

**December 2016**

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**Review was granted in the following cases during the month of December 2016:**

Daniel B. Lowe, et al v. Veris Gold USA, Inc., Docket Nos. WEST 2014-614-DM, et al. (Judge Moran, October 25 and 28, 2016)

Secretary of Labor obo Thomas McGary and Ron Bowersox, et al. v. The Marshall County Coal Co., et al., Docket Nos. WEVA 2015-583-D, et al. (Judge Miller, October 27, 2016)

**Review was denied in the following case during the month of December 2016:**

Mark Bailey v. Rex Osborne, et al., Docket No. WEVA 2016-241-D (Judge Miller, November 10, 2016)



# **COMMISSION ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 7, 2016

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

v.

VENTURE AGGREGATES, LLC

Docket No. CENT 2014-602-M  
A.C. No. 41-05027-353486

BEFORE: Jordan, Chairman; Young, Cohen, 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 September 10, 2014, the Commission received from Venture Aggregates, LLC, (“Venture”) a request 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") demonstrate that the proposed assessment was delivered on June 19, 2014, and became a final order of the Commission on July 21, 2014.

Venture asserts that it had hired a consultant to review MSHA matters and that it mailed the consultant the proposed assessment to review in a timely manner. The operator claims that, upon not hearing back, it followed up with the consultant, who stated that he never received the proposed assessment. At this point, although the operator recognized that the 30-day period for contesting a proposed assessment had passed, it requested an informal conference and paid the uncontested penalties on July 25, 2014. On September 8, 2014, having not heard back from MSHA, Venture filed this request.

The Secretary does not oppose the request to reopen. However, he urges Venture to ensure that future penalty assessments are contested in a timely manner.

Having reviewed Venture'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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 7, 2016

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

v.

SOUTHWAY CONSTRUCTION  
COMPANY, INC.

Docket No. CENT 2015-103-M  
A.C. No. 29-02224-357557

BEFORE: Jordan, Chairman; Young, Cohen, 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 November 20, 2014, the Commission received from Southway Construction Company, Inc. (“Southway”) 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") demonstrate that the proposed assessment was delivered on August 20, 2014, and became a final order of the Commission on September 19, 2014. On November 4, 2014, MSHA mailed a delinquency notice to the operator. Southway claims that it had mailed the contest form on September 15, 2014. It does not, however, offer any proof of delivery via certified mail. The Secretary states that it has no record of receiving the contest form. The Secretary does not oppose the request to reopen. However, he urges Southway to ensure that future penalty assessments are contested in a timely manner.

Having reviewed Southway'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

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 7, 2016

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

v.

REVELATION ENERGY, LLC

Docket No. KENT 2015-410  
A.C. No. 15-18280-369960

BEFORE: Jordan, Chairman; Young, Cohen, 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 April 1, 2015, the Commission received from Revelation Energy, LLC (“Revelation”) 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”) demonstrate that the proposed assessment was delivered on December 26, 2014, and became a final order of the Commission on January 26, 2015. Revelation asserts that it failed to

timely contest the proposed assessment because the mine was closed for several days in December and January during the Christmas holiday break. The Secretary does not oppose the request to reopen and confirms that the contest form was sent on January 29, 2015, three days after the date of the final order of the Commission. However, the Secretary urges Revelation to ensure that future penalty assessments are contested in a timely manner.

Having reviewed Revelation'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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 7, 2016

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

v.

THE OHIO VALLEY COAL COMPANY

Docket No. LAKE 2014-729-M  
A.C. No. 33-01159-355875

BEFORE: Jordan, Chairman; Young, Cohen, 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 September 17, 2014, the Commission received from The Ohio Valley Coal Company (“Ohio Valley”) 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") demonstrate that the proposed assessment was delivered on July 18, 2014, and became a final order of the Commission on August 17, 2014. Ohio Valley asserts that its error arose from the fact that the safety director was new and misunderstood the process. Specifically, the safety director thought that after marking the penalties to be contested, he was supposed to send the contest form to Ohio Valley's corporate office where it would be submitted to MSHA along with the check for the portion of the penalties that he intended to pay. This caused the contest form to be filed four days late, as well as being sent to the wrong MSHA office. The operator asserts that, following this mistake, further training has been provided to the safety director regarding the procedural requirements of the Mine Act. The Secretary does not oppose the request to reopen. However, he urges Ohio Valley to take steps to ensure that future penalty contests are delivered to the proper address and timely contested within 30 days of receipt.

Having reviewed Ohio Valley'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

/s/ William I. Althen  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 7, 2016

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

v.

SOUTH CENTRAL COAL COMPANY,  
INDIANA, LLC

Docket No. LAKE 2015-526  
A.C. No. 12-02431-373526

BEFORE: Jordan, Chairman; Young, Cohen, 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 May 29, 2015, the Commission received from South Central Coal Company Indiana, LLC (“South Central”) 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") demonstrate that the proposed assessment was delivered on February 13, 2015, and became a final order of the Commission on March 16, 2015. On April 30, 2015, MSHA sent a delinquency notice to the operator. The operator asserts that it filed the contest form two days late because the executive assistant at the company was sick and out of the office. The Secretary does not oppose the request to reopen. However, he urges South Central to take steps to ensure that future penalty contests are timely filed.

Having reviewed South Central'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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 7, 2016

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

v.

SHAMOKIN FILLER COMPANY, INC.

Docket Nos. PENN 2015-77  
PENN 2015-78

A.C. Nos. 36-02945-360227  
36-02945-365829

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

**ORDER**

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On December 23, 2014, the Commission received from Shamokin Filler Company, Inc. (“Shamokin”) two motions seeking to reopen 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).<sup>1</sup>

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

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<sup>1</sup> In light of the similar legal and procedural postures of these proceedings, we hereby order that these matters be consolidated for review. *See* 29 C.F.R. § 2700.12 (“The Commission and its Judges may at any time, upon their own motion or a party’s motion, order the consolidation of proceedings that involve similar issues.”).

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).

Regarding Docket No. PENN 2015-77, records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) demonstrate that the proposed assessment was delivered on September 6, 2014, and became a final order of the Commission on October 6, 2014. Shamokin had previously filed notices of contest to the two underlying citations. The Secretary claims that it mailed a delinquency notice to the operator on November 21, 2014, but did not attach a copy of the notice to its response to Shamokin’s motion.

Regarding Docket No. PENN 2015-78, MSHA records show that the proposed assessment was delivered on November 3, 2014 and became a final order of the Commission on December 3, 2014.

Shamokin asserts that its failures to timely contest the proposed assessments arose from a change in the company’s contest procedures. As a result, the company inadvertently failed to fax the proposed assessments to its counsel as per its usual procedure. The operator’s counsel asserts that she discovered this error during her due diligence review of MSHA’s database, and that Shamokin filed the motion to reopen “within just days” of this discovery. Shamokin asserts that it has since modified its office procedures for receiving and maintaining all MSHA-related paperwork, and has instituted back-up procedures. The Secretary does not oppose the requests to reopen. However, the Secretary urges Shamokin to ensure that future penalty assessments are contested in a timely manner.

Having reviewed Shamokin's requests and the Secretary's responses, 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 petitions 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.  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 7, 2016

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

v.

ROBINSON CONSTRUCTION

Docket No. VA 2015-221-M  
A.C. No. 44-06882-377353 A431

BEFORE: Jordan, Chairman; Young, Cohen, 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 May 13, 2015, the Commission received from Robinson Construction (“Robinson”) 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”) demonstrate that the proposed assessment was delivered on April 2, 2015, and became a final order of the Commission on May 4, 2015. Robinson had contested a related section 104(g)(1) order and a related section 107(a) order, and asserts that it fully intended to

contest the proposed assessment itself. However, the operator claims that a miscommunication occurred between the operator and its counsel regarding who was going to handle the contest of the proposed assessment. As a result, the operator failed to timely contest the proposed assessment in a timely manner. The operator further asserts that counsel changed firms, which “likely exacerbated the communication error.” The Secretary does not oppose the request to reopen. However, he urges Robinson and counsel to ensure that future penalty assessments are contested in a timely manner.

Having reviewed Robinson’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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 7, 2016

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

v.

VARRA COMPANIES, INC.

Docket No. WEST 2015-311-M  
A.C. No. 05-04643-364815

BEFORE: Jordan, Chairman; Young, Cohen, 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 January 21, 2015, the Commission received from Varra Companies, Inc. (“Varra”) 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”) demonstrate that the proposed assessment was delivered on October 23, 2014, and became a final order of the Commission on November 24, 2014. The operator claims that it

contested several proposed assessments at once, including the one in question, and that MSHA received the contest of the other cases. The operator provides certified mail receipts for October 28, 2014 and October 30, 2014, which were the dates that the operator mailed in the contest forms. The operator asserts that it contacted MSHA as soon as it received a delinquency notice sent on January 7, 2014. The Secretary does not oppose the request to reopen, and confirms that Varra contacted MSHA as soon as it received the delinquency notice. However, the Secretary notes that there is no record that the contest form was ever received by MSHA. The Secretary urges Varra to ensure that contests to future penalty assessments are mailed to the appropriate address in a timely manner.

Having reviewed Varra'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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 7, 2016

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

v.

PEABODY TWENTYMILE MINING,  
LLC

Docket Nos. WEST 2015-738  
WEST 2015-739

A.C. Nos. 05-03836-377564  
05-03836-379850

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

**ORDER**

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On June 30, 2015, the Commission received from Peabody Twentymile Mining, LLC (“Peabody”) two motions seeking to reopen 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).<sup>1</sup>

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

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<sup>1</sup> In light of the similar legal and procedural postures of these proceedings, we hereby order that these matters be consolidated for review. *See* 29 C.F.R. § 2700.12 (“The Commission and its Judges may at any time, upon their own motion or a party’s motion, order the consolidation of proceedings that involve similar issues.”).

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).

In WEST 2015-738, records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) demonstrate that the proposed assessment was delivered on April 6, 2015, and became a final order of the Commission on May 6, 2015. In WEST 2015-739, MSHA records demonstrate that the proposed assessment was delivered on May 4, 2015 and became a final order of the Commission on June 3, 2015. In both cases, the operator asserts that it inadvertently mailed the contest forms within 30 days of receipt to MSHA’s payment office in St. Louis, MO. The Secretary does not oppose the requests to reopen. However, he notes that the address for the St. Louis payment office is the incorrect address for submitting contest forms. The Secretary urges Peabody to ensure that contests to future penalty assessments are mailed to the appropriate address in a timely manner.

Having reviewed Peabody’s requests and the Secretary’s responses, 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 petitions 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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 16, 2016

DANIEL B. LOWE

v.

VERIS GOLD USA, INC., and  
JERRITT CANYON GOLD, LLC

Docket No. WEST 2014-614-DM

MATTHEW VARADY

v.

VERIS GOLD USA, INC., and  
JERRITT CANYON GOLD, LLC

Docket No. WEST 2014-307-DM

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

**ORDER**

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

By Order dated September 2, 2016, the United States Bankruptcy Court for the District of Nevada enjoined the above-identified Petitioners “from pursuing their claims against the Purchaser, WBox 2014-1 Ltd., or any other persons or entities related to or associated with the Purchaser or WBox 2014-1 Ltd. . . . in any other Court or proceeding, including any administrative proceeding.” Thereafter, by Orders dated October 25, 2016 and October 28, 2016, respectively, the Administrative Law Judge dismissed the above-referenced cases. No party in either proceeding sought dismissal prior to the Judge’s *sua sponte* dismissals.

On November 23, 2016, Daniel B. Lowe and Matthew Varady filed a petition for discretionary review, which we granted on December 2, 2016.

The dismissal of the actions prior to a motion by either party was premature. Such action deprived the petitioners of an opportunity to decide freely upon their course of action and deprived the respondents of an opportunity to file a fully briefed motion for dismissal. Based upon the preemptory nature of the dismissal, we vacate the order of dismissals and remand the cases for further proceedings.

Claimants may determine freely their response to the Order of the Bankruptcy Court. Separately, respondents may choose to file motions to dismiss or we would expect the Administrative Law Judge would ask for expeditious briefing on the impact, if any, of the Bankruptcy Court's Order upon these cases.<sup>1</sup> In short, it is likely the Administrative Law Judge will be in a position to make a fully considered judgment about the status of the cases.<sup>2</sup>

Finally, we note that during a hearing held on August 11, 2016, the Bankruptcy Court expressed a concern that email exchanges between the Administrative Law Judge and the parties potentially implicated the neutrality of the proceedings before the Administrative Law Judge. Proceedings before the Commission must remain free of any possible question about the neutrality of our adjudications. Therefore, without expressing any concurrence with the Bankruptcy Court expressions, and only out of an abundance of caution, we will remand the case to the Chief Administrative Law Judge for reassignment.

Accordingly, we hereby vacate the dismissals and remand the consolidated cases to the Chief Administrative Law Judge for action consistent with this Order.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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<sup>1</sup> It is premature for the Commission to draw or suggest any legal conclusions based on the record in this case. The initial analysis and fact-finding required to support such conclusions are properly the province of the Judge on remand. *See also Martin County Coal Corp.*, 28 FMSHRC 247 (May 2006) (holding that “fact-finding is not the province of the Commission”).

<sup>2</sup> We note that in two somewhat similar proceedings, the claimants settled their claims in a manner satisfactory to all parties. *Sec’y of Labor on behalf of Cheryl Garcia v. Veris Gold USA, INC., and its successors*, WEST 2014-905-0DC, Unpublished Order dated July 14, 2016; *Sec’y of Labor on behalf of Jennifer Morreale v. Veris Gold USA, Inc., Jerritt Canyon Gold, LLC, Whitebox Management, & Eric Sprott*, WEST 2014-793-DM, Unpublished Order dated May 25, 2016.

Commissioner Cohen, concurring and dissenting:

While I agree with my colleagues that it is appropriate to vacate the Judge's dismissals in these matters for the reasons discussed above, and I also agree that on remand the matter should be reassigned to another Judge, I believe it is important to note that there is a key issue that will need to be resolved in this matter going forward. Specifically, the Judge assigned on remand will need to determine whether an operator can be a successor-in-interest under *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980) when that operator purchased the predecessor's assets "free and clear of all liens, claims, and interests" pursuant to a bankruptcy court sale order.

In light of the fact that this issue is of the utmost importance in these proceedings, I am inclined to have the Commission resolve it now. The observations which follow are preliminary, without the benefit of briefing. They are solely my observations, and may or may not reflect the views of my colleagues.

It is possible that on remand the Judge may ultimately find facts showing that Jerritt Canyon Gold, LLC would be a successor-in-interest to Veris Gold, but for the bankruptcy sale. If that occurs, the parties should not assume, as the Judge of the Bankruptcy Court for the District of Nevada apparently did, that Mr. Lowe and Mr. Varady should be treated like any other creditors under the Bankruptcy Code. Miners and others who file claims based on discrimination or interference under section 105(c) of the Mine Act have rights granted by Congress that may, at times, conflict with rights and responsibilities contained in the Bankruptcy Code. The resolution of those conflicts requires an understanding of the policy choices made by Congress and the role of the Commission.

The primary purpose of the Mine Act is to preserve "the health and safety of [the mining industry's] most precious resource – the miner." 30 U.S.C. § 801(a). According to the legislative history, Congress included section 105(c) because, for the Mine Act "to be truly effective, miners will have to play an active part in the enforcement of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (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 623 (1978). Congress recognized that "in a treacherous environment, miners had to have the ability to act to protect their safety. . . . Obviously, if miners advocate strongly for their own safety, they could be inviting retaliation from mine management." *Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1920 (Aug. 2016). Hence, Congress concluded that "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." *Legislative History, supra*, at 623.

Hence, a miner who has established discrimination under section 105(c) of the Mine Act has a Congressionally-recognized status beyond that of an ordinary creditor under the Bankruptcy Code. In this regard, it does not matter whether the action which established the miner's entitlement as a discriminatee was brought by the Secretary of Labor under section 105(c)(2) or by the miner himself or herself under section 105(c)(3), as in the cases of Mr. Lowe and Mr. Varady.

As the body designated by Congress to assess penalties and adjudicate contested matters under the Mine Act, it is the Commission's institutional responsibility to honor Congress' policy choices regarding the safety and health of miners. It is possible in this instance that the policy choices made by Congress in the Bankruptcy Code<sup>1</sup> are at odds with the choices it made in the Mine Act. In the context of a policy conflict, the Commission's mission is to uphold the purposes of the Mine Act.

Other agencies and courts have taken a similar view regarding policy conflicts with the Bankruptcy Code. For example, in *International Technical Products Corp.*, the National Labor Relations Board discussed whether a company that purchased all of the assets of a predecessor company "free and clear of all liens" pursuant to an order of a bankruptcy court could be held responsible for a predecessor's backpay liability. 249 NLRB 1301 (Jun. 1980). After determining that the purchaser was a bona fide successor, the Board held unequivocally, "we find that . . . liability was not . . . extinguished by the bankruptcy court's order allowing [the successor] to purchase [the predecessor's] assets free and clear of all liens, claims, and encumbrances." *Id.* at 1303. The Board noted that Congress had granted it exclusive authority to modify or set aside a claim under the National Labor Relations Act and that it therefore did not share that authority with the bankruptcy courts. *Id.* The Board believed that finding otherwise would "be tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority . . . to proceed against a successor employer in furtherance of that obligation." *Id.* In explaining why the Board's Order superseded and was not bound by the Bankruptcy order, the Board noted:

[U]nlike the bankruptcy court's order which affects only the assets of a bankrupt, a Board order, which enforces a public rather than a private right, reaches beyond the assets of an employer and attaches to the employing entity itself. To insure that the adverse effects of a wrongdoer's unlawful conduct are eliminated and that the public right is vindicated, it is essential that there be full compliance with the Board's order requiring that the employer comply with the order's remedial provisions. It should be noted, however, that while on certain occasions the remedial provision of a Board order may or may not, depending on the violations found, require financial reimbursement, that order seeks only to remedy a wrongdoer's unlawful conduct and to this end it is fashioned without regard to a wrongdoer's past, present, or future state of assets. Thus, it cannot be classified or treated simply as a "lien, claim, or encumbrance" within the common usage of

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<sup>1</sup> Article I of the Constitution grants Congress the power to enact bankruptcy laws. U.S. Const. art. I, § 8, cl. 4. Congress has exercised that authority on numerous occasions, sometimes amending the Bankruptcy Code to reflect new policy preferences. *See, e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act Pub. L. 109–8, 119 Stat. 23 (2005); Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 Mich. L. Rev. 2016 (2003). Broadly speaking, the purpose of the current Bankruptcy Code is to equitably distribute a debtor's estate and give debtors a fresh start unburdened by the existence of old debts. *See In re Labor Industries of California, Inc.*, 675 F.2d 1062, 1065-66 (9th Cir. 1982) and *In re Stoltz*, 315 F.3d 80, 94 (2d Cir. 2002).

those terms and, consequently, any liability arising therefrom cannot be extinguished or modified . . . through the purchase . . .

*Id.* at 1304.

The Board explicitly reaffirmed the holding in *International Technical Products* just six years ago in *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 den.* 132 S.Ct. 1741 (2012).

The interests described by the NLRB are substantially similar to those of the Commission. Specifically, Congress granted the Commission, and not the bankruptcy courts, the authority to modify and set aside discrimination and interference claims under the Mine Act. Similarly, the discrimination provision in section 105(c) enforces public rights rather than private rights, by protecting miners who make safety complaints.

Courts have also been willing to hold successors-in-interest liable for the actions of their bankrupt predecessors in certain circumstances. For example, in *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, et al., v. Tasemkin, Inc.*, a company filed for Chapter 7 liquidation at a time that it owed \$300,000 to its pension fund. 59 F.3d 48, 49 (7th Cir. 1995). The fund attempted to recover its claim in the liquidation proceeding but failed. *Id.* Eventually a new company, Tasemkin, Inc., ended up with all of the original company's assets. *Id.* Two years after the bankruptcy closed, the Fund sued Tasemkin, Inc., as a successor. *Id.* The Seventh Circuit noted that many of the protections contained in the Bankruptcy Code no longer exist once the bankruptcy proceeding is closed nor did those protections apply to a successor. *Id.* at 51. More importantly, the court ultimately allowed successor liability, noting:

What the imposition of successor liability would accomplish, and what the district court objected to, would be a second opportunity for a creditor to recover on liabilities after coming away from the bankruptcy proceeding empty-handed. But a second chance is precisely the point of successor liability, and it is not clear why an intervening bankruptcy proceeding, in particular, should have a *per se* preclusive effect on the creditor's chances.

*Id.*

A very recent ERISA case in the Ninth Circuit reached a substantially similar result. In *Carpenters Health and Security Trust of Western Washington v. Paramount Scaffold, Inc., et al.*, 2016 L.R.R.M. 27,070 (W.D. Wash. 2016), the court heard a claim that an employer had withheld required sums from a pension fund. *Id.* The employer eventually filed for Chapter 11 bankruptcy and a new company purchased the assets in a free and clear bankruptcy sale. *Id.* The pension fund pursued the purchaser as a successor. *Id.* As in *Tasemkin*, the court found that many of the bankruptcy protections afforded to debtors did not apply to successors after the close of the bankruptcy proceeding. *Id.* The court described the successorship doctrine as an "exception from the general rule that a purchaser of assets does not acquire a seller's liabilities" and found for the pension fund. *Id. citing Resilient Floor Covering Pension Trust Fund Bd. of Trs. v.*

*Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1090 (9th Cir.2015). In short, the court found essentially the same thing that the NLRB had found: a successor can be found liable for a predecessor's actions even after a "free and clear" sale.

It is with those considerations in mind that I join my colleagues in vacating the Judge's dismissal of these matters.

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

# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 5, 2016

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

v.

KENTUCKY FUEL CORPORATION,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket Nos. KENT 2015-383  
A.C. No. 15-19475-375208

Mine: Beech Creek Surface Mine

**DECISION AND ORDER**

Appearances: Thomas J. Motzny, Esq., U.S. Department of Labor, Office of the  
Solicitor, Nashville, Tennessee, for Petitioner

James F. Bowman, on behalf of Kentucky Fuel Corporation, Midway,  
West Virginia, for Respondent

Before: Judge William S. Steele

**I. STATEMENT OF THE CASE**

This case concerns an injury related to an alleged violation of 30 C.F.R. § 77.404(c), as well as the violation of an associated 30 U.S.C. 813(k) Order. The case was the subject of a May 18, 2016 hearing in Pikeville, Kentucky. A mechanic lying underneath a grease and oil truck attempted to start the stalled vehicle by banging on the starter with a hammer, while another miner in the cab of the truck was at the wheel assisting the mechanic. When the truck started, it rolled backward and over the mechanic, who suffered a punctured lung, several broken ribs, and was airlifted to the hospital. The Respondent was issued multiple citations arising out of the accident, but only two remain at issue here. The first, Citation No. 8299655, alleges that the Respondent failed to block the truck against motion in violation of 30 C.F.R. Section 77.404(c). The second, Citation No. 8299679, alleges that, following the accident, the Respondent allowed work to be done on the grease and oil truck in violation of the 103(k) Order No. 8289927.

## II. STIPULATIONS

The Secretary of Labor and the respondent, Kentucky Fuel Corporation, jointly stipulate to the following facts as not being in dispute:

1. The respondent is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.
3. Kentucky Fuel Corporation is an “operator” as that word is defined in Section 3(d) of the Mine Act, 30 U.S.C. Section 803(d), at the mine where the citations contested in this matter were issued.
4. The respondent has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977.
5. The respondent has mine ID 15-19475.
6. The citations in this docket are complete, authentic, and admissible.
7. The respondent mined 114,647 tons of coal in 2013 and 148,741 tons of coal in 2014.
8. The citations in this docket were properly served on the respondent by a duly authorized representative of the Secretary on the dates stated therein.
9. The penalties proposed in this docket would not affect the respondent’s ability to remain in business.

JX-1.<sup>1</sup>

## III. LAW AND REGULATIONS

### **Burden of Proof and Standard of Proof**

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by a preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006), *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

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<sup>1</sup> The joint stipulations in this case are labeled JX-1. The Secretary’s Exhibits are labeled S. Ex. The Respondent did not submit exhibits for consideration.

Commission precedents have held that “[t]he burden of showing something by a ‘preponderance of the evidence’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), quoting *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that “[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.” *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: “[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates.” *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877).

### **Assessment of Credibility**

As trier of fact, this Court is free to accept or reject, in whole or in part, the testimony of any witness. In resolving any conflicts in testimony, this Court has taken into consideration the demeanor of witnesses, their interests in the case’s outcome, or lack thereof, consistencies or inconsistencies in each witness’s testimony, and any other corroborative or conflicting evidence of record. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on the Court’s part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

## **REGULATIONS**

30 C.F.R. § 77.404(c), “**Machinery and equipment; operation and maintenance,**” specifies:

(c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

30 C.F.R. § 77.404(c).

Section 103(j) of the Mine Act, “**Accident notification; rescue and recovery activities,**” provides that:

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. § 813(j).

Section 103(k) of the Mine Act, “**Safety orders; recovery plans,**” provides that:

In 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 coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

#### **IV. SUMMARY OF TESTIMONY AND EVIDENCE**

##### **The Rollover**

On September 23, 2014, at about 8:30 p.m., Cody Dove, a rank-and-file miner employed by Kentucky Fuel Corporation at its Beech Creek Mine, discovered that his red Autocar Grease Truck would not start. Tr. 19, S. Ex. 1, S. Ex. 3. Dove called out for a mechanic, Jeremy Hensley, who arrived and asked Dove to try and start the truck while he was down at the front wheel of the truck. Tr. 19. This entailed Hensley lying horizontally underneath the vehicle, with his body just behind the driver’s side front wheel and his legs sticking out from underneath the vehicle. Tr. 20, S. Ex. 6. Using a hammer, the mechanic began to bang on the starter of the truck,

which is located underneath the vehicle. Tr. 20-1. Inspector Robinson<sup>2</sup> testified that banging on the starter will, in some cases, start a truck up because “starters, sometimes they stop in a bad spot . . . sometimes you can bang them with a hammer and it’ll move them just a little bit to get to a good place on them and [it’ll] start.” Tr. 20.

As a result of the mechanic striking the starter with the hammer, the truck started. S. Ex. 3, Tr. 20. Immediately afterward, the driver’s side front tire rolled over the mechanic, who came within an inch of being completely rolled. Tr. 20. The rollover caused multiple rib fractures and Hensley’s lung was punctured. Tr. 30. Inspector Wolford<sup>3</sup> represented that the operator of the truck told him that the truck was in reverse at the time of the accident.<sup>4</sup> Tr. 37. The mechanic was subsequently airlifted to receive medical attention. Tr. 30. He made a complete recovery and returned to work at the mine in less than six months. Tr. 30, 11.

Inspector Ralph Fannin verbally issued Section 103(j) Order No. 8289927 that evening at approximately 9:35 pm to Steve Ritz, foreman on site. S. Ex. 1. This stopped all work at the mine immediately. Tr. 92-3, S. Ex. 1. At approximately 11:15 pm that evening, Fannin modified the 103(j) Order to a written 103(k) Order. S. Ex. 1, Tr. 92. The 103(k) Order was modified the next day, September 24, 2014, at approximately 3:30 pm, to release all portions of the mine from the Order except the red Autocar grease truck that ran over the mechanic and the mechanic’s personal blue International truck.<sup>5</sup> S. Ex. 1, Tr. 93. The Order was again modified on September

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<sup>2</sup> Brian Robinson was a surface specialist with MSHA. Tr. 13-4. Prior to this position, he was a general surface CMI for his first five years with MSHA. Tr. 14. Robinson had been employed variously as a highwall miner, electrician, foreman, and equipment operator in mining operations for almost 12 years when he began work at MSHA in October of 2006. Tr. 14-5. Robinson has certifications in low, medium, and high voltage electrical “cards,” as well as a foreman’s certification. Tr. 15.

<sup>3</sup> Melvin Wolford is a surface specialist in the Pikeville, Kentucky field office and began work for MSHA in 2006. Tr. 62-3. Prior to that, Wolford had roughly 10 years of mining experience, beginning his career in 1995 before moving on to Massey New Ridge Mining, where he worked as a highwall miner and equipment operator. Tr. 61-2. While at Massey Wolford had the opportunity to operate and work on bulldozers, loaders, and rock trucks and left in 2000 to take work at Nice Winter Coal Group. Tr. 62. Wolford continued as an equipment operator, acquiring his foreman’s card in 2005. Tr. 63.

<sup>4</sup> At hearing, Inspector Wolford ruled out the possibility that the truck was out of gear, in forward gear, or neutral at the time of the accident. Tr. 82. “If it would have been in neutral or would not have been in gear or would have been in forward gear, the truck would have went forward instead of backwards and went up on the guy.” Tr. 82. Inspectors did not test whether the vehicle would remain stationary if the truck was shifted into neutral and then started. Tr. 83-5.

<sup>5</sup> At hearing, Inspector Robinson testified that the blue truck was also sequestered under the 103(k) Order as it was the mechanic’s personal vehicle, supplied privately by him, and not the focus of any investigative work. Tr. 106-7.

25, 2014, at around 3:00 pm, to release the mechanic's personal blue International truck. S. Ex. 1, Tr. 94.

Mark Huffman, employed at the time of the accident as Director of Health and Safety at the Beech Creek Surface Mine, was at home on the night of September 23, 2014.<sup>6</sup> Tr. 135. Huffman was called by Steve Ritz, foreman on site at the time.<sup>7</sup> Tr. 135, Tr. 147. The phone call was short and relayed that an employee had been injured by a truck that had rolled back on the employee. Tr. 136.

Unsure of the severity of the employee's injuries, Huffman immediately called the Mine Safety and Health Administration (MSHA) and the Kentucky Office of Mine Safety and Licensing to report the accident. Tr. 136. After notifying MSHA and the Kentucky Office, Huffman placed a third call to Pat Graham, his superior and Vice President in charge of Health and Safety, relaying what details he had of the accident once more. Tr. 136.

By this time, Graham had already spoken to the mine superintendent, Perry Rider, regarding the accident. Tr. 136. Graham, upon hearing that the mechanic was talking to other miners, suggested to Rider that the incident was not a reportable accident. Tr. 136. Graham subsequently traveled to the mine after speaking with Huffman. Tr. 139. Huffman directed that the accident site be preserved in accordance with the Mine Act, then went to the hospital to see the injured employee. Tr. 137-8. The accident had occurred late in the day, too late to begin work in earnest, and it was decided the accident investigation would begin instead the next day. Tr. 138, S. Ex. 3.

### **The Accident Reconstruction and Investigation**

Two inspectors involved in the accident investigation testified at hearing, as well as a representative of the Respondent who had conducted his own investigation of the accident.

Inspector Brian Robinson was briefed on September 24th, the day after the accident, and notified he would be participating in the accident investigation. Tr. 17. On September 24, Robinson and other MSHA personnel used the Phelps field office to review the mine file and coordinate their efforts. Tr. 18. As designated lead investigator, Robinson then traveled to the mine and assigned tasks for each member of his team in order to begin the investigation. Tr. 18.

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<sup>6</sup> Huffman was employed by Blue Stone Industries, another mine operator, at the time of hearing. Tr. 133. He had 11 years of mining experience and a number of professional certifications, including in mine rescue, as an electrician, a surface and underground miner, as a first class mine foreman, MSHA instructor, and as a certified dust sampler. Tr. 133-4. At the time of the accident, Huffman had been Director of Health and Safety at Beech Creek, working for Kentucky Fuel Corporation. Tr. 134-5. Part of his duties included independent accident investigations. Tr. 134-5.

<sup>7</sup> At hearing, Huffman testified that Ritz was in the mine office at the time of the accident and was not in a position to observe the accident itself. Tr. 147.

Robinson also took statements from Steve Ritz, foreman on site at the time of the accident, and Nicholas Dove, the driver of the truck at the time of the accident. Tr. 18-9, 147. It was decided Inspector Melvin Wolford would supervise the truck inspection. Tr. 18.

In their statements to Inspector Robinson, Ritz maintained the truck was not blocked against motion at the time of the accident, whereas Dove maintained the truck was blocked against motion. Tr. 20-1. At hearing, Jim Bowman, the Respondent's representative, offered that the Respondent would stipulate the vehicle was not blocked against motion. Tr. 21. Steve Ritz told Inspector Robinson that a crib block was placed to block the truck against motion after the accident, but before the arrival of inspectors. Tr. 21.

In the course of the investigation, MSHA inspectors took multiple photographs of various portions of the affected truck, as well as the area of the accident generally.<sup>8</sup> Tr. 19, S. Exs. 5-17. The first photo, according to Inspector Robinson, depicts the area of the accident. Tr. 19, S. Ex. 5. The second photo depicts the accident scene, including the hammer used to start the truck. Tr. 20; S. Ex. 6. Robinson described the second photo as showing the victim's position as he lay beneath the truck. Tr. 20. The third and fourth photos depict the rear of the truck and its condition. Tr. 21. S. Ex. 7, 8.

The fifth photograph depicts the wheels of the truck blocked with chock blocks, which were placed there by MSHA personnel after their arrival. Tr. 22, S. Ex. 9. The sixth photograph depicts one of the rear wheels, showing how far the vehicle traveled after being started by the mechanic. Tr. 22, S. Ex. 10. Inspector Robinson asserted at hearing that the ruler placed in the frame of the photograph suggested the truck moved backwards approximately 2 feet before becoming stopped by the mechanic's body. Tr. 23. The seventh photograph depicts the front wheel demonstrating that it also moved backwards. Tr. 22, S. Ex. 11.

The eighth photograph depicts the starter on the affected truck. Tr. 23, S. Ex. 12. With a pen, Inspector Robinson circled places where the hammer struck and knocked mud off the starter. Tr. 24. The ninth photograph depicts the gross vehicle weight rating (GVR) of the truck, which is 48,000 pounds. Tr. 23, S. Ex. 13.

On December 1, 2014, Inspector Robinson issued Citation No. 8300622 on the affected vehicle for "not being maintained in a safe operating condition."<sup>9</sup> Tr. 25. Among the deficiencies

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<sup>8</sup> The Respondent's representative, James Bowman, objected at hearing to the admission of Secretary's Exhibits 3-17. The Respondent admitted that "[i]t certainly is the truck. It represents what was there," but the identity of the photographer was unknown. Tr. 88. Based on the Respondent's own admission, the photographs are a faithful representation of the vehicle and its situation around the time of the accident. The Court admitted the photographs into evidence at hearing. Tr. 88-9.

<sup>9</sup> Despite multiple alleged deficiencies with the truck's condition, Robinson issued one citation with multiple deficiencies listed on it, rather than multiple individual citations. Tr. 25. Citation No. 8300622 is not before the Court.

alleged by the citation was a film or coating on the right rear and left front tandem, caused by oil and grease, that prevented the brake shoe from gripping the brake drum. Tr. 25. Two of the four parking brake units were rated as deficient, making the parking brake only 50% effective. Tr. 25.

Further, the backup alarm on the truck, designed to audibly warn those behind a truck when the truck is reversing, was unplugged. Tr. 26.

Robinson testified at hearing that if the parking brake had been adequate, absent any grease or oil, one could strike the starter from beneath the truck, and start the truck, and the truck would not move. Tr. 26. Further, Robinson testified that if the backup alarm had been operational, the victim would have been aware the vehicle was reversing and might have moved out of the way. Tr. 28.

Robinson also issued Citation No. 8299655, alleging that the Respondent “failed to block the affected grease truck from motion before getting under the truck to work on the starter,” in violation of 30 C.F.R. Section 77.404(c). S. Ex. 3, T. 29. The citation also alleges that “suitable wheel chocks sited for the equipment being used on the job was not available at the mine site when this accident occurred.” S. Ex. 3. The citation’s gravity was marked “occurred,” and the injury determined to be “lost work days, restricted duty,” because the mechanic had actually been injured and lost work days as a result. Tr. 29-30.

The negligence on the citation was rated “high,” because, according to Inspector Robinson, during his investigation and interviews, personnel could not identify where wheel chocks were stored, and told him that rocks and crib blocks were used.<sup>10</sup> Tr. 30. Robinson testified that a crib block or rock can be sufficient to satisfy the standard, but not always. Tr. 31. Robinson explained that, in this case, the diameter of the tires made it such that a single crib block was not enough to chock the wheels of the truck. Tr. 31.

At hearing, safety director Huffman testified that the mechanic kept wood crib blocks on his vehicle at all times. Tr. 146. Huffman reported personally seeing these blocks. Tr. 146-7. Huffman also contended wood blocks were very effective in blocking a truck, and, depending on the configuration, a number of crib blocks could block a Caterpillar 994 haul truck. Tr. 149, 161-2.

Inspectors attempted to reconstruct the accident itself the day after, September 24, 2014. Tr. 38-40. The inspector in charge of the truck, Melvin Wolford, performed a number of tests on the vehicle and its components. Tr. 61. A reconstruction involved testing the parking brake,

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<sup>10</sup> Asked by the Solicitor how common manufactured wheel chocks are in surface mines, Robinson testified that they were on just about every mine-site he visited, located usually on mechanic’s trucks for easy access. Tr. 49. Robinson also testified that it is the company’s responsibility to purchase and supply wheel chocks. Tr. 49.

putting the truck in reverse and hitting the starter.<sup>11</sup> Tr. 37-8. This was performed by putting chock blocks back “a couple feet,” placing the truck in reverse, and starting the truck with the parking brake engaged. Tr. 71. The truck started and moved, despite the parking brake being engaged. Wolford testified at hearing that the parking brake “wasn’t sufficient to hold the truck.” Tr. 71.

Wolford inspected the vehicle, noting the position of the gear shifter and air pressures, and going underneath the truck and measuring brake strokes. Tr. 64. Wolford also examined the condition of the brakes, steering components, oil drums, brake canisters, and other parts of the truck. Tr. 64-5. Wolford observed a number of deficiencies on the truck. Tr. 64. Among these were steps and ladders bent on the truck, oil-covered walkways, malfunctioning brake canisters, suspension components with defective leaf springs, and grease contamination on two of the four brake drums. Tr. 65. A brake chamber suffered from an air leak, discovered when Wolford performed an audible test of the brakes to listen for any air pressure leaks. Tr. 65.

Like Robinson, Wolford documented his findings with photographs. Wolford’s first photograph depicts, according to Wolford, grease and oil contamination on one of the truck’s brakes. Tr. 66-7; S. Ex. 14. Wolford scratched on the surface of the brake to show the extent of the grease buildup, testifying that the buildup would not have occurred recently. Tr. 67. Wolford testified that dry braking surfaces are essential in order for a brake to properly function. Tr. 66-7. Wolford’s second photograph is a picture of a brake drum visibly caked with grease or oil and similarly marked with a sharp object by Wolford to show the extent of the buildup. Tr. 67-8, S. Ex. 15. The brake drum shoe that was depicted is activated when the standard surface brake is engaged, but it is also activated when the parking brake is thrown. Tr. 68. Similarly, Wolford’s third photograph shows a buildup of oil and grease on one of the truck’s braking shoes. Tr. 68-9, S. Ex. 16. Wolford testified that oil and grease contamination on braking surfaces reduces the amount of friction within the brakes, in turn affecting the ability of the brakes to properly stop the vehicle from moving. Tr. 68.

Wolford’s fourth photograph depicts a wheel on the driver’s side of the truck, with the wheel assembly and brake drums removed, showing oil contamination on the uncovered brake shoes. Tr. 69, S. Ex. 17.

At hearing, Wolford testified that that the conditions he observed were also likely to be observed during a preoperational examination. Tr. 87. Wolford noted that a preoperational shift is performed on the truck twice a day. Tr. 87.

The Respondent also performed its own investigation into the accident. Tr. 138. Safety Director Mark Huffman checked both the service and parking brakes, the low air buzzers, and the warning and audible alarms on the vehicle. Tr. 139. The truck’s parking brake was tested

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<sup>11</sup> Asked why this test was performed, Inspector Wolford explained that in order to perform a more traditional test, MSHA would be required to correct all the deficiencies on the brake system. To do so would’ve rendered the test itself of negligible investigatory value, as the test was designed to determine if the truck, in the condition it was in at the time of accident, would pull through its parking brakes in similar circumstances. Tr. 78.

with the vehicle in forward gear at least twice. Both times the truck did not move. Tr. 139. Huffman contended that the result of the tests was that the service and park brakes were both working properly. Tr. 140. The Respondent's own investigation of the truck found no deficiencies except for a broken spring in a brake canister. Tr. 151.

### **The Alleged Violation of the 103(k) Order**

Inspector Fannin's 103(k) Order on the truck remained in force following the accident investigation. Tr. 94. The 103(k) Order was modified multiple times after it was issued, including to allow equipment to be examined and to allow the operator to fill a diesel fuel tank. S. Ex. 1. A 103(k) Order is modified when an operator requests for a modification and provides sufficient reasoning to justify why the modification would not affect the primary purpose of the 103(k) Order. Tr. 95-6. If the modification is deemed appropriate, inspectors then travel on-site, review the 103(k) Order, modify it, and give the operator an updated 103(k) Order with the included modification. Tr. 96.

On November 7, 2014, Inspector Robinson traveled to the mine site. Tr. 96. Meeting a foreman and a mechanic at an access road, Robinson was surprised to hear from the mechanic that the mechanic had put the wheels and tires back on the sequestered truck and intended to adjust its brakes. Tr. 97. This was unusual as any work performed on the truck would require a modification of the 103(k) Order, and typically the Inspector in charge would do the modifying. Tr. 97.

Robinson tried to learn who had given the miners permission to perform work on the sequestered vehicle. Robinson asked mine superintendent Perry Rider who had given the order to perform work, and Rider identified Mark Huffman, the mine's safety manager. Tr. 97. Robinson called Huffman on speaker phone in the presence of Rider and Huffman denied remembering doing so. Tr. 97. (At hearing, Huffman also denied authorizing any work to be performed on the vehicle.) Tr. 158. Still with Inspector Robinson at the mine site, Rider then suggested it may have been MSHA Inspector Dustin Rutherford who gave them permission to work on the vehicle. Tr. 97. Dustin Rutherford was working at the nearby Phelps field office, and reached by phone there, denied permitting work to be done on the truck. Tr. 97. At hearing Robinson testified that he believed Rider was the person who gave the order for work to be performed on the vehicle. Tr. 100.

Once at the mine site, Robinson compared the photographs he had of the truck taken on September 24 with the condition of the vehicle in front of him on November 7. Tr. 97-8. He noted multiple differences between the condition of the truck on September 24 as compared to the condition on November 7. Among the things that had been modified or removed, two ladders had been taken off the side of the truck, a fuel hose reel had been removed, and multiple wheels and tires had been put back on. Tr. 99, S. Ex. 2.

As a result, Inspector Robinson issued Citation No. 8299679. S. Ex. 2. He assessed the likelihood of injury as "none," and expected injury as "no lost workdays," because the truck was immobile at the time. Tr. 100-1. Robinson assessed the negligence as "reckless disregard." Tr. 101. This was due to the fact that Robinson learned from Inspector Rutherford that the

Respondent had requested and been denied a modification the 103(k) Order prior to Robinson's discovery of the violation. Tr. 101.

