter Res.*, 22 FMSHRC at 22.

1989). “An independent contractor's presence at a mine may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence.” *Lang Bros., Inc.*, 14 FMSHRC 413, 420 (Mar. 1992). While the Respondent argues only six vehicles used at the quarry were serviced or repaired at the garage in January, April, and May, the regularity of use and relationship between Buck Mountain Quarry and the garage is significant. J.S. 47. Six vehicles were repaired, air conditioning charging equipment used for quarry vehicles was stored at the garage, and Natt’s truck used at the quarry was stored and serviced at the garage. J.S. 15, 17, 47, 49, 50, 54. This is a regular relationship that is more than *de minimis* and justifies MSHA jurisdiction.

ALJ decisions have followed the expansive view on jurisdiction taken by the Secretary. In *Associated Sand & Gravel Co.* the ALJ found that “if a facility is used in support of mining activities to any extent, MSHA may choose to assert its jurisdiction.” 17 FMSHRC 1385, 1387 (Aug. 1995)(ALJ). *W.F. Saunders & Sons* also held “[i]t is immaterial that some of the equipment and machinery, or even most of it, may have been used in areas that may not have been under MSHA's jurisdiction.” *W.F. Saunders & Sons*, 1 FMSHRC 2130, 2132 (Dec. 1979)(ALJ). Additionally, in *Austin Powder Co.*, the ALJ found that a facility storing only 10% of the material used in a mining process “is more than enough to establish that its use is not *de minimis*. Using up to 10% of the stored materials would not signal ‘that it would be difficult to conclude that services were being performed.’” *Austin Powder Co.*, 37 FMSHRC 1337,1356-57 (June 2016)(ALJ) citing *Otis Elevator Co.*, 11 FMSHRC 1896, 1900-01 (Oct. 1989). These broad jurisdictional findings support the reasonableness of MSHA jurisdiction for the garage at issue.

The Respondent’s argument that the garage does not share corporate ownership with the quarry is not relevant to this Court’s determination as to whether the garage qualifies as a mine under the Act. The D.C. Circuit court has held that mine jurisdiction “does not require that those structures or facilities owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property where such extraction occurs.” *Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984). Thus, it is not dispositive that Buck Mountain Quarry is operated by BEI (of which John P. Brdaric was the sole shareholder) and the garage was owned by Brdaric in an individual capacity.

MSHA jurisdiction is appropriate under the plain reading of the Mine Act and under the Secretary’s interpretation. Therefore, Citation No. 8655952 and 8657882 denying MSHA inspectors access to the garage are affirmed.

C. MSHA/OSHA Interagency Agreement

The Interagency Agreement between MSHA and OSHA holds that “the Federal Mine Safety and Health Act...authorizes the Secretary of Labor to promulgate and enforce safety and health standards regarding working conditions of employees engaged in underground and surface mineral extraction (mining), related operations, and preparation and milling of the minerals extracted.” MSHA/OSHA Interagency Agreement, 44 Fed. Reg. 22827, 22827 (March 29,

1979), amended by 48 Fed. Reg. 7521 (Feb. 22, 1983) (“Interagency Agreement”). Moreover, the agencies have stated that “the general principle is that as to unsafe and unhealthful working conditions on mine sites and in milling operations, the Secretary will apply the provision of the Mine Act and standards promulgated thereunder to eliminate those conditions.” *Id.*

The ALJ further notes that Point B.5. of the MOU specifically states that any jurisdictional “doubts” as to whether a physical establishment is subject to either authority by MSHA or OSHA should be “resolved in favor of the inclusion of a facility within the coverage of the Mine Act.” *Id.* at 22828; *Shamokin Filler Co.*, 33 FMSHRC 725, 728 (March 11, 2011) (ALJ). As a result, I reject the Respondent’s assertion that OSHA should have jurisdiction over the garage, because the garage falls under sections 802 and 803’s definition of a mine. 30 U.S.C. §§802(h)(1), 803.

Moreover, MSHA affords more protection for those working in mining conditions than OSHA. If MSHA jurisdiction was not asserted over this garage, there would not be adequate protection for the individuals working on mining equipment and there would be no liability for the garage operator if the mechanics improperly or inadequately repair or service mining equipment. In *Shamokin Filler Co.*, the Third Circuit emphasized “[b]ecause of the dangers inherent in mining, Congress also gave the Secretary more rigorous enforcement mechanisms under the Mine Act than under the OSH Act.” *Shamokin Filler Co.*, 772 F.3d 330, 333 (3d Cir. 2014). MSHA jurisdiction provides for protection at both the quarry and the garage.