Robinson testified that the operator was well-aware of the procedure that modifying a 103(k) Order entails. Tr. 102-3, 130. Inspector Robinson testified that personnel knew that he was the lead investigator and therefore primarily responsible for its modification. Tr. 130. At hearing, Huffman testified that he did ask for a modification of the 103(k) Order but was unable to provide documentation supporting his testimony. Tr. 161.

The 103(k) Order was terminated when the vehicle was removed from the mine site by the operator's decision. Tr. 103.

## **V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Citation No. 8299655**

#### **A. Contentions of the Parties**

The Secretary contends that Kentucky Fuel Corporation violated 30 C.F.R. Section 77.404(c). Sec'y's Post-Hearing Br., 3. The Secretary further contends that Citation No. 8299655 was properly designated as Significant and Substantial (S&S), as the violation contributed to the risk of being crushed by unintended motion of a truck, that such an injury was reasonably likely to occur and that such an injury was of a reasonably serious nature. Id., at 4. The Secretary further maintains that Citation No. 8299655 was properly designated as high negligence, as the failure of the operator to properly supervise, train, and discipline employees contributed to the accident. Id., at 5. For evidence in support of the proposition, the Secretary notes the failure of the operator to discipline any miner involved in the accident, the alleged absence of suitable wheel chocks on the mine site, the truck's individual safety defects, and the failure of mine management to block the truck after the accident had occurred. Id., 6-8.

The Respondent stipulated that a violation of a mandatory safety standard did occur in this case. Resp't's Post-Hearing Br., at 6. The Respondent contends that the Secretary failed to sustain his burden of proof that Citation No. 8299655 was the result of the operator's high negligence. Id., 5. In support of this argument the Respondent cites the long-standing proposition that the conduct of rank-and-file miners is generally not imputable to the operator in determining negligence for penalty purposes. Id., 6. The Respondent also contends that Mr. Hensley was not directly supervised by any member of management and acted on his own initiative. Id., at 6. The Respondent notes that the sole foreman at the mine site at the time was far away and only reachable by radio contact. Id. Therefore, the Respondent argues, the operator did not have knowledge of the violation and the negligence was improperly designated as "High." Id. The Respondent contends that the operator provided wooden crib blocks for use to block trucks against motion, and that wooden crib blocks are an adequate type of blocking material. Id., at 8-9.

## **B. The Secretary Has Carried His Burden of Proving a Violation By a Preponderance of the Evidence**

As stated *supra*, the Respondent stipulated to a violation of 30 C.F.R. § 77.404(c). Resp't's Post-Hearing Br., at 6. The regulation specifies that "repairs or maintenance shall not be performed on machinery unless the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." 30 C.F.R. § 77.404(c).

It is undisputed that there was a failure to block the truck against motion. Subsequently, the truck moved backward, rolling over and injuring a miner, who was engaged in "repairs or maintenance" at the time. Tr. 19-21. This Court therefore finds that the Secretary has carried his burden of proving a violation of 30 C.F.R. § 77.404(c) by a preponderance of the evidence. Beyond the Respondent's own stipulation there is ample evidence to substantiate the violation's existence, as discussed *supra*.

## **C. The Violation was Reasonably Likely to Cause a Fatality and was Properly Designated Significant and Substantial**

The Secretary assessed the violation as reasonably likely to cause a fatality and Significant and Substantial (S&S).

The Commission's recent decision in *ICG Illinois, LLC*, \_\_ FMSHRC \_\_, slip op. at 3-4, LAKE 2013-160, elaborated on the traditional four-part S&S test:

The Commission has recognized that a violation is S&S if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC at 3-4 (Jan. 1984), the Commission further explained:

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

6 FMSHRC 1, 3-4, (Jan. 1984), (footnote omitted); *accord Buck Creek Coal, Inc., v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc., v. Secretary of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). In conducting the *Mathies* analysis, the focus now generally centers on the interplay between the second and third steps. *Newtown Energy, Inc.*, \_\_ FMSHRC \_\_, slip op. at 5, No. WEVA 2011-283 (Aug. 29, 2016).

The second step of *Mathies* addressed the contribution of the violation to a discrete safety hazard, i.e., the extent to which the violation increases the likelihood of occurrence of the particular hazard against which the mandatory standard is directed. *Newtown*, slip op. at 5, citing *Knox Creek Coal Corp.*, 811 F.3d 148, 162-63. (4th Cir. 2016) (citing *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1741 n. 12 (Aug. 2012)). At this stage, it is essential that the Judge adequately define the hazard to which the violation allegedly contributes. A clear description of the hazard at issue provides context when determining the relative likelihood that the violation contributes to a hazard, and will also frame the potential source of injury for purposes of determining gravity in the third step of *Mathies*. The starting point for determining the hazard is the regulation cited by MSHA; the “hazard,” for purposes of the *Mathies* analysis, is the danger which the cited safety standard is intended to prevent. *Newtown*, slip op. at 6. Having clearly defined the hazard, the next task in analyzing the second step of *Mathies* is for the judge to determine whether the Secretary has proven that the violation contributed to that hazard. That means the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. *Id.* We recognize that “reasonable likelihood” is not an exact standard measured in percentages, but rather a matter of degree, an evaluation of risk with a particular focus on the facts and circumstances presented. *Id.*, at 7.

At this stage, the focus shifts from the violation to the hazard. The third and fourth steps are primarily concerned with gravity, i.e., whether the hazard identified in step two would be reasonably likely to result in serious injury. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2364-66 (Oct. 2011) (citing *Musser Eng’g, Inc., & PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *Knox Creek*, 811 F.3d at 162. If the Judge concludes, based upon the evidence, that the violation sufficiently contributes to the hazard identified at step two, the Judge then assumed such occurrence and determines at step three whether, based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. At step four, the Judge determines whether any resultant injury would be reasonably likely to be reasonably serious.

*ICG Illinois, LLC*, \_\_ FMSHRC \_\_, slip op. at 3-4, LAKE 2013-160 (Oct. 21, 2016) (footnotes omitted).

This Court finds that the Secretary has proven an underlying violation of a mandatory safety standard. *Mathies*, 6 FMSHRC at 3-4 (footnote omitted), *see supra*.

The second step “addresses the extent to which the violation contributes to a particular hazard. This step is primarily concerned with the likelihood of the occurrence of the hazard against which a mandatory safety standard is directed.” *Newtown Energy, Inc.*, slip op. at 5. The Commission in *Newtown, Inc.*, observed that “it is essential for the Judge to adequately define

the particular hazard to which the violation allegedly contributes.” *Newtown, Inc.*, at 6. The hazard, according to *Newtown, Inc.*, is defined “in terms of the prospective danger the cited safety standard is intended to prevent.” *Id.*

The hazard that 30 C.F.R. § 77.404(c) was promulgated to guard against, plainly, is injury to a miner by heavy machinery that has not been blocked against motion. In other words, getting crushed by a truck is made significantly more likely by a failure to block that truck against motion. Such an injury did occur in this case, which is an illustration that this contemplated hazard is more than a hypothetical concern. Thus this Court finds that this violation was reasonably likely to lead to the hazard described *supra*.

The third step concerns the gravity, or reasonable likelihood that the hazard contributed to will result in an injury. Given the Commission’s instruction that this third step requires a nuanced examination of the relevant facts peculiar to this case, the Court now considers the factual situation vis-à-vis the reasonable likelihood that this hazard would contribute to an injury.

The following facts in the record are uncontested: that a miner was beneath the truck performing maintenance when it was not blocked against motion, that the truck moved while the maintenance was being performed, that the truck ran over the miner, and that the miner had to be airlifted to the hospital. Tr. 12, Tr. 20, Tr. 30, Tr. 41.

Regarding the severity of the miner’s injuries, Mark Huffman, director of health and safety at the Beech Creek Surface mine, testified that “if [a truck] rolled all the way over them, yes, it could [kill a miner].” Tr. 154. Brian Robinson, an inspector with nine years’ experience at the time of citation testified that the victim was “within an inch of being completely rolled,” and if that had occurred, the consequences would’ve been “probably fatal.” Tr. 30. As it happened, the miner suffered cracked ribs and a punctured lung. Tr. 154.

In the instant matter, the truck was not blocked against motion. This violation led to the increased likelihood that the foreseeable hazard, getting run over by the truck, would manifest. The particular facts in this case also require consideration of the miner’s location underneath the vehicle, which put the miner at obvious risk of being run over. When the truck did start, the miner was run over. Both the Secretary and Respondent concede that if the truck had moved backward a few more inches, the miner would likely have been killed.

Therefore, this Court finds it was reasonably likely that the hazard contemplated would lead to a reasonably serious injury. Indeed, in this instance, a reasonably serious injury did occur. The miner was fortunate that he sustained injuries less than fatal. This Court finds that the most likely injury to result from being run over by a truck to be a fatality. S. Ex. 13. As a result, the third and fourth steps of *Mathies* have been satisfied. The violation was properly designated Significant and Substantial (S&S).

#### **D. The Violation was the Result of the Respondent’s High Negligence**

Section 110(i) of the Mine Act authorizes the Commission to assess penalties for violations of the Act, and includes the operator’s negligence as one of the criteria the

Commission is required to consider in assessing a penalty. To start the process, MSHA proposes a penalty pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a). MSHA has published regulations explaining its role in the penalty process, including how it arrives at proposed penalty amounts. *See* 30 C.F.R. Part 100.

The Part 100 regulations address how MSHA calculates most proposed penalties in light of the statutory criteria the Commission must consider, and explains how MSHA views each of the criteria. *See* 30 C.F.R. § 100.3. With regards to the negligence criteria, MSHA has adopted a formulaic approach, categorizing negligence into five different levels, from “no” negligence to “reckless disregard,” based on the existence of a mitigating circumstance, or multiple such circumstances, for the violation. 30 C.F.R. § 100.3 (d); *see generally Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3106 (Dec. 2014) (Comm’r Cohen, concurring.)<sup>12</sup>

The Commission has recently explained that judges are not required to apply the level of negligence definitions in Part 100 and may evaluate negligence from the starting point of a traditional negligence analysis<sup>13</sup> rather than the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec’y of Labor*, 804 F.3d 1259, 1263-4 (D.C. Cir. 2016).

Moreover, the Commission in *Brody* held that judges in making their negligence determinations were not to be limited to an evaluation of potential mitigating circumstances but should instead consider “the totality of the circumstances holistically.” *Brody*, 37 FMSHRC at 1702.

In determining the existence and degree of negligence associated with an alleged violation, a Commission judge must consider the duty of care accompanying the mandatory standard at issue.

Negligence is not defined in the Mine Act. The Commission has, however held:

“[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.”

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<sup>12</sup> *See also* § 100.3, Table X- Negligence, which provides for 0 penalty points where there is “no negligence” (the operator exercised diligence and could not have known of the violative condition or practice); 10 penalty points for “low negligence” (the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances); 20 penalty points for “moderate negligence,” (the operator knew or should have known of the violative condition or practice but there are mitigating circumstances); 35 penalty points for “high negligence” (the operator knew or should have known of the violative condition or practice and there are no mitigating circumstances); 50 points for “reckless disregard” (the operator displayed conduct which exhibits the absence of the slightest degree of care).

<sup>13</sup> Under a traditional negligence analysis the operator is negligent if it fails to meet the requisite standard of care – a standard of care that is *high* under the Mine Act. *Brody*, at 1702.

*A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

*JWR*, 36 FMSHRC at 1975; *see, e.g., id.* at 1976-77 (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated.)

*Brody*, 37 FMSHRC at 1702.

Traditionally, the Commission has held that the conduct of a rank-and-file miner cannot be imputed to the operator for penalty purposes within the context of negligence. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112 (July 1995). The Commission observed in its recent decision, *Leeco, Inc.*, 38 FMSHRC \_\_\_ No. KENT 2012-166 (July 18, 2016), determining an operator's negligence includes considerations beyond whether that operator had actual knowledge of a violation:

In cases where a rank-and-file miner has violated the Act or its mandatory standards, the Commission examines the operator's supervision, training, and disciplining of its employees to determine whether the operator had taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("SOCCO"), *citing Nacco Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981). The Commission also considers the foreseeability of the miner's conduct and the risks involved when determining whether the operator was negligent. *A. H. Smith*, 5 FMSHRC at 15, *citing SOCCO*, 4 FMSHRC at 1463-64; *Nacco*, 3 FMSHRC at 850-51.

*Leeco, Inc.*, at 3.

To determine if the operator has met its duty of care, the Court considers what a reasonably prudent person, familiar with the mining industry, the relevant facts, and the protective purpose of the 30 C.F.R. § 77.404(c), would have done. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015).

### **1. The Respondent's Supervision, Training, and Provision of Materials Failed to Meet the Required Standard of Care**

The Court examines first the operator's supervision, training, and disciplining to determine whether the operator had taken reasonable steps to prevent the rank-and-file miner's violative conduct. The Court then examines the foreseeability of the miner's violative conduct, given the condition of the truck, as well as the apparent absence of proper blocking materials (or proper training on blocking techniques). Finally, the Court concludes by finding that, under

*Brody's* reasonably prudent person standard, the operator's conduct was a product of its own high negligence. The Court can find no mitigating circumstances to balance the negligence determination.

The supervision and training of miners, a factor of consideration under *Leeco, Inc.*, in this instance relates to the supervision and training the miners received in the performance of blocking vehicles against motion. *Leeco, Inc.*, 3.

Regarding supervision, this Court notes that one foreman, Steve Ritz, was on-site during the evening shift. Resp't's Post-Hearing Br., 7 However, Respondent's assertion that Kentucky Fuel Corporation could not predict the mechanic's conduct goes too far. Resp't's Post-Hearing Br., 7. The Respondent's deficiencies in either training or supply of materials for use in blocking, as well as the truck's damaged brakes and inoperative safety features, made the mechanic's conduct reasonably foreseeable.

The Respondent's conduct in this case suggests a deficiency either in the supply of training and/or materials regarding the blocking of vehicles against motion. It is undisputed that the Respondent failed to block the truck against motion. It is also undisputed that an accident subsequently occurred as a result of such. Arriving on the scene of the accident, Steve Ritz, the sole mine foreman on site at the time, rescued the mechanic from under the truck, arresting the truck's movement with a single crib block. Tr. 20-21. The Court finds that blocking a truck capable of a gross-weight rating of 48,000 pounds with a single crib block is unsafe, and essentially a continuing violation of 30 C.F.R. § 77.404(c). This is because the diameter of the tires of the truck in question were too large for a single crib block to effectively arrest the truck's motion, according to Inspector Robinson's persuasive testimony. Tr. 31.

Following this, Pat Graham, a member of mine management, visited the accident scene without directing that proper blocking materials be put down. As the Solicitor notes in his brief, "no member of mine management adequately blocked the truck even after the accident occurred." Sec'y's Post-Hearing Br., at 6.

This is highly persuasive evidence that even the Respondent's own management were not properly trained in the blocking of vehicles against motion. The Court rejects the Respondent's contention that there was no evidence in the record of improper training regarding blocking procedures with the above information in mind. Resp't's Post-Hearing Br., at 8.

In its brief the Respondent argues that wooden crib blocks are a time-tested blocking material and rightly points out that the regulation does not require wheel chocks to be employed as blocking material. Resp't's Post-Hearing Br., at 9. Whether or not wooden crib blocks *can* be an adequate source of support to block a truck against motion is not a question before this Court. Nor is the question of whether 30 C.F.R. § 77.404(c) requires the use of wheel chocks on every mine site. While 30 C.F.R. § 77.404(c) does not specify what kinds of materials are necessary, it does require that in order for work to be performed, the vehicle must be powered off, and blocked against motion.

The Respondent's contention that wooden crib blocks are an adequate form of support is too broad. It may be true that in some cases, with proper training and the right crib blocks, crib blocks can be used to satisfy 30 C.F.R. § 77.404(c)'s requirements. However, that question is not before this Court.

In the instant case, both the material (one crib block, or a rock, it is unclear), as well as the training involved in placing these materials, were inadequate. Tr. 20-1. Wheel chocks are almost always likely to fall in the category of safe blocking materials; crib blocks, rocks, and other ad hoc materials, if deployed improperly as a result of poor training, are inappropriate.

Examining the materials and techniques used to block vehicles against motion, as well as the defective conditions of the vehicle in question, the Court finds that the mechanic's conduct was a reasonably foreseeable result of the Respondent's conduct.

The evidence suggests that if chock blocks were available on the mine site, they were not readily available to the mine mechanic. The mechanic in this case traveled with crib blocks in his truck and possibly used rock to block the red Autocar grease truck. Tr. 31. Thus, if they were available on the mine site, wheel chocks were not practically available to the mechanic, or the mechanic was not properly trained in their use. The responsibility of the operator is the same: supplying proper training and materials is part of the Respondent's high duty of care. At hearing, the Court heard persuasive testimony from Inspector Robinson that wheel chocks are on nearly every mine site he visits. Tr. 49. Inspector Robinson also testified that wheel chocks are easy to transport and deploy. Tr. 49. Finally, Inspector Robinson testified that a miner would not commonly use rocks instead of wheel chocks. Tr. 50.

Testimony offered at hearing by Mark Huffman suggested that mechanics at the mine routinely carry crib blocks to use in the back of their truck. Tr. 153. Huffman also testified that he witnessed crib blocks in the rear of the mechanic's truck. Tr. 153. If this were true, then why would a mechanic choose to block a truck with a rock when he could just as easily use a safer crib block? Or, if the truck was actually unblocked, why would a mine mechanic choose to leave the truck unblocked with blocking materials so conveniently at hand?

The mechanic's conduct in this case suggests the absence of readily available blocking material on the mine site, or the absence of proper training on blocking techniques.

Beyond the operator's training and materials, the Court considers the mine mechanic's own interests. Choosing to block a truck against motion with rocks is less safe, and exposes one to greater risk, than using chock blocks or crib blocks. In order for the Respondent's position to be credible, the Court would have to accept that the mechanic willingly exposed himself to fatal injury when materials may have been at hand that could've substantially mitigated this risk.

While the presence of wheel chocks on a mine site may not be required by 30 C.F.R. § 77.404(c), plainly the training and materials supplied in this case were inadequate to meet the requirements of the safety standard and fell far short of the operator's high duty of care under *Brody*.

The operator's discipline of the mechanic's violative conduct consisted of an admonishment, according to the Respondent's brief. Resp't's Post-Hearing Br., 7. The Respondent's representative argues that the mine mechanic was sufficiently punished by his injuries in his brief. Resp't's Post-Hearing Br., 7. There is no more evidence in the record regarding the disciplining of the mine mechanic.

## **2. The Mechanic's Conduct Was Reasonably Foreseeable**

By examining *in toto* the operator's training, provision of materials, and discipline of errant miners, the Court finds that the Respondent cannot defend against the Secretary's negligence determinations simply because its sole foreman was not present when the accident occurred. This is due not just to the failure in either training and/or the provision of materials, but also due to the foreseeability of the mechanic's conduct.

Taking the specific deficiencies of the truck together with the inadequate training and/or materials provided to the miners in this case, the Court finds that the mechanic's conduct was reasonably foreseeable. A reasonably prudent person, familiar with the peculiar facts and circumstances of this case as well as the protective purpose of the 30 C.F.R. § 77.404(c), would have foreseen the mechanic's conduct as a possibility and moved to prevent it. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (finding that determining whether an operator has met its duty of care requires considering the actions that a reasonably prudent person, familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would take in the same circumstances).

Part of why this accident was reasonably foreseeable is due to the bad condition of the truck in question. The tests performed by the Secretary and the tests performed by the Respondent, as described *supra*, produced different conclusions regarding the safety and functionality of some of the truck's key safety features: its backup alarm, its parking brake, and its service brake. Tr. 64-6, Tr. 139-140. In assessing the validity of the tests conducted by both parties, the Court finds the results of the Secretary's tests to be more credible than the results of the Respondent. The Court finds that the truck was in such a deficient state that a reasonably prudent person, familiar with the mining industry, the protective purpose of the regulation, and the peculiar facts of this case, would have repaired the numerous deficiencies in the vehicle before returning it to work. *Brody*, at 1702.

The Court finds the Secretary's tests to be more credible primarily due to methodology. The Secretary's witnesses offered more detail, described *infra*, and presented independent corroboration of their findings in the form of photographs. Tr. 64-6, S. Ex. 5-17.

The methodology of the Respondent's testing is less clear, and its results were unsupported by any evidence beyond testimony. Indeed, based on the testimony, it is difficult to determine whether the Respondent's tests found no deficiencies, or if the test results were not

explained in detail. For example, Mr. Huffman, the Respondent's witness who was in charge of accident reconstruction, testified at hearing:

We checked both the service and the park brake... we checked the low air buzzers, the warning and audible alarms on it. We checked the truck with the park brake set in the forward and reverse positions. We tried to pull it forward, pull it out backwards, and stall the engines. We did that with both the service brake and with the park brake set . . . the truck didn't move.

Tr. 139.

It unclear from the testimony offered here whether "checking" the warning and audible alarms on the vehicle confirmed they were operational. It is also unclear whether the brake chambers were examined beyond checking the low air buzzers; Inspector Wolford's own tests revealed an air leak within the brake chamber. Tr. 65. The Respondent, in describing the testing, did not detail the grade of the slope, the condition of the truck and its parts during the test, and the weight of the truck itself during the test. Ultimately the Respondent's witness testifies that the parking brake and service brake were "working properly."<sup>14</sup> Tr. 140.

But as Inspector Wolford testified at hearing, merely having the brakes work properly does not necessarily mean a truck's braking *system* is working properly. Bad braking components, oil and grease contamination, and air leakage could render a working brake effectively inoperative. Tr. 68. The paucity of description regarding the condition and function of both brakes renders much of Huffman's testimony merely conclusory statements. This testimony is difficult to reconcile with the Respondent's conduct with regard to a previous citation arising out of the same facts and circumstances.

As the Secretary notes in his brief, Citation No. 8300622 was issued for various defects associated with the vehicle. Among these defects were the unplugged back-up alarm and the oil and grease build-up on the rear brakes. Sec'y's Post-Hearing Br., 7. The Respondent did not contest this citation.

The Secretary's photographic exhibits in this case appear to depict brakes covered in a thick build-up of grease and dirt. S. Ex. 14, 15, 16. The Respondent's description of the 'check' of the back-up alarm does not clarify whether it was operational. Further, the thick build-up of grease and dirt visible in the Secretary's photographs apparently had no effect on the truck's braking capacity during the Respondent's tests. Altogether, the Respondent's testing lacks sufficient indicia of reliability to persuade.

The tests performed by the MSHA inspectors possess greater indicia of reliability, and are therefore more credible. In his description of the testing performed, Inspector Wolford identified not only what he tested, but what he determined from the testing. Tr. 64-6, 70. This is not so of the Respondent's testimony, where details essential for credibility determination were

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<sup>14</sup> Huffman could not recall any additional defects on the truck at hearing, but for a broken spring. Tr. 151.

not introduced into evidence. Moreover, Wolford tested the truck in a reenactment of the accident, placing the parking brake on and the gear in reverse, and as a result reproduced the same outcome as occurred in the accident: the truck pulled through its brakes on the slope and moved backward once started. Tr. 71.

The decision to not perform a so-called “function test” does not affect the Court’s credibility calculus. As noted *infra*, a function test as described by the Respondent’s representative, Jim Bowman, would require the tester to repair defects that had made a material difference in the truck’s performance in order for the vehicle to travel to a testable slope. To perform such a test would require altering the condition of the truck, which would create testing difficulties.

The Secretary’s witnesses, both experienced inspectors, were supported in their testimony by the photographic evidence described *infra*. The Respondent’s tests are not similarly supported by independent evidence.

A truck with a malfunctioning parking brake, no working back up alarm, and two of its four brake drums caked in grease is far more likely to slip its brakes and move of its own accord. Tr. 65, 67. Once in motion, the lack of a back-up alarm would expose miners to the risk of being run over. Tr. 28. Preventing and remediating these dangerous defects was part of the Respondent’s duty of care.

It is a long-standing principle of Commission caselaw that the Mine Act’s strict liability regime is meant to encourage greater operator vigilance in locating and correcting health and safety violations. See, e.g., *Rock of Ages Corp. v. Sec’y of Labor*, 170 F.3d 148, 155 (2nd Cir. 1999). Over time, the operator’s conduct allowed the truck’s condition to degrade until it was unsafe. The operator knew or should have known the truck was unsafe. The training and supply of blocking materials was inadequate. The operator knew or should have known this.

Accordingly, this Court finds a reasonably prudent person, familiar with 30 C.F.R. § 77.404(c) and the facts and circumstances of this situation, would have provided proper blocking training and materials.

Citation No. 8299655 was properly assessed as High negligence.

### **Citation No. 8299679**

#### **A. Contentions of the Parties**

The Secretary contends the underlying 103(k) Order was validly issued. Further, the Secretary contends that the 103(k) Order was violated. The Secretary contends there are no mitigating circumstances for the violation. The Secretary contends that the Respondent displayed reckless disregard in violating the 103(k) Order.

The Respondent contends that the Secretary failed to prove a violation of Section 103(k) by substantial evidence. The Respondent contends that the initial 103(j) Order issued in this

matter was not validly issued.<sup>15</sup> The Respondent contends that the accident did not have the reasonable potential to cause a fatality. The Respondent contends that the accident was therefore not a reportable one under the Mine Act. Further, the Respondent contends that the Secretary failed to prove, if a violation did occur, that that violation was one of reckless disregard by substantial evidence.

### **B. The Underlying (k) Order was Valid**

To challenge the citation's validity, the Respondent disputes whether a qualifying accident occurred in this matter. The Respondent also attacks the validity of the 103(k) Order because it "exceeded the authority granted MSHA." Resp't's Post-Hearing Br., 13.

As noted *supra*, the period of time between when Inspector Ralph Fannin issued his 103(j) Order on September 23, 2014, and when he modified that order into a 103(k) Order, was approximately 90 minutes.<sup>16</sup> S. Ex. 1. Section 103(k) of the Mine Act provides that "in 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 coal or other mine." 30 U.S.C. § 803(k).

There is no dispute that Inspector Fannin qualified as an "authorized representative of the Secretary" when he issued his 103(k) Order.

The Respondent argues in its brief that no qualifying accident occurred in this matter, as there is no way to reasonably conclude the accident required rescue or recovery work. Resp't's Post-Hearing Br., 10. In support of this position the Respondent contends that the Secretary failed to introduce any evidence of labored breathing or severe pain. *Id.*, at 11. The Respondent further argues that there should be an inference drawn, in the absence of hospital records, that those records would not support a finding of a life-threatening injury. *Id.*

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<sup>15</sup> The Respondent's representative, in a section of the Post-Hearing Brief titled "The Secretary failed to sustain her burden of proving by substantial evidence that Citation No. 8299679 was a violation of Section 103(k)," appears to conflate 103(j) and 103(k) control orders in his brief. The Respondent's representative cites throughout to *Big Ridge, Inc.*, 37 FMSHRC 1860 (Sept. 2015), in support of his assertion that "[w]hen MSHA issues a 103 (j) Order there should be some rescue or recovery work that needs to be performed . . . there was no rescue or recovery work performed[.]" Resp't's Post-Hearing Br., 10. In *Big Ridge, Inc.*, the Commission ruled that the definition of "accident" under sections 103(j) and 103(k) is to be found in *Revelation Energy*, discussed *infra*. The Respondent failed to address the Commission's explicit rejection of its argument regarding the definition of accidents, despite citing to the decision in support of the proposition that the 103(k) Order in this case did not concern the rescue or recovery of miners.

<sup>16</sup> Within this time period Inspector Fannin permitted work to be done on an unrelated vehicle suggesting that the operator and its agents were well aware- even within hours of a control order's issue- of the procedures regarding control orders. Tr. 92-3.

These arguments fundamentally misconstrue Commission precedent. A truck rolled over a mechanic, shattering multiple ribs and puncturing a lung. This was an accident that had a reasonable potential to cause death: indeed, the miner was lucky to survive such a rollover. There will not be any inferences drawn regarding records not admitted by this Court. Even if the Respondent was correct in arguing that this accident did not, on its face, present a danger to a miner's life, it would still be incorrect in its definition of qualifying accident, according to Commission precedent.

The definition of accident, as relevant for 103(k) purposes, was articulated by the Commission in *Revelation Energy, LLC*, 35 FMSHRC 3333 (Nov. 2013). In *Revelation Energy*, the Respondent propelled a two-ton rock off the mine property while performing blasting operations. The rock rolled through a residential yard and came to rest near a local home. *Id.*, at 3334-5. No one was injured. *Id.* The Respondent argued in that case that the blasting incident did not constitute an accident for Section 103(k) purposes, as it did not fit within the definition of accident set forth in Section 3(k) of the Mine Act or 30 C.F.R. § 50.2(h).<sup>17</sup> *Id.*, at 3335-6.

The Commission rejected that argument, reasoning that the list provided in 30 C.F.R. § 50.2(h) was designed to be non-exhaustive, as it begins the list with the word, "includes." *Id.*, at 3337. Instead, the Commission reasoned that:

the plain meaning of "accident" in section 3(k) includes more than the specific events enumerated in section 3(k) and that the scope of section 3(k)'s definition of "accident" is ambiguous. We accord deference to the Secretary's reasonable interpretation of "accident" as including events that are similar in nature to, or have a similar potential for injury or death as, the events specifically listed in section 3(k).

*Revelation Energy, LLC*, at 3336.

This Court finds that an accident did take place that falls within the scope described by the Commission in *Revelation Energy, LLC*, as this accident had a similar potential for injury or death as ones described in 30 C.F.R. § 50.2(h).

The Respondent's apparent confusion of 103(j) and 103(k) control orders necessitates some explanation of the differences between the two types of control orders. 103(j) and 103(k) Orders are both typically described as control orders in Commission decisions. See, e.g., *Small Mine Development*, 37 FMSHRC 1892 (Sept. 2015) (referring to 103(j) orders as "control orders,"); *Pocahontas Coal Co.*, 38 FMSHRC 157 (Feb. 2016) (referring to 103(k) orders as "control orders.")

The Commission has stated that "Section 103(k) ... empowers an authorized representative of the Secretary to issue such orders as he deems appropriate to insure the safety

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<sup>17</sup> 30 C.F.R. § 50.2(h), also known as the "dirty dozen," contains a non-exhaustive list of twelve types of reportable accidents.

of any person in a mine in the event of an ‘accident’ at the mine.” *Revelation Energy*, at 3336. Continuing, the Commission observed that “Section 103(k) constitutes a broad grant of discretionary authority to the Secretary to protect miners in the event of a mine accident.” *Id.*, at 3338.<sup>18</sup> The Commission quotes the Senate Report, detailing that “[t]he grant of authority . . . in Section [103(k)] to issue orders is intended to provide the Secretary with flexibility in responding to accident situations.” *Revelation Energy*, 35 FMSHRC 3333, 3338, *citing* S. Rep. No. 181, at 29 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 617 (1978).<sup>19</sup>

In contrast, 103 (j) Orders are strictly cabined to those circumstances involving active rescue and recovery of miners. Indeed, the Commission has found that 103 (j) Orders are invalid “in the absence of rescue and recovery work.” *Big Ridge Inc.*, 37 FMSHRC 1860, 1864 (Sept. 2015). In other words, “the Secretary’s authority to issue any section 103(j) control order . . . occurs in the event of an accident where there is ‘rescue and recovery work.’” *Id.* In other circumstances concerning safety, if the Secretary of Labor or his agent seeks to control a mine under the Act, the proper vehicle is the 103(k), not the 103(j), Order. There is no “rescue and recovery” requirement for 103(k) control orders.

The Respondent’s brief contains the following line of argument:

A 103(j) Order gives MSHA authority to take control of rescue and recovery work to see that the work is performed safely and miners are not put at risk. There is no evidence that the operator should have been limited in immediately releasing Mr. Hensley from the grip of the tire. When MSHA issues a 103 (j) Order there should be some rescue or recovery work that needs to be performed.

Resp’t’s Post-Hearing Br., 10.

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<sup>18</sup> Citing to the opinion of *Miller Mining Co. v. FMSHRC*, the Commission quotes the 9th Circuit’s reasoning that “Section 103(k) gives MSHA plenary power to make *post-accident* orders for the protection and safety of all persons.” *Revelation Energy, LLC*, 35 FMSHRC 3333, *citing* *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983).

<sup>19</sup> The Senate Report continues, “Further, the circumstances surrounding the accident may be such that [an] order necessary to preserve evidence may be appropriate. It is intended that by preventing possible destruction of evidence, the Secretary may be better able to determine the cause of the accident and thereby prevent the future occurrence of a similar accident.” S. Rep. No. 95-181, at 29.

In other words, the Respondent’s contention that the 103(k) Order was improper due to the length of time it was in place conflicts with the legislative aims of the 103(k) Order, which include the preservation of evidence.

It must be noted that Citation No. 8299679 alleges a violation of Section 103(k) of the Mine Act. S. Ex. 2. The Secretary has not alleged a violation of Section 103(j) of the Mine Act.<sup>20</sup>

In essence, the Respondent asks this Court to invalidate a 103(k) Order because it would be invalid if it were a 103(j) Order. But the rescue and recovery requirement applied to 103(j) Orders is not relevant toward determining the validity of this 103(k) Order.

On this basis, the Respondent's argument that the Secretary's failure to perform rescue or recovery work vitiates the 103(k) Order in this case is not relevant. While similar, 103(j) and 103(k) Orders are distinct from one another and concern separate legislative goals.

Under 103(k), MSHA possesses plenary power to issue orders after an accident to protect the safety of all persons in the affected area. This 103(k) Order was a proper exercise of the Secretary's broad discretionary authority. It was issued consistent with the primary purpose of the Mine Act: safeguarding the health and safety of the nation's miners.

This Court finds the 103(k) Order in this matter was lawfully issued by a duly authorized representative of the Secretary after a qualifying accident.

### **C. The Respondent Violated the Terms of the (k) Order**

On September 25, 2014, the 103(k) Order at issue before the Court was modified to release the blue International mechanic's truck; the same 103(k) Order stated that "the red Autocar grease truck #7175 still remains under the affected 103(k) Order." S. Ex. 1.

When Inspector Robinson returned to the mine on November 7, 2014, he was informed by a mine mechanic that wheels and tires had been reattached to the grease truck. Tr. 96-7. Robinson, as MSHA's designated accident inspector for this matter, would typically permit or deny 103(k) Order modifications. Tr. 97. In an effort to get to the bottom of this apparent 103(k) Order violation, Robinson was told first that Mark Huffman, safety director of the mine, had permitted work to be done on the affected vehicle. Tr. 97. Mark Huffman was not authorized to issue, modify, or disregard 103(k) Orders. Mark Huffman denied authorizing the work. Robinson was then told that the anonymous authorizer was possibly Inspector Dustin Rutherford. Tr. 97. Inspector Rutherford, while authorized to issue and modify 103(k) Orders, denied allowing work to be done on the truck. Tr. 97.

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<sup>20</sup> 103(j) Orders are not predicates of 103(k) Orders. Even if the (j) Order were invalid, it would have no bearing on the validity of the 103(k) Order. This point was made clear in *Jim Walter Resources*, 37 FMSHRC 1868 (Sept. 2015), by the Commission: "JWR further challenges the section 103(k) order on the basis that the Mine Act does not permit the Secretary to convert a section 103(j) order to a section 103(k) order. The Mine Act permits an inspector present at the mine to issue a 103(k) order to protect persons in the mine. We will not exalt form over substance by finding a 103(k) order invalid because it was issued as a conversion of a 103(j) order. Thus, although we determine that the section 103(j) order is invalid, the (k) order meets all the requirements of the Mine Act and is an independently valid order." *Jim Walter Resources, Inc.*, 37 FMSHRC 1868, at 1871 (Sept. 2015), emphasis added.

At hearing, Inspector Robinson testified that, in conversation with Inspector Dustin Rutherford, he learned that Rutherford had denied the Respondent's verbal request to modify the 103(k) Order some time earlier. Tr. 101.

Beyond the multiple tires and wheels reattached to the vehicle, a grease drum, two ladders, and a fuel hose were removed. S. Ex. 2., Tr. 98. At hearing, the Respondent offered no evidence to suggest that MSHA personnel had permitted this work to be done. The Respondent offered no evidence of mitigation or justification for the actions of the operator and its agents. The fact that personnel at Beech Creek sought to justify their actions by claiming an Inspector had authorized those actions demonstrates they were aware of the procedures for modifying a 103(k) Order. It appears that the operator's agents, perhaps frustrated over the truck's lengthy sequestration under the control order, simply cannibalized the truck for parts.

The Respondent therefore violated the terms of the 103(k) Order.

#### **D. The Violation was Properly Designated as "Reckless Disregard."**

"Reckless disregard" is described in Part 100 as constituting those circumstances where "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3.

Judge McCarthy summarized Judge Paez's analysis of the words "reckless disregard" in the absence of any statutory definition:

As Judge Paez recently noted in *Stillhouse Mining*, supra, Slip op. at 7, the term "reckless" is commonly understood as "without thinking or caring about the consequences of an action [or inaction]," citing *The New Oxford American Dictionary* 1414 (Erin McKean ed., 2d ed. 2005). As a legal term, "reckless" conduct is "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard or indifference to that risk; heedless; rash .... more than mere negligence: it is a gross deviation from what a reasonable person would do." *Black's Law Dictionary* 1298 (8th ed. 2004). The term "disregard" is commonly understood as "to treat without fitting respect or attention: to treat as unworthy of regard or notice: to give no thought to: pay no attention to." *Webster's Third New International Dictionary (Unabridged)* 665 (1993). I note that for civil penalty purposes, 30 C.F.R. §100.3, Table X, defines "reckless disregard" as "conduct which exhibits the absence of the slightest degree of care."

*Pine Ridge Coal*, 33 FMSHRC 987, 1027 at n. 42 (Apr. 2011).

The Secretary's evidence in support of its reckless disregard designation is persuasive. First, the Secretary argues that an inspector verbally refused a request to modify a 103(k) Order but work was nevertheless performed on the sequestered vehicle. Sec'y's Post-Hearing Br., 12. The Secretary argues the negligence here is aggravated by the ease with which an unsatisfied Respondent could seek out a modification from the inspector. *Id.*, at 13.

In *DQ Fire & Explosion*, the Commission found that an operator's actual knowledge of a violation of a 103(k) Order, and failure to act in compliance with federal regulations and orders, constituted high negligence.<sup>21</sup> *DQ Fire & Explosion*, 36 FMSHRC 3090, 3096-7 (Dec. 2014), *aff'd*, 632 F. App'x 622, 625 (D.C. Cir., 2015). In this case, there is evidence in the record that the Respondent's agents knew how to modify a 103(k) Order. Tr. 129-130. Moreover, when Inspector Robinson arrived on the mine site on November 7, 2014, he met Terry Young, the mine mechanic, and *foreman* Bernie Harper. Tr. 96. A foreman's presence, and apparent supervision, of the violation of a 103(k) Order is evidence that the operator, through its agent, was aware of work being done on the sequestered vehicle.

The 103(k) Order, already having been modified in the past at the request of Kentucky Fuel Corporation personnel, is itself evidence that the Respondent was familiar with the procedures for modifying a 103(k) Order. Nevertheless, after a request for modification was denied, work was still performed. If the Respondent was concerned that the terms of the 103(k) Order were overly burdensome, a formal request to modify the 103(k) Order would have been a logical next step. There is no evidence the Respondent sought to modify the 103(k) Order through written communication. The Respondent's actions suggest another decision was made. In the words of Inspector Robinson, "They asked, and we said 'No,' and they did it anyway." Tr. 101.

The fact that work was performed *after* a requested modification was denied is indicative of reckless disregard, perhaps even "a conscious (and sometimes deliberate) disregard." *Black's Law Dictionary* 1298 (8th ed. 2004). The operator's inability to name *who* authorized work on the sequestered vehicle, despite a mine foreman's knowledge of the performance of that work, is evidence the operator failed to exhibit even "the slightest degree of care." 30 C.F.R. § 100.3.

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<sup>21</sup> *DQ Fire & Explosion* also saw the Commission consider whether an alleged informal process of modification could mitigate a Respondent's negligence in violating a 103(k) Order. In that case, the Commission affirmed the ALJ's reasoning that DQ offered no evidence why a belief in an alleged informal modification process was reasonable. *DQ Fire & Explosion*, at 3094. The Respondent argues in its brief that because Inspector Robinson apparently allowed work to be done on the affected truck once during accident reconstruction without a formal modification, the Respondent's agents were justified in later violating the 103(k) Order. Resp't's Post-Hearing Br., 12.

It is not clear from the transcript whether what Robinson did constituted a modification of the 103(k) Order. Tr. 120-2. The Respondent argues that because the violation of the 103(k) Order did not change the scene of the truck at time of accident, it was therefore reasonable for the operator's agents to violate that Order. Resp't's Post-Hearing Br., 12. This rationale was apparently derived from Robinson's willingness to remove tires from the truck on September 24 without a 103(k) Order modification, in order to facilitate accident investigation. Tr. 120. However, the 103(k) Order was modified numerous times on September 24, according to Inspector Robinson. Tr. 93-4. It is unreasonable to assume that the multiple modifications on September 24 were trumped by a single alleged informal modification made on the same day. The Respondent could not reasonably rely on this single day occurrence to justify violating the 103(k) Order.

This Court finds the violation was one of reckless disregard.

## **VI. PENALTY**

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

The Secretary proposed two special assessments in this matter. For Citation No. 8299679, the Secretary proposed a penalty of \$3,000. Sec'y's Post-Hearing Br., 14. For Citation No. 8299655, the Secretary proposed a penalty of \$52,500. The Court finds that the Secretary's penalty assessments are fair and necessary in this case. The Court examines both of the penalty assessments through the statutory list of criteria provided in Section 110(i) of the Mine Act.

### **Citation No. 8299655**

#### **History of previous violations**

The Secretary notes that while the mine has seen no past violations of 30 C.F.R. § 77.404(c) of the Mine Act, the mine did have 18 violations of 30 C.F.R. § 77.404(a) in the fifteen months prior to the issuance of the citations in this case. Sec'y's Post-Hearing Br., 14. This factor is aggravating, as 30 C.F.R. § 77.404(a) concerns the proper maintenance of vehicles, and improper maintenance of a vehicle exacerbated the risk in this violation.

#### **The size of the operator**

As the Secretary notes in his brief, the Respondent stipulated that it mined 114,647 tons of coal in 2013 and 148,741 tons of coal in 2014 at this mine. J.X. 1.

#### **Negligence**

The operator's negligence in violating 30 C.F.R. § 77.404(c) was high, as described *supra*. This is a significantly aggravating factor, given the apparently mine-wide deficiencies in training in and or supply of proper blocking materials. This Court also considers the length of time it would take for the truck's deficiencies to accumulate to the point as depicted in the Secretary's photographs.

#### **Effect of penalties on operator's ability to remain in business**

As the Secretary notes in his brief, the operator has stipulated the penalties in this case will not affect the operator's ability to remain in business. This is a neutral factor.

## **Gravity**

The gravity of Citation No. 8299655 was assessed as “reasonably likely to cause a fatality.” See *infra*. The miner’s actual injuries in this case do not constitute mitigation, as the condition of the vehicle, as well as the deficient training and or supply of blocking materials, made a fatal injury more likely than the actual injury suffered by the mechanic. Both the Secretary and the Respondent’s witnesses testified that being completely rolled over by a truck has a “reasonable potential to cause death.” The fact that the mechanic was not completely rolled over was a matter of happenstance and the gravity in this citation is a significantly aggravating factor.

## **The operator’s efforts at good faith abatement**

The record is bare of evidence that the Respondent moved in good faith to abate these citations before MSHA’s intervention.

## **Citation No. 8299679**

### **History of previous violations**

The Secretary notes that the mine has seen no past violations of Section 103(k) of the Mine Act. Sec’y’s Post-Hearing Br., 14. This is a neutral factor.

### **The size of the operator**

As the Secretary notes in his brief, the Respondent stipulated that it mined 114,647 tons of coal in 2013 and 148,741 tons of coal in 2014 at this mine. J.X. 1.

### **Negligence**

The operator’s negligence in violating Section 103(k) of the Mine Act was evaluated properly as reckless disregard. Two possibilities obtain: either the Respondent’s management ordered miners to disregard a 103(k) Order, or mine management was so unconcerned with the requirements of the 103(k) Order that it allowed work to be done. Regardless, the operator’s conduct was inexcusable and no reasonable mitigation was offered by the Respondent to alter the negligence calculus. This is a significantly aggravating factor.

### **Effect of penalties on operator’s ability to remain in business**

As the Secretary notes in his brief, the operator has stipulated the penalties in this case will not affect the operator’s ability to remain in business. This is a neutral factor.

## **Gravity**

The gravity of Citation No. 8299679 was rated as “No Lost Workdays” as no miner was injured, or reasonably could have been injured, when the Respondent violated the 103(k) Order.

Nevertheless as the Secretary notes in his brief, the Respondent's violation "could have compromised MSHA's investigation into the accident." Sec'y's Post-Hearing Br., at 15. The purpose of 103(k) is, at least partially, to preserve evidence of a violation for future or continuing investigation. S. Rep. No. 95-181, at 29. The gravity of the Respondent's violation, therefore, is aggravating.

### **The operator's efforts at good faith abatement**

The record is bare of evidence that the Respondent moved in good faith to abate these citations before MSHA's intervention.

### **Delinquency**

The Secretary's brief offers a somewhat novel argument for applying another criterion of assessment to the penalties in this case. The Secretary argues that in order to deter future violations, when analyzing special assessments, the Commission is not restricted to the criteria contained within 110(i). Sec'y's Post-Hearing Br., 16-7. Noting that Kentucky Fuel Corporation has been delinquent in paying a large number of final citations and orders, the Secretary argues that this pattern of delinquency should act as an aggravating factor. *Id.*, at 17, citing *Kentucky Fuel Corporation*, 38 FMSHRC 632 (Apr., 2016) and *West Alabama Sand & Gravel, Inc.*, 38 FMSHRC 1532 (June 28, 2016). According to the Secretary's evidence, the Respondent owes at least \$8,000 in delinquent payments for violations that became final orders over two years ago. Sec'y's Post-Hearing Br., at 17.

The Commission recently described the operator's history of payment of penalties as "abysmal." *Kentucky Fuel Corporation*, 38 FMSHRC 632, at 633. (Apr. 2016). In that decision the Commission noted that the operator had an outstanding penalty balance of \$351,696.00. *Id.*

In his brief, the Secretary contrasts the language of *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 841 (June 1996), and *Black Beauty Coal Co.*, 34 FMSHRC 1856 (Aug. 2012). Sec'y's Post-Hearing Br., at 16.

In *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, the Commission held that "the judge abused his discretion . . . in basing the assessment, in part, upon JWR's alleged delinquency in the payment of penalties. An operator's delinquency in payment of penalties is not one of the criteria set forth in section 110(i) for consideration in the assessment of penalties." *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 841, at 850 (June 1996).

In *Black Beauty Coal Co.*, however, the Commission reasoned that "[s]imply put, we refuse to require our Judges to apply blinders . . . and to ignore the central and most obvious purpose of civil penalties – to ensure operator compliance with safety measures – when deciding whether such penalties are appropriate. Deterrence is a principle basic to and underlying the entire statutory scheme of imposing civil penalties." *Black Beauty Coal Co.*, 34 FMSHRC 1856, at 1869 (Aug. 2012).

The Court agrees with Judge Feldman that including delinquency of payment when considering the Secretary's penalty assessment is consistent with the protective purpose of the Mine Act. *West Alabama Sand & Gravel, Inc.*, 38 FMSHRC 1532, at 1540 (June 2016). The Court also agrees with Judge Feldman's reasoning that refusing to consider the broader deterrent purpose of civil penalties is an elevation of form over substance, and inconsistent with the original purpose of civil penalties. *Id.* In *Black Beauty Coal Co.*, the Commission rejected the elevation of form over substance, and reminded ALJs that "the central and most obvious purpose of civil penalties" is to ensure operator compliance. *Black Beauty Coal Co.*, at 1869. As Judge Feldman reasoned, consideration of delinquency during a penalty assessment may induce operators' toward further compliance:

I am cognizant that increasing the civil penalty in view of West Alabama's pattern of delinquency raises an obvious question: How will raising the civil penalty foster compliance in view of West Alabama's apparent disinclination to pay? Encouraging compliance is a two-step process. As noted, compliance is achieved through the payment of civil penalties. Thus, step one involves motivating delinquent mine operators to pay civil penalties by increasing future assessed penalties that, if not paid, become a debt owed to the federal government, collectable through an action brought by the Department of Justice. In step two, by encouraging the payment of civil penalties, the Mine Act's goal of deterrence and future compliance hopefully will be achieved.

*West Alabama Sand & Gravel, Inc.*, at 1540.

This Court will not close the door on considering delinquency in payment for penalty purposes in a future decision. However, the Secretary's penalty assessments are fair without considering Kentucky Fuel Corporation's history of delinquency in payment. The gravity of Citation No. 8299655 was significantly aggravating. The negligence exhibited by the Respondent in each of these citations was inexcusably high, but in particular, Citation No. 8299679 was the product of reckless disregard. In both cases, the addition of another aggravating factor is unnecessary. The Court therefore did not consider delinquency of payment in affirming the Secretary's penalty assessments.

**VII. ORDER TO PAY**

Citation No. 8299655 is affirmed as issued. Citation No. 8299679 is affirmed as issued.

Accordingly, it is hereby **ORDERED** that the operator pay a penalty of \$55,500.00 within 30 days of the issuance of this order.<sup>22</sup>

/s/ William S. Steele  
William S. Steele  
Administrative Law Judge

Distribution:

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<sup>22</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 7, 2016

THE DOE RUN COMPANY,

Contestant,

v.

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

Respondent.

CONTEST PROCEEDINGS

Docket No. CENT 2016-279-RM  
Citation No. 8626619; 03/17/2016

Sweetwater Mine/Mill  
Mine ID 23-00458

Docket No. CENT 2016-280-RM  
Citation No. 8626620; 03/17/2016

Viburnum #29 Mine  
Mine ID 23-00495

Docket No. CENT 2016-281-RM  
Citation No. 8626621; 03/17/2016

Brushy Creek Mine/Mill  
Mine ID 23-00499

Docket No. CENT 2016-282-RM  
Citation No. 8626622; 03/17/2016

Fletcher Mine/Mill  
Mine ID 23-00409

Docket No. CENT 2016-283-RM  
Citation No. 8626623; 03/17/2016

Viburnum #35 (Casteel Mine)  
Mine ID 23-01800

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

Petitioner,

v.

THE DOE RUN COMPANY,

Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2016-392  
A.C. No. 23-00409-408952

Mine: Fletcher Mine and Mill

Docket No. CENT 2016-393  
A.C. No. 23-00458-408953

Mine: Sweetwater Mine/Mill

Docket No. CENT 2016-394  
A.C. No. 23-00495-408954

Mine: Viburnum #29 Mine

Docket No. CENT 2016-395  
A.C. No. 23-00499-408955

Mine: Brushy Creek Mine/Mill

Docket No. CENT 2016-396  
A.C. No. 23-01800-408957

Mine: Viburnum #35 (Casteel Mine)

**AMENDED DECISION APPROVING SETTLEMENT<sup>1</sup>**  
**ORDER TO DISMISS**

Before: Judge Simonton

These dockets are before me upon The Doe Run Resources Corporation's ("The Doe Run Company" or "Doe Run") notices of contest and the Secretary's petitions for assessment of civil penalty issued in accordance with the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* ("Mine Act") and 29 C.F.R. § 2700.50 *et seq.* The Parties have filed a Joint Motion to Approve Settlement and Dismiss Proceeding, as well as a formal Agreement with Figures 1-8 appended thereto (the "Agreement").

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<sup>1</sup> This Decision Approving Settlement has been amended to clarify that Citation No. 8960639 in Docket No. CENT 2016-393 is not included in this settlement. Accordingly, the Decision amends the last sentence to reflect the fact that all penalty dockets, except for CENT 2016-393, are dismissed.

On March 17, 2016, MSHA issued Citation Nos. 8626619, 8626620, 8626621, 8626622 and 8626623 to multiple Doe Run mines alleging violations of 30 C.F.R. § 57.11050(a) on the basis that two escapeways were not provided to the surface from all working areas. Doe Run timely contested the issuance of each citation pursuant to 29 C.F.R. § 2700.20. Doe Run further contested the proposed penalty assessments to the aforementioned citations pursuant to 29 C.F.R. § 2700.26. On August 19, 2016, I granted the Secretary's Unopposed Motion to Consolidate and Stay Civil Penalty Proceedings which consolidated the Contest cases with the Civil Penalty cases and stayed the Civil Penalty cases pending a final resolution of the Contest cases.

Doe Run maintains that 30 C.F.R. § 57.11050(a) limits the two escapeway requirement to the lowest levels of the mine rather than all working areas. MSHA disagrees. Beginning on June 20, 2016, a four (4) day trial on the merits was held before me in St. Louis, Missouri. Recognizing, however, the risks associated with an adverse ruling against either Party, as well as facts and circumstances specific to the Doe Run mines and Department of Labor's administration of the Mine Act at these mines, the Parties engaged in significant settlement discussions following the trial which resulted in a comprehensive settlement agreement. As set forth in the Agreement, in consideration of MSHA voluntarily vacating Citation Nos. 8626619, 8626620, 8626621, 8626622 and 8626623, Doe Run will, among other things, locate and install Refuge Chambers and designated points of safety ("DPOS") in single access areas as specified in the Agreement.

The Commission has made clear that "[s]ettlement of contested issues is an integral part of dispute resolution under the Mine Act." *Hickory Coal Co., 16 FMSHRC 226 (Rev. Comm. February 1994)*. A settlement agreement is a form of contract; therefore, basic principles of contract law govern the existence and enforcement of such agreements. *Chaganti & Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1221 (8th Cir. 2006); *MLF Realty L.P. v. Rochester Ass'n*, 92 F.3d 752, 756 (8th Cir. 1996). To establish a contract with the United States, as is the case here, the party seeking to enforce the contract must demonstrate a mutual intent to contract, including an offer, an acceptance, and consideration, as well as a showing that the government representative had actual authority to bind the United States. *Compliance Sols. Occupational Trainers, Inc. v. United States*, 118 Fed. Cl. 402 (2014); *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cr. 2003).

After thoroughly reviewing the Agreement, it is clear to me that the Agreement is the product of extensive negotiation over a number of months between the Parties. It is further evident that the terms of the Agreement were negotiated and approved by Neal H. Merrifield, Administrator for Metal and Nonmetal Safety and Health, and Steve Batts, Vice-President Southeast Missouri Operations, both of whom have the authority to enter into the Agreement on behalf of MSHA and Doe Run, respectively. It is unmistakable that the Parties intend for the Agreement to be legally binding upon and shall inure to the benefit of each of them and their respective successors and assigns. In sum, I find that the Parties' Agreement contains all of the necessary elements of an enforceable contract, including mutual intent, offer, acceptance, consideration and authority to bind.

It is also evident that the Agreement is designed (1) to resolve the current litigation and (2) absent future rulemaking modifying relevant miner escape provisions in Subpart J of 30 CFR

Part 57, to provide a defined and enforceable means of compliance with the escapeway provisions contained in 30 C.F.R. § 57.11050(a) (as such standard exists as of the date of the Agreement) at all currently existing Doe Run mines (comprising of Sweetwater Mine/Mill, Mine ID No. 23-00458; Viburnum #29 Mine, Mine ID No. 23-00495; Brushy Creek Mine/Mill, Mine ID No. 23-00499; Fletcher Mine/Mill, Mine ID No. 23-00409; Viburnum #35 Casteel Mine, Mine ID No. 23-01800; and Buick Mine, Mine ID No. 23-00457) presently and in the future. In the event Doe Run consolidates any of the aforementioned mines and/or MSHA assigns new Mine IDs to the aforementioned mines, the Parties intend for the Agreement to apply to the consolidated mine(s) (regardless of mine name) and newly issued mine IDs.

### **ORDER**

After considering the representations and documentation submitted in this case, I conclude that the Agreement is appropriate under the criteria set forth in the Mine Act.

**WHEREFORE**, the Parties' Joint Motion to Approve Settlement and Dismiss Proceeding is **GRANTED**.

It is **ORDERED** that Citation Nos. 8626619, 8626620, 8626621, 8626622 and 8626623 are vacated.

It is **FURTHER ORDERED** that the Parties' Agreement be approved as an enforceable Order of the Federal Mine Safety and Health Review Commission.

It is **FURTHER ORDERED** that Doe Run locate and use Refuge Chambers and DPOSS and follow other protective provisions as provided in the Agreement.

It is **FURTHER ORDERED** that absent future rulemaking modifying relevant miner escape provisions in Subpart J of 30 CFR Part 57, the Agreement is to provide a defined and enforceable means of compliance with the escapeway provisions contained in 30 C.F.R. § 57.11050(a) (as such regulation exists as of the date of the Agreement) at all Doe Run mines (Sweetwater Mine/Mill, Mine ID No. 23-00458; Viburnum #29 Mine, Mine ID No. 23-00495; Brushy Creek Mine/Mill, Mine ID No. 23-00499; Fletcher Mine/Mill, Mine ID No. 23-00409; Viburnum #35 Casteel Mine, Mine ID No. 23-01800; and Buick Mine, Mine ID No. 23-00457) presently and in the future.

It is **FURTHER ORDERED** that the above-captioned Contest dockets, as well as Penalty Docket Nos. CENT 2016-392, CENT 2016-394, CENT 2016-395, and CENT 2016-396 be dismissed.

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 9, 2016

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

v.

RED RIVER COAL COMPANY, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2015-303  
A.C. No. 44-05971-389169

Mine: Stoker

## DECISION AND ORDER

Before: Judge Simonton

On October 31, 2016, the Secretary and Red River Coal Company, Inc. (“Red River”) filed motions for summary decision. At issue is a single citation, Citation No. 8201361, issued on June 22, 2015, to Red River. The citation originally cited a violation of 30 C.F.R. § 71.403(c) for Red River’s failure to have a valid bathhouse waiver. The Secretary has since modified the citation to a violation of 30 C.F.R. § 71.400 for Red River’s failure to provide a bathing facility, clothing change room, and sanitary flush toilet facilities. Neither party disputes that Red River did not have the required facilities or a bathhouse waiver at the time the citation was issued. Thus, the only issue presented for summary decision is whether Red River had adequate notice of the citation and the Secretary’s requirements for approving a bathhouse waiver application. Red River argues that District 5 of the Mine Safety and Health Administration (“MSHA” or “District 5”) has inconsistently applied the bathhouse waiver regulations over the past few years and did not provide adequate information to assist Red River in submitting a satisfactory renewal application. The Secretary argues that Red River had notice that it would receive a citation for its failure to have a current waiver and did not in fact have a waiver at the time the citation was issued. After careful consideration of the parties’ motions, the attached exhibits, the relevant case law, and the entire record in the case, I deny Respondent’s motion for summary decision and grant the Secretary’s motion.

### I. FACTUAL BACKGROUND

30 C.F.R. § 71.400 requires operators to provide bathing facilities, clothing change rooms, and sanitary flush toilet facilities. In cases where mines have arrangements with third parties to satisfy the bathhouse requirement or are unable to construct or support a surface bathhouse facility at the mine site, an operator may apply for a waiver under 30 C.F.R. § 71.403. Standard bathhouse waivers extend for a 1-year period, and must be renewed annually. 30 C.F.R. § 71.403(a). If necessary, operators may file for an extension of a waiver at the end of the one-year period. 30 C.F.R. § 71.403(d). The requirements for granting a waiver are quite general. Section 71.404(a) requires the application contain the name and address of the mine

operator, the name and location of the mine, and “a detailed statement of the grounds upon which the waiver is requested and the period of time for which it is requested.” Operators must have a current waiver or extension at all times.

The conditions at Red River’s Stoker Plant are unsuitable for facilities that require plumbing, and Red River therefore must apply for the bathhouse waiver each year. Prior to 2010, Red River’s waiver applications were approved without issue. Red River’s approved applications contained the same information: an application form with mine and operator information and employee signatures; a detailed statement written by the mine safety director describing the grounds for the request; and a letter from the Wise County/City of Norton Department of Health dated January 12, 2011, that denied Red River a sewage disposal construction permit (“Sewage Permit Denial”). Resp. Ex. C, D. Since 2011, however, the MSHA District 5 Manager has denied two of Red River’s bathhouse waiver applications.

Red River first began to experience changes in the waiver approval process after Greg Meikle assumed the District Manager position. On April 24, 2013, Meikle denied Red River’s February 8, 2013 waiver application. Resp. Ex. E. Red River’s application contained the same information as the previous two applications, which were approved. Meikle explained, however, that “based on the letter from Wise County/City of Norton Health Department, dated January 12, 2011, there may be alternative sewage disposal systems that might be applicable to [Red River’s] situation, but [Red River did] not pursue[ ] these alternatives.” *Id.* MSHA subsequently issued a citation to Red River for its failure to have bathing facilities, clothing change rooms, and sanitary facilities on the mine site. *See* Resp. Ex. H. On May 14, 2013, Meikle approved Red River’s interim application for a six-month extension while it looked into alternative sewage disposal systems. Resp. Ex. G.

On November 18, 2013, Red River submitted a bathhouse waiver application that addressed District Manager Meikle’s concerns. In addition to the waiver form and sewage permit denial, Red River provided more detail on the alternative sewage disposal systems. In its grounds for the request letter, Red River directly addressed the alternative sewage disposal systems, discussed the lack of potable water, distance from the closest public water line and public sewage line, Red River’s inability to obtain a building permit, and cost prohibitions as factors in favor of granting a waiver. Resp. Ex. J. Red River also provided a letter from the County of Wise Department of Building and Zoning. *Id.* The letter stated that no public water or sewer system was available at the mine site to support the construction of a bathing facility. *Id.* District Manager Meikle approved this application on January 16, 2014, to expire on January 16, 2015. Resp. Ex. I.

On November 10, 2014, MSHA CLR Hagel Campbell and William J. Sturgill, attorney for Red River, had a conference call with Administrative Law Judge Moran on the 2013 citation. Following the call, MSHA vacated the citation. Resp. Ex. Q.

Red River would again encounter problems upon District Manger Meikle’s departure and replacement the following year. On December 11, 2014, Red River submitted its application for renewal to the District Manager. *See* Resp. Ex. L. The application contained the same information approved by Meikle the prior year: the application; the detailed explanation of the

grounds for Red River's request; the sewage permit denial; and the letter from the County of Wise department of building and zoning. *Id.* However, District Manager Clayton E. Sparks denied Red River's waiver application on February 4, 2015. Resp. Ex. K. Sparks explained that "with the life of this mine being 7 to 10 years, all avenues need to be researched before a waiver could be granted." *Id.* District Manager Sparks specifically referred to the pump and haul system. *Id.* Oddly, Red River's Safety Director did discuss the infeasibility of the pump and haul system and identified the lifespan of the mine to be 5 to 7 years in his detailed letter describing Red River's grounds for approval. *See* Resp. Ex. J, L.

Red River did not request an extension or submit an amended bathhouse waiver application immediately after receiving District Manager Sparks' denial. Instead, it waited almost five months to receive a citation so that it could challenge the District Manager's enforcement of the waiver regulations. Resp. Mot. at 6. On June 22, 2015, MSHA Inspector Joe Black issued the citation to Red River for not having a bathhouse waiver. Sec'y Ex. 1. The citation alleged a violation of 30 C.F.R § 71.403(c). Section 71.403(c) provides "Upon receipt of any waiver, the operator shall post a copy of the waiver for at least 30 days on the mine bulletin board required by section 107(a) of the Act." On September, 29, 2016, the Secretary moved to amend the pleadings to change the section violated to section 71.400, which provides:

Each operator of a surface coal mine shall provide bathing facilities, clothing change rooms and sanitary flush toilet facilities, as hereinafter prescribed, for the use of miners employed in the surface installations and at the surface worksites of such mine.

The citation was marked non-S&S, unlikely to result in lost workdays, and the result of moderate negligence. Red River did not file an objection to the Secretary's motion to amend the citation, and this court granted the motion on October 6, 2016.

On July 7, 2015, Red River submitted an amended application for a bathhouse waiver. The application contained all of the same information as the previous application, save for an amended letter written by Red River's Safety Director and an updated letter from the Wise County Department of Building and Zoning. Resp. Ex. N. Red River's new letter included the same information as the previously approved application, including a discussion of alternative sewage disposal systems in bullet-point format, and discussed the cost of pumping associated with the alternatives. *Id.* It also discussed the infeasibility of an onsite septic system or alternative package plant system, and explained that pump and haul permits are only temporary measures. *Id.* The updated letter from the County of Wise Department of Building and Zoning stated that drilling a well was likely cost prohibitive, that pump and haul permits are only temporary measures, and that site compaction would require a plat. *Id.* It also included a copy of the Virginia state laws for the construction of wells. *Id.* On July 29, 2015, District Manager Sparks approved Red River's amended application. Resp. Ex. M.

Red River currently has an up-to-date waiver. On June 27, 2016, Red River submitted its bathhouse waiver renewal with the same information and was approved on July 22, 2016. Resp. Ex. O, P.

## II. SUMMARY JUDGMENT STANDARD

The Court may grant summary decision where the “entire record...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); *see also UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is “a fact that is significant or essential to the issue or matter at hand.” *Black’s Law Dictionary* (9th ed. 2009, *fact*). “There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor.” *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted). The court must evaluate the evidence “in the light most favorable to ... the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn “from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.” *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party’s claims. *Celotex*, 477 U.S. at 323. “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

## III. DISCUSSION

The Secretary argues, and the Respondent does not dispute, that Red River did not have a current bathhouse waiver at the time the citation was issued, and thus the citation should be upheld. Red River argues that the citation is invalid because the Secretary did not provide adequate notice of what information it must provide to receive a bathhouse waiver. Red River asserts that the Stoker Plant’s conditions have not changed over the past five years. Red River claims that the Secretary has denied its bathhouse waiver applications two times in that span despite the fact that Red River has submitted the same application that was approved the year before. We therefore look to whether Red River had fair notice of the regulations and whether the citation should be upheld.

Considerations of due process prevent adoption of the agency’s interpretation “from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010). To comport with due process, laws must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Hecla Limited*, 38 FMSHRC 2117, 2125 (Aug. 2016) (citations omitted).

The notice requirement is satisfied when a party receives actual notice of MSHA’s interpretation of a regulation prior to enforcement of that standard against the party. *See LaFarge North America*, 35 FMSHRC 3497, 3500 (Dec. 2013). In the absence of actual notice, the

Commission applies an objective standard, commonly known as the “reasonably prudent person test.” *See Wolf Run*, 32 FMSHRC at 1682 (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). The standard assesses “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC at 2416. In deciding whether a party had fair notice, the Court may look to whether (1) the plain language of the cited standard is clear and unambiguous, (2) the Secretary has issued guidance regarding its interpretation, (3) the company was given pre-enforcement warning, (4) previous citations were issued to the mine, or (5) a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the standard’s specific prohibition or requirement. *Ash Grove Cement Co.*, 38 FMSHRC 2151, 2159 (Aug. 2016) (ALJ) (citing *Wolf Run Mining Co.*, 32 FMSHRC at 1682).

Red River argues that the citation at issue should be vacated because the Secretary has inconsistently assessed Red River’s bathhouse waiver applications and failed to provide notice of what is required to merit approval. The Secretary’s denial of Red River’s waiver application, however, did not constitute the violation at issue. The Secretary issued a violation to Red River for failing to have a current waiver or providing the required facilities, not for failing to submit an adequate application. We must therefore first look to whether Red River had fair notice that the citation would be issued.

It is undisputed that Red River did not have a bathhouse waiver at the time that the citation was written. The plain language of sections 71.400 and 71.403 clearly indicate that if the mine site does not have bath facilities, changing rooms, or flush toilets, it must have a current waiver. Red River had received a similar citation in 2013 for failing to have an unexpired bathhouse waiver and admitted that it purposefully delayed reapplying for a waiver in order to receive the citation and challenge the Secretary’s inconsistent enforcement of the waiver application process. *See Resp. Mot.* at 6. Thus Red River had actual knowledge that it would be issued a citation if it failed to comply with the standard.

Having found that Red River had actual knowledge that it would receive a citation if it did not have a valid waiver, I do not find that MSHA’s prior inconsistent enforcement was sufficient to unfairly deprive Red River of notice. The Commission has long held that an inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding under an application of the standard it concludes is correct. *Austin Powder Co.*, 29 FMSHRC 909, 919-20 (Nov. 2007) (citing *Nolichuckey Sand Co.*, 22 FMSHRC 1057). Prior inconsistent enforcement is only one of several factors that the Commission considers in evaluating whether an operator has received fair notice. *Alan Lee Good*, 23 FMSHRC 998, 1006 (Sept. 2011) (Commissioners Jordan & Beatty).

Here, District 5’s bathhouse waiver approval procedure was inconsistent. In each instance where Red River’s application was denied, the denied application had been approved by District 5 the year before. District Manager Sparks’ denial letter requested more detailed information regarding all potential sewage disposal alternatives, but did not give Red River any guidance beyond requiring it to discuss all possible avenues, some of which Red River had already addressed in the previous application. *See Resp. Ex. K.*

However, MSHA's inconsistent prior enforcement does not mean that Red River did not have fair notice, especially in relation to the citation at issue. The factual context surrounding the citation demonstrates that Red River was aware of the waiver approval process and had the opportunity to avoid the citation.

First, Red River had been previously placed on notice as to the application process and an operator's options following a denial. As discussed above, District 5 issued a similar citation to Red River for failing to have a current bathhouse waiver in 2013. In that instance, Red River's initial waiver application was denied for failure to discuss alternative sewage disposal systems. After receiving a citation, Red River quickly submitted an application for an extension, followed by an amended application responding to the District Manager's explanation. Director Meikle approved Red River's extension and subsequent application, and MSHA vacated the citation. While the fact that the previous citation was vacated does not bear on the validity of the current citation, it demonstrates that Red River was previously placed on notice regarding the importance of discussing alternatives in its application. It also demonstrates that District 5 was willing to assist and accommodate operators in obtaining a bathhouse waiver.

Second, the five-month gap between the denial and the citation gave Red River ample time to reply to the denial, seek additional guidance from District 5, and reapply for the waiver before receiving a citation. District Manager Sparks denied Red River's waiver application on February 4, 2015, and MSHA Inspector Black did not issue the citation to Red River for lack of a waiver until June 22, 2015. Thus, the denial was not an enforcement measure, but more akin to a pre-enforcement warning that gave Red River notice of the potential violation. *See General Elec. Co., v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that the agency's pre-enforcement warnings to bring about compliance with its interpretation may provide adequate notice to regulated parties). Red River had knowledge that it was required to have a bathhouse waiver, and that if it did not, MSHA would issue a citation. Red River thus had months to reply to the denial or file an extension and seek clarification regarding the waiver requirements, and successfully reapply. Red River opted not to take that opportunity. Thus, the denial letter served as a pre-enforcement warning and notice of the citation at issue.

Even assuming that Red River did not have actual notice of the citation or regulations, a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the need to work with MSHA to obtain a bathhouse waiver as soon as their previous waiver expired. The provisions at issue are designed to ensure that miners have an area to sanitize before and after working in the mines, and a reasonably prudent miner familiar with this purpose would recognize that failing to provide such facilities, or failing to obtain a waiver, is in direct contravention of the act. 30 C.F.R. §§ 71.400-71.402. While MSHA could have been more explicit and consistent in explaining their requirements for approval of the bathhouse waiver, it is the responsibility of the operator once put on notice not to let a violation continue. *See Consul Buchanan Mining Co. v. Sec'y of Labor*, No. 15-1321, 2016 WL 6648676 (4th Cir. Nov. 10, 2016). District Manager Sparks provided enough explanation in his denial letter to begin a dialogue regarding the application before the risk of a penalty became imminent. Vacating this citation would, therefore, contradict Congress's mandate that mines and operators are primarily responsible for ensuring that their mines are safe and complying with the health and safety standards. 30 U.S.C. 801(e); *see id.*

Red River argues that “a constantly changing standard year in and year out when the regulations have remained the same can certainly have significant and possibly drastic consequences on the operations of Red River and its ability to remain in operations.” Resp. Mot. at 6-7. There is no doubt that MSHA could have and should have been more specific in what it expected from Red River. MSHA would do well to fully explain the reasons behind its denials of applications, especially in instances such as this one where it is unclear what exactly the operator’s application lacked. However, MSHA did wait nearly five months to issue a citation and thus opened the door for dialogue and discussion regarding the specifics of the denial. Red River cannot be said to have lacked notice when it refused to engage in discussions that could advance understanding of the health and safety standards and avoid enforcement measures altogether.

Accordingly, I find that Red River had fair notice of the standard and uphold the violation.

#### IV. PENALTY ASSESSMENT

Section 110(i) of the Mine Act grants Commission Administrative Law Judges (“ALJs”) the authority to assess penalties under the Mine Act *de novo*, in accordance with six criteria. ALJs must consider:

(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 the violation.

30 U.S.C. § 820(i). The Secretary proposed a penalty of \$100.00 for the violation. Since I have granted the Secretary’s motion for summary decision, I have reviewed the six criteria to ensure that the penalty is proper. I find that the Stoker Plant is a small mine, and as discussed above has been cited once previously for this violation; a citation that was later vacated. The parties stipulated that the penalty will not affect Red River’s ability to continue in business. Stip. #4. The violation was not serious and was the result of moderate negligence. I find that Red River abated the violation in good faith when it resubmitted and was approved for a new bathhouse waiver. Accordingly, I find that a penalty of \$100.00 is appropriate.

## V. ORDER

Based on my review of the record and the applicable law, I find that there is no dispute of material fact and the Secretary is entitled to summary decision as a matter of law. The Secretary's motion for summary decision is **GRANTED** and Respondent's motion for summary decision is **DENIED**.

The Respondent, Red River Coal Company, Inc. is **ORDERED** to pay the Secretary of Labor the sum of **\$100.00** within 30 days of this order.<sup>1</sup>

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

Distribution: (U.S. First Class Mail)

Hagel Campbell, M. RosAnn Beaty, Conference & Litigation Representatives, U.S. Department of Labor, MSHA, P.O. Box 560, Norton, VA, 24273

William J. Sturgill, Sturgill Law Office, P.C., 944 Norton Road, P.O. Box 3458, Wise, VA 24293

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<sup>1</sup> 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 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

December 9, 2016

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

v.

C.R. MEYER & SONS COMPANY INC,  
Respondent.

C.R. MEYER & SONS COMPANY INC,  
Contestant,

v.

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-482-M  
A.C. No. 04-02542-323448

Mine: MT Pass Mine and Mill

CONTEST PROCEEDING

Docket No. WEST 2013-826-RM  
Citation No. 6476312; 04/25/2013

MT Pass Mine & Mill  
Mine ID: 04-02542 1ZU

## **DECISION AND ORDER**

Before: Judge Miller

This matter is before me on the parties' cross-motions for summary decision. The Secretary issued the single citation in this case based on the alleged failure of C.R. Meyer & Sons Company, Inc., to reinstate Dustin Rodriguez to his former position as required under a temporary reinstatement order issued by Commission Administrative Law Judge Steele on April 17, 2013. *See Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 981 (Apr. 2013) (ALJ). The threshold question in this case is whether the Secretary has the authority to issue a citation based on a violation of a temporary reinstatement order. C.R. Meyer argues that the Secretary does not have such authority and that the company is entitled to summary decision. The Secretary argues that he does have authority to issue the citation, and that the record shows that he has proven a violation. After careful consideration of the parties' motions, the attached exhibits, the relevant case law, and the entire record in the case, I deny Respondent's Motion for Summary Decision and grant the Secretary's Cross-Motion.

### **I. FACTUAL BACKGROUND**

The facts set forth are based on the parties' statements of material facts and the documents and affidavits submitted with the motions for summary decision. The facts are uncontested except where otherwise noted.

Dustin Rodriguez began working for C.R. Meyer on December 13, 2012, as a journeyman pipefitter. The company asserts that Rodriguez was laid off on January 24, 2013, because of performance issues, and that by February 22, 2013, all pipefitting work at the Mountain Pass Mine and Mill had concluded.<sup>1</sup> On February 25, 2013, Rodriguez filed a complaint of discrimination with MSHA. Shortly thereafter, the Secretary filed an application for temporary reinstatement with the Commission on Rodriguez's behalf. Commission Administrative Law Judge Steele conducted a hearing on the Secretary's application on April 10, 2013. He issued an order granting the Secretary's application on April 17, 2013, in which he ordered C.R. Meyer to reinstate Rodriguez immediately at the same rate of pay and benefits as he had had at the time of his discharge.

In a conference call with Judge Steele and the attorney for the Secretary on April 19, 2013, Erik Eisenmann, counsel for C.R. Meyer, stated that the company intended to petition the Commission for review of the order and to request a stay of the order. He further explained that C.R. Meyer did not intend to reinstate Rodriguez "at the very least until [it received] a decision from the Commission." The parties dispute the meaning of Eisenmann's statement as set forth in the transcript of the telephone conference. The Secretary claims that Eisenmann was referring to the Commission's decision on the merits of the temporary reinstatement order, and C.R. Meyer asserts that he was referring only to the Commission's ruling on the motion to stay. In either interpretation, the mine refused to reinstate Rodriguez as ordered, without further ruling from the Commission.

C.R. Meyer filed a petition for review of Judge Steele's order with the Commission on April 23, 2013, along with a motion to stay the order pending appeal. The next day, the Secretary filed a complaint in the U.S. District Court for the Central District of California, seeking a temporary restraining order and preliminary injunction to compel C.R. Meyer to comply with Judge Steele's order. On April 25, MSHA issued the Section 104(a) citation at issue in this case based on the alleged failure of C.R. Meyer to comply with Judge Steele's order to reinstate Rodriguez. The Secretary alleged that the company had not yet reinstated Rodriguez and that this constituted a violation of Section 105(c) of the Act. The citation also alleged that the operator had indicated to the judge that it did not intend to comply with his order until it obtained "a final decision from the FMSHRC, although no stay [had] been entered of the ALJ's order." Compl. Ex. A.

On April 26, the Commission issued an order denying C.R. Meyer's motion for a stay. The same day, the company sent a letter to Rodriguez informing him that he had been reinstated effective April 18, 2013. It notified him that it would issue a check to him for the work days April 18 and 19 and promised to pay him the following week for the work days April 22 through 26. The company asserts that April 26 was the standard pay date for work on April 18 and 19. The Secretary, on the other hand, argues that, given that the mine would not immediately reinstate Rodriguez, the standard pay dates are immaterial to the outright refusal to reinstate. Sec'y Cross-Mot. and Opp. at 21. Rodriguez subsequently returned to work with C.R. Meyer and continued to work there until May 17, 2013.

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<sup>1</sup> The Secretary does not agree with the mine's description of Rodriguez's discharge but argues that it is not material to the citation that is the subject of this case. *See* Sec'y Cross-Mot. and Opp. at 21.

The Commission ultimately granted review of Judge Steele's order and issued a decision on May 10, 2013, finding that the judge had erred in excluding evidence that C.R. Meyer no longer had pipefitting work for Rodriguez. The parties entered into a settlement agreement resolving the discrimination case in August 2013.

## II. SUMMARY JUDGMENT STANDARD

Commission Rule 67 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 facts; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

In reviewing the record on summary decision, the judge must consider the record "in the light most favorable to ... the party opposing the motion." *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). The judge should not rely solely on the parties' claims, but must conduct an independent review of the record. *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016). Inferences drawn from the facts in the record must also be viewed in the light most favorable to the party opposing the motion. *Id.* (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Both parties allege that there is no dispute of material fact and that this case is appropriate for summary decision.

## III. DISCUSSION

### A. *The Secretary's Authority Under Section 104(a)*

C.R. Meyer's principal argument is that the Secretary has no authority to issue a citation based upon an operator's failure to follow an Administrative Law Judge's order of temporary reinstatement. It argues that the citation issued by the Secretary is "in the nature of contempt" because it attempts to impose a fine based on the company's failure to comply with a court order. It argues that contempt power is ordinarily not given to administrative agencies, and so should not be inferred. The company further argues that Section 104(a) authorizes the Secretary to issue citations for violations of "health or safety" standards, rules, orders, or regulations only, and that a temporary reinstatement order should not be considered a health or safety order. C.R. Meyer concludes that MSHA may only enforce a temporary reinstatement order in a federal district court, and therefore the 104(a) citation should be vacated.

The Secretary argues that Section 104(a) is plain on its face and authorizes him to issue a citation for a violation of any order, including a temporary reinstatement order issued by a Commission ALJ. He argues that even if the language of Section 104(a) is ambiguous, his

interpretation is reasonable and entitled to deference. The Secretary asserts that while he has the authority to enforce an order of an ALJ in a separate proceeding in federal district court, he may also choose to issue a citation such as the one in this case. Each is a separate and distinct action.

This case turns on a question of statutory interpretation, and thus the first issue to address is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. If the statute is ambiguous, the Commission gives deference to the Secretary’s interpretation according to its “power to persuade.” *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Knox Creek Coal Corp. v. Sec’y of Labor, Mine Safety & Health Admin.*, 811 F.3d 148, 160 (4th Cir. 2016); *N. Fork Coal Corp. v. Fed. Mine Safety & Health Review Comm’n*, 691 F.3d 735, 743 (6th Cir. 2012). The weight given to the Secretary’s position depends upon “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements,” among other factors. *Skidmore*, 323 U.S. at 140; *N. Fork Coal*, 691 F.3d at 743.

The relevant statutory provision here, Section 104(a), provides as follows:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or *any* mandatory health or safety standard, rule, *order*, or regulation *promulgated pursuant to this chapter*, he shall, with reasonable promptness, issue a citation to the operator.

30 U.S.C. § 814(a) (emphasis added). A reading of this provision of the Mine Act clearly authorizes the Secretary to issue a citation for a violation of any order, including a temporary reinstatement order. Section 105(c)(2) provides that upon receipt of a discrimination complaint, “if the Secretary finds that such complaint was not frivolously brought, the Commission ... shall order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2). Thus, a temporary reinstatement order is clearly “promulgated pursuant to” the Act, and one of the ways the Secretary may enforce an order is by issuing a 104(a) citation.

C.R. Meyer asserts that there is some ambiguity in the provision by arguing that “orders” enforceable under 104(a) are limited to “health or safety ... orders.” Resp. Mot. at 7. It cites the “series-qualifier” canon of statutory construction, under which a modifier at the beginning or end of a list of terms applies to all terms in the list, so long as the modifier makes sense with all of the terms. *Id.* (citing *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012)). Thus, the company argues that when Congress authorized the Secretary to issue citations for violations of “any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter,” Congress intended the words “health or safety” to be a limiter on “rule, order, or regulation.” However, the Supreme Court has stated that the series-qualifier canon should not be applied where contextual cues point to another meaning. *Lockhart v. United States*, 136 S. Ct. 958, 964–65 (2016). In the Mine Act, “mandatory health or safety standard” is a defined term referring to a specific set of regulations, *see* 30 U.S.C. § 803(l), and it is used throughout the Act. *See, e.g.*, 30 U.S.C. § 811 (directing the Secretary to develop “improved mandatory health or

safety standards”); 30 U.S.C. § 821 (providing compensation for miners upon closure of a mine for the operator’s failure to comply with “any mandatory health or safety standards”); 30 U.S.C. § 814(e)(1) (providing enhanced enforcement mechanisms for a “pattern of violations of mandatory health or safety standards”). Thus, it is most likely that Congress intended to invoke a term of art in Section 104(a) and did not intend “mandatory health or safety” to apply to all of the terms in that provision.

In line with this interpretation, the Commission has upheld a 104(a) citation issued for a violation of an order that did not directly involve health or safety. *See Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1336-37 (June 2016). In *Hopkins County Coal*, the Secretary requested personnel records from a mine operator as part of a discrimination investigation, as permitted under Section 103(h) of the Act. *Id.* at 1317. When the mine operator refused to produce the records, the Secretary issued a 104(a) citation for a violation of Section 103(h). *Id.* The mine continued to refuse, and the Secretary issued a failure to abate order pursuant to Section 104(b) of the Act. *Id.* When the mine refused again, the Secretary issued a second 104(a) citation for a violation of the failure to abate order. *Id.* at 1336-37. While the Commission noted that the initial 104(a) violation “may not present an immediate safety risk,” it nevertheless upheld the failure to abate order and the subsequent 104(a) citation. *Id.* It noted that this outcome was “consistent with the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an operator incurs repeated violations and refuses to comply.” *Id.* at 1336.

Even if Congress did intend to limit the Secretary’s citation power to violations of “mandatory health or safety orders” as argued by the mine, it is likely that a temporary reinstatement order would fall under the broader definition of “health or safety.” The legislative history of the Mine Act is clear that the anti-discrimination provisions of the Act are intended to encourage miners to “be active in matters of safety and health” and to “play an active part in the enforcement of the Act” so as to increase the effectiveness of the Act. S. Rep. No. 95-181, at 35 (1977). A temporary reinstatement order enforcing the anti-discrimination provisions of the Act is thus intended to improve mine safety and health and could therefore be considered a “health or safety order.”