D. Fair Notice

Under the Mine Act, facilities involved in mineral extraction or milling are subject to MSHA jurisdiction. 30 U.S.C. §803. This statute consequently provides notice of jurisdiction for the garage at issue here because the garage repaired and stored equipment and vehicles used in mineral extraction and milling at Buck Mountain Quarry. Further, notice of MSHA jurisdiction in garages and shops is available in the similar cases, such as, *W.J. Bokus* and *Jim Walters* cases. *W.J. Bokus*, 16 FMSHRC at 708 (finding jurisdiction over a stove, grinder, and cylinder inside a garage); *Jim Walter Res.*, 22 FMSHRC at 28 (finding jurisdiction over a central supply shop).

It is not necessary for MSHA to give specific notice to the Respondent that the garage could be subject to MSHA jurisdiction. Nonetheless, the Secretary quoted MSHA Inspector William MacDonald’s notes in 2008 stating he “[d]iscussed issue with the garage area and explained MSHA has jurisdiction over the garage area where mining equipment are [sic] repaired in this area.” S.M.S.D. at 13. He also wrote “[t]he company has decided as of today that no mining equipment will be repaired in the garage area.” *Id.* The Secretary’s evidence of a MSHA Inspector’s notes in Joint Exhibit D, show further notice given specifically to Buck Mountain Quarry that use of the garage for mining equipment repairs would invoke MSHA jurisdiction. *See id.* Accordingly, the Respondent has not been deprived of due process in having its garage subject to MSHA jurisdiction.

V. ORDER

The undersigned finds that MSHA has jurisdiction over the garage at issue, and that the Respondent had sufficient fair notice of the law. Accordingly:

The Respondent's Motion for Summary Decision is **DENIED**; and

The Secretary's Motion for Summary Decision is **GRANTED**.

Therefore, it is **ORDERED** that Citation No. 8655952 in PENN 2012-313-M and Citation No. 8657882 in PENN 2013-54-M should be affirmed.⁵

It is further **ORDERED** that the six citations in PENN 2013-55-M (Citation No. 8657883, 8657884, 8657885, 8657886, 8657890, and 8657891) and proposed penalties for that docket should be affirmed and assessed as per the parties Joint Stipulations. Accordingly, the Respondent shall pay \$2,987.00 within 30 days of this order.⁶

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

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⁵ The parties stipulated by email on February 11, 2016, that Citations 8655952 and 8657882 should be affirmed, and the related penalties assessed, if jurisdiction is found.

⁶ 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

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

February 17, 2016

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

v.

WEST ALABAMA SAND & GRAVEL,
INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2009-870-M
A.C. No. 01-02738-194100

Mine: West Alabama Sand & Gravel

ORDER

Before: Judge Feldman

The Commission has remanded this matter, directing me to revisit the issue of unwarrantable failure and the appropriate penalty to be assessed. 37 FMSHRC 1884 (Sept. 2015). The single citation at issue is 104(d)(1) Citation No. 6511548, issued to West Alabama Sand & Gravel, Inc., (“West Alabama”), alleging a violation of 30 C.F.R. § 56.15005, which provides that “[s]afety belts and lines shall be worn when persons work where there is danger of falling. . . .” Specifically, Citation No. 6511548 alleges:

A customer truck driver [Johnny Kroger, who was employed by Dunbar Transportation,] was observed climbing on top of the loaded trailer. [Kroger] was not wearing a safety belt and lanyard or any other type of restraining device to prevent a fall to the ground below. [Kroger] was on his knees pulling on tarp within inches of the side of the trailer. [Kroger] was exposed to a fall of ten feet to ground level. Clay Junkin (Vice President) engaged in aggravated conduct constituting more than ordinary negligence by his statement of knowing this was a hazard, and allowing this failure to comply with a mandatory standard.

Citation No. 6511548 was abated after West Alabama posted a sign advising contract haulage drivers to tie down when securing their loads with tarp.

The Secretary filed a motion for summary decision seeking the affirmance of 104(d)(1) Citation No. 6511548, which characterized the cited violation as significant and substantial (S&S) and attributable to an unwarrantable failure, and imposition of the proposed \$15,971.00 civil penalty. West Alabama opposed the Secretary’s motion, not disputing the fact of the violation or the S&S designation, but opposing the imposition of the \$15,971.00 proposed penalty as excessive.

The initial decision granted, in part, the Secretary's motion for summary decision with respect to the fact of the violation and the S&S designation. However, the initial decision modified 104(d)(1) Citation No. 6511548 to a 104(a) citation, thus deleting the unwarrantable failure designation. Consequently, the imposed civil penalty was reduced from \$15,971.00, as initially proposed, to \$760.00. 34 FMSHRC 1651, 1657 (July 2012) (ALJ).