Next, C.R. Meyer argues that the citation at issue is “in the nature of contempt” because it attempts to impose a fine based on the company’s failure to comply with a court order. The company argues that contempt power is ordinarily not given to administrative agencies, and should not be inferred absent clear wording to the contrary. The company thus argues that the Secretary’s only means of enforcing a temporary reinstatement order is to seek an injunction in federal district court and that the Secretary may not also use the sanctions associated with a citation. This argument relies on language in the Supreme Court case *Interstate Commerce Commission v. Brimson*, in which the Court observed that “a subordinate administrative or executive tribunal ... could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment.” 154 U.S. 447, 485 (1894), *overruled on other grounds by Bloom v. Illinois*, 391 U.S. 194, 198–200 (1968). *Brimson* involved enforcement of an administrative subpoena in a federal court of appeals, and several courts of appeals have subsequently applied its language in finding that administrative agencies do not have the power to enforce their own subpoenas. *See NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 497–98 (4th Cir. 2011); *NLRB v.*

*Detroit Newspapers*, 185 F.3d 602, 605–06 (6th Cir. 1999); *NLRB v. Int'l Medication Sys., Ltd.*, 640 F.2d 1110, 1115–16 (9th Cir. 1981); *cf. Atl. Richfield Co. v. U.S. Dept. of Energy*, 769 F.2d 771, 793 (D.C. Cir. 1984). It is important to note that in this case the order was not issued by the agency attempting to enforce the order, as a subpoena typically is, but instead was issued by a separate agency, the Commission. There is no precedent in the Commission body of cases, or the court of appeals that prohibit the Secretary from issuing both a 104(a) citation for a violation of a temporary reinstatement order and simultaneously proceeding in the federal district court to enforce the order.

Finally, an interpretation permitting the Secretary to issue a citation for the failure to comply with a temporary reinstatement order is consistent with the policies underlying the temporary reinstatement provision. The legislative history of the Act indicates that Congress believed temporary reinstatement to be “an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.” S. Rep. No. 95-181, at 37 (1977). Consistent with this concern, the discrimination provision emphasizes the need for temporary reinstatement orders to be processed quickly: once a miner files a complaint, the Secretary must begin an investigation within 15 days; and if he finds that the complaint was not frivolously brought, he must apply for the Commission to order “immediate” temporary reinstatement “on an expedited basis.” 30 U.S.C. § 815(c)(2). Further, the low standard of proof for obtaining a temporary reinstatement order reflects Congress’s intention to place the burden of the risk of an erroneous decision on employers rather than miners. *See Jim Walter Res., Inc. v. Fed. Mine Safety & Health Review Comm’n*, 920 F.2d 738, 748 n.11 (11th Cir. 1990). It is thus unlikely that Congress intended to require the Secretary to seek enforcement of temporary reinstatement orders solely in federal court, which would substantially delay the proceedings and leave the miner without compensation. Therefore, I conclude that Section 104(a) authorizes the Secretary to issue a citation for a violation of a temporary reinstatement order in addition to any enforcement in the federal district court.

### *B. The Violation*

In order to prevail on the Cross-Motion for Summary Decision, the Secretary must demonstrate that the undisputed facts prove that a violation of Judge Steele’s order occurred. In this case, the facts are well established based on the pleadings, the decision from the related discrimination case, and the affidavits and documentation submitted by the parties with their motions for summary decision. The controversy instead lies in the parties’ understanding of the law. After careful consideration of the record and the parties’ arguments, I find that the Secretary has proven a violation.

Judge Steele’s April 17 order required C.R. Meyer to “provide immediate reinstatement to Rodriguez, at the journeyman pipefitter’s rate of pay for the same number of hours worked, and with the same benefits, as at the time of his discharge.” *Sec’y on behalf of Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 981, 1005 (Apr. 2013). The record shows that on April 26, the company sent Rodriguez a letter of reinstatement and issued him a paycheck for his first two days of reinstatement, April 18 and 19. In the intervening days between the order and the letter sent to Rodriguez, Erik Eisenmann, counsel for C.R. Meyer, expressed in a telephone conference with the judge that the company planned to appeal Judge Steele’s order and would

not comply with it until it received a decision from the Commission. The company subsequently filed its petition for review with the Commission on April 23, along with a motion to stay the order pending appeal. At that time the company had taken no steps to show that it was complying with the order. The Secretary filed a complaint in federal district court on April 24 seeking to compel the company to comply, and on April 25 issued the 104(a) citation at issue here. The Commission denied the company's motion for a stay on April 26.

C.R. Meyer asserts that it timely complied with Judge Steele's order when it issued a paycheck to Rodriguez on April 26. It claims that April 26 was the regular pay date for the two days following the date of the order, April 18 and 19, and thus there was no delay in Rodriguez's pay. It argues that its reinstatement of Rodriguez was therefore within the reasonable bounds of "immediate" reinstatement as required by the order. I am not persuaded by the argument. The company waited nine days after the date of the order to notify Rodriguez of his reinstatement. While it argues that it paid him as soon as practicable under its payroll system, it has produced no evidence for the delay in sending him a reinstatement letter. While I accept the company's argument that "immediate" should be interpreted as "as soon as practicable," I do not find that C.R. Meyer's actions were within that time frame.

The company further argues that the Secretary has inappropriately relied on Eisenmann's statement about refusing to comply with the order, and that such a statement of intention is not a legitimate basis for a citation. However, I base my finding of a violation not so much on the statements of Eisenmann, but rather on the company's failure to notify Rodriguez of his reinstatement.<sup>2</sup> Nevertheless, I note that Eisenmann's statement is relevant to the fact that the mine refused to put Rodriguez back to work until the Commission issued some type of ruling and is also relevant to the negligence analysis for this violation.

Finally, C.R. Meyer's delay in reinstating Rodriguez is not excused by its April 23 motion to stay Judge Steele's order. Under Commission Procedural Rule 45, "The filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances." 29 C.F.R. § 2700.45(f). Thus, the stay would not have gone into effect until granted by the Commission, which it was not in this case.

Accordingly, I find that a violation occurred.

#### **IV. PENALTY**

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties

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<sup>2</sup> The parties dispute the meaning of the statement by Eisenmann in the conference call that "Our position is that we are not going to reinstate Mr. Rodriguez at the very least until we get a decision from the Commission." Sec'y Cross-Mot., Ex. 2 (Conference Call Transcript). The Secretary argues that Eisenmann was referring to a decision on the merits of the reinstatement order, while C.R. Meyer argues that he was referring to a decision on the motion to stay pending appeal. In either case, the mine did not intend to immediately put the miner back to work.

provided in [the] Act.” 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator’s history of violations, its size, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion “bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act’s penalty scheme.” *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In this case, I find the gravity of the violation was lessened due to the fact that the miner was reinstated within nine days of the ALJ’s order. With regard to negligence, the statements of Eisenmann indicate that the company intentionally refused to comply with the judge’s order. The violation was not abated in good faith; rather, the company waited until receiving a decision on its motion to stay to comply with the judge’s order. The Secretary did not introduce the company’s history of violations or its size but both are available on the MSHA website. Therefore, I take judicial notice of the company’s record as indicated in the MSHA Mine Data Retrieval System, which shows a history of few violations in the fifteen months prior to this violation and that this contractor is a small operator. The mine did not raise the defense of its inability to pay the proposed penalty. In view of these factors, I find that a penalty of \$308.00 as proposed by the Secretary is appropriate.

## V. ORDER

Based on my review of the record and the applicable law, I find that there is no dispute of material fact and the Secretary is entitled to summary decision as a matter of law. Respondent’s Motion for Summary Decision is hereby **DENIED** and the Secretary’s Cross-Motion for Summary Decision is **GRANTED**. Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of \$308.00 within 30 days of the date of this decision. Upon receipt of payment, the contest case is **DISMISSED**.

/s/ Margaret A. Miller  
Margaret A. Miller  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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December 20, 2016

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

v.

WESCO,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2016-209-M  
A.C. No. 26-00668-397355 NFU

Mine: Adams Claim Mine

## DECISION

Appearances: D. Scott Horn, U.S. Department of Labor, Vacaville, CA, for the Secretary;  
Tim Wright, WESCO, Salt Lake City, UT, for the Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against WESCO 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 parties presented testimony and documentary evidence at a hearing held in Reno, Nevada. Closing arguments were made on the record. One section 104(a) citation was adjudicated at the hearing. WESCO was an independent contractor performing blasting work at the Adams Claim Mine, a surface gypsum mine in Lyon County, Nevada. For reasons set forth below I affirm the citation and assess a penalty of \$5,000.00.

### **I. DISCUSSION WITH FINDINGS OF FACT & CONCLUSIONS OF LAW**

Citation No. 8789786 alleges a violation of section 56.6306(e) of the Secretary’s safety standards and asserts that the blast area at the mine was not being controlled to prevent flyrock from traveling off of mine property. Specifically, the citation notes that flyrock was found on a neighboring property where persons lived. Section 56.6306(e) requires that “[i]n electric blasting prior to connecting to the power source, and in nonelectric blasting prior to attaching an initiating device, all persons shall leave the blast area except persons in a blasting shelter or other location that protects them from concussion (shock wave), flying material, and gases.” 30 C.F.R. § 56.6306(e).

Inspector Joshua K. Wilmoth<sup>1</sup> determined that an injury was reasonably likely to be sustained and, if an injury were sustained, it could reasonably be expected to be fatal. He determined that the violation was significant and substantial (“S&S”), that one person was affected, and that WESCO’s negligence was moderate. The Secretary has proposed a penalty of \$5,080.00 for this alleged violation.

### Summary of the Evidence

The Adams Claim Mine is a surface gypsum mine operated by Art Wilson Company. Tr. 7-8. Gypsum is extracted from the pit through blasting. Although Art Wilson Company was responsible for drilling blast holes at the mine, it contracted with WESCO, an explosives and blasting contractor, to load the explosives and conduct the actual blasting. Tr. 24. Blasting occurred two to three times per week. Tr. 19-20.

On October 16, 2015, WESCO personnel conducted a blast at the mine. Tr. 35. Bryan Lloyd<sup>2</sup> was the WESCO employee in charge of the blast. Tr. 36. Travess Lane and Cody Jensen, both employees of WESCO, were also present. Tr. 44, 47. Lane, a bench hand responsible for priming holes, loading and running equipment, testified that he noticed nothing abnormal about the loading and stemming for the blast. Tr. 44.

On October 19, 2015, a private citizen filed a hazard complaint with MSHA alleging that flyrock from blasting operations at the Adams Claim Mine had fallen on her residential property. Tr. 7-8, 14; Ex. P-1. The complaint alleged that she was outside at the time and could hear flyrock landing around her. Ex. P-1. In addition, the complaint alleged that this had happened two other times, once in September 2015 and once in August 2011. Tr. 13-14; Ex. P-1.<sup>3</sup>

In response to the hazard complaint, MSHA Inspector Wilmoth traveled to the mine to investigate the incident. Tr. 13. Wilmoth interviewed the private citizen who filed the complaint and credited her statements concerning the events. He photographed multiple pieces of gypsum on the individual’s residential property. Tr. 14-16, 20; Exs. P-3, -4 & -5. Wilmoth indicated on a map the location where the rocks were found. Tr. 12; Ex. P-12<sup>4</sup>. He did not notice any indentation marks on the ground. Tr. 30.

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<sup>1</sup> Inspector Wilmoth has been with MSHA for over five years and works as both an inspector and special investigator. Tr. 6. In addition to standard mine inspector training, he has received training for special investigations, including training provided by the FBI regarding interviews, interrogation, and detecting deception. Tr. 7.

<sup>2</sup> Lloyd has been a blaster for 23 years and with WESCO for 5 years. Tr. 32.

<sup>3</sup> At hearing Wilmoth confirmed that MSHA had made positive findings regarding other hazard complaints for the same thing. Tr. 27.

<sup>4</sup> Wilmoth circled the area on the map where the rocks were found. Tr. 12.

WESCO personnel detonated the blast on October 16 from a position 500 feet east of the shot location. Tr. 39-40, 42. At hearing, Lloyd indicated on a map the location of the shot as well as the location from which the group detonated the shot. Tr. 39-40; Ex. R-2<sup>5</sup>. According to Lloyd, the group's location was chosen because it was higher up a hill and allowed them to overlook the pit area. Tr. 40. He agreed that their location was behind the shot and, while they could not see the blast pattern, they had a clear view of the sky, which was overcast. Tr. 35; Ex. R-1. Jensen agreed with Lloyd's depiction on Ex. R-2 as to their location during the detonation. Tr. 51. Jensen initially testified that their location was such that they were positioned between the shot location and the residences and any flyrock that went onto the residential property would have had to pass over top of them, but later indicated that they were not between the shot location and the residences. Tr. 47-53. Lloyd estimated that the residential property line was 770 feet from the location of the shot. Tr. 39.

Lloyd, Lane, and Jensen testified that they did not see any flyrock or hear any unusual sounds during the blast. Tr. 40, 44-45, 47, 50. However, at hearing, each acknowledged that it was possible they could have missed seeing flyrock. Tr. 46, 50. Lloyd stated that there was nothing out of the ordinary about the shot, but agreed that the blast did not go the way he wanted it to because the rocks were too big following the blast. Tr. 38, 41. As a result, WESCO, along with Art Wilson Company, changed the blast pattern after that blast. Tr. 35, 37.

At hearing, Lloyd opined that, depending on the velocity of the rocks, there would be an indentation where they hit the ground. Tr. 41. According to Wilmoth, the gypsum seen in the pictures was the same material mined at the neighboring Adams Claim Mine. Tr. 14-15. The photographs, which included a MSHA investigation folder in the frame for scale, show that the pieces of gypsum ranged in size from slightly smaller than a baseball to slightly larger than a softball. Tr. 29-30; Exs. P-3, -4 & -5. Based on the bright white color of the material and the lack of weathering, Wilmoth determined that the material was "fresh" and "didn't appear to have been there for a [long] period of time[.]" Tr. 15. Other material from the mine site was also observed on the residential property at the time, but it was easily distinguishable due to discoloration and browning from dirt buildup. Tr. 15. Wilmoth estimated that the rocks traveled between 200 and 500 yards from the location of the blast to where the rocks were found. Tr. 30.

The following day Wilmoth met with representatives from the mine to discuss the incident. Tr. 16. The mine representative, Lonnie Kleyseth, told the inspector that both Art Wilson Company and WESCO had recently altered the blast pattern to tighten it up and add more stemming. Tr. 17. According to Wilmoth, Kleyseth opined that the flyrock could have come from the use of less stemming before the pattern was changed. Tr. 17. Following meetings with the individual who filed the hazard complaint as well as representatives of the mine operator and WESCO, Wilmoth issued Citation No. 8789786 on October 23, 2015 to WESCO for an alleged violation of section 56.6306(e).<sup>6</sup> Tr. 19.

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<sup>5</sup> The shot location is marked on the exhibit with a pushpin graphic, while the group's location during the detonation is marked with a red "X."

<sup>6</sup> A second, identical citation was issued to Art Wilson Company. Tr. 24. Art Wilson Company did not contest the citation and paid the proposed penalty in full. Tr. 24-25; Ex. P-10.

At hearing, Wilmoth explained that section 56.6306(e) requires all persons to leave the blast area. Tr. 20. WESCO was responsible for determining the blast area. Because material flew out of that area to where people were, it was not in compliance. Tr. 26. Here, he cited WESCO because it did not control the blast area to prevent flyrock from leaving mine property and landing on neighboring property where a person was outside. Tr. 19, 21. Failing to control the blast area exposed miners and non-miners to potentially being struck by flyrock. Tr. 20.

Lloyd testified that he was not notified of the alleged flyrock incident until Friday, October 23, at which point he, Lane, and Jensen documented the event on company incident forms. Exs. R-1, R-3 and R-4; Tr. 33-36, 47. At hearing, Lloyd agreed that the some of the rocks found by the inspector were fairly small and it was possible they did not see them during the blast. Tr. 42.

### Fact of Violation

I find that the Secretary established a violation of the cited standard. The cited standard requires that, before blasting, all persons be removed from the blast area, but provides an exception to that requirement when persons are in a blasting shelter or other location that protects them from the harmful effects of the blast. In order for an operator to comply with the standard they must not only ensure that everyone is outside of the blast area, they must also control the blast so that the concussion, flying material and gasses do not extend outside of the planned blast area. Accordingly, a violation will exist when persons are in the blast area during a blast and not in one of the excepted areas. Here, there is no dispute that the exception does not apply. As a result, the only question is whether persons were in the blast area when the blast occurred. For reasons set forth below, I find that persons were in the blast area.

The Secretary's regulations define the term "blast area" as "the area in which concussion (shock wave), flying material, or gases from an explosion may cause injury to persons." 30 C.F.R. § 56.2. The regulation states that "[i]n determining the blast area the following factors shall be considered: (1) Geology or material to be blasted. (2) Blast pattern. (3) Burden, depth, diameter, and angle of the holes. (4) Blasting experience of the mine. (5) Delay system, powder factor, and pounds per delay. (6) Type and amount of explosive material. (7) Type and amount of stemming." *Id.* In a case involving a different subsection of the cited standard, Commission Judge Moran explained that this list of factors, "while helpful, does not represent an exclusive list of the factors that are to be considered when conducting the ultra-hazardous activity of blasting." *Lakeview Rock Products*, 34 FMSHRC 244, 246 (Jan. 2012) (ALJ); *see also Austin Powder Co.*, 35 FMSHRC 3656, 3672 (Dec. 2013) (ALJ)<sup>7</sup>. In *Lakeview*, Judge Moran found that, because flyrock landed on and penetrated the roof of a residence, the residence was "within the blast area." 34 FMSHRC at 249-250.

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<sup>7</sup> In *Austin Powder*, Commission Judge Barbour affirmed a violation of section 56.6306(e) after determining that the blast area at a limestone quarry had not been cleared of persons by the operator, in part, because the operator, in determining the blast area, had not adequately considered all of the seven factors set forth in 30 C.F.R. § 56.2.

In *Orica USA, Inc.*, 32 FMSHRC 709 (May 2010) (ALJ), Chief Judge Lesnick addressed a somewhat similar situation where an operator was cited under subsection (f) of the standard, which requires that access routes to blast areas be guarded or barricaded. A blasting contractor was alleged to have set off a production shot in a quarry which resulted in flyrock traveling off mine property and onto a highway, where it struck vehicles and caused injuries. Chief Judge Lesnick, in denying the operator's motion to dismiss for lack of jurisdiction, noted "the Secretary's reasonable interpretation that [the operator was] not absolved of its duty to protect people in the blast area from injury merely because the blast area extended beyond the legal property line of the . . . mine." *Id.* at 712. Moreover, he found that the operator should not be able "to escape liability for violations of section 56.6306 that result in injuries simply because the injuries occur off of the mine property." *Id.*

The parties offer two conflicting factual accounts. WESCO's primary argument in this matter is that the gypsum material found by the inspector on the residential property was not flyrock from the mine. The Secretary, on the other hand, asserts that the material was flyrock from the mine. For reasons set forth below, I credit the Secretary's factual account and find that the Secretary has met his burden of establishing a 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 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.")

In support of its argument, WESCO asserts that its employees did not see flyrock leave the mine property and there was nothing unusual about this particular blast. I find these arguments unavailing. Each of the WESCO witnesses conceded that it was entirely possible that they did not see flyrock leave the mine property. Given the white color of the gypsum rock, the overcast skies that were present on the day of the blast, the relatively small size of the rocks, and the position of the individuals 500 feet away from the location of the shot, I find it likely that Lloyd, Lane and Jensen missed seeing the material travel off the mine property and onto the residential property, which was even further away from their location than the location of the shot. Moreover, while WESCO asserts that there was nothing unusual about the blast, Lloyd conceded that it did not go the way he wanted it to and, in response, WESCO and Art Wilson Company changed the blast pattern following the October 16 blast, but before the contractor was ever aware of the hazard complaint.

The Secretary's factual account, while reliant in part on circumstantial evidence, is consistent with that alleged in the hazard complaint and the credible evidence presented at hearing. The inspector found the individual who lodged the hazard complaint to be credible. I credit the inspector's testimony that the gypsum rocks he observed on the residential property were fresh and of the same type of material mined at the Adams Claim Mine. WESCO did not dispute this. While WESCO asserts that the inspector would have found indentations in the ground had flyrock landed on the property, Lloyd testified that the presence of an indentation would have been dependent on the velocity with which the rocks hit the ground. In addition, the rocks could have landed at a different location on the residential property and bounced or rolled to the location where they ultimately came to rest. As a result, the fact that the inspector did not

find indentations is not determinative of whether the material was flyrock.<sup>8</sup> I find that the rocks observed by the inspector were from the Adams Claim Mine and. As a result of the blast on October 16, were propelled onto the residential property and in close proximity to the individual while she was outside. Because flyrock landed on the residential property, that area of the property was within the blast area.

I find that WESCO failed to control the blast and rocks from the mine left the planned blast area and landed on the residential property near an individual. It is clear that there was at least one person in the blast area, i.e., “the area in which . . . flying material . . . from an explosion may cause injury to persons,”<sup>9</sup> in violation of section 56.6306(e)’s requirement that “all persons . . . leave the blast area” prior to either “connecting to the power source” or “attaching an initiating device[.]” 30 C.F.R. § 56.6306(e) and 30 C.F.R. § 56.2. The Secretary has proven a violation of the cited standard.<sup>10</sup>

### Gravity and Negligence

I find that the violation was S&S. 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).

The Commission has explained that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *ICG Illinois*, 38 FMSHRC \_\_\_, slip op. at 3, No. LAKE 2013-160 (Oct. 21, 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the “particular hazard to which the violation allegedly contributes[.]” and then determine whether “there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.* at 3-4. This determination must be made “based on the particular facts surrounding the violation[.]” *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard “was reasonably likely to result in serious injury.” *Newtown* at 2038; *ICG Illinois* at 4.

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<sup>8</sup> At hearing WESCO’s representative declined to speculate as to how the gypsum rocks ended up on the property and argued only that they were not flyrock from the mine.

<sup>9</sup> WESCO did not present evidence regarding the factors set forth in section 56.2.

<sup>10</sup> At hearing, Respondent’s representative conceded that, if the rocks were determined to be flyrock from the blast, then a violation would be proven. Tr. 55.

Wilmoth designated the violation as S&S because, given the varying sizes of the rocks that were ejected by the blast and landed on the neighboring property near at least one person, it was reasonably likely that material would strike a person and cause a serious injury. Tr. 21-22, 26-28. Wilmoth testified that flyrock striking a person have caused fatalities in the past. Tr. 12-12, 26-27; Ex. P-11.

I already determined that the Secretary established a violation of the cited standard. Here, the hazard that the standard is designed to protect against is a person being injured by the “concussion (shock wave), flying material, and gases” from a blast. The specific hazard in this instance was the private individual being struck by flyrock from the blast that traveled onto her property. Here, WESCO’s failure to control the blast resulted in flyrock leaving the property and falling around the private individual while she was outside on her property. WESCO’s failure to control the blast to prevent the rocks from going outside the planned blast area was reasonably likely to result in someone being struck by flyrock. Both WESCO and the private individual were lucky that the material fell around the individual and did not strike her. I credit the inspector’s testimony that, assuming a person was struck by flyrock of the size found on the property, an injury was likely to occur and that injury was reasonably likely to be fatal or at least very serious. The Secretary has met his burden of proving that the violation was S&S.<sup>11</sup>

I find that WESCO was moderately negligent. I agree with the inspector that WESCO, as a blasting contractor, was well aware of the need to control the blast area. Tr. 23. Its failure to do so in this instance came close to resulting in a serious injury. I defer to the inspector’s moderate negligence determination.

## II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining appropriate civil penalty. 30 U.S.C. § 820(i). The parties did not present any evidence as to WESCO’s history of previous violations but Exhibit A to the penalty petition indicates that WESCO had a history of 23 violations. The parties did not present any evidence as to WESCO’s size but Exhibit A to the penalty petition indicates that WESCO was assigned 20 penalty points, which correlates to a moderately large contractor. 30 C.F.R. § 100.3 Table V. The violation was promptly abated and payment of the proposed penalty will not have an adverse effect upon WESCO’s ability to continue in business. Sec’y Response to Request of Prehearing Report 2. The gravity and negligence are discussed above. Based on the penalty criteria, I assess a civil penalty of \$5,000.00 for Citation No. 8789786.

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<sup>11</sup> At hearing, Respondent’s representative conceded that, if the material were determined to be flyrock from the blast, then the violation would be S&S. Tr. 55.

### III. ORDER

For the reasons set forth above, Citation No. 8789786 is affirmed as issued. WESCO is **ORDERED TO PAY** the Secretary of Labor the sum of \$5,000.00 within 40 days of the date of this decision.

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

Distribution:

D. Scott Horn, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 991 Nut Tree Road, 2<sup>nd</sup> Floor, Vacaville, CA, 95687

Tim Wright, WESCO, 3135 S. Richmond Street, Salt Lake City, UT, 84106-3053

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
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TELEPHONE: 202-434-9933 / FAX: 202-434-9949

December 22, 2016

GENE ESTELLA,  
Complainant,  
  
v.

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-0031-DM  
WE-MD-15-17

NEWMONT USA LIMITED,  
Respondent.

Mine: Phoenix Mine  
Mine ID: 26-00550

**DECISION AND ORDER**

Appearances: Ms. Debra M. Amens, Esq., Amens Law, Ltd., Battle Mountain, NV, for Complainant

Ms. Laura E. Beverage, Esq., Jackson Kelly PLLC, Denver, CO, for Respondent

Ms. Hiliary N. Wilson, Esq., Newmont USA Ltd., Elko, NV, for Respondent

Before: Judge Moran

This case is before the Court upon a complaint of discrimination under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (“the Act”). At issue is the question of whether Complainant Gene Estella (“Estella” or “Complainant”) was wrongfully terminated by the Respondent, Newmont USA Limited (“Newmont,” or “Respondent”) in retaliation for safety complaints made to the Mine Safety and Health Administration (“MSHA”).

A hearing was held on Tuesday, April 26 through Thursday, April 28, 2016 in Elko, Nevada and the hearing then resumed and was completed on July 6, 2016. Javier Esquibel, Marcos Soto, and Robert Wells, current or former employees of Newmont, testified on behalf of the Complainant. Complainant Gene Estella, Monica Sampson, and Tanya Holland also testified for the Complainant. Dayne Heese, Respondent’s health and safety manager, testified for the operator, as did Steve Blaskovich and John Cole, all managers with Newmont, and Rocky Mitchell, a mine employee relations specialist for management.

For the reasons which follow, the Court finds that Complainant Estella was discriminated against for making such safety complaints and that Newmont had no independent, legitimate, basis for the Complainant’s firing.

## Findings of Fact

### Summary

Complainant Gene Estella, an employee at Newmont USA Ltd.'s Phoenix Mine at its copper/leach processing operation, filed a discrimination complaint against Newmont alleging that he was wrongfully terminated in retaliation for safety complaints made to MSHA. As set forth below, the Court finds that Estella and others made anonymous safety complaints to MSHA, that an MSHA inspection occurred as a result of those complaints, and that several citations were issued in connection with that inspection. Two (2) weeks after the complaint-initiated inspection, Newmont suspended and then fired Estella and two other employees who worked in the copper/leach area, which area was the focus of the safety complaints. At least as to Estella,<sup>1</sup> the Court finds that Estella was fired for making safety complaints, and established a prima facie case of discrimination. Further, Newmont was unable to rebut Estella's case and presented no legitimate independent reason for Complainant's firing.

### Complainant's Evidence

#### Testimony of Javier Esquibel

Javier Esquibel, a current employee with Newmont, was called as a witness for the Complainant. At the time of the events in issue, he worked at the copper/leach operation, ("copper/ leach") but now works at the mine's mill. Tr. 12. At the copper/leach his job title was an "operator." Copper/leach has four crews, designated as A, B, C and D. Over the course of his employment there, Esquibel worked his way up from the tech 1 position. At the time of anonymous safety complaints made to MSHA, which prompted that agency to conduct an investigation in 2015, shortly after the Memorial Day weekend, Esquibel had progressed to a tech 5, although that is still not a supervisory position. Tr. 13-14. When MSHA arrived to conduct its investigation, Esquibel was on the C crew.

Esquibel knows the Complainant, Gene Estella, and they are friends. Tr. 19. When Esquibel began working at Newmont, as a temp, he and Estella were both assigned to the D crew. Later, he was assigned to the C crew, while Estella remained with the D crew. Esquibel had occasion to speak with Estella about safety issues at the mine.

Esquibel expressed that his concerns included,

the stripping machine, the way they wanted us to lock it out. They wanted us to lock it out on the main panel. A few other ones were working, you know, without

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<sup>1</sup> Fellow copper/leach employee Shane Watson was also terminated by Newmont. While not strictly in front of the Court, because Watson did not file a discrimination complaint after his firing, the circumstances involved with Watson's termination are instructive in demonstrating Newmont's pretextual excuse for his firing.

-- you know, people working on, doing stuff, without locking it properly. The fire alarm system that they cut the wires on the buzzer.

Tr. 20-21.

Esquibel raised these concerns to his supervisor, who in turn took them to another supervisor, Steve Blaskovich, the superintendent for copper/leach. The response was that they should stop worrying about other crews and worry about their own crew. Tr. 21. Esquibel had similar discussions regarding his safety concerns with other employees besides Estella. Tr. 21. Esquibel informed Estella and Kyle White that he planned to call MSHA regarding these safety concerns, stating that he told them, "I was going to call MSHA, you know, of all these unsafe stuff that was going on, that they wouldn't do nothing about it." Tr. 22. Both Estella & White told Esquibel that they intended to call MSHA too. *Id.*

MSHA appeared at the mine on or about June 2, 2015 for the investigation. Esquibel asserted that the MSHA investigator asked him who had called MSHA. Esquibel did not want to identify who called but the investigator purportedly told him that the mine can't retaliate against the employees. Tr. 24. In response, Esquibel revealed that Estella had called MSHA and that a couple of employees from the C crew had called too. Tr. 24. Esquibel was called to help the investigator "go through the monitors so they could see what was going on, all the unsafe acts that was happening." Tr. 25. Esquibel stated that "numerous complaints" were made to MSHA; they were not solely about the control room. Tr. 25-26. He identified his complaints as "there (sic) were locking -- working on some stuff that wasn't locked out properly. Stripping machine, stuff that was in there that was unsafe. And the biggest one was the fire alarm system that they cut the wires on the buzzer." Tr. 26. This concern was that if there was a fire, but no alarms sounded, employees might not know there was a fire because only a blinking light on the machine would alert them to that hazard. His concern was not simply academic, as Esquibel stated they did have some fires. Tr. 26-27. One occurred in the rectifier. After MSHA arrived, the mine did have some people come and fix the problem. The MSHA cited violations were subsequently posted at the mine. Tr. 26-27.<sup>2</sup>

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<sup>2</sup> The citations were admitted into the record. The Court expressed that this testimony would be considered in the context of "setting the stage" for what was going on at the mine. Tr. 31. Esquibel recognized Citation No. 8779858 as one of the posted violations. Issued June 2, 2015, it involved an access gate that was unlocked although that was not one of the matters he called MSHA about. Tr. 28, referencing Ex. P-1. Next was Citation No. 8779859, also issued June 2nd. It involved "Miners [who] were observed entering the moving machine -- machine part area of the stripping machine without locking out and tagging out." Tr. 30, referencing Ex. P 2. Esquibel saw miners doing that and he did call in a complaint to MSHA about this. Next, was Citation No. 8779860, Ex. P 3, also issued June 2, 2015, involving the tank house fire alarm system, which Esquibel identified as another of the safety issues about which he called MSHA. He added that Estella and Kyle [White] told him that they were going to call MSHA about this issue too. Tr. 32. Next was Citation No. 8779862, which was issued on June 3, 2015. This was not one of the safety issues called in by Esquibel. It involved a failure for a number of miners not having received task training. Tr. 33, referencing Ex. P. 4. Considering this context, the  
(continued...)

On the first day of the MSHA investigation, Esquibel was called up to the copper/leach control room by Jesse Leon. Tr. 37. Leon was running the control room at that time. Tr. 38. Esquibel was called up to assist the MSHA investigator in understanding the video of a month or two earlier and explain what was being shown. Tr. 38. While this was going on, Steve Blaskovich, the mine's copper/leach superintendent, Jack Stull, the MSHA investigator, and other individuals, including Kyle White, Mike Peansnall and Dayne Heese, the safety manager at Newmont's Phoenix mine, came in to the control room at various times.<sup>3</sup>

According to Esquibel, it was while he was assisting in the control room that MSHA's Stull asked him who had called MSHA. Tr. 40. Heese, and Blaskovich, were present, right behind him, when Stull posed the question to him. Tr.41. Esquibel also asserted that throughout the investigation Heese made comments to him such as "[a]re you going to snitch on your crew." Tr. 41. Esquibel added that after MSHA's viewing of video showing violations, the mine terminated that review ability, stating that they took that "away from us, from us being able to go back and see anything that was recorded, you know." Tr. 43. He didn't know who took that action, but reiterated that while they "still have the videocamera system [miners] can't... go back into the computer" to view events from a previous week. Tr. 44 "At least," he added, "we can't, you know." *Id.* That change occurred the very next day. *Id.* Esquibel also related that, while viewing the video, the inspector remarked, "these guys need a lot of training." Tr. 48.

Esquibel stated that he was also present when Jesse Leon raised the issue of the alarm system. Tr. 49-50. According to Esquibel, mine management's Heese and Blaskovich asserted that the alarm was not a safety hazard in any way. At that point Esquibel spoke up, contending that it was a safety issue: "that's when I jumped in and said, 'Yeah, it is. That alarm right there will tell us if -- if there is a fire out in the cellars, it will tell you that there's a fire out there. With the buzzer being cut off, you can't hear nothing.'" Tr. 51. He continued,

What happened with the buzzer was that it was going off for weeks. The buzzer was just going off. And then we -- we would have to put ear plugs in our -- just to be in the control room because the buzzer was going off. . . . the first day when we came back from our day off, that's when we noticed that the buzzer was off, was cut off, the wires. So we right away notified our supervisor. [An electrician was called and wired it back on but] [t]he next day we came back to work, it was

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<sup>2</sup> (...continued)

Court finds that there is no question but that an anonymous complaint or complaints were made to MSHA, that MSHA investigated the mine as a result of those complaints, and that citations were issued pursuant to its investigation.

<sup>3</sup> Though counsel in their questioning tended to refer to key players by their first names, the Court employs the last names for them, including Steve Blaskovich, Rocky Mitchell, Dayne Heese and Javier Esquibel.

cut off again. . . [it was only] the day that MSHA showed up, that was the day that they started fixing that stuff.

Tr. 51.

After the first day of MSHA's inspection, a safety meeting was called in the control room where several members of management were present, including Cole, Blaskovich and Mike Peasnall, Esquibel's supervisor. Tr. 52. Most of the discussion pertained to the complaints which had been made to MSHA. Tr. 53. The subjects included working without properly locking out and the fire alarm defect. *Id.* The following day there were more questions, described by Esquibel as an interrogation. Tr. 54. This occurred in Cole's office with Mitchell and Blaskovich present. Everyone from the crew was questioned in a one-on-one fashion. Tr. 54. Leon joined with Esquibel, because he didn't want to be questioned alone.<sup>4</sup> Tr. 54. Esquibel thought he had revealed to White that he gave the names of those that had called MSHA. Tr. 55.

As noted, with Blaskovich and Mitchell present, Esquibel was questioned in Cole's office about the list of complaints made to MSHA. Esquibel inferred that they had figured he was the source because he had indirectly raised the issue with Blaskovich previously, by telling his immediate supervisor, Mike Peasnall, about it. Tr. 62.

To clear up some ambiguities, the Court asked about the safety complaints to MSHA. Esquibel denied that Mitchell or Cole expressed displeasure at him for making safety complaints during the investigation concerning safety complaints. Tr. 69. Esquibel also stated that he never gave Estella's name to Mitchell or Cole or to any other person with management and did not disclose to them that Estella had called MSHA. *Id.*

On the issue of the inspection on June 2, 2015, when Esquibel was in the control room with Leon, MSHA Inspector Stull, Mr. Blaskovich and Dayne Heese, Esquibel stated that Stull left the control room with Heese. He also stated that Blaskovich left the room. When Stull was in the control room Heese was there the whole time. When Esquibel called MSHA, he did not give his name, as he was scared to do so. Tr. 82-83. However, he stuck with his claim that Stull asked him who made the complaint. Tr. 83-84. Esquibel told Stull, "there were a couple of us on this crew and I believe one guy out of D crew, it was Gene." Esquibel did not know for certain that Gene Estella had made the call, but Estella told him that he was going to call MSHA. Tr. 84. On questioning by the Court, Esquibel stated that when inspector Stull came to the mine he disclosed Estella's name to him and his own, as the people who called MSHA. Tr. 88-89. It was only later, when Esquibel had his meeting with the mine related to people who made complaints to MSHA, that he maintained that he never disclosed Estella's name to mine management people. Tr. 89-90.

The Court finds that Esquibel was a credible witness. It also finds that it is fair to conclude, based on the number of management people involved and the extent of their reactions

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<sup>4</sup> The mine was also dealing with another problem – the theft of some copper. Tr. 57.

to the MSHA call, that the mine management was very perturbed over the call to MSHA. In support of this conclusion, the Court notes that the lockout and alarm issues could have been corrected without the interrogations which ensued. The Court finds that Esquibel did disclose who called MSHA, after he was reassured that any disclosure of the callers' identity could be protected if adverse action were to occur. However, this finding is not critical to the decision in this case because all of the complaints were related to the copper/leach, and therefore the list of those who could have called was a small group. The subsequent, very close-in-time actions taken against three of the four members of the D crew made it clear to the Court that management had fingered the source of the calls, a deduction that was not hard to reach.

### Testimony of Marco Soto

Marcos Soto also testified for the Complainant.<sup>5</sup> Soto began working at the Newmont Phoenix Project on the copper/leach D crew, under Bob Wells, about three years before the hearing, his employment having ended about a year before his testimony in this matter. Tr. 106. Soto ran the stripping machine, on the same crew as Gene Estella. At that time he lived in Battle Mountain, as did Estella, and they often drove to work together. Tr. 107. Occasionally, Estella and Soto socialized. From their conversations, Soto was aware that Estella was concerned about some safety issues. Tr. 108. Estella was the leadman in the crew, so it was natural that such issues would be discussed. Soto was a tech 4, and Estella, a tech 5, at Newmont. If Wells wasn't present, Estella would be the lead man. Tr. 109. Estella told him that he was considering calling MSHA and later revealed to him that he had called. Tr. 110. The subjects of Estella's call were the alarms and the stripping machine. Soto also had an issue with maintenance people wanting him to continue running the machine while maintenance was being performed. He refused to unlock it and run the machine during such maintenance. The maintenance people tried to force him to do that, and went to Mike Chopp over the dispute. Still, Soto refused and he then went to Wells, who supported his refusal. Tr. 111. Ultimately, Soto prevailed on this safety issue. Soto, during his two years and one month of employment at Newmont, was never written up for disciplinary issues. Tr. 114. Following MSHA's inspection, as a result of a citation, Soto and others received "5023" task training for the stripping machine. Tr. 117. However, a few weeks after MSHA came to inspect, following the

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<sup>5</sup> As part of Complainant's effort to establish that he did call MSHA to make safety complaints, Monica Sampson testified. Tr. 97. The Complainant has dated her mother for the past nine years. Ms. Sampson worked most recently as a laundry folder and, before that, as a housekeeper at a motel. Tr. 98. Mr. Estella asked her how he could make an anonymous phone call and she told him about using the "\*67" feature on a cell phone. She added Estella told her that he needed to make an anonymous call to MSHA to report a safety violation. Tr. 100. She let him use a track phone she possessed and, in her presence, he called MSHA. However, she wasn't sure what was being said, as Estella made the call in another room. Tr. 101. He then gave the phone back to her. An unseemly admission, Ms. Sampson stated that she "found" a phone at her former motel job which had been left in a room and that it was a simple track or "flip" phone. She maintained, after asking other housekeepers, that they advised if the phone was less than \$30 in value, she need not turn it in to lost and found. Tr. 99, 104. This occurred over the Memorial Day Weekend. Estella later confirmed to her that he made the call to MSHA. Tr. 102.

anonymous safety complaint which precipitated the inspection, Soto was suspended and soon thereafter fired, along with Estella and Shane Watson. Tr. 114-115.

Soto set forth the circumstances regarding that employment termination. On that early morning Watson was the carpool driver. Watson picked up Soto first at about 4:45 a.m. Watson was a co-worker on Soto's crew. Estella was then picked up. Watson lives in Winnemucca. Soto and Estella live in Battle Mountain. Tr. 120. The men were due at work at 6:00 a.m. They then stopped at the Midway Market to pick up items for lunch. Estella and Soto walked into the market together, but went their separate ways once in inside the store. It is undisputed that Watson remained in his car.

Soto bought chips, soda, and some beer and ice. He purchased the beer to drink at his home after work that evening. Tr. 122. He stated that it was his normal routine to purchase beer the night before. Tr. 122. Soto stated that he did not see what Estella purchased. Tr. 122. When Soto arrived at the register, Estella was walking out of the market. Tr. 123. Soto also saw Heese, a safety supervisor at the mine, entering the store as Estella was exiting. Soto did not normally see Heese at the market. Tr. 123. Heese and Soto exchanged routine greetings. At the checkout line, only Heese and Soto were present, Estella having already exited. Tr. 124. Soto stated that his purchases were plain to see, but Heese said nothing about the beer Soto was purchasing. Tr.125. The checkout person double bagged his beer purchase and Soto left with three bags, the beer, ice and his snacks for work. During the checkout process, Soto stated that he said out loud he needed to buy ice. Tr. 124. After Soto exited the store, he saw Estella looking in the car's trunk for something in his lunch box. Tr. 126. Estella then took his lunch box and went to the car's back seat. Soto then put the beer and ice in his cooler, which was in the car's trunk, and put the other items in his lunch box. Soto did not tell Watson he had beer. Tr. 126. Soto was sure that Estella did not see his purchases. Tr. 127. Soto stated that, when they left the market, Heese was standing outside as they departed. Tr.130.

Soto then informed Watson that he needed to drop off his cooler at his (Soto's) house. Tr. 128.<sup>6</sup> Before doing that, the three went to McDonald's for breakfast, using the drive-thru. By then it was about 5:25 a.m. and they were running late, since they were due for work at 6:00 a.m. Tr. 129. The McDonald's is directly across the street from the market, so Heese would have been able to observe Watson's car driving there. Tr. 130. Work was a 20 to 25 minute drive from the McDonald's. At that point, aware that they were running late, Soto forgot to go to his house to drop off the cooler. Tr. 129.

The three arrived at work at 5:50 a.m., and left Watson's car at the mine's parking lot. When Soto went to the car's trunk to retrieve his lunch, he did see the cooler and beer, but "didn't think too much of it. So [he] just closed the trunk and headed to the [mine's entrance] gate." Tr. 133. As Estella was in the back seat and had his lunch with him, he did not go to the car's trunk. Tr. 133.

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<sup>6</sup> Soto was asked by Respondent's Counsel, "when you got in the car with Shane and Mr. Estella, did you say you needed to drop the cooler with the beer in it at your house?" Tr. 169. But Soto, was clear in his response, replying, "I didn't say beer. I just said, "I need to stop at my house to drop off the cooler." Tr. 169.

They then took a company vehicle to the plant, whereupon Soto changed into his uniform at his locker and went to the control room to eat breakfast and attend the safety meeting. Tr. 134. Soto stated that he never told Estella or Watson that he had brought alcohol to the car. Tr. 134-135. Around 9:00 a.m., Soto went down to his locker to get some quarters for a soda at the vending machine. Heese followed Soto to his locker and asked what he was doing and he explained about the quarters to buy a soda. Heese said nothing but watched Soto the whole time he was at his locker. Tr. 135. Soto then bought a soda and returned to the control room. Watson then joined Soto for their break which they customarily took together.

At that point Mitchell appeared and told Soto he was wanted for questioning in Blaskovich's office. Soto inquired what the matter was about and Mitchell told him there was a suspicion that he was under the influence of alcohol. Tr. 136. Blaskovich, and Mitchell, with Wells also present, asked Soto if he had purchased beer that morning and Soto immediately admitted that he had done so. Asked where it was, he informed that it was in the car. Asked why he brought it to work, he explained it was his intention to leave it at his house, but that they were running late for work and he forgot about the beer. Tr. 137. They also asked if Watson and Estella knew of the beer and he told them they did not know of it. Tr. 138. Mitchell then advised that they were going to check his lunch box and his locker to see if there was anything that should not be there. Tr. 138. They found nothing improper. Tr. 138. Soto was then taken for a drug and alcohol test, the results of which were negative. Tr. 138. He then went with Heese down to the car in order to search it. Soto had never seen the mine search cars before. Tr. 139. Soto was fired five days after the "beer in the car trunk" event.<sup>7</sup> Tr. 139. His fellow car poolers, Estella and Watson were also fired the same day. Tr. 140.

Returning to the events at Watson's car that day, Soto stated that Blaskovich, Heese, Mitchell and a security person were all there at that time but Complainant Estella was not there. Tr. 145-146. Soto had not spoken with Estella since the investigation events started that morning and he first spoke with Watson in connection with the events only when they had convened at the car. Tr. 146. The mine management officials had Watson open the trunk of his car and they had Soto retrieve the cooler. They took photos of the cooler. Then they gave Soto his cooler back, but now empty of the beer. Watson and Soto were then directed to return to the control room and not to do anything. Tr. 146. They returned with Blaskovich. Tr. 146.

Upon arrival at the control room Estella was then present. The three (Soto, Watson and Estella) were told to wait, and advised that they would be questioned for a second time. Tr. 147. This was Soto's first opportunity to speak with Estella about what was going on and he then told Soto that he had been questioned about the matter. Tr. 147. It was only then that Soto informed Estella about what was happening, revealing that he had purchased beer that morning. He told Estella that it had been his intention to drop it off at his (Soto's) house, but that they were running late for work and he had simply forgot about the beer in the trunk. Tr. 147. Soto also disclosed to Estella that Heese had seen him buy the beer and that was "why this was all

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<sup>7</sup> The confrontation over the beer in the car's trunk occurred on June 17th Tr. 144, and Ex. P-6. Exhibit P-6 was also used to note that Soto's termination occurred on June 24th. Tr. 145. Exhibit P-6 was admitted for the limited purpose of establishing those dates.

going on.” Tr. 147. Estella, in turn, told Soto that he too had been questioned about the matter. *Id.*

Not only did Soto admit to the beer, he also admitted that he knew about the mine’s policy prohibiting alcohol on the site. His only defense was that he simply forgot about having it in the trunk. Tr. 148. At Soto’s second round of questioning, in the presence of Blaskovich, Mitchell and Wells, the same questions were asked of him and he gave the same response – he was running late for work and simply forgot about the alcohol in the trunk. The Court, evaluating Soto’s testimony, found his account to be credible also concludes that it does not seem farfetched that such a sequence of events could occur. As such, it finds Soto’s account to be plausible, as people can forget.

Following the questioning, Soto was told to “dress out,” (i.e. prepare to leave the mine and go home) and he was advised that he was suspended until further notice. Tr. 149. Blaskovich then drove Soto and Estella back to their homes, and Watson drove himself home. Tr. 150.

Following that, on June 23rd Mitchell telephoned Soto, informing him that he was to meet with mine personnel the following morning at the Newmont office in Battle Mountain, Nevada. At that meeting, Soto was questioned for the third time about the beer incident and he repeated the same answers as before. The examiners also asked about Watson’s and Estella’s knowledge of the beer and again Soto said they did not know. Tr. 151. He was then informed that he was terminated, but also told it was possible that he might be rehired in the future, as the management acknowledged that he was a good worker and noted that he had received numerous safety awards. Tr. 151. Soto did not appeal their decision, as he figured that, since it was his beer, an appeal was pointless. *Id.*

In further testimony,<sup>8</sup> returning to the events of the morning of June 17th, Soto stated that he did not see what Estella purchased at the market that morning. He agreed that the beer, soda and energy drinks are all in the same area of the store in the Midway Market. Tr. 157. He estimated being in the market for five or ten minutes, but could not say how long Estella was in the market, as he only saw him walk out. Tr. 158. Soto repeated that “Gene [Estella] was never at the checkout with me and [Heese].” Tr. 160.

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<sup>8</sup> Though the Court views the following as inconsequential to the issues to be resolved, it is noted that during cross-examination, Soto agreed that, following the MSHA inspection of June 2nd, he had to have task training and that he signed papers acknowledging that such training was received. Tr. 153. Although Respondent’s counsel asserted that MSHA did not issue a citation for lack of task training on the stripper machine, Soto responded that the mine did receive a citation for lack of training on equipment, but he did not know specifically what type of equipment was involved. In addition, Soto also informed counsel that he had operated the stripping machine before receiving training on it, although he admitted that he was familiar with the machine’s operation before receiving the training. Tr. 154. Soto affirmed that he and Estella would usually carpool to work and that Watson would join them periodically. Though not at all in controversy, as a point of fact he agreed that the A crew worked opposite the D crew and the C and B crews worked opposite one another. Tr.156-157.

When asked if he was aware that taking beer on the site was in violation of the company's policy, Soto noted, "Well, it was outside of the mine site, it was in the parking lot." Tr. 162. Ultimately, in response to a question from the Court, Soto agreed it was a violation. *Id.* Further, Soto admitted that there was signage posted in the parking lot prohibiting alcohol and drugs. Tr. 163. When the Court asked Soto why he did not take the beer home first, given that Soto's house was only a mile from the convenience store, Soto answered that he "forgot about it. I forgot about the beer since we were running late. I just got it in my head that I don't want to be late and I just forgot about it." Tr. 163.

The Court inquired further, trying to understand how Soto could forget about the beer so quickly: "But you just placed it in the car, you put the ice there. And somehow, in the time after you put the ice and the beer in together, you forgot that you had the beer, even though you are just a mile away?" Tr. 164. Soto stood by his statement that he had forgot about the beer, adding that they weren't running late when they next went to McDonald's, but after that stop they were running late. Tr. 165. Soto reiterated that he did not think about the beer in the trunk again until they arrived at the mine site. Tr. 165. As noted above, the Court finds this account plausible.

Soto agreed during cross-examination that R's Ex. 11 is a document that he had to sign when he was hired and that page 64 of the document provides, "Newmont strictly prohibits the following conduct anytime an employee is on company premises, work sites, parking lots, exploration sites, et cetera, including in company vehicles as well as private vehicles on company property or work site location, whether on duty or not on duty." Tr. 167. Thus, he agreed that the handbook specifically prohibits alcohol in a car in an employee parking lot. Tr. 167. Soto signed this agreement. Tr. 167-68, referencing Ex. R 11 (the employee handbook) and Ex. R 11A. Soto admitted from the start that the beer was his, while, to the disappointment and consternation of Newmont, simultaneously absolving the others in the car from knowledge of the beer. That Soto signed an agreement acknowledging that alcohol is prohibited on Newmont's mine is of little pertinence to the issues at hand.

Soto did agree that he was aware that violating any of the rules in the handbook can result in discipline, including sanctions other than being fired. Tr. 173. Further, he agreed that he was fired for violating the drug and alcohol policy. *Id.* But the policy itself does not pronounce which infractions will result in firing; it provides: "Failure [to so comply] may subject you to corrective action up to and including termination of employment." Tr. 173-74 and Ex. R 11 at 2.1.1. The Court also pointed out that among the 28 listed sample reasons for termination, possessing alcohol is not listed. Tr. 174. Further, the Court noted that the exhibit does not establish that violations of any of the 28 examples mandates termination, rather it provides that failure to abide by them "*may* subject [an employee] to corrective action *up to and including* termination of employment." R's Ex. 11 at 2.1.1, Tr. 174 (emphasis added).

Accordingly, the Court expressed at the hearing that the Policy itself presents a problem for Newmont because it does not assert that violation of its drug or alcohol rule *will* result in firing. Tr. 174. Thus the Policy clearly anticipates that discipline less than firing may be imposed for drug or alcohol violations. Particularly here, both the circumstances and the degree of the violation are disproportionate to the punishment meted out. The Court considered all of

the attendant circumstances, below, in determining that the beer in the trunk incident afforded Newmont an excuse to take retribution against miners for calling MSHA with safety complaints.<sup>9</sup>

### Testimony of Robert Wells

Robert “Bob” Wells testified. Wells is a mill shift foreman for Newmont at Phoenix, and has worked there for 18 years. Tr. 176. Wells is part of management. Tr. 179. Wells oversaw a crew of four employees working in the copper/leach area. As described earlier, there were four such crews for the copper leach operation, designated as A, B, C, and D. Tr. 178. Estella had worked for Wells at other mines and had known Estella for 18 years. Tr. 176. Estella worked in the control room as a tech 5 on Wells’ crew at the time he was fired. In addition to Estella, the others on Wells’ crew were Jeremy Tingey, Shane Watson, and Marcos Soto. Tr. 186. One can move up to a tech 6 in that job, which is a semi-supervisory position, as one fills in for the supervisors. Tr. 178. Despite being a tech 5, not a tech 6, Wells had Estella fill in for him on occasion and therefore he was performing tech 6 work at times. Wells also had Estella train new people. Tr. 178. Estella, Wells stated, was a good employee. Tr. 179. Exhibit P 7 is one of Estella’s evaluations; this one being through December 2014. Tr. 180. Respondent voiced it had no objection to any of Estella’s performance appraisals. Tr. 181. Other performance evaluations told the same story: Estella was a good employee. “Gene works well in all phases of the job, including the months filling in for myself while doing the control room operator job as well as keeping the crew on track and helping them to learn new tasks.” Tr. 182, referencing Ex. P 8, Ex. P 9, and Ex. P 10. In summary, Wells considered Estella to be a very good employee, and he agreed that Estella brought safety issues to him. Tr. 188-89.

As for Estella’s assertion that he called MSHA, Wells stated that he was not aware that such a call had been made. Tr. 190. When the MSHA investigator arrived at the mine, Wells was not at the mine, as it was his day off. Tr. 190. When he returned to work, there was casual discussion that MSHA had been at the mine, but Wells was not officially involved in those discussions. Tr. 191. After the MSHA investigation, Wells’ crew had some additional training. On the day that three members of his crew were fired, Wells was present only for the first round of questioning. Tr. 192. The first member interviewed was Soto, followed by Watson. This occurred in Blaskovich’s office. Wells works directly for Blaskovich and Mitchell. Wells involvement was limited, as he was there only as a listener. Wells’ account of Soto’s answers to the questions was consistent with the others who testified. Wells stated that Soto was asked if he brought beer to the mine that morning and he admitted to doing so. Tr. 194. When asked where the beer was, Soto informed that it was in the trunk of the car and that the car was in the parking lot. *Id.*

Wells did not think that they asked if Shane or Estella knew about the beer because Marcos told them, “I bought it and I brought it. The other guys had nothing to do with it.” *Id.* Wells was sure that Marcos took sole responsibility. He offered no excuse, such as any claim that it was not on mine property. He informed that the beer was in the trunk of the car. Tr. 195.

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<sup>9</sup> The Court is, in no way, passing judgment on the appropriate discipline to be imposed in these circumstances — that authority lies with Newmont.

When Watson was then interviewed, Wells' role was again that of a listener. Tr. 195. Watson was asked if he knew that [Soto] had bought beer and he told them he did not know that. Tr. 196. Watson told them the car with the beer was his car. Gene Estella was also interviewed and he too was asked if he knew about [Soto's] beer. He stated he did not know about the beer. Tr. 196. They asked where he was sitting in the car and he informed that he was in the back seat. Tr. 197. He also stated that he went into the store with Soto, but that he did not see what Soto was buying. Tr. 197. Once all three had been interviewed, they were taken down for a drug and alcohol test. Tr. 197. Wells was told to "go through the fridge and the cupboards and the trash cans to look for any beer cans . . . [for] [e]vidence or whatever," but Wells found nothing. Tr. 198.

Later, Wells was called back in for the second round of questioning. This occurred not long after the first round. Except for Soto, the others were called back in for more questioning. Tr. 199. According to Wells, the second round of questioning occurred before the employees were sent down for drug and alcohol testing. *Id.* The Court inquired about the new phase of questioning: "The second round, was it like the first round, they brought them in one at a time? Or were all three of them there for the second round at the same time?" Wells informed that the same procedure was employed; each employee was questioned separately, one at a time. Tr. 200. As noted, for the second round, Wells again was there strictly as an observer. Tr. 200-01.

During the second interrogation, Estella was asked again if he knew that Soto had brought beer. Wells stated, "[Estella] said -- I think he said, 'Yes, now that [Sotto] told me, I -- 'I know.'" Tr. 203, 213. To be clear, Estella stated that Sotto had told him about the beer *after* the first round of questioning, so that it was only then that he became aware of it at the time of the second questioning. Tr. 204. According to Wells, the questioners challenged Estella's account, stating that he was right next to Sotto and therefore had to have known about the beer. However, Estella told his examiners that he was ahead of Sotto at the store checkout line. *Id.*

After the second questioning, the employees were taken down for urine and alcohol testing. Tr. 206. Neither Mitchell nor Blaskovich ever asked Wells for his view on what action should be taken against the three. Tr. 207. Wells considered it unusual that they did not seek his viewpoint. Wells' recollection was that he did express whether termination was appropriate before the first interviews and he told them that they were all really good employees. Tr. 208. However, before he uttered that view, Mitchell said words to the effect of "[w]ho are we going to fire first?" *Id.* Wells also stated that to the best of his recollection, he had never 'written them up' for anything negative. That was modest, because in fact his write-ups involved positive things they had done. Tr. 208-209.

Directed to the employee handbook at page 12, and the 28 or so examples of misconduct listed there, Wells, after reviewing that list, saw none that applied to Estella. Tr. 211. Wells was never informed of the reason for the employees' dismissals; instead he was told only of the conclusion that "after the investigation was done, that the findings were they were terminating all three." Tr. 212.

When further directed to item 16 from the employee handbook, providing, "[k]nowingly giving false or incomplete information which would affect the performance of your duties, other

employees, or the course of an investigation [concerning] . . . Newmont operations,” Wells couldn’t state if that applied to Estella, as he was not at the store and therefore could not comment about the events. Tr. 212. Although neither Mitchell nor Blaskovich told Wells that Estella gave false information, after the questioning sessions, they stated to him that it was their belief that Estella was lying as to whether he knew there was beer in the car. Tr. 213.

Wells was also asked about the “Corrective Action Procedures” from the employee handbook at section 2.3. Tr. 214. Asked if the procedure applied was typical, Wells first stated, in so many words, that his involvement in such matters had been minimal. *Id.* However, he was then directed to read from that section of the handbook’s provision that the disciplinary “actions include the following: recorded verbal warning, written warning, final warning, and termination.” Tr. 215. He then agreed that this was the procedure the he would normally use. *Id.* In this instance he had no idea who determined that termination was warranted. Tr. 215-216. Continuing with the handbook’s provision, Wells then read from section 2.3.3 which provides that “[t]he level of corrective action for any violation, including attendance, will depend on all of the circumstances involved, including the severity of the misconduct, willfulness, history of corrective action, and any other considerations.” Tr. 217. As noted, Wells was never asked for his thoughts about the severity of the matter.

Wells did offer to Mitchell and Blaskovich for their consideration, “that all of them never missed a day, never called in, and that the only time they were -- had any paperwork at all, it was good paperwork.” Tr. 218. In reaction, Mitchell and Blaskovich acknowledged to Wells that “it’s never happened before -- or that they know of, so they would have to call other mine sites so they can be consistent.” *Id.* However, he was never advised if that transpired or what was learned. *Id.* Instead, he was told to make arrangements for employees to do overtime, in order to compensate for the three who were suspended. *Id.* Wells was not involved with any of the employees’ appeals. Tr. 219. The Court then asked if Wells, with his 19 years with Newmont if he ever could “recall any incident similar to that where an employee was fired for having alcohol -- no test, no positive test -- but alcohol in a vehicle, no consumption . . . where some other employees were fired for something similar to what happened here?” Tr. 221. Wells answered, “No.” *Id.* The Court considered all of the matters raised during the cross-examination of Wells.<sup>10</sup>

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<sup>10</sup> The Court did not consider much of the cross-examination of Wells to be significant to the issues to be decided. The information derived from it is recounted here only for the sake of completeness and to show that the Court considered the testimony and then decided that it was not significant. That cross-examination involved the following: When Wells was asked during cross-examination if he was surprised to learn that Estella had called MSHA over a safety complaint, the Court interjected, asking the witness if he knew that such calls were made on a hotline to protect the person from being identified and that at times the caller remains anonymous even to MSHA. Tr. 248-49. The Court then pressed further, asking the witness if it was equally plausible that, because of the hotline system’s design, Estella could have called the number 10 times and he never would have learned of such calls. Wells agreed. Tr. 249. Counsel for Respondent pressed the point, however, that Wells did not believe that his performance as Estella’s supervisor would ever give Estella a reason to make such a call.

(continued...)

## Testimony of Complainant Gene Estella

The Complainant, Gene Estella, testified. He had been employed by Newmont for 11 years, at three different sites. At the Phoenix mine he worked for nine years, with two and a half of those at the copper leach operation. Tr. 275. Estella stated that he had a good relationship with Wells and Wells' supervisor, Blaskovich. Estella similarly had a good relationship with James Polanco, Blaskovich's predecessor. Tr. 276. Estella was the control room operator in the copper leach area, in the role of a tech 5. Whenever he saw a safety issue, he would correct it himself or inform his supervisor of the problem. Tr. 277-78.

In the spring of 2015, Estella informed Wells of safety concerns he had with his crew. Tr. 280. Wells was responsive, at least for concerns that he could address. Design changes, for example, were outside of Wells' authority. Tr. 280. In that same spring, Estella also stated that he had safety issues, not with his crew, but rather with the actions of the other crews. Tr. 282.

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<sup>10</sup> (...continued)

(i.e. that Wells was unresponsive to Estella's safety concerns and therefor would have a need to bypass him and call MSHA. ) Similarly, Wells expressed his opinion that Blaskovich was responsive to safety concerns, though he didn't work there for very long. Tr. 250. However when the Court inquired further, Wells' answer was more nuanced about Blaskovich's reaction to safety issues, stating there were times when he did not accede to a safety concern. Wells agreed with the Court's summary of his view of Blaskovich and his addressing safety issues that "there were times in your interaction with him when he was responsive, but if I understand your testimony there were some other times when he didn't agree and, therefore, didn't act upon your issues?" Tr. 251. Wells agreed that the mine has a "continuous improvement process" and agreed that suggestions for such improvements had been made using that process. *Id.* As to the June 17 incident with the alcohol in the car investigation, Wells agreed that alcohol is strictly prohibited and that it so states in the handbook. Tr. 252. Further he agreed that the drug and alcohol policy is reviewed annually with the miners. Tr. 253. Wells also agreed it was his understanding that "the information that had been provided by Mr. Heese about what had happened that morning at the Midway Market." *Id.* In a similar reaction, the Court ultimately considered much of the subject matter on re-direct not to be especially valuable. It too is recounted here as a matter of completeness: On redirect, Wells was asked about his relationship with Mike Peasnall, who was a supervisor on the C crew. Peasnall stopped being the supervisor of that crew a few months after the June beer issue. Tr. 260. Estella's attorney asked some questions about the fire pump issue, and Wells explained "We've had some kick on for no reason. We've had some that leak constantly. We've had the jockey pump, which is a pump that maintains pressure on the line where it would not shut -- it would run and stop running and stop running instead of just maintain pressure because there was probably a leak somewhere. We've had them locked out for various reasons during different pumps or sometimes all of them." Estella's attorney then asked, "So when they are locked out what is the fire suppression system that is available to the operation?" Wells responded, "There isn't," and that nothing occurs, although at one time they did have a water truck come over. Tr. 267. This was stopped, because water would not be effective to deal with that type of fire. Tr. 268. Wells never heard directly from anyone that a miner had called MSHA; all his information about that subject was secondhand. Tr. 271.

In particular, he cited his concern about “[a]ccess to the stripping machine while it was running. The fire alarm system and the pumps was concern of mine also, and other crews.” *Id.* The audible alarm problem was that pumps were supposed to run if there was a fire. *Id.*

Estella stated that he shared his safety concerns with other employees during that spring of 2015, and that a plan was made with Javier Esquibel and Marcos Soto to call MSHA. Tr. 283-84. Kyle White had similar safety concerns, but Estella spoke “very little” with him. Tr. 284. Estella stated that he told both Esquibel and Soto that he was going to call MSHA, a decision he made around Memorial Day 2015. *Id.* Estella stated that, in fact, he did make one call to MSHA. *Id.* His call to MSHA was about 30 minutes long. Tr. 285. His complaint encompassed the audible alarm and the pumps, as they are linked together, and the lack of training and the stripping machine lock out and procedure. *Id.* He made the call anonymously to the MSHA hotline on a phone he borrowed, from Monica Simpson. Tr. 297. As noted, Ms. Simpson is his girlfriend’s daughter. Tr. 285. He used that method in order to avoid being linked to his own phone. Tr. 286. Estella expressed his concern about the risks in calling MSHA with both Esquibel and Soto. *Id.* Later, though not right after he called MSHA, Estella revealed to Esquibel that he had made the call. Tr. 287. Esquibel works on the C crew. *Id.* Estella also informed Soto that he had called MSHA. Tr. 289. This occurred on the day before they went back to work after the Memorial Day Holiday. *Id.*

Upon Estella’s return to work, he learned that MSHA had been at the mine on June 2nd and 3rd. *Id.* Estella asserted that his complaints to MSHA were covered by the subsequently issued MSHA citations. Tr. 290; Plaintiff’s Ex. 2. That matter pertained to entering the moving machine parts area of the stripper machine without de-energizing it and not locking and tagging. *Id.* Estella affirmed to the Court that was one of his complaints made to MSHA and that he made that complaint to MSHA prior to the citation being issued. Tr. 290-91. Similarly, Plaintiff’s Ex. 3, another citation, encompasses another complaint he made to MSHA during his hotline call. Tr. 291. That one related to the fire system, with the functional alarm disconnected inside the control room and a fire pump not functioning. *Id.*

Estella agreed that the MSHA citation went further as it involved more than the audible alarm, as it included the fire pump too. Tr. 292. Estella affirmed that Esquibel also called the MSHA hotline and later told Estella about that, but not until a week or two after MSHA appeared at the mine to conduct the inspection. *Id.* Plaintiff’s Exhibit 4, Estella affirmed, is another citation issued to the mine, and it too pertains to a specific complaint he made to MSHA during his call. This one involved miners not being task trained in the tank house. Tr. 293.

When Estella was suspended, on the 17<sup>th</sup>, it was the last day of the rotation. At that time he was working on the day shift. Tr. 294. Estella carpooled with Soto and Watson that day, with the latter being the driver. Watson picked up Estella around 5:00 a.m. The group then traveled to the Midway Market, which was a custom for them. Tr. 296. Soto and Estella entered the market, while Watson stayed with his vehicle. *Id.* Estella purchased a burrito and then a drink from a display near the checkout counter. He did not see Soto at that time, and he paid for his purchase and left the store. Tr. 297. He did see that Soto and Heese were heading towards the checkout when he left the store. Tr. 297-98. Estella proceeded to Watson’s car and Watson opened the car’s trunk for him. Tr. 298. At the trunk, Estella put his items in his

lunchbox. Unable to find his gate badge card, because it was dark, he brought his lunch box to the car's back seat, entering on the passenger's side, and then made use of the car's dome light to continue searching for his badge. Tr. 299. At that time, Soto was leaving the store. Estella did not see what Soto had bought; he only noted that Soto had white bags. Tr. 300. As he was entering the back seat of Watson's car, Estella observed Heese leaving the market. However, there was no communication between Heese and Estella. Tr. 301.

The group then proceeded to McDonald's. Tr. 301. Though a visit to McDonald's for breakfast was not part of their routine, Soto was treating that day. *Id.* They used the drive-thru. From there, the trio went to Newmont's Phoenix mine, a trip that takes about 20 minutes. Tr. 303. They were on time, but close to being late. *Id.* Estella then left the car and went to the gate to clock in. He was the first of the group to enter. On that day Estella was working in the control room. Tr. 305. After changing into their work gear in the locker rooms, he went to the control room. The D crew assembled for a safety meeting and Wells was present for that as well. Tr. 306. Estella did not see Watson or Sotto after that meeting until they had come to the control room after the car had been searched. *Id.* The next event after that was Newmont performed a lunchbox search in the control room. Tr. 307. Mitchell then told Estella that the issue was "suspicion of alcohol." *Id.* Estella testified that he did not know what Mitchell was talking about. *Id.* Estella's lunchbox, which was right there in the control room, was searched but no alcohol was found. *Id.* They then conducted a locker search, with Mitchell still presiding in the searches. Again, Newmont found nothing. Tr. 308. Following that, they proceeded to Blaskovich's office. In attendance were Estella, Wells, Mitchell and Blaskovich. They didn't announce the purpose of the meeting; they simply started asking him questions. *Id.*

The questions posed to Estella were whether he knew that Marcos had brought beer to work and what kind of car Watson drove. *Id.* Estella replied that he didn't know that Marcos had brought beer and he only knew that Watson's car was white. *Id.* Estella could not recall if the examiners advised him about the incident at the Midway Market or Heese's presence at the market that morning. Tr. 309. Estella was then led for a drug and alcohol test in the company of Heese and a security guard. The results of that test were negative. *Id.* Following that, Estella was then taken to the control room by Wells and he began to perform his job operating the control room. Tr. 310.

Estella next saw Watson and Soto after they returned from Watson's car in the parking lot. Soto and Watson told him that management had searched the car. They also then told him what was going on, namely that Soto had brought beer in a cooler and forgot to drop it off at home before heading to work. Tr. 310. Estella had heard Sotto mention his cooler earlier but he didn't "put it together" until Soto told him of the beer. Tr. 310-11. Estella knew that alcohol and drugs were not allowed on the property and that it was a fireable offense. Tr. 311-12. He knew this as a matter of common sense – if one "show[s] up drunk, you're going to get fired." Tr. 312. However, he did not know of anyone who had been terminated for drug and alcohol use at the mine. *Id.*

After he was in the control room with Watson and Sotto, Estella was then again called back into Blaskovich's office. Tr. 313. Those present with him were the same group as before: Blaskovich, Wells, and Mitchell. *Id.* They asked Estella if he would like to change his story.

Estella said “yes.” *Id.* But the *change* to his story is more accurately described as an *updating*, as he told them, “that Marcos Soto informed me that he had alcohol in the vehicle.” Tr. 313-14. The group specifically asked Estella if he had seen the beer and he informed them, “No.” Tr. 314.

The Court then stepped in, asking: “When was the first point in time when you became aware that Marcos [Soto] had beer in Watson’s vehicle?” Estella responded, “When they came up from the car search in the control room.” Tr. 314. The Court inquired further, “Is it your testimony that prior to that point in time you had no knowledge that there was beer in that vehicle?” Estella answered, credibly in the Court’s assessment, “Correct.” *Id.* Soto was the person who initially informed Estella of this in the control room. Tr. 315.

Due to its importance, the Court decided to delve further on this issue, asking, “When he informed you of that was that *after* your first interview with people about this incident?” Tr. 315 (emphasis added). Estella responded, “Yes.” *Id.* The Court probed further, asking, “So you had one interview with the people, you say you know nothing about alcohol; is that right?” *Id.* Estella affirmed, “Correct.” *Id.* The Court continued, “Then . . . you meet with [Watson and Soto] . . . [i]n the control room?” *Id.* Again, Estella affirmed that was correct. *Id.* The Court then asked whether, “It’s at that point in time that Marcos [Soto] tells you he had beer in the vehicle?” and again, Estella affirmed, “Yes.” Tr. 315. To be sure of his testimony on this point, the Court asked, “And that’s the first point you knew of it?” *Id.* Again, Estella answered “yes.” *Id.* Continuing, the Court asked, “You had no clue -- It’s your testimony under oath that you had no clue there was beer in that vehicle until that moment in time?” Tr. 315-16. Again, Estella responded, “Yes.” Tr. 316. The Court determined that Estella’s testimony was truthful in his responses to these particulars.

Newmont’s Phoenix Mine questioners asked Estella if he would have said something to Soto if he had known about the beer, and Estella responded that he would have said something. Tr. 316. Not insignificantly, Estella then brought up a pertinent point asking, “why didn’t Dayne Heese say something to him when he was in there with him?” *Id.* The response, in Estella’s view, offered no good reason: “They didn’t really give me a good response on that. We kind of -- after that we kind of got arguing.” *Id.* The meeting then became “a little contentious,” with Estella “kind of getting upset.” Tr. 317.

Estella stated that there was no recording of the meeting, although he believed that someone from management was taking notes. The second meeting lasted about ten minutes. Tr. 318. Following its conclusion, he was told that he was suspended until further notice. He then went to the lunchroom and waited there, alone, for about 15 minutes. After that, Soto and Watson entered the lunchroom. Tr. 317-19. Blaskovich then drove Estella and Soto home. Tr. 319. They were advised that Newmont would be in contact with them. There was no contact from June 17th until the 23rd, and a meeting ensued on June 24th. On the 24th, Estella met with Mitchell and Blaskovich at a Newmont building in town. Tr. 320-21. Estella was told at that meeting that he was terminated, with the reason given as, “off the job behavior that adversely affected the company.” Tr. 321. Estella appealed that determination, seeking reinstatement. During that meeting he was not asked again about his knowledge of the beer. This was the first time he was given a reason for his firing. Tr. 322. Concerning his appeal,

Estella was advised that he would have a meeting with John Cole and that occurred some 14 to 16 days after the meeting announcing his firing. Tr. 323. Mitchell was also at that subsequent appeal meeting. Oddly, Cole asked Estella to tell him about the events, as he didn't know much about what happened. Tr. 324. Estella repeated the events, reiterating that he had not seen the beer. When the meeting ended, Cole advised that he would get back with Estella. *Id.*

During the time between his suspension and his meeting with Cole, Estella filed for unemployment benefits. He was denied those unemployment benefits, and he then appealed that determination. Exhibit P 20 is a decision regarding unemployment, a letter to Estella, dated July 21, 2015. Tr. 327. Exhibit P 20 reflects that Estella was discharged for off duty behavior which adversely affected his employer. Tr. 328. Thus, the Court notes that Estella's testimony regarding the reason Newmont gave for his termination and the unemployment letter are in concert as to Newmont's first claimed basis for his firing. *See* Tr. 320-21. The Court finds that Estella's testimony is the more credible basis for Newmont's initial, professed, justification.

Subsequently, Cole advised Estella that he was upholding the original determination. Tr. 329. Estella informed that he would be appealing that determination, which involved a meeting with the mine manager, Ms. Cecile Thaxter. Tr. 330. While awaiting the appeal with Thaxter, Estella's appeal before the unemployment division was continuing. Upon meeting with Thaxter, Estella continued to seek reinstatement. Tr. 331. At his meeting with Thaxter, Mitchell stated that he was being terminated for not being truthful in an investigation. Tr. 332. This was the first time that basis, a lack of truthfulness, was asserted by Newmont. *Id.* Estella questioned Mitchell about the other reason that had been asserted, the beer on premises, and Mitchell stated that was *not* the reason. Estella then presented Mitchell with the unemployment division letter stating that *was* the reason. Tr. 333. That is, Estella presented to Newmont the reason that Newmont gave to the unemployment division for his termination. *Id.* Subsequently, Estella was able to have his unemployment benefits reinstated. Tr. 339.

Upon cross-examination, Estella agreed that he was aware of the company policy regarding alcohol, including that alcohol was not allowed at the company's parking lot. Tr. 341. Estella agreed that during his appeal process he never asserted that he was being wrongfully terminated because he made a safety complaint to MSHA and Newmont knew about such complaint. Tr. 342. In the Court's view, that proves nothing – it does not diminish the merits of Estella's claim as that was hardly the setting for him to raise such matters. He was, after all, seeking to be re-employed by Newmont. Further, as explained *infra*, Newmont's actions towards Estella made no sense other than to demonstrate that its termination stemmed from Estella's safety complaints, and that it seized upon the beer incident to exact punishment for making them.

In further questioning about the incident at the market, Estella acknowledged that the Midway market is a small store. Tr. 345. Estella reasserted that he did not notice that Soto was carrying a bag of ice. *Id.* He agreed that he did see Heese and Soto at the checkout line as he was exiting the store. Tr. 346. Estella also reasserted that he did not see that Soto had beer on the checkout belt. *Id.* Estella stated that, as he was entering Watson's car, he saw Heese exit the market. Tr. 347. Estella did express that, in his opinion, it was Heese's responsibility to say something about the beer while at the market.

As noted, on June 25, 2015 the Nevada Department of Employment was advised that Estella was discharged for off-duty behavior. Tr. 322, Ex. P 19.<sup>11</sup> Thereafter, on July 8, 2015, Newmont asserted that Estella's discharge was attributable to being "involuntarily separated for unacceptable job conduct – knowingly gave false or incomplete information during the course of an investigation." Ex. P 19 and Tr. 350-51. However, in the Employment Department's July 21, 2015, the decision denying benefits again reflects that Estella was discharged for off-duty behavior which adversely affected his employer. These exhibits were offered to show that Newmont changed the reason for his discharge. Tr. 353. Acting on his own, and without the assistance of legal counsel, Estella appealed the initial denial of unemployment benefits. *Id.*<sup>12</sup>

Respondent's Counsel then asked Estella about Ex. P 15.<sup>13</sup> That exhibit is the statement made by Estella in his attempt to obtain unemployment benefits. Estella stated that the letter was typed by his girlfriend. He had written out his unemployment statement and she typed it, but Estella stated that he believed it accurately recounts what he stated. Tr. 357. The exhibit can be viewed as problematic for Estella, but the Court's reaction is that it must focus on the Mine Act discrimination complaint, not the remarks he made in seeking unemployment benefits. In this regard it must be noted that Respondent's Counsel wanted to have unemployment matters both ways, seeking to invoke such matters when helpful and to distance those decisions when disadvantageous.

Estella, directed to Exhibits R-5 and P-15,<sup>14</sup> agreed that he stated "I admitted to hearing Marcos ask if we could stop by his house to drop off the cooler with beer in it[.]" Tr. 358. Estella then stated that he made that admission during *the second meeting* with his employer on June 17, 2015. Tr. 358. Estella was unsure but believed that he filed his discrimination complaint with MSHA around July 24, 2015. Tr. 359. Estella affirmed that he specifically discussed the pump situation, meaning the control panel, in his complaint to MSHA. Tr. 360. Shown Ex. P 3, Estella stated that in his complaint to MSHA he talked specifically about a fire pump malfunctioning. He also brought up the issues of wires being cut on a fire alarm and task training. His call to MSHA included the stripper machine and the lack of task training for that for the younger employees. Tr. 362. He also brought up lock out procedures as an issue. Estella did feel that those on his crew, the D crew, were adequately trained. Tr. 363. As an example of his awareness of the inadequate training for some of the younger employees on the other crews, Estella cited learning of this when those other crew members worked overtime and

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<sup>11</sup> Only Pages 1 and 2 from P 19 were admitted at that time; those pages also include a reference to Ex. 4 and Ex. 5 on bottom right corner, but those numbers do not relate to this decision and the exhibit remains identified as Ex. 19.

<sup>12</sup> When Estella made his statement to the employment division, he was not represented by legal counsel. Nor did Estella's attorney handle any of his employment appeal before that division. Tr. 404. R's Ex. 5.

<sup>13</sup> Estella recognized the document, but believed that, unlike Exhibit 15, the version of the document that he submitted had his signature on it. Estella was then shown Ex. R 5, which is the same as P15, except that the latter does have Estella's signature on it.

<sup>14</sup> As has already been noted, these are essentially the same document.

how his crew would straighten them out, explaining how to do things correctly. Tr. 364. Estella affirmed that if Wells was unavailable, he would fill in for him as the shift relief foreman. *Id.*

Estella was then shown Ex. R 11, the Newmont employee handbook. Tr. 366. He admitted receipt of the handbook when he was hired. Ex. R 8 is Estella's acknowledgement of receiving the handbook, dated April 29, 2012. Tr. 368. Estella stated that he had a good relationship with Wells, Blaskovich, and had no problems with Mr. Cole. As for Cecile Thaxter, he stated that he didn't really know her. Tr. 370.

Estella stated that he informed Soto before Memorial Day, 2015 that he intended to call MSHA. Tr. 370. Shown Respondent's Ex. R 1, Estella stated that the first two pages are the discrimination report papers he completed when he filed his complaint with MSHA, dated July 24, 2015. He stated that he waited to file his complaint with MSHA until July 24, 2015 because he first wanted to exhaust his appeals within Newmont's appeal process. Tr. 372. The Court notes that it accepts this assertion as it makes sense in the totality of the events here. First and foremost Estella wanted his job back. A good employee of long-standing at the Phoenix Mine, Estella believed that the real reason he was terminated was because he called MSHA. Tr. 373. The Court agrees and so finds. Estella also believed that his character has been damaged within the mining industry because he is now known to have called MSHA. The Court would agree that, as a practical matter, calling MSHA with safety or health complaints is likely not to be applauded by the mining industry in general; it is effectively a scarlet letter for those miners who are so identified. Indeed, Thaxter admitted that Newmont was not thrilled by the complaint having been lodged and it would be naïve to think that its only irritation would be that there were safety issues without regard to the source that brought them to light. Tr. 903-906.

In his Complaint filing with MSHA, Estella listed Dayne Heese first and then Mitchell, Cole, Blaskovich, and Thaxter for the discriminatory action against him, although he could not name any specific discriminatory action taken by them when he filed his claim. Tr. 374. This is not surprising, given the circumstances, that the Complainant or any complainant would know such information. Inherently, at that stage the best a complainant can do is name likely suspects. Estella confirmed for the Court that those individuals were listed because they were part of Newmont's management. Tr. 375. Estella was then shown Exhibit R-2, which is the letter from MSHA denying his discrimination claim. Tr. 376. Of course, an MSHA denial of a discrimination claim is only that – it carries no other import, or silent suggestion, that the complaint is without merit. MSHA's conclusion is that there is insufficient information to meet the preponderance of evidence standard and nothing more. MSHA can get it wrong however, as occurred here, a fact Congress recognized by including the provision for a miner to proceed on his/her own with a claim.

Exhibit R 3 is Estella's appeal to the Commission of the denial of his claim, dated October 5, 2015. The appeal was drafted by Estella's attorney, and the Court would note that there is nothing unseemly about that. This is part of the attorney's role in representing the client. That appeal letter stated: "I'm certain that they have recognized that the reason given for my termination is only an excuse, but I feel that their final decision is based on wanting to send

a message to current employees that if you utilize MSHA's complaint reporting process you will no longer have a job at the mine.” Tr. 378-79; Ex. R 3. Estella agreed with the assertion by Respondent’s counsel that “[i]n [his] appeals process not once did [he] raise the issue that [he] believe[d] that [he] [was] being discriminated against or defamed because [he] had called MSHA.” Tr. 379. The Court wanted the record to be clear that, regarding the questions posed to Estella about not raising the issue of his termination based on Newmont wanting to send a message to its employees for those who might contemplate calling MSHA, his failure to make that claim was in the context of appealing his termination within the *Newmont’s* appeal process. *Id.* The point is that one would hardly make such a claim before one’s employer when seeking to have that employer grant reinstatement.

Estella was then shown Ex. R6, which is the August 4, 2015 interview he had with MSHA investigator Kyle Jackson. Tr. 380. Estella did express a worry for Wells, fearing that if there was any perceived link between him and Wells, it would be a problem for Wells. As Estella put it, “he will bear the wrath of it and it was my - ” [Estella’s answer was interrupted by Respondent’s attorney, asking the basis for his claim that Wells would bear the wrath of Newmont.] Tr. 382. Estella then continued, “Just you don't want to be linked with calling MSHA. You want to keep it as quiet as you can.” *Id.* This theme of Estella has been mentioned earlier in this decision. The Court does not believe Estella’s perspective is irrational.<sup>15</sup>

Turning to Newmont’s code of conduct, in further cross-examination, Estella agreed that it is his responsibility as an employee of Newmont to abide by that code. Tr. 383. He also agreed that he had observed the mine property signage, per Exhibit R 16, prohibiting alcohol, drugs or firearms at the site. Tr. 384. Estella, it will be recalled, was not terminated for any alcohol, drug or firearm violation. Estella also agreed that during his second meeting on June 17th, he told Mitchell, Blaskovich and Wells that he was “old school,” meaning that he was not a tattletale. Tr. 385. The Court inquired about Estella’s education level and he informed that he finished high school and went to community college for auto mechanics but did not finish that program. Tr. 387.

The Court also inquired why it was that Estella never asserted to Newmont that they were firing him because he made a safety complaint. He responded, “You know, I don't know. I thought if I could appeal it that I would get reinstated.” He explained further, “I was just because of the -- because of why they told me they fired me is what I was going after.” Tr. 388-89. Asked when he first came to believe that the real reason he was fired was for making a safety complaint, Estella stated “After, what is his name, [Esquibel] expressed to me that he mentioned my name.” *Id.*

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<sup>15</sup> Estella was then asked about Esquibel’s testimony that he provided Estella’s name to the MSHA inspector. Tr. 382. Estella agreed that Wells continues to work at Newmont and that nothing bad employment-wise has occurred against him. Tr. 383. The point of this question, obviously, is that Esquibel has not been terminated. Of course, no infraction has been made by Esquibel. In addition, this case is about *Estella’s* discrimination complaint.