The Commission now has vacated the initial decision in favor of West Alabama on the issue of the unwarrantable failure designation, and directed that I reconsider the issues of negligence and unwarrantable failure consistent with their decision. 37 FMSHRC at 1891.

Following a series of conference calls, on December 15, 2015, West Alabama stipulated that the subject section 56.15005 violation was attributable to an unwarrantable failure. Specifically:

1. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of unwarrantable failure under 30 U.S.C. § 814(d)(1).
2. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of "high" negligence level.

West Alabama's Stipulation of Material Facts, at 1 (Dec. 15, 2015).

Given West Alabama's stipulation to the Secretary's unwarrantable failure designation, the remaining issue is the appropriate penalty to be imposed for Citation No. 6511548. The statutory minimum penalty for citations issued under section 104(d)(1) of the Mine Act is \$2,000.00. 30 U.S.C. § 820(a)(3)(A).

In determining the appropriate civil penalty, the Commission applies the statutory criteria in section 110(i) of the Mine Act. 30 U.S.C. § 820(i) provides:

In assessing civil monetary penalties, the Commission shall consider the 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. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Thus, the issue is whether application of the facts in this case to the statutory penalty criteria in section 110(i) warrants the imposition of a civil penalty in excess of \$2,000.00 minimum for an unwarrantable failure.

ORDER

Consequently, **IT IS ORDERED** that the Secretary address, by applying the statutory civil penalty criteria in section 110(i), whether there are aggravating factors relevant to section 110(i) that warrant a civil penalty higher than the \$2,000.00 statutory minimum.

With respect to the degree of negligence, the Secretary should address:

- Whether West Alabama was on notice that greater efforts for compliance were necessary based on West Alabama's history of previous relevant violations. If so, the Secretary should specify the violations relied upon;
- Whether West Alabama was ever required as a consequence of past MSHA inspections to post a warning sign with respect to the necessity for contract drivers to tie down. If so, the Secretary should provide the relevant details;
- Whether the fact that the violation was committed by a contract employee that was not under the direction and control of West Alabama is a mitigating circumstance;
- What actions Clay Junkin took to justify the assertion made by the issuing inspector that Mr. Junkin "allowed," through his interaction with contractor employee Johnny Kroger, this violation to occur. On this point, the issuing inspector noted in Citation No. 6511548 that:

Clay Junkin (Vice President) engaged in aggravated conduct constituting more than ordinary negligence by his statement of knowing this was a hazard, and allowing this failure to comply with a mandatory standard.

- Whether MSHA has exercised its discretion to cite contractor Dunbar Transportation, in addition to Alabama Sand, for driver Johnny Kroger's failure to tie down, which was the basis for Citation No. 6511548, given the fact that Dunbar Transportation was in a better position to supervise, train, and discipline Kroger. If so, the Secretary should provide a copy of the relevant citation.

With respect to the appropriateness of the penalty to the size and nature of the business, the Secretary should address:

- Whether the imposition of a penalty in excess of \$2,000.00, given the record evidence that West Alabama has only approximately eight employees, is appropriate to the size of the business;
- Whether the fact that Clay Junkin, a principle of West Alabama, has unrelated income as a partner in a law firm is a relevant consideration with respect to the statutory penalty criteria.

With respect to abatement, the Secretary should address:

- Whether Alabama Sand abated the cited violation in a timely manner by installing a sign advising contract haulage drivers to tie down when securing a load.

The Secretary should address any other information relevant to justify the imposition of a civil penalty higher than the \$2,000.00 statutory minimum.

IT IS FURTHER ORDERED that the Secretary respond, in writing, to the above **on or before March 11, 2016**. If West Alabama elects to file a written response to the Secretary's submission, such response should be filed by **March 25, 2016**. Alternatively, the parties should advise, **at any time prior to March 25, 2016**, whether they have reached an agreement with respect to the appropriate civil penalty to be imposed in this matter.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

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/acp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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TELEPHONE: 202-434-9956 / FAX: 202-434-9949

February 24, 2016

JONATHAN BETHEL WOODWARD,
Complainant

v.

CARMEUSE LIME AND STONE,
Respondent

DISCRIMINATION PROCEEDING

Docket No. SE 2016-59-DM
SE-MD-15-23

Mine: Filled Products – North Mill
Mine ID: 09-01094

ORDER

This proceeding is before me upon a complaint of discrimination under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3).