Also, in answer to the Court's inquiry, Esquibel stated that the first time he was told that he was fired for knowingly giving false or incomplete information was when he had his interview with Mitchell and Thaxter. Tr. 390. The Court then asked Estella about Ex. R 5, directing his attention to middle paragraph of the second page of that exhibit and, noting that it was a document that he signed, noted, "It says I admitted to hearing Marcos ask if we could stop by his house to drop off the cooler with beer in it. They thanked me for being honest and then informed me that I was suspended until further notice." Tr. 392. The Court expressed that passage sounded like Estella admitted that he did know about the beer in the cooler. Estella agreed that it sounded like that but explained that he didn't word his answer very well. Given that, the Court then asked of Estella just what was "the truth of the situation." *Id.* Estella explained, that he "didn't admit to the cooler full of beer. I admitted -- Well, he [Soto] told me previously when we were in the control room what was in the cooler and then I told them that he told me that he did have a cooler in the beer or beer in the cooler." *Id.*

The Court expressed to Estella that the apparent conflict was a troublesome part of his case. Estella reiterated that the letter with the troublesome language was typed by his girlfriend. The Court pursued this line of questioning with a last inquiry,

What is the truth of the matter, Mr. Estella? Did you admit to hearing -- did you admit to Newmont, did you admit to Newmont hearing that Marcos [Soto] asked if all of you could stop by his house to drop off the cooler with beer in it, did you admit that to Newmont?"

Tr. 393.

Estella responded, "No." *Id.* Thus, Estella maintained that the words expressed there were not correct. *Id.* Further, he repeated that he never made such an admission to Newmont. *Id.* The Court finds that, notwithstanding the language used in the letter (Ex. R 5) that within its four corners the letter contradicts itself on this question and therefore is equivocal on the issue, and perhaps more importantly, the Court finds that Estella's testimony on the issue was credible – he only admitted to knowledge of the alcohol *after* the first interrogation, when Soto disclosed his violative behavior about the beer to him.

On redirect by Attorney Amens, Estella affirmed that he had made a general complaint about training. Tr. 396. He also complained to MSHA on its hotline about the stripping machine. *Id.* He stated that when he filed his complaint with MSHA, per Ex. R 1, he did not have legal counsel. Estella read from his statement to MSHA investigator Jackson (Ex. R 6) that he was wrongfully terminated for being revealed as an employee that contacted MSHA. Tr. 398. His interview with Jackson was after he had been fired by Newmont. *Id.* Estella did not type that claim; it was prepared by MSHA. Tr. 399. In one of his responses to the MSHA investigator, Estella named Dayne Heese as one of the persons that heard Estella's name mentioned in the control room. Tr. 400. Estella reaffirmed, and the Court finds credible, that he waited to file his discrimination complaint because his primary interest was in being reemployed by Newmont. The Court construes this approach to speak well of the Complainant, as he was foregoing a discrimination complaint in the hope of being reemployed. Also, as noted in this decision, Newmont's actions against Estella, so out of proportion to the mine's claimed

offense of Estella being initially untruthful, supports the Court's conclusion about the driving force behind its action against complainant. Tr. 402.

On continued redirect, in attempting to address Estella's conflicting remark in his letter to the employment division that he admitted to hearing Soto state that he needed to drop off the beer, Estella reaffirmed that he never admitted to Newmont that he knew of the beer in the car. Tr. 407. Estella explained that the sentence in his unemployment statement was inaccurate, and he attributed it to Marcos [Soto] and his girlfriend all being present with him, when his girlfriend typed the statement. Estella's girlfriend typed up both his and Soto's unemployment claims. Tr. 410. Both were typed at the same time. Tr. 413-14. As noted, the Court finds, in the context of the entire letter, and considering the record in its entirety, that Estella's assertion is credible.<sup>16</sup>

Thus the Court finds that it is understandable that Estella's letter could reflect a lack of articulateness,<sup>17</sup> in that Estella did learn of Soto's admission about the beer, *but that such knowledge was acquired after* Newmont's inquisition began, between the first and second questioning. Estella himself made this clear, stating, "I told them that I did know what was in the cooler *after* I talked to Marcos [Soto] in the control room." Tr. 407. (emphasis added).

Continuing with this issue of Estella's statement to the unemployment division, the Court noted that it would be helpful to see Estella's girlfriend's letter that she typed for Estella. Complainant's Counsel states that letter was provided to the Respondent. This was identified as P 6. Tr. 412. Again, Estella backed away from his statement in that document, asserting that it is inaccurate with the claim within it that he "admitted to hearing Marcos ask if we could stop by his house to drop off the cooler with beer in it. They thanked me for being honest and then informed me that I was suspended until further notice." Estella affirmed that statement is inaccurate. Tr. 416. In addition, Estella asserted that he made it clear during the Newmont questioning that he only learned of the beer when he and Marcos were in the control room after the first round of questioning.

On re-cross examination, Respondent's Counsel revisited Estella's claim that he didn't bring up his safety complaints to MSHA when before Newmont because he was afraid of the repercussions. His concern was not limited to Newmont's reaction, as he believed that any

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<sup>16</sup> The Court reaches the same conclusion regarding the sentence in Ex. R 5 stating the Newmont thanked him for being honest. Tr. 407. Estella's "honesty" was qualified in that his honesty was intact in both rounds of questioning, the difference being that by the second round he had new information, as provided by Soto after the first questioning.

<sup>17</sup> Even Blaskovich testified that he wasn't so sure that "articulate" would describe Estella. Tr. 622. This has relevance to the conflicting assertions made by Estella in his unemployment claim and his discrimination claim. Nor could he say that Estella was quick to understand new procedures, but rather he understood and would pick things up. Thus, he agreed it would take Estella a little while for him to fully understand new procedures. Tr. 622-23.

mining operation would not view him favorably, if he were known as one who called MSHA. The Court then commented,

In context my understanding of his testimony was that he was saying that if he were to disclose he called the MSHA hotline and that became known in the mining community that he was the type of guy that would call the MSHA hotline, he viewed that as being not helpful to his future job opportunities, and I think that's a reasonable conclusion for one to reach.

Tr. 419-20.

Estella's belief about that company reaction was based upon his entire experience with his mining community acquaintances – if one is branded as an MSHA caller, “your mining career is done.” Tr. 420. Estella reaffirmed that he heard Esquibel say that MSHA investigator Jack Stull asserted to Esquibel that Estella would be protected. Tr. 421. While Estella agreed that his annual training informs that one can contact MSHA without fear of retaliation, he responded “Yes, they *say* you can.” Tr. 422 (emphasis added). The Court would comment that, clearly, Estella did not buy into that claim, which the Court views as reasonable.<sup>18</sup>

### Respondent's Evidence

#### Testimony of Dayne Heese

The Complainant then rested and Respondent called its first witness, Dayne Heese. Tr. 426. Heese is employed at Newmont's Phoenix mine. His title is “[s]enior manager of health, safety and loss prevention.” Tr. 427, 546. His work at the mine began around September 2012. Five people report to him; Jeneca Fitzgerald, Josh Wiley, Kerry Tuckett, Deb Teskey, and Jade Austin. Tr. 428.

Mr. Heese has about 40 years of mining experience. He described his educational background as follows:

I have got a high school education. I've got lots of college classes that I've taken, training classes, certification, lots of certifications in loss control management. I went through the ILCI program, the auditing programming. That's the International Loss Control Institute. It's now DMV. . . . I'm an EMT. I still hold my EMT license.

Tr. 431

Asked whether “the [mine's] health and safety group over which [he was] the manager have (sic) responsibility for administering the drug and alcohol program?” Heese answered,

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<sup>18</sup> As the Court remarked at hearing, it views Estella's claim as encompassing his consideration of whether he could continue working in the mining community, close-knit as it is, if he became known as a worker who is likely to call MSHA. Tr. 424.

“That's correct.” Tr. 432. Heese answered that he was aware of, and familiar with, Newmont’s rules concerning drugs and alcohol on the mine property. He added,

Well, on two different fronts. So they are not allowed on the mining property at least through the 30 CFR by MSHA. They are not allowed on property by company policy through the employee handbook. *We* reemphasize it every year at the annual refresher, during new hire training, any time there are changes to the drug and alcohol policy or the program *we* reeducate everybody on it and there are signs on the parking lot. There used to be signs out on the access road as well, but *we* have them as you're coming into the employee parking lot.

Tr. 432-433. (emphasis added).

It was brought up by counsel for the Respondent that Mr. Heese is an ordained minister, asking, “Are you an ordained minister?” He responded, “I am.” Tr. 433. Minister Heese has served as the senior pastor of a congregation in Battle Mountain since 2000.<sup>19</sup> Tr. 433. Heese stated that it was correct that he has had “a lot of jobs in the mining industry relating to health and safety” and that it required him “to fairly regularly interface with MSHA inspectors.”<sup>20</sup> *Id.*

Focusing upon May and June 2015, Heese was asked about his participation with MSHA. He answered,

Well, they usually come right into the building and they usually stop by my office and let me know that they are there for a regular inspection or sometimes they do the walk and talks and they just stop by to, you know, bring up some safety alerts or things of that nature or they will come in with a hazard complaint, but they

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<sup>19</sup> Heese has been a minister since October 2000. He did not attend any divinity school. Self-study is the basis for his title. Tr. 547. He explained that “the title minister was bestowed “through our church by my senior pastor, previous senior pastor and the church board, and [he] also had to go through a process with Calvary Chapel Association.” Tr. 548.

<sup>20</sup> Heese stated that, prior to the 2015 incident, the last time the mine had more than the usual two inspections per year was in 2012. Tr. 531. Further, the last time he had dealt with a hazard complaint was in 2008. Therefore it is fair to observe that these events have been rare for Heese. Tr. 532.

usually stop and talk to me and then if I have one of my employees available then they will go with them from there.<sup>21</sup>

Tr. 434.

Heese informed that he knows about and has participated in about perhaps eight or nine hazard complaints. In all that time he has never heard an MSHA inspector ask an employee who made a hazard complaint. Tr. 435. Addressing events related to this action, he was asked about the MSHA inspection on June 2, 2015, and he responded that inspector Jack Stull was at the Phoenix Mine on that date for a hazard complaint. *Id.* He elaborated that the inspector “came in, right into my office, said he had a hazard complaint, briefly showed me what it was about a -- about a stripping machine, said where is this stripping machine. So we went for a walk and headed for copper leach.” *Id.*

Responding to the question whether the inspector showed him information ahead of the physical inspection with a summary of the complaints, Heese stated, “He showed it to me, just one sheet, and it had a couple of line items on it. The first one was the stripping machine and that's when we headed straight for the stripping machine at copper leach.” Tr. 435-36. The inspector and Heese went alone to the stripping machine and then met Kyle White, the machine operator at that time. The inspector looked at access points around the stripping machine. The inspector inquired whether the operator knew of people accessing that area without locking it out. The operator advised that he did not know of that practice. Tr. 437.

The group then noticed some gates that weren't signed and locked. Observing this, Heese then had the stripping machine cathodes shut down until everything was signed and correctly addressed. Tr. 437-38. He admitted that some signage was down on a gate. That sign stated that fall protection was required beyond that point and that the machine had to be locked out before accessing. Tr. 438. The party then went to the control room, where Jesse Leon was the operator for that day. Shown Ex. R 24, the crew schedule for May and June, Heese advised that on the day of the inspection, the C crew, Mike Peasnall's crew, was working. Tr. 439. The inspector then inquired if Leon ever saw anyone accessing the stripping machine without locking it out. Leon affirmed that did happen and he went to video footage to prove that. Leon was looking at the video to show the B crew failing to lock out. Tr. 442. Javier Esquibel, a member of the C crew, then entered the control room. Esquibel asked Leon if he could run the video machine, as he was more efficient at that task. Esquibel then found within the video footage of an employee going over the handrail so that the inspector could observe that improper practice. Tr. 443. Esquibel then continued to go through the video to show other things that the crew was doing improperly. Blaskovich then entered the control room. They continued to look at video, with Heese present nearly, but not all, of that time. Tr. 444. Heese

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<sup>21</sup> Heese admitted that, as senior manager of health and safety, he would be immediately informed of an MSHA hotline complaint and that he would be very much involved if MSHA is coming to the mine for a 103(g) inspection. *In fact, he would be the mine's lead person* for such an inspection. Tr. 550. Consistent with that, Heese admitted that he was involved as the lead person when Inspector Stull came to the mine and also when Inspector Jackson came to the mine regarding the discrimination complaint. Tr. 551.

recalled that just before he left for a moment, Mike Peasnall, the shift supervisor for the C crew, came into the control room. The inspector inquired of those present if, when they observed the issues shown on the video tape, they brought those matters to their supervisor. They advised they did not do that. Tr. 445. Peasnall stated that no one had ever brought those issues to him and, if they had, he would have taken immediate action. *Id.*

Heese was then asked, “[d]uring the course of the time you were in the control room with Javier Esquibel that day did [he] hear Jack Stull ask Javier [Esquibel] who made the complaints - that led to the hazard complaint?” Heese responded, “No.” Tr. 446. Yet, when the question was raised again as to the claim that Esquibel told inspector Stull who called in the MSHA complaint, Heese responded later, “I don’t know. I’m not aware of that.” Tr. 519. Heese stated that at no time did he speak with Esquibel while he was in the control room. Tr. 447. However, when asked how long he was in the control room with Esquibel, he answered, “It seemed like quite a while.” *Id.* Respondent’s counsel asked how many hours were involved, suggesting two, three or four hours. Among the choices offered, Heese picked two hours for his answer. Heese agreed that all of that time was while Esquibel was looking for instances of B crew misconduct. *Id.*

Heese was then asked about the MSHA enforcement actions that were issued as a result of the hazard complaint inspection. Shown Complainant’s Ex. 1, the safe access violation issued by inspector Stull, Heese stated that violation was issued “[p]rimarily because ... the signs that we found that weren’t posted and then because of the observation that we saw on camera on May 24<sup>th</sup>, the video evidence.” Tr. 449. Complainant’s Ex. 2, was likewise issued because of the things observed on the video tape. Heese agreed that Esquibel was able to show events on May 9<sup>th</sup> and May 24<sup>th</sup>, regarding the violative actions. *Id.* Complainant’s Ex. 3 involved the issue with the fire alarm. For that one, Heese stated that the complaint was that the wires had been cut to the fire alarm system. Tr. 450. Heese downplayed the violation, “not all the wires were cut. The wires were cut just to the warning buzzer, the audible alarm and that was for a system failure, not a fire alarm. It was on the system side.” *Id.* Referring to the same Exhibit 3, Heese was asked what it meant by its statement that “fire pump number 1 not functioning.” He did not know what that meant. *Id.* As best he could recall, it had to do “with a bypass valve that was in the rectify room that wasn’t functioning properly and that’s what the system alert was for.” *Id.* However, when Heese was asked if the system still functioned with respect to fire protection, he answered “very much so.” *Id.*

Heese was then asked about the vital behaviors program at Newmont. He described it as,

an employee driven program and it’s based on the behavior based side of safety of making good decisions and part of that, how they decided which vital behaviors to use, which talking points or decision points to use for the program . . . [and it considered things] like close calls, accidents, things, situations that happened over the course of many years . . .

Tr. 451-52.

Heese was then shown Ex. R 21, which he identified as the vital behaviors that were developed. One of those vital behaviors is to “speak up.” Tr. 452.

The Court did not find Heese to be an especially credible witness. This determination was made upon an overall assessment of his demeanor during his testimony. One such example for the Court’s determination came about when he was asked to explain the “speak up” vital behavior. Heese answered,

Well what we find many times is that people feel like they can’t speak up or they shouldn’t speak up, it’s not their place, and *it’s an expectation that we set for everybody*, not just our employees, but all contractors, everyone that comes on-site. *We expect them to speak up. If you see something, say something about it. If you are concerned about something, bring the point up.* If something needs to be changed say something. That is what the speak up is for.

Tr. 453. (emphasis added).

Yet, despite all that he claimed to have viewed at the Midway Market that morning, Minister Heese did none of those things.

Heese was then asked about the continuous safety improvement program at the mine. Tr. 453. He described it as a program for employees to convey safety concerns, ideas, and ways to make their jobs easier. Employees are encouraged to participate in the program and they may do so anonymously. Perhaps reflective of the environment at the Phoenix Mine, it does seem odd to the Court that the program provides for anonymity, given its stated purpose.

Shown Exhibit R 23, Heese identified it as the field level risk assessment sheet for tasks the workers perform. Tr. 454-56. He did not know if the copper leach workers were participating but he was sure they had an opportunity to do so. Tr. 457. Heese could not speak with definiteness on the issue of whether the training for this program had been completed for the copper leach employees. He could only state that, “[i]t was starting to be rolled out with this particular program to the supervisors” but he couldn’t speak to how much the copper leach people were utilizing the cards during May and June. Tr. 458. Heese also didn’t know if the hourly people had training about this program. *Id.* The Court then intervened and advised that it could not admit R 23, at least not with the infirmities about Heese’s understanding of its implementation. The Court then added that it was obvious that the document was intended to show how safety conscious Newmont was and is and counsel for the Respondent agreed that was the intent behind its hope to introduce the exhibit. Tr. 460. However, the Court explained that it viewed the intended exhibit to be of minimal interest in the sense that it viewed it as a cul-de-sac, in that, while the information may be interesting and even if Newmont demonstrated that it has a wonderful program regarding safety, the Court could still find that it discriminated against Estella. The two matters are not mutually exclusive. Instead the Court viewed the information as “an interesting side trip along our main journey.” Tr. 460. Therefore, it concluded that it was not worth spending a lot of time on it. *Id.* The Court advised that in its view the more significant testimony from Heese was, without then opining about the credibility of the assertion, Heese’s “statement that he did not hear Mr. Esquibel volunteer Mr. Estella’s

name when meeting with the MSHA investigator.” Tr. 461. As the Court summed up its thoughts on this issue, “These other things are interesting, but it’s not going to be that my decision rests upon the fact that Newmont has a wonderful safety program.” *Id.*

Testimony then turned to other subjects, beginning with whether Heese took any notes during the course of his inspection with MSHA Inspector Stull. Heese stated he did take notes. Tr. 462. The Court then inquired whether the citations that were issued as a result of the MSHA hotline calls were admitted as violations or contested. Heese stated that he did not know the answer. *Id.* The Court was surprised by this, as Heese had just stated that he took notes during the inspection and he admitted that he tries to offer as much mitigating circumstances about such violations, yet he stated that he never learned of the final disposition. Tr. 463. In any event, Ex. R17 reflects Heese’s notes about the citations. Tr. 464.

Heese’s testimony then turned to the events of June 17, 2015 at the Midway Market. As with Estella and Soto, Heese likewise was there to get some breakfast, describing himself as a creature of habit. According to Heese, at that time Estella and Soto were also in the market and he first saw Estella at the cash register, with Soto “standing right beside him.” Tr. 465. Heese stated that it looked like Estella was purchasing food items. As for Soto, Heese stated that he had food items and “a six pack of beer.” Elaborating, Heese stated that “[w]hen [he] got to the cash register Mr. Estella’s stuff was already – was being checked across by the cashier. Mr. Soto’s stuff was on the conveyor right next to his.” *Id.* Heese stated that he said “hi,” but couldn’t remember which person replied hi back to him. Heese then stated that Estella did not exit the store before Soto. Instead, he waited at the end of the counter and waited for Soto to check his items. Heese continued that Soto then told Estella he needed to get a sack of ice. Soto then got the ice, and returned to the register to pay the cashier for that additional purchase. Tr. 466.

The Court would note that, if Heese’s version was truthful, both Soto and Estella would have been keenly aware that Heese had seen Soto’s beer purchase. In the Court’s estimation, it defies common sense to think that both Estella and Soto would have simply brushed this aside and not considered the danger associated with Heese’s alleged observations. It would have been imperative in both Soto’s and Estella’s mind that the beer, having allegedly been viewed by Heese, would need to be dropped off at Soto’s home.

Asked if he said anything about the beer, Heese answered, “I did not.” His reasoning was he “didn’t feel it’s [his] place to direct people on their days off or their free time. [he, i.e. Heese] wouldn’t want someone asking me why [he] was buying what [he] was buying at the store.” Tr. 467.

The Court would note that Minister Heese’s solicitous manner did not require him to approach the matter that way. At 5:30 that morning, with the work day shortly to arrive, he could’ve simply stated something along the lines of “Hey Marco [i.e. Soto], a friendly reminder, there is the no liquor requirement at Newmont.” Certainly Heese did not hesitate to throw the hammer down on Soto and Estella shortly after they arrived at work, his courtesy about the impropriety of mentioning the issue having then completely evaporated.

The Court also concludes that Heese's response lacked credibility with his claim about Estella and Soto being on their days off. The Court probed Heese on this point, "[b]ut you're not telling me, are you, that you thought these gentlemen were on their day off when you saw them that morning, are you?" Tr. 467. Unbelievably, Heese maintained he had no clue, "I didn't know where they were, if they were on their day off. I had no idea." *Id.* Heese agreed that this encounter occurred at 5:00 o'clock in the morning. The Court pressed further, "And so you made no presumption, you had no clue as to whether they were going to work, Mr. Estella and Mr. Marcos [Soto], you had no clue as to whether they were going to work or just having a day off; is that right?" *Id.* Heese answered, "That's correct." *Id.* Heese also admitted that, despite his claim of having no clue, at 5:20 in the morning, "[m]ost everybody is on their way to the mine at that time." Tr. 468. On these responses alone, the Court finds that Heese was not a credible witness but, as noted, that is not the only basis for the Court's strong conclusion that Heese's testimony was simply not credible.

Continuing with his recounting of the events at the Midway Market, Heese's testimony demonstrated that he kept an unusually close eye for the persons that he thought might be on their day off at 5:00 that morning. When asked if he saw Estella and Soto after they left the market, he stated that he did observe them after they left and that they "were behind a white Chrysler with the trunk open." Tr. 469. He placed himself as two spaces over from the Chrysler, stating, "[t]hey were loading items into the trunk. Mr. Estella had ahold of the trunk lid. Mr. Soto was standing to his left. Mr. Soto was loading stuff in." *Id.*

This degree of alleged detailed recounting came from a man who claimed he had no clue that the liquor would be an issue. After all, as far as the minister knew, the two might have been off that day, at 5 a.m. that morning, and not on the way to work. Bearing in my mind that Heese was claiming a presumption of innocence with the beer purchase, he continued with his watchful, unusually detailed, observations of the group's actions, even noting that the car did not go in the direction of work when it left the market parking lot. *Id.* Heese then went to work, arriving around 5:40 or 5:41 a.m. After he checked into work he went down to the health and safety building where random drug and alcohol testing was going on that morning. Tr. 470. That testing finished up around 7:00 a.m. The practice for the testing involves looking to see which employees are working that day and then calling such employees' supervisors so that the employees are brought for the testing. Stating he was bad with names, Heese could not identify who was scheduled to be tested that day. Tr. 472.

The Court, again surprised, asked of Heese, "[y]ou don't know the people who were on the crew list for that [C] crew, you don't know the C crew list. You can't tell me what people were on the list at that time?" Heese answered, "[o]nly by looking at the list." The Court queried of Heese, "[s]omehow by looking at the list and seeing the names you're going to remember which of those individuals were tested that day?" *Id.* Heese answered that he could do that. Shown Exhibit R 24, Heese answered that Shane Watson was on the list for testing that day. Looking at the list, Heese stated that, upon seeing that Estella was on the C crew list, "[a]t that moment when I looked at the crew list, [t]hen I started to get concerned." Tr. 474. His concern was that "we would have alcohol on the mine site, that either it would be on the mine site or being consumed." *Id.*

Once the testing was completed, Heese then went to see Mitchell, the mine's human resources representative. As he recounted that meeting with Mitchell, Heese told him,

what [he] observed that morning and that [he] thought they were on their days off, but just realized that they were on property and that they may have alcohol on-site, [and he] told [Mitchell] that [he] saw alcohol being placed into a white Chrysler sedan and asked [Mitchell] if he could accompany [him] down to the guard shack to make sure that -- whether that car was on the mine site or not.

Tr. 474.

Again, in the Court's view, this is a most implausible story, as its foundation is that Heese believed that the three employees were on their days off, *but just realized* that morning that they were on mine property and that they may have alcohol on-site. The hunt, so to speak, was then on in full for the 6 bottles of beer. Heese was directed to the trio's locker room by Mitchell and directed to, "just be staged [sic] there in case something, the beer went in there or, you know, what happened, just stay there, make sure that nothing went in or out of the building." Tr. 476. A security guard was sent to another location, but Heese didn't know where that other location was nor, apparently, the purpose for the adventure to the other location. Next, Estella and Soto, with the help of a security guard, were apprehended and taken for drug and alcohol testing. *Id.* Ostensibly, this was to rule out the possibility that alcohol had been consumed on the mine site. Tr. 477. Asked if they passed the alcohol testing, Heese answered, "[t]hey were all negative." *Id.* No evidence of alcohol was found in the lockers or lunch boxes either. The investigative crew, then consisting of Heese and a security guard then went to the employee parking lot, and Soto was also brought along. *Id.* Watson joined the group separately, with all arriving at about the same time. Tr. 479. Heese could only say that "roughly" five people were then at the site of the car, and then that number was amended, for a total of seven people present. *Id.* Upon questioning by the Court, Heese agreed that Mitchell, Estella and Blaskovich were also at the site of the car. *Id.* Their purpose was "[t]o have them open up the trunk so we could look in the car to see if the alcohol came to the site." Tr. 478. Heese then volunteered, "At that point we didn't know if it had." *Id.* As with much of Heese's testimony, the Court considered that last remark of his to be without any credibility.

Asked if Watson gave permission to open the trunk, Heese answered, "He [Watson] opened the trunk." Tr. 481. Heese stated that on their way to the car, Soto admitted to him about the beer. Tr. 482. Worried that he might lose his job, Heese remembered very well telling Soto he couldn't "imagine someone risking a 60 to \$80,000 a year job over a six pack of beer. I remember that very well." *Id.* Dealing with the six pack of beer, Heese reported, "we dumped all the beer out. We took pictures of it. We made sure it was disposed of, because we don't allow it on property, not even if it's in custody. As if they were dealing with heroin, Heese informed that he "*said let's get it destroyed so no one can use it* and they took pictures of the whole event." Tr. 483. (emphasis added). Heese stated that marked the end of his involvement with the matter, but he added that he wrote down that happened at the Midway Market and submitted a statement about it, "just to document everything that happened." Tr.484; Ex. R 19, Heese's statement.

Expressly asked by Counsel for Respondent Newmont, if “the reason [he, i.e. Heese]] didn't say anything at the Midway Market was because [he was] planning some sting operation of these individuals at the site,” Heese answered, “No.” Tr. 485. In fact, Heese contended, “I was very hopeful they weren't going out to the site.” *Id.* The Court does not believe Heese was truthful about this either. A strong proponent of the no alcohol policy, Heese stated, “[i]t keeps our employees safe. There's no -- there is no room for anybody being inebriated or high or anything else. It's a matter of safety. It cannot happen.” Tr. 486. Yet, full of innocence, he allegedly perceived no issue associated with his close watch of the activities that morning. Of course, it should not be lost, though a tangential matter, but nevertheless significant factor, that no one was found to be inebriated or high or *anything else*. But while he firmly asserted that there was *no room* for alcohol, as it was a matter of safety, Heese nevertheless *found room* to say nothing when he observed the beer purchase.

Cross-examination began with questions about Heese's interaction with MSHA investigator Stull on June 2nd. As noted, Heese agreed that MSHA's inspections would begin first with a visit to his office. Thus, Heese was the point man at the mine where MSHA inspections were involved. Investigator Stull advised Heese of the complaint ID numbers that MSHA received, a total of 5 complaints. Referencing Exhibit R 17, the complaint ID numbers brought to his attention on that date, Heese was first asked about the complaints made and he agreed there were three. Tr. 492. The inspection first went to the stripping machine. Esquibel came to the control room shortly after the inspector and Heese had arrived there. Blaskovich also was present. As noted earlier, Esquibel took command of the computer operation and while doing that pointed out substandard actions or conditions to the inspector. As to whether Heese heard Stull ask Esquibel who called in the complaints to MSHA, Heese stated Stull did not ask but then stated that he didn't “remember that.” Tr. 498. Heese asserted that, apart from three minutes, he was in the control room the whole time, and that Blaskovich was there during his brief absence. Tr. 499. Following the inspection by Stull, Heese met with Cole, explaining what had occurred during the inspection. Tr. 501. Heese could not recall if he had a close-out conference after the inspection. *Id.* Yet, Heese admitted that a close-out conference is customary and that he is typically involved with them. Tr. 502. Directed to his own notes, Heese agreed that he was involved in such a conference regarding the inspection, along with Cole. Tr. 503; Ex. R 17. Heese agreed that, although he spent two days with Inspector Stull, he never learned of the results of the inspection. Tr. 504. The Court then asked Respondent's counsel to provide it with the outcomes of the inspections. Tr. 505. Respondent's counsel stated that the training citations were in contest but the others had been paid. Four citations were in issue, beginning with Exhibit P1. *Id.*

Heese agreed that he is an employee advocate, but he defined that to include management, as he told the Court, “[t]hey are employees, too, sir.” Tr. 509. Directed to Exhibit R 21, the mine's “vital behaviors” program, Heese stated that it applied to *all* employees. One of those behaviors, as noted, is to “speak up.” It provides “when I see something good or bad, I will say something. I will communicate openly, honestly and voice my concern.” Tr. 510. However, Heese maintained that even though the night shift does not finish prior to 5:20 a.m., he believed it “very plausible” that Estella and Soto were just on a day off. “I see employees -- Usually they are a tight group. They go fishing together. They go hunting together. It's very plausible that they could be – if they are not on shift that they would all be at a grocery store

together.” Though it was 5:20 in the morning, Heese still maintained “[i]t’s possible.” Tr. 511. The Court would note that almost anything is possible, but Heese’s claim, contrary to his assertion, was decidedly not plausible.

While in the check-out line with Soto and Estella, Heese stated that he saw Estella had food items, while Soto had food and beer, adding “I was *really focused* on the beer.” Tr. 516 (emphasis added). The Court notes the inherent incongruity in Heese admitting he was *focused on the beer*, while simultaneously asserting the employees could be on their day off, buying beer for hunting or fishing that day. Heese was also aware that the ice was brought to the trunk of the car. *Id.* Despite his offering an innocuous view to explain the beer purchase – that they were off for a jaunt of fishing or hunting that day – Heese stated,

Let me clarify something. The reason why this is so clear in my mind is *he kept gaining* (sic) *eye contact with me and I thought it was odd*. He would look at me and he would just kind of stare me down and the same thing happened out at the car. Before he just -- at the trunk *he gained* (sic) *eye contact with me* and then when he was going to get in the front seat of the car he stood there and gazed over and looked at me like -- I just felt -- *I felt it odd*. That is why *it's so clear in my mind, that whole situation*. We're the only people in the store and *he's gaining this eye contact with me* and it was just -- *it's so vivid*.

Tr. 518-519 (emphasis added).

The Court notes that while Heese stated it was “so vivid,” it did not impact his professed belief that the workers were likely on their way for a jaunt that day. Tr. 519.

Heese’s testimony continued the next day. Further undercutting his claim that he presumed the beer purchase had no connection with work, and that it was all plausibly quite innocent, ever watchful, he stated that he observed Estella and Soto placing items in the trunk. He added, “Mr. Estella glanced over at me.” Tr. 537-38. Then, he added, “Mr. Estella went up to the front door, opened the door and he glanced back over the top of the roof towards me and made eye contact with me again.” *Id.* Yet, suspicions still apparently unaroused, Heese apparently did not reassess his view that the fellows were probably off for recreation that day.

Asked if Estella ever gave Heese a reason to believe that he would not be honest, Heese answered, “No.” The same was true for Soto; Heese never had a reason to believe that he would be dishonest either. Tr. 546.

Further regarding the Midway Market event, Heese confirmed that in his testimony the previous day he expressed being “very hopeful that the men weren’t going out to the mine site.” Tr. 552. He also reconfirmed that the previous day in his testimony he stated there was no room for alcohol and that it was a matter of safety and that it cannot happen. *Id.* Yet, despite the professed depths of his concern and despite being an “employee advocate,” and despite seeing the alcohol, and seeing it placed in the car’s trunk, along with furtive looks from Estella, Heese said nothing to the employees. Tr. 553.

Regarding the 103(g) complaint, Heese admitted that Newmont is not pleased when such a complaint is made, nor is it pleased when citations or orders are issued to the mine. Tr. 553-54. Heese, while not agreeing, semantically, that the responsibility and heat for such matters falls principally and initially upon him, effectively contradicted himself, by then admitting that he takes “ownership” for them. Tr. 554.

On redirect, Newmont’s attorney asked if Heese’s salary was affected by the number of violations issued at the mine. He responded, “No.” Tr. 555. Nor has he ever been disciplined because of MSHA issuing citations or orders. *Id.* As to whether the citations impacted his bonus, Heese responded, “No.” Tr. 562. He repeated, “No,” when asked if there was any adverse effect to his bonus. *Id.* However, the Court inquired further about the bonus issue. Heese admitted that the bonus for 2015 was given out in March and he stated that he received a bonus. Tr. 566. It is fair to state that Heese was initially not forthcoming about the bonus issue. In that connection the Court asked, “Did you receive a bonus for 2015?” and Heese answered, “Yes.” Asked what the bonus amount was, Heese responded that he did not remember. Inquiring about the bonus for 2015, which was given out in March of 2016, Heese affirmed that he received a bonus for 2015. The Court continued, “just for simplicity sake [we’re] talking about the year 2015 no matter when you get it; right?” Heese agreed. The Court then got to the key question, “So what was your bonus for 2015?” *Id.* Heese acted uncertain about what seemed to be a straightforward matter, asking, “[t]he bonus amount?” The Court affirmed that was the question. Continuing to act flummoxed, Heese then asked, “Before or after tax?” *Id.*

The Court tried to simplify what it believed to be an uncomplicated inquiry, continuing, “You get a check; right?” Heese admitted he receives the bonus via a check, then disclosed that it was \$21,000.00. The Court then asked what Heese’s bonus was for the prior year and Heese answered “[i]t was 27 [thousand dollars.]” The Court replied, “So about \$6,000 less for 2015; correct?” and then reminded Heese, “[y]ou have to answer.” Heese then responded, “[y]es sir.” Tr. 567. That is, to express it succinctly, in the year of the anonymous call to MSHA with validated safety complaints, Heese was impacted adversely by a reduced bonus. Further, Estella’s attorney asked Heese if civil penalties affected profitability and whether the time spent on those matters would affect productivity, as each of those categories are listed on the bonus components. Heese admitted they did affect profitability and productivity. Tr. 569-70.

In terms of his involvement with the vital behaviors program, Heese stated he was not a “key author” of it. Rather, an individual from Denver started the program. Asked if he was heavily involved in tailoring it to the Phoenix mine, Heese again engaged in semantics, disavowing that he *tailored it*, but rather describing his role as *supporting it to a great degree*. Tr. 563. However, he agreed that the vital behaviors that were identified came from teams within the Phoenix site. *Id.* Heese also conceded that the vital behaviors were not limited to work, as the program states those behaviors are “[v]ital at work, vital at home, vital for life.” Tr. 564. Asked if that meant such behaviors extend outside of work, Heese responded, “Yes, yes.” *Id.* Next, still reading from the program, Heese stated that it provides, “When I see something good or bad, I will say something. I will communicate open and honestly and voice my concern.” *Id.* Despite that language, Heese remained firm that he was not obligated to say anything upon his observations of the beer incident at the Midway Market. Tr. 565. This view, expressed by Heese as the safety manager at Newmont’s Phoenix mine, under the circumstances

about which he was very attentive, and contrary to his own statement about the vital behaviors, forms yet another reason for the Court's conclusion that Newmont discriminated against Estella.

### Testimony of Steve Blaskovich

Steve Blaskovich, project manager at the Phoenix mine, also testified for the Respondent. Tr. 571. When he was the process management superintendent at the Phoenix mine, he was responsible for operating the copper leach facility at that site. Tr. 573. At the relevant time, four persons reported to him: Mike Peasnall, with the C crew, Marco Diaz, with the B crew, Cory Mills, with the A crew, and Bob Wells with the D crew. Tr. 577. Blaskovich knew Estella, who was the relief supervisor when Wells was off. He believed he had a good working relationship with Estella. Tr. 578. He stated that during the time the two worked together at the copper leach facility, Estella would bring up safety issues, although he could not recall the specifics of the matters Estella raised to him. Tr. 579. Blaskovich stated that no one ever told him about B crew employees accessing the stripping machine without locking it out. *Id.* As for the issue of anyone ever telling him about inadequate task training, he answered, “[n]o, I don’t recall anybody coming to me with that.” Tr. 580. In May 2015, he was told about wires on the fire alarm being cut, explaining,

I think I was off for a week and when I came back I had heard that there was some malfunctions in the fire control system and the alarm was going off on a continuous basis and the operators weren't able to turn it off by just hitting the acknowledge button and over a course of time they ended up disconnecting wires on the horn on the control cabinet to disengage the alarm, the audio alarm.

Tr. 580.

This did not make the fire system inoperative, as a digital display still functioned, but the horn would no longer buzz. Tr. 580. The contractor who installed the system had to order parts to repair it and it disengaged the alarm pending receipt of the needed parts. Tr. 581-82.

Blaskovich did recall that there was an MSHA hazard complaint inspection on June 3rd. He added that the contractor's visit to repair alarm was before the MSHA visit. Tr. 582. Blaskovich learned of the MSHA visit while it was in progress and he went over to copper leach facility where the inspector and Heese were in the control room, along with Javier Esquibel, who was showing them video of the B crew entering the stripping machine without locking it out. Tr. 583. While Blaskovich was in the control room most of the time that Esquibel was there, he wasn't there the whole time, stating, “[t]he only time I wouldn't have been in there is when Dayne [Heese] brought him over prior to me coming into the control room when I was not in the facility.” Tr. 584-585. However, Blaskovich maintained that he was in the control room for the entire time Esquibel was there. *Id.* Asked if he heard “Mr. Stull ask Mr. Esquibel who had made the hazard complaint,” Blaskovich answered, “[n]o, I did not.” Additionally, Blaskovich was asked while inspector Stull was in his presence, did the inspector inquire who had made the complaint, responding, “No, he did not.” Tr. 586.

In terms of the four crews getting along with one another, Blaskovich stated that the A and D crews got along well, but the B and C crews did not. Tr. 587. The Court considered much of Blaskovich's testimony to be tangential to the issues to be decided in this matter. Counsel for the Respondent offered this testimony "to establish on the record that there were personality conflicts between the B and C crew, none of which had anything to do with Mr. Estella." Tr. 590. Estella's attorney, sharing the Court's view that the information was not central to the case, stipulated to the testimony about the lack of inter-crew harmony. *Id.*

After the first day of the hazard complaint inspection, MSHA inspector Stull requested a safety meeting with all four of the crews. Tr. 592. Blaskovich and Cole were present at that meeting. Blaskovich claimed that Esquibel brought up an issue concerning pilfered muffins and the safety issues too. Tr. 593. The Court will not address the missing muffin caper further.

Turning to June 17, 2015, Blaskovich stated that he learned of the market incident through Mitchell and that Heese reported, "two of our employees were in the grocery store in Battle Mountain that morning and he was also in the store at the checkout stand and he reported that [Estella] and Marcos Soto were in front of him at the checkout and that [Soto] was purchasing beer that morning." Tr. 596. Though obvious, the Court notes that all of this is secondhand, a re-telling of Heese's account.

Blaskovich then related his involvement with the interview process related to the beer incident, stating that they (i.e. he, Wells, and Mitchell) spoke individually with the three employees involved, beginning first, apparently, with Watson, the car driver. Tr. 597. Watson stated he was not aware of the beer. Tr. 598. Soto was interviewed next and he admitted that he purchased the beer and that it was in the car in the parking lot. Estella was then questioned. Estella told them "he knew nothing about alcohol being in the car." Tr. 599. Blaskovich then stated that, following drug and alcohol testing and the trip to Watson's car, where the beer was observed in the trunk, they were all re-interviewed. Watson told them on this second round of questioning what he told them on the first round, but adding a new piece of information, that he "didn't know there was beer in the car until [Soto] told [him about it] in the control room after the first interview." Tr. 600.

The Court finds that Watson's version was quite credible. The three employees were effectively under complete control by Newmont at that point, with no time to hatch a collaborative lie. Thus, it is found that Watson did not know of the beer until Soto informed him about it after the first round of questioning.

For Soto, on the second interview, his story remained the same. For Estella, however, Blaskovich stated that the Complainant had a different story during his second round, asserting,

[Estella] admitted right away that he knew that beer was purchased that morning and that he saw [Soto] *coming out of the store*<sup>22</sup> with a bag and he knew that there

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<sup>22</sup> It is noted that Blaskovich's version is less inculpatory than the story Heese presented in his hearing testimony, in that in this telling Estella did not remain with Soto in the store, as Heese contended.

was beer in the bag. . . [and that] the reason he didn't say anything during the first interview was that he -- he's old school and he wasn't going to narc on anyone.

Tr. 600-01.

Curiously, while Heese disclaimed any responsibility to speak up when he observed the beer purchase at the market, in contrast, Blaskovich believed that Estella did have a responsibility to *speak up*, stating,

We did talk to [Estella] a bit more about it while he was still present with us and we discussed how, you know, he would – he was the person that could have changed the outcome of this whole event that morning<sup>23</sup> and with the position that he is in as a lead control room operator and leading the crews and that that *we would have expected him to speak up* and not be in a position to allow anybody to bring alcohol onto the property.

Tr. 601 (emphasis added).

Yet this duty did not extend to Heese. Blaskovich larded his testimony on this point and the double standard he employed, “we just expressed that we were disappointed in what had taken place and that he didn't take *the leadership in his role with his experience and speak up.*” Tr. 601 (emphasis added.)

The three miners were then suspended, with Blaskovich driving Watson to his car and then taking Estella and Soto to their homes. According to Blaskovich, when driving them, the three “were still jovial with each other,” which behavior seems quite unlikely, given the events. Tr. 602. Conflicting with his claim that there was joviality, Blaskovich also stated that in his presence, Estella and Soto “did discuss on the way back [ ] that they felt that at the store when [Heese] saw them where [Soto] was purchasing beer that he should have said something to them and stopped them from doing that, and they talked back and forth for a while about that.” Tr. 602-03. In the Court’s view, this account doesn’t add up, as Blaskovich’s recounting would mean that the two recognized they were about to violate the company policy but wanted Heese to bring it up to them and only then would they elect to leave the beer at Soto’s house.

Following that, Blaskovich returned to the mine, reviewed matters with Mitchell and it was expressed that they wanted “to be able to treat this [discipline] in a consistent manner that has taken place over a period of time.” Tr. 604. Blaskovich recounted that after Mitchell consulted with others within Newmont about the issue, it was decided that Soto and Watson would be terminated. Regarding Estella, Blaskovich stated that “his role was that he wasn't

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<sup>23</sup> “Speak up,” the reader will recall, is a mantra of Newmont’s selectively applied “vital behaviors.” Blaskovich’s perspective absolved Heese of any concomitant responsibility to speak up, and of Heese’s leadership role as part of mine management. Accepting for the sake of argument that Heese’s version was credible, he too could have changed the outcome of the whole event and, as part of the leadership credential that comes with a management position, with more forceful effect.

honest during the investigation and that because of him not being honest it was recommended that he would also be terminated for that.” Tr. 605.