The Respondent in this 105(c)(3) action has requested a subpoena to compel the Mine Safety and Health Administration (MSHA) to produce its investigative file. In order to protect the rights of both parties to this litigation,¹ under Rule 60(a) of the Commission’s procedural rules, 29 C.F.R. § 2700.60(a), I am ordering *sua sponte* the compulsory production of documents, namely MSHA’s investigative file in the matter of *Woodward v. Carmeuse Lime & Stone*, MSHA Case No. SE-MD-15-23. The file will be submitted to the Court for in camera review before distribution of properly releasable documents to the parties.²

MSHA is hereby **ORDERED** to submit the investigative file directly to me by mail marked “Private, Judge’s Eyes Only” within 30 days of the date of this order.

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

¹ I note that the Complainant is proceeding *pro se* in this matter.

² The Respondent previously filed a FOIA (Freedom of Information Act) request for the investigative file which was answered by a letter from MSHA stating that the statutory time limits for processing the request could not be met due to “unusual circumstances.” This explanation is vague and broad and will result in effective denial of the FOIA request, as production will be untimely for litigation purposes. I find this denial suspect and contrary to the public’s right to information and to the opinion expressed in *Justice Marshall v. MSHA*, Civil Action No. 2:14-14438 (S.D.W. Va. July 31, 2015) (memorandum opinion and order compelling MSHA to produce documents for in camera review).

Enclosure: Subpoena to Thomas W. Charboneau, Acting Director, MSHA Office of Assessments, Accountability, Special Enforcement & Investigations

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

February 26, 2016

SANDRA G. MCDONALD,
Complainant,

v.

GEORGE KING, MARK TOLER,
FRASURE CREEK MINING, LLC,
and GUARDCO SECURITY, LLC,
Respondents,

DISCRIMINATION PROCEEDING

Docket No. WEVA 2014-387-D
HOPE-CD 2013-10

Frasure Creek Mining, LLC
Mine ID 46-07014 5G1

ORDER TO SHOW CAUSE

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on January 7, 2014, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (Mine Act). Sandra G. McDonald seeks to recover appropriate relief under Section 105(c) of the Mine Act,¹ from TMK Enterprise Security Services, Inc. (“TMK”), a business entity that had been incorporated in West Virginia.

I. Background

McDonald was a contractor employee working as a security guard during the period May 2011 through September 3, 2013, at a mine site operated by Frasure Creek Mining, LLC (“Frasure Creek”). However, the evidence of record reflects that TMK’s corporate status was terminated by the state of West Virginia on June 12, 2009. Consequently, McDonald was never employed by TMK prior to its termination as a corporate entity. Rather, McDonald was employed by George King and Mark Toler, the former principles of TMK, who continued to operate their security services business as a non-corporate entity.

¹ Section 105(c)(1) provides, in pertinent part:

No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because such miner ... instituted any proceeding under or related to this Act

30 U.S.C. § 815(c)(1).

Consequently, on February 3, 2015, I issued a stay order to provide counsel with an opportunity to amend the pleading by adding King and Toler as the proper respondents. However, rather than amending the complaint to include King and Toler—who during several telephone conferences had asserted a financial inability to pay any relief claimed by McDonald—McDonald’s counsel sought to substitute Frasure Creek as an entirely new respondent, under a new theory of the case. Specifically, McDonald’s counsel alleged:

Frasure Creek was intimately involved in and had direct knowledge of all of the hazard complaints at issue in this discrimination case, and had a direct role in effectuating an illegal and discriminatory course of conduct, by communicating and consummating an adverse employment action against the Complainant in retaliation for protected activity.

Mot. to Lift Temp. Stay and to Amend Compl., at 2 (Feb. 18, 2015).

On March 12, 2015, I issued an Order Denying McDonald’s Motion to Amend Complaint, which sought to substitute Frasure Creek for TMK, rather than add King and Toler as respondents as directed by the February 3, 2015, Order. McDonald’s motion was denied based on apparent Commission precedent that McDonald was precluded from bringing a discrimination action against Frasure Creek in a 105(c)(3) proceeding as the allegations of discrimination against Frasure Creek had not been investigated by the Secretary under section 105(c)(2). 37 FMSHRC 683, 685 (Mar. 2015) (ALJ); *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991) (citations omitted). The case was dismissed because McDonald’s counsel elected not to amend the complaint to include King and Toler as respondents. 37 FMSHRC at 685. However, the March 12, 2015, Order noted that the dismissal was *without prejudice* to any subsequent reopening of McDonald’s 105(c)(3) discrimination complaint against King and/or Toler, as individuals. *Id.*

On March 23, 2015, McDonald filed a Petition for Reconsideration with the undersigned that sought to set aside the March 12, 2015, dismissal order by allowing McDonald to add King and Toler as respondents. Shortly thereafter, on March 31, 2015, the Commission exercised review *sua sponte* of the March 12, 2015, Order. On October 23, 2015, the Commission remanded this matter granting leave to McDonald to “amend the complaint to add other relevant parties, including King and Toler,” an opportunity that was essentially previously extended by the undersigned and initially rejected by McDonald. 37 FMSHRC 2239, 2243 (Oct. 2015).