Blaskovich was then asked about the employee handbook, Ex. R 11. He agreed that Estella violated section 2.1.3 of that handbook by failing to provide honest and complete information during an investigation. Tr. 606. He stated Estella was informed of the basis for his dismissal when he and Mitchell met with him in Battle Mountain. According to Blaskovich, Estella did not have any specific questions about that, but did inquire about the appeals process. Tr. 607. That appeals process began with the process manager, Coles, and after that a further appeal would be with Cecile Thaxter.

Counsel for the Respondent acknowledged that Estella had no prior disciplinary action of any sort, and therefore inquired why Newmont decided to terminate him. Blaskovich answered, “in our disciplinary process we have a step by step process, but you also have flexibility depending upon the situation where you can bypass steps up and to termination depending upon the situation that has taken place.” Tr. 608. In short, in the Court’s view, this was a non-responsive explanation. Blaskovich stated that, in his experience, a termination for failing to be honest occurred once before, in February 2015, where an employee denied damaging some property while using a forklift. A video of the event showed otherwise and the employee was terminated. Tr. 609. The Court notes that property damage was involved in that incident and the mine had video to show that the employee was lying.

On cross-examination, Blaskovich was asked if Estella ever gave him any reason to doubt his honesty, and he responded, “Not during the time that he worked at the copper leach,” and acknowledged that Estella “was good about all aspects of the jobs that he did.” Tr. 621-22.

On the day of Inspector Stull’s visit to the mine following the hazard complaint, Blaskovich stated that Heese, Jose Leon, and Esquibel were in the control room when he arrived there. At that time Esquibel was showing the inspector video associated with the B crew. Interestingly, he acknowledged that the video system was changed so that operators could no longer go back and view what occurred a couple of months earlier. Tr. 625. That system feature was changed after Stull’s inspection. *Id.* The explanation Blaskovich offered for this change was, “it was *management's right* at that point to have the system set up so that they could review them only. We didn't feel there was a need for the operators to be able to go back and look at things that had transpired.” Tr. 626 (emphasis added). He admitted that the footage displayed safety violations. *Id.* The Court would comment that this change can hardly be characterized as a change in the interest of safety. Rather, it was to ensure that the embarrassing footage would not be available for future MSHA inspections.

Interestingly, Blaskovich stated that they did follow-up with the individuals committing the safety violations, asserting that all of them were disciplined. Tr. 627. That discipline, he stated, was that they were “written up,” though he was not sure if the write-ups were first or second level warnings. *Id.* On the recurring question, this time posed to Blaskovich, of whether he heard Javier [Esquibel] tell Stull who called in the violation, Blaskovich answered, “I never did hear that.” Tr. 631. He stated he did not hear Esquibel tell the inspector that he and another person on his crew and Estella called in the violation. Tr. 631-32. Blaskovich further stated

that the inspector was asking [Heese] questions during that time. Tr. 632. He also admitted that he was not present the whole time that inspector Stull was present. Tr. 634.

On the subject of fireable offenses, Blaskovich did not believe there is a list of fireable offenses. Tr. 635. He denied that Mitchell made any remark to the effect of “which one do we want to terminate first.” Tr. 636. According to Blaskovich, when the first of the three, Watson, was interviewed, and he denied awareness of the alcohol, Blaskovich made no credibility determination about Watson’s truthfulness. Instead they “just listened.” Tr. 637. The Court notes that this claim is inconsistent with human nature. Anyone in that circumstance could not help but make a credibility assessment of the claims made by Watson and the other two employees. Instead, he maintained, Mitchell was simply documenting things. In contrast, when asked if he made an assessment of Soto’s answers, Blaskovich contradicted his earlier statement, stating that Soto “appeared to be honest.” Tr. 637.

On the important question of whether Soto asserted that Watson and Estella had nothing to do with the beer, Blaskovich’s memory failed him, stating, “You know, I can’t recall that, but he – I can’t recall if he said that specifically.” Tr. 638. Though he thought that Mitchell might have asked Soto about that subject, he could not remember what Soto said. That he could not remember such an important point is surprising, and informative, to the Court’s assessment of Blaskovich’s credibility.

When Blaskovich was asked about the interview of the third employee, Complainant Estella, and his assessment of Estella’s credibility, he fell back to his answer for Watson, asserting they “just listened to what [Estella] had to say.” Tr. 638. During the first round of questioning, Blaskovich acknowledged that Estella did not say that he waited for Soto at the checkout stand. Tr. 639. According to Blaskovich, when the three employees were all assembled at the scene of the beer violation, at Watson’s car, none of the three said anything. Tr. 640-41. After the trip to the beer scene at Watson’s car, the three were taken to the main facility for the second round of questioning. Tr. 641.

During the second round of interrogation, according to Blaskovich, Watson continued to maintain that he was unaware of the beer but he added an important factual development, which occurred between the first and second round of questioning – Soto told him there was beer in the car, “[Watson] said that he wasn’t aware that there was beer in the car in the morning when they arrived on the property and *it wasn’t until after the first set of interviews that Marcos [Soto] told him that there was beer in the car.*” Tr. 642. (emphasis added). Thus, Blaskovich, in effect, agreed with Watson’s statement, because upon being asked *when* Watson said he spoke to Soto, Blaskovich answered, “*It would have been after* the two of them were interviewed.” Tr. 642. (emphasis added). As Blaskovich and Mitchell did not employ a method to keep the three separated from one another between questioning sessions, Blaskovich was “sure that they spoke in the control room.” Tr. 642-43. Further, Blaskovich stated that Watson “appeared to be telling the truth” that he only learned about the beer *after* the first round of questioning, when Soto then informed him about it. Tr. 644.

On the important question of whether Soto asserted that the other two, Estella and Watson had nothing to do with the beer, Blaskovich’s memory let him down again, as he

asserted “*I don't recall* him saying that during the interview.” Tr. 645. In both the first and second round of questioning, Soto stated that he simply forgot about the beer being in the trunk. Tr. 645.

Curiously, despite Watson’s statement about when he learned of the beer, when it came time for Estella’s second round of questioning, Blaskovich asserted that Estella reversed course, and then admitted that he “was aware that beer was purchased and it was in the car.” Tr. 646. In Estella’s case, Blaskovich maintained, Estella described that “he saw Marcos [Soto] coming out of the store with a plastic bag and he could see the six pack of beer in the bag.” Tr. 647. Thus, Blaskovich denied that Estella informed him that he learned about the beer while sitting with Soto in the control room. *Id.* As noted earlier, Blaskovich’s recounting conflicts with management member Wells, who was present during both rounds of questioning for Estella. Wells testified that Estella made it clear that he learned of the beer *after* Soto so informed him about it, which disclosure occurred following the first round of questioning. Tr. 203-04, 213.

Blaskovich acknowledged that the vital behaviors program applies to management too. Tr. 653. His answer about Heese’s obligation to speak rested upon the dubious claim, in line with Heese’s assertion, that “[y]ou know, at that point does Dayne [Heese] even know whether they are going to work or they are going home?” Tr. 653. That response suggests that their answers were coordinated. Further, under the circumstances, the claim is simply not credible, whether voiced by Heese or Blaskovich, as Blaskovich maintained that he continued his discussion with Mitchell after he returned from driving Estella and Soto home. Mitchell and Blaskovich agreed between themselves that it was not Heese’s responsibility to speak up – that responsibility rested solely with the employees. Tr. 654. For Watson, his blame was having alcohol in his personal vehicle, a determination made without regard to his knowledge of its presence. Termination was imposed for Watson, despite the apparent acknowledgement that the unwitting driver did not even enter the market that day. To this point, displaying Newmont’s pretext for discharging the miners, Complainant’s counsel observed that by Blaskovich’s admissions, the mine’s contract bus drivers who drive many employees to the mine do *not* have the same obligation to ensure that there is no alcohol in the miners’ lunch pails. Tr. 655.

Blaskovich, when asked again about lying and whether it is listed as a fireable offense in Newmont’s code of conduct, admitted “[i]t doesn’t say so specifically, no.” Tr. 659. Further, in the mine’s disciplinary process, while admitting that it is not stated that discipline steps can be skipped, Blaskovich responded, “Yes, it's interpreted that way, yes.” Tr. 660. Blaskovich defended the decision to forego a recorded verbal warning, a written warning and a final warning, this time asserting there were two lies on Estella’s part; not being honest during the mine’s investigation and not being honest about bringing alcohol onto the property. As Newmont conceded that the beer was Soto’s alone, it had to find another reason to discipline Estella for the improper act of another. Therefore, it latched onto the dishonesty claim. While completely excusing Minister Heese, who admitted seeing the beer, and being fixated on the conduct he allegedly observed at the Midway Market, the standard applied for Estella was Newmont’s “looking for him to also provide leadership away, and if he was to see something -- somebody, for instance in this case here, bringing alcohol onto the property we would have expected [Estella] to have stopped that even before it got to the car.” Tr. 664. The Court then

highlighted Blaskovich's varied approach, asking, "But not Mr. Heese; correct?" Blaskovich responded succinctly, "Correct." Tr. 664.

Upon questioning by the Court, Blaskovich agreed that the four citations issued by MSHA occurred during June 2nd through June 3rd, 2015 and that "all four of those citations related to violations found within the copper leach SXEW part of the operation." Tr. 668. As counsel for the Respondent admitted, the citations in Exhibits P 1 through P3 were paid, and the citation admitted as Exhibit P4 was settled. Thus, the citations all arose from the area where the three fired employees worked. As the Court pointed out, and about which observation Blaskovich agreed, the other crew employees, to the extent any of them received any discipline, were only written up. While such a write up becomes part of their employment record, no one, on any of the crews, other than the alleged beer violators, was suspended, nor lost any time at work, nor lost any pay. Tr. 669. This is also instructive on the issue of Respondent's pretext for disciplining Watson and Estella.

#### Testimony of Rocky Mitchell

Rocky Mitchell also testified for the Respondent. Until just before the hearing, Mitchell had been employed by Newmont as the Phoenix mine employee relations specialist. Tr. 674. Mitchell became aware of MSHA's hazard complaint inspection of June 2 and 3rd, 2015 on the day the inspector first arrived. Heese advised him of MSHA's presence. Tr. 676. It was Heese who informed Mitchell of the June 17, 2015 alcohol investigation, stating,

Heese shared that he was in Battle Mountain prior to the start of shift at the Midway Market, had come across some employees of ours. He mentioned that he saw Gene Estella and Marcos Soto in the Midway Market there standing at the checkout counter. He told me that he had greeted them, at least one had responded. He said Gene had walked out before Marcos, turned around and said something about don't forget the ice. He said when he walked out of the building that both of them were standing at the rear of the vehicle. He said he went to his pickup, didn't think too much of it, to report to site. He saw that their vehicle went the opposite direction of the property and that morning he was conducting random drug and alcohol tests.

Tr. 677-78.

At odds with Heese's version, Mitchell stated that Heese told him that the white four door sedan was Shane Watson's car. Tr. 678.

Mitchell took notes during the two interrogations of the three employees, describing them as his "notes of *the majority* of my investigation." Tr. 680 (emphasis added), R's Ex. 29, 30, 31 and 32. It was not just Estella who appealed; Watson appealed too. Tr. 683. Turning to Newmont's code of conduct, Mitchell described it as "set[ting] expectations of behaviors for *all* Newmont employees." Tr. 685, Ex. R 14 and Ex. R 15, with the latter showing Estella's signature on a sign-in sheet for the code of conduct training.

Further demonstrating Newmont's inexplicable overreaction in terminating all three employees, all of them passed their drug and alcohol testing. At worst, there was a simple mistake, yet three were fired. Essentially, Mitchell's testimony echoed that of Blaskovich, but fortunately credibility determinations are not made by counting up the number of people who tell essentially the same story.

Mitchell did concede that Soto continued to deny at his second interrogation that Estella was aware of the beer purchase. Tr. 693. However, when it came to the recounting of Estella's second round of questioning, Mitchell asserted that Estella's story "completely changed from the original meeting," admitting, in essence that he knew all about the beer being in the trunk of the car. Tr. 694. Of course, Mitchell did not feel that Heese had any duty or responsibility to say something at the market,

[Estella is] a senior level experienced miner. He fills in as a relief foreman. There are expectations of our employees to do the right thing. Our code of conduct talks about our values and acting with integrity and doing the right thing. That's part of all of our responsibility as a Newmont employee is to look out for what's best for the company and each other.

Tr. 695.

It does not wash with this Court that Mitchell perceived a "Heese exemption" under the code of conduct. His quoted remark, above, makes no such distinction either.

In trying to justify the termination of Estella, Mitchell cited the Ortiz employee example and added a Mr. Johnson as another example of an employee terminated for lying. In the latter's case, that employee was injured while performing work. Though he first asserted that he followed a *lockout procedure*,<sup>24</sup> he then admitted he did not follow the procedure. That individual provided Newmont with a handwritten confession about the incident. Tr. 708-09.

As mentioned, Newmont's appeal process has a second and third step. In this instance, Cole, the process manager conducted the second appeal step, while Cecile Thaxter did the third, and final, step. Tr. 712. Mitchell, who was present during the second step appeal, recounted that Estella reviewed his long tenure with the company, having a good record, and "talked about his accolades," but she responded that he was terminated for being dishonest. Tr. 714. Mitchell noted that Estella pointed out that his drug/alcohol tests were negative, that nothing was found on him, that the guilty party, Soto, confessed and therefore he felt that termination was unfair. *Id.* When before Cole, he repeated that he only learned of the presence of the beer during the interval between the first round of interrogation and the second round, when he was in the control room with Soto. Tr. 714-15. None of those reasonable mitigating and exculpatory points made any headway in Estella's attempt to regain employment. This does not add up.

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<sup>24</sup> Apart from the instance cited to demonstrate termination for lying, it will be recalled that problems adhering to lockout procedures surfaced again in this case, prompting, among other safety concerns, the anonymous call to MSHA.

Rather, it points to the Court's conclusion that Newmont's reason for terminating Estella was purely pretextual.

In a leading question of an extreme variety, counsel for Respondent posed to Mitchell,

I want to make sure I understand this and this is clear on the record. Did [Estella] tell Mr. Cole that he had heard in the car on the way over to work . . . Mr. Soto tell Mr. Watson that he needed to stop off and drop off his cooler of beer?

Tr. 715.

Unsurprisingly, Mitchell answered "Yes," to the question. *Id.* The Court comments that both the leading question and the predictable answer are both clear on the record, but that does not mean that the Court must adopt the loaded question and robotic answer — and it does not.

Mitchell was also present for Watson's second step appeal. Watson's defense was unchanged; he stated he was simply unaware of the presence of the beer. The third step deserves little discussion; the appeal outcome was the same. One twist was that Mitchell asserted that Estella expressed disagreement with the alcohol on site prohibition. Ms. Thaxter was reportedly taken aback by his alleged claim. To her, according to Mitchell's telling, this meant that Estella wasn't supportive of the mine's drug and alcohol free environment. Tr. 719. Mitchell maintained that Estella was never told that his firing was due to off-duty behavior which adversely affected Newmont. Tr. 720.

On cross-examination, Mitchell acknowledged working at the Phoenix mine until just before the April 28, 2106 hearing, having then started work with a new employer. Tr. 722. When MSHA came to the mine pursuant to the hazard complaints it received, and citations were issued as a result of that investigation, at the close out meeting, Cole, Thaxter and Heese were all present. Tr. 725. Unbelievably, Mitchell maintained that among the management people there was no discussion or speculation as to who might have called MSHA. Tr.726, 727. When the Court followed up, posing to Mitchell, "[n]o one was curious, it was just the farthest thing from your mind?" Mitchell responded, "That's right." Tr. 727. However, Mitchell then did allow that he assumed the complaint must have come from someone in the department where Steve Blaskovich is responsible. Tr. 728. Again, the Court inquired about the subject, with Mitchell stating that he didn't share that assumption of the source of the complaint with anyone. *Id.* In the Court's view, Mitchell's representation, being at odds with human nature, was not credible.

In terms of Mitchell's recounting of Heese's disclosure to him about the Midway market event, Mitchell stated that Heese said he "wasn't sure. He didn't know that they were going to be reporting to work [that morning]." Tr. 730. He also stated that Heese identified Watson as the car driver. Tr. 731. They went to the car just to confirm that it was Watson's car. *Id.*

As Mitchell stated,

So [Heese] identified [Watson] there at the Midway Market. So he knew whose car that was. So we went out to the parking lot to see if that same car was indeed at our property, which it was, and so we suspected that was [Watson's] car. That's when we went to security to notify them of what is taking place and what the concerns were.

Tr. 731.

Mitchell did admit that Estella denied being in the checkout line with Heese, that he had denied speaking with Heese, that he had no knowledge of the beer. Tr. 734. As to whether Mitchell found Estella credible, his answer was an indirect affirmation, stating, "Did I find Gene [Estella] credible? Gave him the benefit of the doubt, absolutely." Tr. 735. Mitchell reached the same conclusion regarding Soto, finding him credible. When asked, "Did you find [Soto] credible?" he responded, "Yeah, he admitted to having alcohol on-site, absolutely. Again we gave him the benefit of the doubt." Tr. 738. Mitchell's memory failed him when then asked, "did anyone say thank you [to Soto] for being honest?" responding, "I don't remember." *Id.* Yet, at the end of the day, Mitchell, contradicting his credibility assessment, opted for Estella's discharge. Tr. 735.

The Court observes that even Newmont's version presents a very odd outcome, to say the least. Of the three employees, one, Soto, admits to the whole thing. As Mitchell himself stated, "So Marcos acknowledged responsibility for purchasing the beer. It was his beer. It was in the car and he claimed that both Shane and Gene had no knowledge of the alcohol." Tr. 737. Consistent with Soto's statement to his examiners at the mine, the other two, Estella and Watson denied any knowledge of the beer. The stories of all three mesh. Further, there was no time to collaborate or rehearse a unified story prior to the first round of interrogations. Yet, all three were fired. This can only be rationally explained by the close-in-time events of MSHA's arrival and issuance of citations pursuant to the anonymous hazard complaint call. Further, given the area of the citations, it would not take much insight to figure out the source of the calls, at least at to the crew that made the call. As noted below, overt evidence of discrimination is rare.

Mitchell was asked about the second round of interrogation for Soto and he confirmed that Soto gave the same version of the events and repeated that he was the culpable party. When Mitchell was asked, this time relating to the questioning of Soto, if he was being truthful, he responded, "I thought he was being truthful, yes." Tr. 745.

According to Mitchell, during Estella's second round of questioning he admitted to it all; that he knew about the beer, etc. Mitchell denied that Estella told them he only learned of the beer after the first round of interrogation. Tr. 746. Obviously, *if* Estella really told such a revised version, it would mean that Soto had been lying during his first and second round of questioning, yet Mitchell did not assert that he revised his assessment of Soto's testimony.

Inconsistently, and in the Court's view, lacking credibility, Mitchell reiterated that if Estella had told the truth the *first* time he was questioned, instead of the second time, which was shortly after the first interrogation, he would not have been fired. Tr. 758. Mitchell stated that favorable outcome, not being fired, would have occurred even though the underlying violation involved the drug and alcohol policy. *Id.* The Court would note that this too, does not add up. No one asserted that Watson was untruthful, and not even Heese's testimony claimed that Watson was in the store, nor did Heese claim that Watson observed the beer, yet Watson was fired too, for violation of the beer and alcohol policy. If Mitchell's testimony were truthful then at least Watson would not have been terminated. That didn't happen.

The Court wishes to emphasize that this is *not* a case of the Court substituting its judgment for that of Newmont as to the appropriate sanction to be imposed. Rather, it is a determination about Newmont's real motive and the lack of credibility of its witnesses, as their collective story simply does not add up.

According to Mitchell, the order of the initial interrogation was Estella, then Soto, and last, Watson. Tr. 777. Also, Mitchell stated that there was a time gap between each individual's questioning. Illustrating this, Mitchell stated that after questioning Estella, there was a search of his locker and then he was given a drug and alcohol test. Only then was the second person, Soto, interrogated. Tr. 778.

The Court inquired why it was that the mine decided to do another round of interrogation, when they had all three miners' statements. Mitchell contended that it "didn't make sense that none of them knew." Tr. 781. Of course, that is not true, as Soto knew and confessed immediately to the transgression. Simply put, Mitchell and the others just didn't believe them, as he put it, "the other two had to have known." Tr. 781. Thus, it is clear that the minds of the inquisitors had been made up. Questioning was unnecessary because the determination of guilt had already been reached. Concluding that they "had to have known," there was no point to the next round, except for the hope of one of them tripping up.

Because the Court believed that the management stories meshed too well, it asked Mitchell about his contacts with Heese. Mitchell admitted that between June 2015 and prior to the April 28th hearing, he had multiple conversations with Heese. Tr. 783. The same is true with regard to Cole and Blaskovich; Mitchell had multiple conversations with them prior to testifying on April 28th. Tr. 784. Mitchell then admitted that his conversations with those individuals included what his testimony would be, "Yes, I had to tell them what my findings, were, yes." *Id.* However, Mitchell stated he never had such conversations with Heese. *Id.*

## Testimony of John Cole

John Cole testified for the Respondent.<sup>25</sup> Since February of 2015 he has been the process manager at the Phoenix Mine. Tr. 789. In that role, he is “responsible for the operation and maintenance of the process areas at the Phoenix Mine.” Tr. 790. His job encompasses the copper leach, the concentrator, crushing, and the laboratories both at Phoenix and at Lone Tree, which is another Newmont Mine. *Id.* Cole was asked about his role in the appeals process at the Phoenix mine. As the area manager, he is tasked with the second level of appeal, with the third appeal level carried out by the general manager. Tr. 792. Cole had no prior experience with this process; this was Cole’s first appeal meeting for Newmont. Respondent’s Ex. 35 reflects the notes he took at the appeal meeting, which were typed up shortly thereafter. Cole stated that during the appeal meeting, he showed his notes to Estella. As for the actual decision making, Cole stated that he was consulted via a conference call. While he could not recall talking about any one of the three employees in particular, all participating in the decision reached the conclusion that termination was the appropriate action. Tr. 795.

The Court asked Cole about Estella’s inquiry at the appeal meeting, when he asked for the reason he was being terminated. The Court continued that it was its “understanding is that your answer is that he was not -- [Mitchell] nor you did not at that point tell him oh, you're being terminated because we believe you lied, that did not happen; is that right?” Tr.799. Cole responded, “That's correct. I have no recollection of saying your termination was for this reason. It was talking about some paperwork.” *Id.* The Court asked for further confirmation on this point, “So the answer -- he was not given an answer then?” Cole replied, “Correct. I did not state the reason for termination. I do not recall Rocky stating a reason for termination at that meeting.” The Court, “Neither of you?” Cole again confirmed, “Correct, neither.” *Id.*

However, before the appeal meeting began, Cole knew that Estella was terminated for lying. Tr. 800. Estella did state at that meeting that he had not been given the reason for his termination, and Mitchell responded that it would be mailed to him. In any event, Cole stated that he wanted to hear Estella’s side of the story and that this occurred. Tr. 801. Estella also sought reinstatement and gave his grounds for that relief. According to Cole, Estella never brought up making a complaint to MSHA as one of those grounds. Cole’s approach was the same for Watson, to hear his recounting of the events.<sup>26</sup> Tr. 802.

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<sup>25</sup> Regarding the testimony of Mr. Cole, generally, the Court noted that “with no offense to Mr. Cole I consider him to be a secondary player in this process. He comes in sort of late to the process.” Tr. 815.

<sup>26</sup> Though it is of no moment, the Court can only conclude that Cole was mixed up when referring to Watson’s appeal, as he contradicted himself within his own remarks, stating at first that Watson “said *he knew about the drug and alcohol*. He didn’t think he was on company property because he wasn't inside the gate. I pointed out to him that he crosses onto company property about a mile and a half before the employee parking lot and there is a sign stating no firearm, drugs or alcohol just at the entrance to the employee parking lot. I also did point out to him that having the alcohol, he didn't feel that it was -- that he was at fault because *he didn't know the alcohol* was in his car. I said it's your car, you're in control of it.” Tr. 802-03.

Cole's standard for reversing the determination to terminate was "new information," for which there was none, and the absence of a "compelling reason to overturn." Tr. 804. Apart from the "compelling reason" standard Cole applied, the Court did not think much of the "appeal process," as it was clear that it was a formality, the outcome preordained. Cole admitted that in all his time with Newmont he has never seen anyone successfully appeal a termination. Tr. 823. That said, the questionable process employed by Newmont is not at all the basis for the Court's decision finding discrimination. Further, it doesn't matter whether Cole or, for that matter, whether Mitchell or Blaskovich, believed Estella's claim that he didn't know of the beer, as that determination is reserved for the Court.

Along with Thaxter, Heese and the mine manager, Cole did participate in the June 3rd close-out meeting with MSHA following the hazard complaint. Tr. 808. He admitted that the nature of the close-out conference reasonably led him to conclude that the hazard complaints came from the copper leach facility. Tr. 809. Following the MSHA investigation and the issuance of citations, Cole admitted there were "additional management, upper management meetings regarding the hazard complaints" and that Heese, Thaxter, Mitchell and others attended them. Tr. 812. Despite that, Cole maintained that there was never a time "where there was discussion about who called in the complaint," and that there was no conjecture about it either. Tr. 813. As noted earlier, this claim is not credible. Tr. 816.

Finally, Cole's meeting notes demonstrate that, despite Estella's presentation at his appeal before Cole of a wealth of *undisputed facts* – that he is a long term employee, with a good safety record, and good job performance and that the beer found in the car was not his, that the car the beer was in was not his car, that he had a clear drug and alcohol test the morning of the incident, that his locker was searched and no drugs or alcohol were found, and that someone else, Soto, confessed to buying the beer and has not appealed his termination, none of that mattered. Ex. R 35. The same meeting notes reflect Estella's version of the events, including his lack of knowledge that Soto had bought beer that morning. The Court notes again that, without an opportunity for forethought or collaboration, Estella presented that version during his first interrogation. All of that was for naught; Estella and Watson were fired.

### Testimony of Cecile Thaxter

The testimony resumed on July 6, 2016 with Respondent's witness Cecile Thaxter, general manager at the Phoenix mine. Thaxter has held that position since December 2014. Tr. 837. Thaxter took the job at Newmont because she "had always wanted to be responsible for a business, be responsible for a profit and loss statement." Tr. 838. Although the Court, again for the sake of completeness, notes Thaxter's testimony, it must be said that she is not a key witness in this case, at least in terms of the issues the Court must resolve. Her testimony, relating primarily to her role as the official presiding in Newmont's third appeal, is of no moment to the issues before the Court.

Ironically, Thaxter did speak about the mine's vital behaviors program, with the first such behavior being to "speak up. So, we encourage folks to speak up." Tr. 840. As noted by the Court, Newmont applies this behavior unevenly and selectively, under the "Heese exemption" its witnesses invoked.

Thaxter informed that, in the wake of the citations that were issued after the hazard complaint and MSHA's requirement that the violations had to be posted, someone "put red dots beside three names and the three persons on that crew felt that they were being singled out, they were being targeted so they complained about it." Tr. 847. The dots were next to the names Leon, Esquibel and White, each a member of the C crew. Tr. 848. The C crew worked opposite the B crew, which was a crew associated with the citations issued by the inspector during his complaint investigation. Tr. 849. However, Thaxter did not look into who put the dots beside the names, unlike the muffin caper, a matter apparently of a different order.<sup>27</sup> She did meet with each of the crews after the "dot" incident. Also, following the hazard complaint, supervisor Cory Mills complained that someone had written on his car, using a finger, "you're next." Tr. 847. Thaxter was also present at the close-out meeting with the MSHA inspector, following the complaint investigation. Tr. 885.

As alluded to above, it is fair to say that, in the Court's estimation, Thaxter's testimony did not shed any additional useful information regarding the central issues in this case. Rather, in large measure, it was a regurgitation of things others had told her, such as Mitchell's recounting of the employees' interviews regarding the six bottles of beer. Tr.858-59. Thaxter contended that Estella, during his appeal before her, asserted that the alcohol policy was "stupid" and that it did not make sense. Tr. 864.

The Court finds it highly unlikely that Estella would assert such a claim, given that his goal was to be re-employed. Assessing Estella's intelligence, as the Court did during his testimony, he certainly had enough wisdom to avoid attacking Newmont's alcohol policy when trying to become re-employed. Further, though this was brought out by Respondent's counsel, when questioning Thaxter, it must be recalled that Estella was discharged for allegedly being untruthful, not for any alcohol violation. Tr. 868. After Thaxter stated that Estella failed to take responsibility "for being there when the alcohol was being bought, having knowledge of it, being -- recognizing that we do have a policy," the Court observed at the hearing that "a given individual could deny what was alleged about what transpired, but at the same time one could still, seems to me, be opposed to a policy without that, therefore, translating into some sort of indirect admission that that's what happened."<sup>28</sup> Tr. 869.

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<sup>27</sup> See page 36 regarding the muffin matter.

<sup>28</sup> To make that point clear, the Court elaborated that, "for instance, to personalize it, I could be against a policy. I could say that I think it's ridiculous, hypothetically, that the company has a policy that says you can't even bring alcohol in the trunk of your car, even though there is no intent to consume it until you leave the property at the end of the day, just to store it in your car. I could be against that policy without having any sort of conflict about what happened at the market. Being against the policy does not, therefore, what I'm expressing, equate with knowledge about what happened at the market . . . that does not translate into meaning ah, he not only was against that policy, but then he also -- that means indirectly because he was against the policy he knew there was alcohol being brought to the vehicle." Tr. 870.

Thaxter learned of the alcohol investigation about midday on the date of the occurrence, and that the D crew was involved. Tr. 909. She also knew that Mr. Estella was involved and that Mitchell, Blaskovich and Wells were involved with the investigation. She also knew that Heese was the reporter of the incident. *Id.* Accordingly, it is quite clear that Thaxter was informed of the incident from the start. As alluded to above, the Court commented that Thaxter's role in this matter was quite limited, as it was restricted to the appeals process. Though the Court concluded that Thaxter's answers and demeanor demonstrated that she was first and foremost a company person, her disposition had been tainted even before the pro-forma appeal began, as she had already heard Mitchell's and Blaskovich's view of the matter about Estella's denying that he knew of the alcohol. That said, even in that limited role, based on her testimony as a whole, Thaxter certainly cannot be viewed as any sort of an independent mind in the appeals process. Even with her predisposition, her objectivity, or lack thereof, is not of concern, as the Court must make the critical credibility determinations. Apart from the Court's conclusions about Thaxter, her own admission about her involvement in such employee appeals is instructive. She was asked, "Have you ever reversed an appeals hearing at your level," she answered, "No." Tr. 924.

#### Complainant's Rebuttal Evidence:

##### Testimony of Tana Holland

Tana Holland, girlfriend of Estella, was called as a rebuttal witness for the Complainant. Tr. 949. Holland's primary topic pertained to her involvement in the letter sent to the unemployment office, the entire subject of which is a side issue, and which has been discussed previously and resolved by the Court. As with witnesses Cole and Thaxter, the Court finds that, as a tangential witness, Ms. Holland's testimony was of minimal import to this case. In any event, Holland stated that in the spring of 2015 Estella voiced safety concerns to her about the Phoenix mine. Estella never told her that he had called MSHA until the day he was sent home (i.e. suspended) from work. Tr. 954.

Holland typed up Estella's and Soto's statements for unemployment benefits. Essentially, Holland claimed that between Estella's and Soto's confusing statements to her and her trying to edit that information and make it comprehensible for the typed version she was creating, errors were made. Tr. 956-59. Soto and Estella had handwritten notes. She was typing from what they had written for her. Tr. 969. Exhibit P 6 is Soto's statement to unemployment, as typed by Holland, while R 5 is Estella's statement. Tr. 957, 960. Within the statement that Holland prepared is the sentence, "I admitted to hearing Marcos [Soto] ask if we could stop by his house to drop off the cooler with beer in it." Tr. 961, Exhibit R 5. However, though typed, Holland stated that was an error, "[b]ecause [Estella] never said anything about knowing about the beer in the cooler." Tr. 962. Holland typed both R 5 and P 6. Tr. 966.

##### Rebuttal Testimony of Gene Estella

Complainant Estella was then recalled, for rebuttal purposes. Asked about the third appeal level, Estella stated that he brought a paper with him to that appeal as "the only thing that [he] knew of why [he] was terminated was on that piece of paper." Tr. 978. At that

meeting he asked Thaxter why he was being terminated; he wanted a written copy of the reason for Newmont's action. That paper, which Thaxter read, contained what unemployment was told as to the reason for his termination. The letter from unemployment stated that Estella was terminated for "off the job behavior that adversely affected the company." Tr. 981. Estella denied that he ever raised a claim that he was discriminated because of his Native American heritage, noting that no one even knew his heritage. Tr. 986.

### **Mine Act Discrimination Claims**

This discrimination complaint was brought under section 105(c)(3) of the Mine Act, alleging a violation of section 105(c)(1), which states, 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 [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c).

Where, as in this case, the Secretary has decided not to bring case on behalf of the miner, Section 105(c)(3) of the Mine Act provides that if the Secretary of Labor determines that a violation of section 105(c)(1) has not occurred, "the complainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3).

As the Commission stated in *Jaxun v. Asarco*, "[t]he Mine Act, the Administrative Procedure Act ('APA'), and the Commission's Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation." *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007).

The legal framework for assessing discrimination claims brought under the Act is well-established and clear. A complainant may establish a prima facie case by showing "(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity." *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of proving these elements by a preponderance of the evidence. *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); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

Protected activity often takes the form of complaints made to the operator or its agent of an "alleged danger or safety or health violation. 30 USC § 815(c)(1). Often, the Court will be called upon to consider indirect evidence of a discriminatory motivation for the adverse action.

The Commission has stated that “[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: “(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.” *Turner v. Nat’l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510). When considering indirect evidence, the Court may draw reasonable inferences from the facts. *Id.*

An adverse action is any “act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” *Sec’y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). An adverse action must be material, meaning that the harm is significant rather than trivial. In determining whether adverse action has occurred, the Commission applies the test articulated in *Burlington North v. White. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *see also Sec’y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012).

If a complainant establishes the required elements, the burden shifts to the operator to rebut the prima facie case by showing “either that no protected activity occurred or that the adverse action was in no part motivated by protected activity.” *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

An operator who cannot rebut the prima facie case may still raise an affirmative “mixed motive” defense by proving that the adverse action was motivated only in part by protected activity, and it “would have taken the adverse action for the unprotected activity alone. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982). The operator must prove this defense by a preponderance of the evidence. *Id.*, *see also Pasula*, 2 FMSHRC at 2799-800. When evaluating an affirmative defense, the Court follows the two-step analysis outlined by the Commission in *Chacon v. Phelps Dodge. Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981). The first step of the *Chacon* analysis directs the Court to determine whether “the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive.” 3 FMSHRC at 2516. If the Court finds that the justification is *not* pretextual, it then moves to the second step, which is a “*limited* examination” of the justification’s substantiality, and assesses the narrow question of “whether the reason was enough to have legitimately moved that operator” to engage in the adverse action.” *Id.* at 2516-17. At no point in this analysis is the Court sitting in judgment of the merits or demerits of the operator’s business decisions.

## Further Discussion<sup>29</sup>

By way of summary of the foregoing, the Court finds that Esquibel was a credible witness and that he did disclose that Estella was one of those who called MSHA about Newmont's safety issues. Those safety issues were essentially confined to the copper/leach operation. Apart from, and independent of, that finding, given the particularity of the location of the safety complaints, Newmont had to have been quite aware of the pool of employees who could have made the call to MSHA from the beginning. From there, it did not take rocket scientists to narrow the list of likely callers. It was logical to deduce that Estella, the lead in the C crew, one of the best crews at the copper/leach operation, would have been suspect. Fortune came to Newmont when Dayne Heese, the safety manager at Newmont's Phoenix mine, espied Soto purchasing beer at about 5:00 a.m. that morning of June 17, 2015 at the Midway Market. Although Heese and other Newmont employees sanctimoniously described how *all* employees had a duty to "speak up" under the company's "vital behaviors" program, Heese was considered exempt from that policy.

To be clear, the Court rejects Heese's claim that he presumed that Watson, Soto, and Estella were just as likely to be on a convivial jaunt together that morning, rather than on their way to work. As set forth above, Heese was plainly not a credible witness. In contrast, the Court also found Wells, Soto and Estella to be credible in their testimony. The Court finds that Estella did not know of Soto's beer purchase until after Soto disclosed it to him, following the first round of the three employees' interrogation.

The Court also wants to make it clear that it is not substituting its judgment for that of Newmont's in terms of the punishment it meted out for Estella's alleged lie to it. First, as just mentioned, the Court, weighing the credibility of the various witnesses, has found that Estella did not know of the beer purchase when first interrogated by Newmont. Therefore, it finds that he did not lie to Newmont.

Second, it is undisputed that Soto, immediately owning up to his mistake, was not seeking reinstatement. Moreover, Newmont's reaction of firing three employees, not just Soto, did not wash and Newmont itself recognized that it had to come up with a second reason in order to fire Estella. The Court cannot help but observe that the mine's reaction to the event, as evidenced by the repeated interrogations, the drug/alcohol testing, the parade involved with the visit to the "crime scene," the search of the car and the destruction of the six pack of beer in the trunk, was out of proportion to the event. More was clearly driving those involved with the infraction – a six pack of beer, completely unconsumed, in a car trunk at the mine parking lot, which lot was some distance from the actual work location – simply does not add up as a rational reaction.

Thus, as none of the men were found to have alcohol in their bloodstream; with the alcohol technically on the property, but not at the work station, nor in their lockers,

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<sup>29</sup> The Court fully considered the parties' post-hearing briefs.

management's response was not reasonable and inexplicable on its face.<sup>30</sup> The alcohol in the trunk provided a convenient pretext to apply a sledgehammer, where a tack hammer would've been anticipated.<sup>31</sup>

A number of additional observations are made with regard to Newmont's claim that it fired Estella based on its claim that he lied about his knowledge of the beer.<sup>32</sup> Newmont's reaction to the six pack of beer issue was so disproportionate that they cannot have been motivated only by Estella's presumed dishonesty in regard to that situation. Thus the Court finds, with ample testimony to support its conclusion, that the safety complaints were the real source of its undue reaction. Finding beer only, and little of it, and located only in the car's trunk, there was a patently disproportionate reaction by management, a reaction which was irrational and inexplicable by itself, especially considering the punishment meted out. Accordingly, while it is not for the Court to substitute its judgment as to the proper punishment for a claimed lie, the Court can observe if the claimed reason simply isn't plausible. The Court so finds that to be the case – Newmont's claimed reason does not add up. Rather, the presented reason was pretextual. The underlying reason for the mine's irrational decision to fire the three employees was the MSHA inspection initiated by miner complaints.

The Court also notes that Mitchell's first claim, that Soto was under suspicion of being under the influence of alcohol, turned out to be empty. Then, Newmont had to formulate new charges. Following the first round of interrogation, Mitchell then advised that they were going to check Soto's lunch box and his locker to see if there was anything that should not have been there. Newmont found nothing improper there either. In addition, following the interrogation of the three employees, Wells was told to go through the fridge and the cupboards and the trash cans to look for any beer cans for evidence, but again nothing was found. Further, the Court notes that Soto immediately admitted that he had brought the beer and told Newmont right then that neither Estella nor Watson knew of the beer, when he had had no time to concoct a story.

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<sup>30</sup> Newmont's emphasis over the employee handbook, when it was never in dispute that Estella received it when hired and acknowledged such knowledge and receipt of it, amounts to a distraction. Tr. 366-68, Ex. R 8. Estella was not accused of violating Newmont's alcohol policy. Tr. 366.

<sup>31</sup> While Respondent elicited from Estella that he had a good relationship with Wells and Blaskovich, and that he had no problems with Cole and didn't really know Thaxter, all intended to show that those individuals had no ax to grind with him, nor he with them, for the reasons already articulated, the MSHA complaint-induced inspection disrupted whatever may have appeared on the surface in the parties' prior relationships with one another.

<sup>32</sup> As noted, Newmont's inquisition-style questioning produced nothing vis-à-vis Estella, finding no alcohol in his lunchbox, nor in his locker, and nothing in his body system via the drug and alcohol testing. Although Estella did express that, in his opinion, it was Heese's responsibility to say something about the beer while at the market, it should also be remembered that it was not Estella's beer, nor was it Estella's car. Therefore the only thing Newmont had against Estella was the claim that he lied about his knowledge of the beer in the trunk and for that claimed lie, it decided to discharge him.

The flavor of Mitchell’s testimony, as well as that of Heese and Blaskovich, was that they were dealing with an armed robbery. Security was partnered and called to standby at the gate: “to ensure that nobody was making themselves -- I guess, gaining access or leaving property with the alcohol, just to ensure that alcohol wasn't being transported right there and now that we know there is a potential that it could be on-site.” Tr. 679. Those actions were completely out of proportion.

The Court considered certain aspects of this case to be confounding on both sides. For example, Soto’s choice to buy beer on the way to work, instead of picking it up on his way home, was somewhat illogical. Nonetheless, it does not follow that the Court considered his responses to be untruthful. As to Newmont’s side of the case, management did not articulate a predictable discharge policy, nor apply its internal policies in a coherent and reasonable way. For example, on the issue of whether alcohol is a fireable offense, Heese did not know if the employee handbook so stated that to be the case. Tr. 562. Instead, he expressed that *any* offense could lead to termination, depending on the circumstances. *Id.* Referencing Newmont’s employee policies, contained in Exhibit R -11, the Court noted that the Policy

lists all these things. But it doesn't tell [the Court] anything that [it has] seen yet - - maybe [Newmont] will educate [the Court] on this -- about fireable offenses. [The policy] just says, don't do this, don't do that. It doesn't [identify] grounds for discharge. . . . but it doesn't make that next step and say, “By the way, if you do X, Y and Z, you're fired.”

Tr. 172.

Newmont’s actions did not add up in terms of any reasonable application of the Corrective Action Procedures from the employee handbook. The handbook does provide that the disciplinary actions include the following: recorded verbal warning, written warning, final warning, and termination. However, it also states that the level of corrective action for any violation, including attendance, will depend on all of the circumstances involved, including the severity of the misconduct, willfulness, history of corrective action, and any other considerations. Clearly that standard was not applied.

There are other holes in Newmont’s story. Finding Soto truthful, Mitchell can’t simultaneously claim that Estella’s version amounted to a lie, as his version was consistent with Soto’s. Estella simply didn’t know of the beer. Blaskovich asserted that Estella’s offense was dishonesty during the first round in which he was questioned. Even if this were momentarily accepted by the Court as an accurate recounting, (which to be clear, it is not so accepted), under the Respondent’s claim, Estella’s rapid acknowledgement counted for nothing – termination was still imposed.