Consistent with the Commission’s October 23, 2015, remand, an order was issued on November 3, 2015, granting leave for McDonald to amend her complaint to include King and Toler, as well as any other relevant parties. 37 FMSHRC 2651 (Nov. 2015) (ALJ). On December 31, 2015, McDonald filed an amended complaint. In addition to adding King and Toler, McDonald now seeks to add Frasure Creek and Guardco Security, LLC (“Guardco”), as a successor-in-interest to TMK. On February 5, 2016, Guardco answered McDonald’s amended complaint, through counsel, by denying any liability in this matter.

II. Frasure Creek

In her amended complaint, McDonald alleges that she was terminated by TMK, at the insistence of Frasure Creek, shortly after MSHA received anonymous complaints regarding Frasure Creek's alleged failure to provide periodic refresher and hazard training, as required by 30 C.F.R. §§ 48.28(a) and 48.31, respectively. Amended Compl., at 4-7 (Dec. 31, 2015). However, the evidence of record in this matter reflects that McDonald's discrimination complaint under section 105(c)(2) was never previously construed by MSHA, or McDonald's counsel, as a complaint against Frasure Creek. Consequently, MSHA never conducted an investigation under section 105(c)(2) to determine whether Frasure Creek discriminated against McDonald. *See Hatfield*, 13 FMSHRC at 546 (holding that an MSHA investigation of a claim of alleged discrimination under section 105(c)(2) is a statutory prerequisite for a complaint under section 105(c)(3)). Significantly, McDonald's counsel has, to date, never served Frasure Creek as a party, such as during discovery in this proceeding, serving only TMK (Toler and King).

Consequently, McDonald **IS ORDERED TO SHOW CAUSE** why her amended complaint should not be dismissed with respect to Frasure Creek. Specifically, McDonald should address whether MSHA's failure to investigate Frasure Creek's alleged discrimination against McDonald under section 105(c)(2) precludes McDonald's attempt to add Frasure Creek as a respondent in this 105(c)(3) proceeding.²

III. Guardco as a successor-in-interest

McDonald's amended complaint also seeks to add Guardco as a successor-in-interest to her former employer, TMK (Toler and King). The Commission has recognized that a successor-in-interest may be found liable for its predecessor's discriminatory conduct. *See Meek v. Essroc Corp.*, 15 FMSHRC 606, 609-10 (Apr. 1993). To determine whether an entity is a proper party in a discrimination proceeding as a successor-in-interest, the Commission has traditionally considered nine factors:

(1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operation, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same products.

² In view of the Commission's holding in *Hatfield*, in a March 12, 2015, Order, I denied McDonald's motion to amend her complaint to include Frasure Creek. The Commission remanded this matter granting leave "for McDonald to amend the complaint to add other relevant parties, including King and Toler." 37 FMSHRC at 2243. Consequently, I do not consider the previous denial of McDonald's request to include Frasure Creek as a respondent to be the law of the case.

Sec'y of Labor o/b/o Keene v. S&M Coal Co., 10 FMSHRC 1145, 1153 (Sep. 1988) (citing *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), *aff'd sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir 1983), *cert. denied*, 464 U.S. 851 (1983)). The key factor in this successorship analysis is whether there is substantial continuity of business operations. *Id.*

Accordingly, McDonald **IS ORDERED TO SHOW CAUSE**, by specifically addressing any of the relevant indicia of successorship noted above, whether Guardco is a proper successor-in-interest to TMK (Toler and King) in this proceeding.

ORDER

Consistent with the above, McDonald **IS ORDERED TO SHOW CAUSE on or before March 30, 2016**, why Frasure Creek and Guardco are proper parties in this matter. Any oppositions or replies filed by Frasure Creek³ and/or Guardco should be filed **on or before April 20, 2016**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (by regular and certified mail)

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/acp

³ To date, Frasure Creek has not answered, or otherwise acknowledged, McDonald's amended complaint identifying it as an alleged party in this matter. Frasure Creek is cautioned that a failure to oppose or reply to McDonald's response to this Order to Show Cause, may result in the issuance of a default judgment against it with respect to any reasonable remedy that may be awarded in this matter.