As to the side-issue of Exhibits R 5 and P 15, which are, essentially, the same document, in which Estella stated that he admitted to hearing Marcos ask if they could stop by his house to drop off the cooler with beer in it, Estella then explained that he made that remark during the second meeting with his employer on June 17, 2015. Tr. 358. While Respondent energetically points to that language in Estella’s unemployment letter, the Court finds that it is not as

definitive as suggested. This is because at the start of his letter Estella effectively denied knowing of the beer, stating that he “did not notice what [Soto] had purchased due to the fact that [he, Estella] was looking for [his] badge” which was needed for entry to the mine gate. Ex. P 15.

The inculpatory remark only occurs in the context of the second interrogation, when he was asked if he wanted to change his story. While the Court does not wish to insult Estella, neither he nor his girlfriend (who typed up the letter for him) could be described as wordsmiths and their education level was modest, a fact displayed in their respective testimony.

As noted, Respondent made much of the Newmont employee handbook and that Estella was aware of it and signed an acknowledgement of receiving a copy of it. The Court was not impressed by it, especially as it was applied to Estella and, for that matter, to Watson. The only clear violator of the alcohol policy was Soto, who immediately admitted to the violation. But it cannot be denied that the admitted violation was on the low end of the spectrum for that violation, as it was beer, a small amount of it at that, and which was untouched by anyone. Newmont’s reaction to the six bottles of beer, destroying it because God only knows what havoc could’ve ensued if it was left in the car’s trunk in the parking lot, evidences that it was motivated by more than the beer. Of course, Estella was not charged with the alcohol violation, but rather for, according to the mine’s telling of the story, not admitting initially to knowledge of the alcohol but then, again by Newmont’s account, admitting to such knowledge during the second interrogation, which occurred shortly after the first interrogation. For this alleged lie, Newmont opted to go immediately to the ultimate sanction, firing, bypassing its own handbook’s provision providing for other possible sanctions being imposed.

Further demonstrating that something beyond the infraction was motivating Newmont, it fired Watson for being the driver. But Watson was not driving a getaway car, he was simply the hapless driver that day, which Newmont presumed to have knowledge of the beer. No claim was made that Watson had lied – even Newmont never made that claim. Instead, it presumed that as the driver he had to have known of the beer, though there is no dispute in the record that he never entered the market that morning. That Newmont decided to fire all three employees demonstrates that it was acting for reasons other than the pretext presented.

At the end of the day, what was going on is clear. The mine had just experienced an MSHA visit, an inspection which was not part of the semi-annual statutorily mandated inspections, but which was prompted by one or more safety complaints. The number of management persons involved with that complaint-prompted inspection was large, and the meetings following it were numerous. Further, the inspection did not absolve Newmont, but cited it for the complaints that were lodged and for which it acknowledged culpability for the

cited violations.<sup>33</sup> Clearly, Newmont was quite displeased over the complaint, the ensuing inspection, and the outcome of that inspection. It took the beer in the trunk opportunity to retaliate against employees suspected of complaining, and to exact a severe price from them, while simultaneously sending a clear message to any other employees at the mine about what happens to those who call MSHA.

### **CONCLUSION AND ORDER**

For all of above stated findings of fact, together with the Court's associated reasons and analysis, the Court finds that Newmont unlawfully discriminated against the Complainant, Gene Estella, for engaging in protected activity and thereby interfering with his statutory rights, in violation of §105(c) of the Act.

The Court directs Newmont to permanently reinstate the Complainant to his former position at Phoenix Mine together with any back pay and interest due and with all entitled benefits. All references to the termination of Mr. Estella, and the reasons asserted therein, are to be removed from his personnel file.

Within ten days of this Decision, the Phoenix Mine shall post the decision along with a visible notice on a bulletin board at the mine that is accessible to each and every employee, explaining that Newmont has been found to have discriminated against an employee, that such discrimination will be remedied, and that it will not reoccur in the future. The notice shall also

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<sup>33</sup> On December 15, 2016 the Court sent an e-mail to the parties about the following issue:

Thaxter was shown MSHA mine data retrieval information and that it tracks citations, orders and safeguards for each mine. Tr. 893. There was an issue of an inadequate foundation for the admission of the document, which Estella's counsel represented was derived from MSHA's website. Tr. 892-96. The Court ruled on the question of admissibility and whether the document was self-authenticating, as follows, permitting Complainant's counsel "within two weeks to give me authority for the admission of this, but first I will have you state on the record exactly what [the] documents [are] . . . [and to provide] the reason that [the information] is important." Tr. 897-98. With that ruling, per the Court's instruction, Complainant's counsel identified the proposed exhibit's purpose "to show that the number of citations that the Phoenix Mine had in 2015 were a large number compared to other the other Newmont sites, which also would have been visible internally at Newmont, and second, it was also a large number of citations and a large penalty that was assessed in comparison to the last ten years within the Phoenix operation." Tr. 898. Proposed, (Provisional) Ex. P 27. The parties responded to the Court, with Newmont advising that it did not continue to object to judicial notice of the exhibit which includes various Newmont mines from MSHA's data retrieval system, but that its acquiescence did extend to Complainant's summary of that data. Complainant noted Respondent's position in its response, while noting that it did not use the data from the exhibit in its post hearing briefing. The Court did not consider the exhibit as significant in resolving the issues in this case.

inform all employees of their rights in the event they believe they have been discriminated against.

Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of this decision will be sent to the office of the Regional Solicitor having responsibility for the area in which Newmont's Phoenix Mine is located so that the Secretary may take the actions required by the rule.

## **Damages**

A successful complainant is entitled to be made whole for the entire period of his unemployment, plus interest. See *Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988) ("Local 2274"). When a discrimination complainant's claim is granted, Section 105 (c)(3) of the Act provides that the administrative law judge may grant "such relief as it deems appropriate."<sup>34</sup>

Accordingly, the parties are **ORDERED TO CONFER** within 21 days of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that will constitute the complete relief to be ordered in this case. If an agreement is reached, it shall be submitted within 30 days of the date of this decision.

**If an agreement cannot be reached**, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations, and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages and relief on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. In the rare event of factual disputes requiring an evidentiary hearing, the parties should submit a joint request.

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<sup>34</sup> The cited section provides, in pertinent part, "if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. . . . Whenever an order is issued sustaining the complainant's charges under this subsection, 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, . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. . . . Violations by any person of paragraph (1) shall be subject to the provisions of sections 818 and 820(a) of this title." 30 U.S.C. §815(c)(3). Medical expenses, if any, that would have been covered, are within the ambit of this relief.

The Court retains jurisdiction of this matter until the specific remedies to which Gene Estella is entitled are resolved and finalized, at which time a final decision will be issued. Accordingly, this decision will not become final until an order granting any specific relief and awarding any monetary damages has been entered.

**SO ORDERED.**

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

**Distribution:**

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 28, 2016

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

Petitioner,

v.

ACHA CONSTRUCTION, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2016-27-M

A.C. No. 26-02780-393232

Mine: Crusher 1

## DECISION

Appearances: Tara E. Stearns, Esq., and Joseph M. Lake, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;

Cassie Delbridge, Acha Construction, LLC, Elko, Nevada, for Respondent.

Before: Judge Paez

This docket is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. In dispute is one section 104(d)(1) citation issued to Acha Construction, LLC (“Acha” or “Respondent”).<sup>1</sup> To prevail, the Secretary must prove any cited violation “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

### I. STATEMENT OF THE CASE

On August 4, 2015, the Secretary issued Citation No. 8876244 alleging Acha violated 30 C.F.R. § 56.9300(b) by failing to maintain the berms on a loading ramp at the required height. The Secretary proposed a specially-assessed penalty<sup>2</sup> of \$3,400.00, which Acha timely contested.

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<sup>1</sup> In this decision, the hearing transcript, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Tr.,” “Ex. S-#,” and “Ex. R-#,” respectively.

<sup>2</sup> MSHA may elect to waive the regular assessment under 30 C.F.R. § 100.3 if it determines that conditions warrant a special assessment; when MSHA determines a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in section 100.3(a), and all findings shall be in narrative form. 30 C.F.R. § 100.5(a), (b); (Ex. S-4).

Chief Administrative Law Judge Robert J. Lesnick assigned me this matter on March 16, 2016. Upon proper notice to the parties, I held a hearing on October 4, 2016, in Elko, Nevada.

At the hearing, the parties stipulated to the following items verbatim in a joint exhibit:

1. Respondent is an operator within the meaning of the Mine Act.
2. At the time Citation No. 8876244 was issued, Respondent was engaged in mining activities at the Crusher 1 Mine (“the Mine”).
3. At all relevant times, the Mine’s products entered commerce or affected commerce within the meaning of the Mine Act.
4. At the time the Citation was issued, Ernie Merkley was employed by Respondent as foreman at the Mine.
5. The ramp described in the Citation leads to a loading bin attached to a crusher at the Mine.
6. During the month before the Citation was issued, one or more of Respondent’s employees regularly used a CAT 966K front-end loader (“the front-end loader”) to travel up the ramp and dump material in the loading bin.
7. The wheels on the front end loader are 32 inches high at the mid-axle point.
8. The ramp was used by one or more of Respondent’s employees to dump material into the loading bin on August 3, 5, & 6[,] 2015.
9. At the time of the inspection, Respondent had no written policy regarding the use of berms and guardrails on roadways.
10. At the time of the inspection, Respondent had never disciplined any miner for failing to comply with MSHA standards related to berms on roadways.
11. The proposed penalty of \$3,400, if paid, will not affect Respondent’s ability to remain in business.
12. Respondent abated the violation on the same day the Citation was issued.
13. Respondent has no history of violations that became final orders during the 15 months before the inspection.
14. MSHA assigned zero penalty points for Respondent’s size and the Mine size in calculating the proposed penalty.

(Joint Ex. 1; Tr. 16:5–17:21.) The Secretary presented testimony from MSHA Inspector Patrick Barney. Acha presented testimony from its former foreman Ernie Merkley and owner Cassie

Delbridge. The parties presented closing arguments at the hearing in lieu of submitting post-hearing briefs.

## II. ISSUES

For Citation No. 8876244, the Secretary asserts that Acha violated 30 C.F.R. § 56.9300(b)<sup>3</sup> by failing to maintain the berms on a ramp at the height required by the standard. (Tr. 121:17–21.) The Secretary asserts that the violation should be upheld as significant and substantial (“S&S”),<sup>4</sup> inasmuch as it was reasonably likely to result in a fatality, and is a result of the operator’s high negligence and unwarrantable failure.<sup>5</sup> (Tr. 121:25–123:20.) In contrast, Acha does not contest the fact of the violation but challenges the Secretary’s gravity and negligence determinations due to mitigating factors. (Tr. 123:24–124:11.)

Accordingly, the following issues are before me: (1) whether Citation No. 8876244 issued for a violation of 30 C.F.R. § 56.9300(b) was S&S; (2) whether Acha’s negligence in committing the violation is “high” and constitutes an unwarrantable failure; and (3) whether the Secretary’s proposed penalty against Acha is appropriate under section 110(i) of the Mine Act.

For the reasons set forth below, Citation No. 8876244 is **AFFIRMED** as written.

## III. FINDINGS OF FACT

### A. Operations at Acha’s Crusher 1

Acha operates Crusher 1, a construction sand and gravel plant located two miles south of Carlin, Nevada on the Eureka Highway. (Tr. 24:1–18.) To produce sand and gravel for construction, Acha uses front-end loaders to scoop up overburden around a given area or in a pit and feeds it into a crusher. (Tr. 25:3–16.) The employee operating the front-end loader then transports the collected material a couple hundred feet away up a ramp, which is approximately six to seven feet high at its top and has a slope of 75 degrees. (Tr. 25:3–10, 31:22–32:2, 66:18–67:4; Ex. S–1 at 1.)

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<sup>3</sup> Section 56.9300(b) provides: “Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.” 30 C.F.R. § 56.9300(b).

<sup>4</sup> The S&S terminology is taken from section 104(d)(1) of the Mine 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.”

<sup>5</sup> The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine 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.”

Upon reaching the top of the ramp, the front-end loader lifts the material overhead and dumps it into a loading bin that feeds the crusher. (Tr. 25:3–16; 73:2–6.) A front-end loader can carry up to two and a half tons of material. (Tr. 65:6–12.) The loading bin is positioned above the crusher where the material is sized, washed, and sorted into stockpiles through a system of conveyors. (Tr. 25:3–16, 31:4–9, 32:3–17.) Acha owns two front-end loaders: one Caterpillar (“Cat”) 966K and one Cat 950G. (Tr. 32:24–33:4.) On a normal operating day, Acha feeds the loading bin constantly throughout a shift, using the ramp approximately every 15 to 20 minutes. (Tr. 69:25–70:2.) Crusher 1 is a small, two-man operation where one employee operates a front-end loader while the other employee watches the crusher. (Tr. 33:12–34:2; 91:7–11.)

## **B. Inspection on August 4, 2015**

On July 30, 2015, MSHA Inspector Patrick Barney was driving to his office when he noticed a cloud of dust coming from Acha’s Crusher 1 mine site. (Tr. 26:9–15.) He decided to conduct a spot inspection and pulled into the mine where Acha foreman Ernie Merkley<sup>6</sup> had been on duty. (Tr. 26:14–21; Ex. S–15 at 1.) Barney issued a citation for the dust and served it to Merkley. (Tr. 26:22–27:5.)

Five days later, on August 4, 2015, Barney returned to the Crusher 1 mine site to continue his spot inspection after Cassie Delbridge, the mine’s owner, informed him that Acha had abated the dust violation and was ready to terminate the citation. (Tr. 26:22–27:5.) Barney arrived at the mine at approximately 6:00 a.m. (Tr. 28:8–11.) At the time, it was light out, and the weather was clear and cool. (Tr. 28:8–11.) As soon as he parked, Barney attempted to speak with foreman Merkley. (Tr. 28:1–20.) Merkley was sitting inside the mine’s Cat 950G front-end loader. (Tr. 36:15–20.) According to Barney, Merkley became upset and left the area without speaking to Barney. (Tr. 36:21–25; Ex. S–3 at 3.) Merkley did not accompany Barney as he continued his spot inspection that day, despite normal practice for a member of mine management to do so. (Tr. 40:4–16.) Instead, mine employee Luis Madris stayed with the inspector. (Tr. 36:24–37:1; Ex. S–3 at 3.)

Inspector Barney advised Madris to call Delbridge, who was responsible for safety at Acha. (Tr. 39:3–6; Ex. S–3 at 3.) Barney then noticed that the mine’s Cat 966K front-end loader had been left unattended without chocks in violation of MSHA’s standard, and he issued a second citation to the mine. (Tr. 39:10–15; Ex. S–16.) After Madris abated the violation by placing chocks on the front-end loader, Barney saw the mine’s other front-end loader on the ramp to the loading bin. (Tr. 40:20–23.) From 100 feet away, Barney noticed that the berms along the ramp were not high enough under MSHA’s standard, which requires berms to be at least mid-axle height of the equipment normally used on a roadway. (Tr. 40:22–41:1; Exs. S–2,

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<sup>6</sup> Ernie Merkley has worked in mining since 1993. (Tr. 86:1–2.) Before working for Acha, Merkley worked for Boehler Construction and Staker Parsons Companies. (Tr. 86:10–11; Ex. R–6.) During rebuttal testimony, Inspector Barney revealed that Merkley was terminated from his employment at Staker Parsons for violating the company’s safety policy on locking and tagging out equipment. (Tr. 118:7–119:17.) There is no evidence in the record that Acha had knowledge of the reasons behind Merkley’s termination prior to hiring him, nor did Merkley himself comment on the incident at hearing.

R-2.) Barney testified he could clearly see the loader tire behind the left-hand berm and tell the berm was not high enough. (Tr. 83:8-10.)

A berm is a wall of dirt designed to guard against mobile equipment going off elevated roadways, which typically include ramps. (Tr. 71:1-7, 62:21-24; Exs. S-2, R-2.) Berms help prevent mobile equipment from rolling over, which could lead to injury. (Tr. 70:14-21, 73:15-23.) Such injuries could include cuts from broken glass, neck and/or back injuries, and suffocation from heavy material, like overburden, falling from the elevated scoop of a front-end loader and burying the equipment operator in the cab. (Tr. 73:15-23.)

Along the ramp, Inspector Barney identified sections of berm that appeared nonexistent. (Tr. 41:3-7; Exs. S-2, R-2.) Barney walked over to the ramp to take photographs and measurements of the berms and front-end loaders. (Tr. 44:16-20.) The berm on the left-hand side facing the loading bin varied from six to 19 inches, and the berm on the right-hand side measured 25 inches. (Tr. 44:23-45:1; Ex. S-3 at 3.) The mid-axle height of the Cat 966K measured 32 inches, and the mid-axle height of the Cat 950G measured 28 inches. (Tr. 48:2-17; Exs. S-3 at 3, S-1 at 4-5.) After taking measurements, Barney found Merkley to ask about the condition. (Tr. 50:14-17.) Barney testified that he learned from Merkley that the condition had existed for at least five days and that the plant normally operated in this condition. (Tr. 51:1-3; Ex. S-3 at 3.) Merkley knew berms must be built to the mid-axle height of routinely-used equipment. (Tr. 51:5-6, 66:1-4, 89:4-6.)

Barney then issued section 104(d)(1) Citation No. 8876244 for failing to maintain the berms at the required height. (Tr. 58:18-22; Ex. S-1.) Barney wrote in relevant part:

At the loading bin the berms were measured at 28 [sic]<sup>7</sup> inches on the right side and 6 to 19 inches on the left. The Front End Loader normally used to load the bin measured 32 inches at the mid-axle height. This ramp is used constantly to load the plant. The ramp is approximately 7 feet high with a 75 degree slope. In the event of an accident involving a rollover fatal injury would reasonably expected to occur. Ernie Merkley-Supervisor engaged in aggravated [sic] conduct constituting more than ordinary negligence in that he is the operator of the front end loader and allowed the condition to exist for multiple shifts.

(Ex. S-1 at 1.) Barney designated the citation as an S&S violation that was reasonably likely to result in a fatal injury to one miner. (Ex. S-1 at 1; Tr. 79:24-80:12.) He also characterized Acha's level of negligence as high. (Ex. S-1 at 1; Tr. 77:10-15.)

To abate Citation No. 8876244, Acha rebuilt the berms on the ramp. (Tr. 60:14-19; Ex. S-1 at 2.) Inspector Barney terminated the citation around 1:30 p.m. on August 4, 2015. (Tr. 60:14-19; Ex. S-1 at 2.) Barney later discussed the citation with Delbridge, who had no questions or comments at the time. (Tr. 61:1-18.)

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<sup>7</sup> Barney acknowledged a typo; the actual berm height was 25 inches. (Tr. 63:10-24.)

## IV. PRINCIPLES OF LAW

### A. Berms or Guardrails under 30 C.F.R. § 56.9300(b)

Section 56.9300(a) requires operators to provide and maintain berms or guardrails on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. 30 C.F.R. § 56.9300(a). Section 56.9300(b) further provides that berms “shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.” 30 C.F.R. § 56.9300(b).

### B. Elements for S&S Violation

A violation is S&S “if, based on 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). To establish a S&S 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 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. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must determine “whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element has been realized and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). The Commission has further found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

### C. Factors for Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). It is characterized by “indifference,” a “serious lack of reasonable care,” “reckless

disregard,” or “intentional misconduct.” *Id.* at 2003–04; *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test). Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *See IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator’s knowledge of the existence of the violation. *See id.* These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998)). All relevant facts and circumstances of each case must be examined to determine whether an actor’s conduct is aggravated or if mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

#### **D. Negligence Determinations**

Commission Judges determine negligence under a traditional analysis rather than relying on the Secretary’s regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015)). Each mandatory regulation carries a requisite duty of care. *Id.* In the negligence determination, the Commission takes into account the relevant facts, the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Id.* In evaluating these factors, the negligence determination is based on the “totality of the circumstances holistically” and may include other mitigating circumstances unique to the violation. *Id.* (quoting *Brody Mining, LLC*, 37 FMSHRC at 1703).

### **V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW**

#### **A. Citation No. 8876244 – Failure to Maintain Berms**

Acha violated section 56.9300(b) by not maintaining the berms on its loading ramp at the mid-axle height of the equipment Acha normally used on the ramp. When Barney issued the citation, the berms measured between six and 19 inches on the left side and 25 inches on the right side. (Tr. 44:23–45:1; Ex. S–3 at 3.) The mid-axle height of the mine’s two front-end loaders were 32 inches and 28 inches. (Tr. 48:2–17; Exs. S–3 at 3, S–1 at 4–5.) Acha does not deny that it violated the standard but disputes the citation’s S&S and gravity designations, specifically the likelihood and severity of injury that would result from the violation. (Tr. 103:12–15; 123:24–124:11.) Additionally, Acha challenges the violation’s negligence designation due to mitigating circumstances. (*Id.*)

1. S&S and Gravity

To establish the first element of the *Mathies* test, the Secretary must prove a violation of a mandatory safety standard. Acha's violation of section 56.9300(b) establishes the first element of an S&S violation.

In regard to the second *Mathies* element, the Secretary must show that the violation created a reasonable likelihood the hazard that section 56.9300(b) aims to prevent would occur. Section 56.9300(b) mandates berms be maintained at mid-axle height of the largest mobile equipment which usually travels a roadway. 30 C.F.R. § 56.9300(b). The purpose is to prevent mobile equipment from rolling over on roadways where a drop-off exists. *See* 30 C.F.R. § 56.9300(a); (Tr. 70:14–21). In this case, the berms were not high enough to deflect the size and weight of Acha's front-end loaders, which could carry up to two and a half tons of material. (Tr. 71:1–7, 65:6–12.) The ramp was narrow and just wide enough to fit the wheelbase of the front-end loaders. (Tr. 72:13–23.) Although a front-end loader would travel up the ramp at a low speed, it is put in an unbalanced, top-heavy position when it lifts material over the loading bin. (Tr. 73:2–6.) In addition to not being high enough, the berms were made of loose, unconsolidated material. (Tr. 71:1–7) Given these facts, I determine the hazard of a rollover was reasonably likely to occur on the ramp because the berms were not high enough and indeed woefully low in some areas to prevent machinery from going over the berm.

With regard to the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood the hazard will result in an injury. If a front-end loader rolled over because the berm was insufficient height, an operator could be thrown about the cab from the resulting seven foot drop. (Tr. 67:23–68:20, 73:15–21.) Additionally, the material from the front-end loader's bucket could fall onto the cab, potentially breaking the cab's glass and burying the operator. (Tr. 73:22–74:9.) Consequently, I determine that the hazard of a rollover would reasonably likely result in injuries, thus satisfying the third *Mathies* element.

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood that the resulting injury will be of a reasonably serious nature. With regard to this element, Acha asserts that any injury caused would not result in a fatality as Inspector Barney determined. (Tr. 103:11–104:2.) Acha contends that both front-end loaders were equipped with rollover protection, and if one of them were to roll over, it would be a relatively small drop-off. (Tr. 103:11–104:2.) Acha also notes that its employees wear seatbelts when operating the front-end loaders. (Tr. 103:11–104:2.)

Although Acha's front-end loaders were equipped with rollover protection and seatbelts, redundant safety measures are not to be considered in determining whether a violation is S&S. *Cumberland Coal Res.*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp.*, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek*, 52 F.3d at 135; *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015). Nevertheless, even rollover protection and a seatbelt would not protect against up to two and a half tons of material falling on top of a front-end loader's cab. (Tr. 73:24–76:3.) The cab of the front-end loader consisted of mostly glass, which in the event of a rollover would likely break from the impact or from material falling on it. (Tr. 74:4–9.) An operator could reasonably likely be trapped underneath the material and unable to maneuver his body,

particularly if he had on a seatbelt. (Tr. 74:16–24.) The resulting injuries could include cuts, neck and back injuries, and suffocation, which could lead to a fatality. (Tr. 75:1–6.) Given these facts, I determine that the injuries expected to result from a rollover would reasonably likely be serious or even fatal, thus satisfying the fourth *Mathies* element.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 8876244 was appropriately designated as S&S. For the same reasons, I affirm the citation’s gravity designation as reasonably likely to result in a fatality.

## 2. Unwarrantable Failure and Negligence

The Secretary asserts that Acha’s conduct amounted to high negligence and an unwarrantable failure. (Tr. 123:18–20.; Ex. S–1 at 1.) In support, the Secretary argues that the violative condition existed for multiple shifts and that Merkley admitted to knowing the violation existed. (Tr. 78:2–7, 122:4–6.) In contrast, Acha claims that rain from the weekend prior to August 4 deteriorated the berms, which should be considered a mitigating factor when assessing negligence. (Tr. 109:10–24, 124:5–7.) Additionally, Acha asserts that the violation did not pose a high degree of danger and that its employees were trained to MSHA standards. (Tr. 124:8–11; *but see* Exs. S–8, S–10 (noting Foreman Meckley’s training records for 2015 were lost).)

In analyzing an unwarrantable failure, I must consider the Commission’s factors for determining aggravated conduct. *See IO Coal Co.*, 31 FMSHRC at 1350-51. The facts and circumstances surrounding this violation unveil multiple aggravating factors. First, the violation posed a high degree of danger because it was reasonably likely to cause a serious or potentially fatal rollover as discussed above. *See* discussion *supra* Part V.A.1. Second, the conditions were obvious, and Inspector Barney noticed immediately that the berms were too low. (Tr. 40:24–41, 83:7–10.) Photographs of the ramp also showed that the berms were of inadequate height and had deteriorated. (Exs. S–1, S–2.) Those photographs in conjunction with Barney’s measurements demonstrate the condition was extensive given that the berms were not up to standard for the entire length of the ramp. (Tr. 44:23–45, 48:2–17; Exs. S–1, S–2, S–3 at 3.) In some places, the berms were nonexistent or less than half of the required height. (*Id.*) Further, Barney testified that Merkley informed him that the berms had been in such condition for five days.<sup>8</sup> Barney witnessed the ramp being used the day of the citation, and the mine’s reports

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<sup>8</sup> Inspector Barney testified that Merkley told him that the violative condition had existed for five days, that the ramp was normally used in such conditions, and that Merkley normally operated the front-end loader. (Tr. 51:1–4; 54:24–56:14; 65:20–24.) Barney took thorough notes of his inspection, including his conversations with Merkley. (Tr. Ex. S–3 at 3.) Merkley, on the other hand, testified that he could not remember any of the conversations he had with Barney that day. (Tr. 92:6–12, 94:20–95:17.) Given Inspector Barney’s detailed notes of the encounter and that Merkley did not deny making such statements, I credit Barney’s testimony regarding the conversation. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (“Since the ALJ 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.” (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984))). *See also Eastern Assoc. Coal*

(continued...)

indicate that the ramp was also used the day prior. (Tr. 40:20–23, 17:2–4; Exs. S–6 at 1, R–4 at 1.) The condition therefore lasted for multiple shifts.<sup>9</sup> Lastly, Merkley knew the standard and acknowledged the berms were not high enough. (Tr. 51: 5–6, 54:21–55:3, 66:1–4, 89:4–6, 92:19–32, 104:12–105:5; Ex. S–4 at 1.) Merkley therefore had knowledge of the violation and yet operated the mine’s front-end loader on the ramp.

The other unwarrantable failure factors appear to be neither mitigating nor aggravating. The Secretary did not present evidence that Acha had been placed on notice by MSHA that greater efforts were required for compliance with the berm standards. In considering the abatement factor, the Commission focuses on compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). The record is silent on any abatement efforts made prior to the citation’s issuance. Accordingly, I afford these factors no weight in the unwarrantable failure analysis.

Because Merkley was a mine supervisor, he is held to a higher standard of care, which he failed to meet by using the ramp despite knowing the berms were inadequate. After considering all the factors, particularly the high degree of danger, the violation’s obviousness, and the operator’s knowledge, I conclude that the violation was the result of the operator’s unwarrantable failure. For the same reasons, I also conclude that Acha was highly negligent for failing to maintain the berms on the loading ramp.

## **B. Penalty**

Under Section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of the penalty

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<sup>8</sup> (...continued)  
*Corp.*, 32 FMSHRC 1189, 1196–97 n.8 (Oct. 2010) (Commission has recognized an ALJ’s credibility determinations are entitled to great weight and may not be overturned lightly).

<sup>9</sup> Although Acha argues that rain the weekend prior to the citation contributed to the berms’ deterioration, Acha’s meteorological evidence shows a rain event but is inconclusive because it did not provide data for, and thus correspond with, the mine’s exact location. (Tr. 107:22–109:1, 109:18–22, 112:8–114:2; Exs. S–17, S–18, S–19.) Even if rain did occur over the weekend and eroded the berm, Acha failed to repair the berm before returning the plant to operation on Monday, August 3, 2015. (Tr. 114:23–115:2; Exs. S–6 at 1, R–4 at 1.) The following day on August 4, Inspector Barney witnessed Acha using the ramp and thus issued the citation. (Tr. 40:20–23, 58:18–22; Exs. S–1, R–1.) I note that although Barney was at the mine site on July 30 when he issued the citation for a dust violation, he did not find any problem with the berms at that time. Thus, it is possible a rain event occurred, further eroding the berms. Indeed, photos provided by Acha demonstrated soil moved due to the effect of running water. (Tr. 106:7–107:21; Ex. R–2, S–2.) It is possible the violative condition existed for five days but that the intervening rain over the weekend worsened the berms’ deterioration by the time Barney returned to the mine on August 4. Nevertheless, the record demonstrates that the violative condition lasted for five days, regardless of whether a rain event occurred the weekend prior.

relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary has proposed that Acha pay a specially-assessed penalty of \$3,400.00 for Citation No. 8876244. (Ex. S-4.) Acha has stipulated that the proposed penalty will not affect its ability to remain in business. (Joint Ex. 1; Tr. 17:11-13.) Additionally, I have upheld the Secretary's S&S, gravity, unwarrantable failure, and negligence designations. I note, however, that a mitigating factor of rain may have affected the berms so that the violation may not have existed in that condition for the five days prior to August 4. Additionally, Acha had no history of violations that became final orders during the 15 months prior to the inspection. (Joint Ex. 1; Tr. 17:16-18.) Nothing suggests that Acha failed to make a good faith effort in attempting to achieve rapid compliance after the citation's issuance. In fact, Acha abated the violation on the same day the citation was issued. (Joint Ex. 1; Tr. 17:14-15.) Lastly, at the time of the inspection, Acha ran a very small operation, requiring only two individuals to run the plant. (Tr. 33:12-20, 17:19-21.) Acha owns and operates only one mine, Crusher 1, which has been closed since September 2015. (Tr. 98:12-15.)

Although I have affirmed the citation as written, I am not bound by the Secretary's penalty criteria. The minimum penalty under the Mine Act for an unwarrantable failure section 104(d)(1) citation is \$2,000.00. 30 U.S.C. § 110(a)(3)(A). Taking into account Acha's size, history of violations, and good faith efforts to abate the violation, as well as considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of \$2,550.00.

## **VI. ORDER**

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8876244 is **AFFIRMED**. Acha Construction, LLC is **ORDERED** to **PAY** a civil penalty of \$2,550.00 within 40 days of the date of this decision.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

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/ivn

# **ADMINISTRATIVE LAW JUDGE ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 2, 2016

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

v.

CALPORTLAND COMPANY, and  
RIVERSIDE CEMENT COMPANY,  
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-264-DM  
WE MD 16-02

Mine ID 04-00011  
Mine: Oro Grande Quarry

## **ORDER DENYING RESPONDENTS' MOTIONS FOR SUMMARY DECISION**

This case is before me upon a complaint of discrimination filed by the Secretary of Labor (“Secretary”), on behalf of Jeffrey Pappas against CalPortland Company (“CalPortland”) and Riverside Cement Company (“Riverside”), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Review Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2).

### **I. STATEMENT OF THE CASE**

In October 2015, Pappas filed a complaint alleging discrimination under section 105(c) of the Mine Act against CalPortland. After an investigation, the Secretary chose to pursue the case on behalf of Pappas and filed an application for temporary reinstatement pursuant to section 105(c)(2) of the Mine Act against CalPortland. I held a hearing on the temporary reinstatement on January 5, 2016, and granted the Secretary’s application. Upon review, the Federal Mine Safety and Health Review Commission (“Commission”) upheld Pappas’ temporary reinstatement. CalPortland subsequently filed a petition for review to the U.S. Court of Appeals for the D.C. Circuit, which granted CalPortland’s petition and vacated the Commission’s decision and order for temporary reinstatement on October 20, 2016.<sup>1</sup>

On February 12, 2016, the Secretary filed a discrimination complaint on behalf of Pappas to the Commission. Chief Administrative Law Judge Robert J. Lesnick assigned the matter to me on March 11, 2016. On March 11, 2016, the Secretary filed an amended complaint adding Riverside as a respondent to the proceeding. CalPortland and Riverside each filed an answer to

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<sup>1</sup> The D.C. Circuit held Pappas was an “applicant for employment” under section 105(c)(2) who was not eligible for temporary reinstatement. *CalPortland Co. v. FMSHRC*, No. 16-1094, slip op. at 2 (D.C. Cir. Oct. 20, 2016). The court maintained, however, that CalPortland may still be held liable for discrimination under the section 105(c)(2). *Id.* at 17 (“[i]n a final decision, CalPortland, as the successor operator of the Oro Grande plant, could perhaps be ordered to instate Pappas if it was found to have violated the Mine Act when it failed to hire him. . . .”) (internal citations omitted).

the amended complaint on April 8, 2016. I issued a Notice of Hearing on April 14, 2016, and set this matter for hearing on December 6–9, 2016, in San Bernardino, California.

## II. ISSUES

On November 10, 2016, Respondents Riverside and CalPortland each filed a motion for summary decision. On November 28, 2016, the Secretary timely filed a response to each of Respondents' motions after filing an unopposed motion to extend the submission deadline, which I granted.

The issues before me are as follows: (1) whether Riverside is entitled to summary decision because there are no material facts in dispute; and (2) whether CalPortland is entitled to summary decision because there are no material facts in dispute. For the reasons that follow, Riverside's motion for summary decision is **DENIED**, and CalPortland's motion for summary decision is **DENIED**.

## III. FACTUAL BACKGROUND

Riverside owned and operated the Oro Grande Quarry from July 2014 to September 30, 2015. (Am. Compl. at 2; Riverside Answer at 1.) Pappas worked at the Oro Grande Quarry as a dust collector and laborer. (*Id.*; Riverside Mot. at 2.) Early in 2014, Pappas grew concerned about a potentially dangerous situation at the mine and filed a hazard complaint with MSHA. (Am. Compl. at 2; Riverside Mot. at 2.) On April 15, 2014, Pappas filed a discrimination complaint with MSHA against his employer. (Am. Compl. at 3; Riverside Mot. at 3.) The complaint resulted in a settlement agreement with Riverside, whereby Pappas was reinstated at the Oro Grande Quarry on January 5, 2015. (Am. Compl. at 3; Riverside Answer at 3; Riverside Mot. at 3.) (*Id.*)

On June 30, 2015, CalPortland entered into an agreement with Martin Marietta Materials, Inc. ("Martin Marietta"), Riverside's parent company, to purchase assets that included the Oro Grande Quarry. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Answer at 8.) In August 2015, CalPortland began visiting Oro Grande's facilities. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Answer at 2.) In September 2015, CalPortland invited Riverside's employees to apply for positions with CalPortland and interviewed those who submitted applications. (Am. Compl. 4; CalPortland Answer at 3.)

At that time, Jamie Ambrose served as Riverside's human resources manager. (Am. Compl. at 4; Riverside Answer at 3.) Ambrose was later offered the position of human resources manager at the mine with CalPortland. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Answer at 2.) On September 3, 2015, Steve Antonoff, Vice President of Human Resources for CalPortland, met with Ambrose and discussed Ambrose's recommendations for hire. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Mot. at 8; Ambrose Decl. at 4.) Ambrose did not positively recommend Pappas for hire. (*Id.*)

Pappas subsequently did not receive an offer of employment from CalPortland. (Am. Compl. at 4–5; CalPortland Mot. at 13.) Pappas was laid off by Riverside and received a severance package. (Am. Compl. at 4; Riverside Mot. at 3.)

## IV. PRINCIPLES OF LAW

### A. Summary Decision

Commission Rule 67(b) provides that 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) [t]hat there is no genuine issue of material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law.” 20 C.F.R. § 2700.67(b). A “material fact” for the purposes of defeating summary decision can also be an inference, drawn from evidence on record, as to a factual element of a claim. *KenAmerican Res.*, 38 FMSHRC \_\_\_, slip op. at 4, No. KENT 2013-211 (Aug. 25, 2016).

The Commission has consistently held that summary decision is an “extraordinary procedure” and analogizes it to Rule 56 of the Federal Rules of Civil Procedure.<sup>2</sup> *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate “upon proper showings of the lack of a genuine, triable issue of material fact.” *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and “inferences drawn from the underlying facts” are viewed in the light most favorable to the party opposing the motion. *Id.* at 2988 (quoting *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The Commission has also recently noted that a party moving for summary judgment bears the initial burden of showing that there is no genuine dispute as to material facts. *KenAmerican Res.*, 38 FMSHRC \_\_\_, slip op. at 4 (citing *Celotex Corp.*, 477 U.S. at 323; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). If the moving party carries its burden, then the burden shifts to the non-movant to establish a genuine dispute as to material fact. *Id.* However, in determining whether facts are disputed, Commission Judges should not solely rely on the parties’ claims, but should conduct an independent review of the record. *Id.*

### B. Discrimination Under the Mine Act

Section 105(c)(1) of the Mine Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of 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 . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has

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<sup>2</sup> Federal Rule of Civil Procedure 56(a) provides for the filing of motions for summary judgment and states that: “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

Under Commission law, a complainant establishes a *prima facie* case of a violation of section 105(c) if the preponderance of the evidence proves (1) that the complainant engaged in a protected activity, (2) that there was adverse action, and (3) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

In evaluating whether a complainant has proven a causal connection between protected activities and adverse action, the following factors are to be considered: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F. 2d 86 (D.C. Cir. 1983).

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. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). If the mine operator cannot rebut the *prima facie* case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328-29; *Pasula*, 2 FMSHRC at 2800.

## V. ANALYSIS AND CONCLUSIONS OF LAW

### A. Riverside's Motion for Summary Decision

Riverside asserts that it is entitled to summary decision because the Secretary cannot prove by a preponderance of evidence that Pappas' termination from Riverside was motivated in any part by protected activity and therefore cannot establish a *prima facie* case of discrimination. (Riverside Mot. at 1-2.) Riverside specifically notes that it laid off its entire workforce following CalPortland's asset purchase of the Oro Grande facility, and thus its decision to lay off Pappas was based solely on the asset sale. (*Id.* at 2.)

In response, the Secretary asserts that his claim against Riverside is not based on Pappas' lay off, but rather on Riverside failing to address Pappas' harassment complaint and declining to recommend Pappas for continued employment at CalPortland. (Opp. to Riverside at 2.) The Secretary therefore argues that Riverside is not entitled to summary decision because Riverside has not identified uncontroverted facts that are relevant to the Secretary's allegations and has failed to establish that no genuine issues of material fact exist. (*Id.* at 5.)

To succeed in his claim, the Secretary must establish a *prima facie* case for discrimination and demonstrate (1) Pappas engaged in a protected activity, (2) that there was adverse action, and (3) that the adverse action was motivated in any part by the protected activity. *Driessen, Inc.*, 20 FMSHRC at 328; *Pasula*, 2 FMSHRC at 2799-2800. Riverside concedes Pappas engaged in protected activity when he filed a discrimination complaint in April 2014, establishing the first element of discrimination. (Riverside Mot. at 6.)

In regard to the second element, the Commission has recognized harassment as a form of adverse action. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd* 770 F.2d 168 (6th Cir. 1985) (concluding that coercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act). The Commission has also held that “an adverse action is an act of commission or omission by the operator subjecting the miner to discipline or a detriment in his employment relationship. *Sec’y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 & n.2 (Aug. 1984) (recognizing discrimination may manifest itself in subtle or indirect forms of adverse action). Thus, the Secretary’s claim that Riverside management allowed co-workers to harass Pappas about his safety complaint could constitute adverse action. (Am. Compl. at 3) Riverside, however, denies Pappas was subject to such harassment. (Riverside Answer at 3.)

Additionally, Ambrose, Riverside’s human resources manager at the time, did not recommend Pappas for employment at CalPortland. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Mot. at 8; Ambrose Decl. at 4.) In other discrimination contexts, a negative reference from a former job employer for engaging in protected activity has constituted adverse action. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding an employer could be liable for retaliation under Title VII by providing a negative job reference against an employee after the employee’s discharge). Ambrose denies giving Pappas a “negative” recommendation, but states she simply passed on giving a positive recommendation. (Ambrose Decl. at 4.) Her characterization, however, is subjective. In fact, the Secretary has disputed Ambrose’s characterization of her meetings with CalPortland and the truthfulness of her statements.<sup>3</sup> The Commission has recognized that credibility determinations are not appropriate for summary decision. *KenAmerican Res.*, 38 FMSHRC \_\_\_, slip op. at 10 & n.11 (“... a hearing, with the opportunity to observe a witness’ demeanor, is the proper venue to determine intent and credibility, not a summary decision motion”). As such, whether Ambrose’s representations regarding her hiring recommendations are credible cannot be determined at this stage.

With respect to the third element, the Secretary must present evidence demonstrating that the adverse action was motivated in any part by Pappas’ protected activity. Discriminatory intent can be established with evidence of: (1) knowledge of the protected activity; (2) hostility or

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<sup>3</sup> In her response to CalPortland’s motion for summary decision, counsel for the Secretary characterizes Ambrose’s lack of recommendation as “blacklisting.” (Opp. to CalPortland at 12.) Additionally, the Secretary appears to question Ambrose’s credibility. (Opp. to CalPortland at 5-6.) Specifically, the Secretary notes Ambrose previously told MSHA Special Investigator Jackson that she did not talk to CalPortland about Riverside employees. (*Id.* at 5.) However, the record establishes that Ambrose did discuss her recommendations for hire with CalPortland. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Mot. at 8; Ambrose Decl. at 4.)

animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510 (Nov. 1981). Riverside admits the Secretary will be able to prove the first element regarding knowledge. (Riverside Mot. at 8.)

In regard to the second element, Riverside asserts there is no evidence of animus and that Pappas was treated identically to all Riverside employees. (*Id.*) Animus may be shown by evidence suggesting supervisors were indifferent to or angered by a miner's protected activity. See *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1069 (May 2011) (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). The Secretary disputes Riverside's claim by asserting Riverside's management failed to respond to Pappas' harassment claim and labeled Pappas a "problem" to the company. (Resp. to Riverside at 4; Riverside Mot. Ex. 5 at 8–10.)

In terms of coincidence in time, Riverside asserts that a significant length of time elapsed between Pappas' original discrimination complaint in December 2014 and his current complaint filed on September 20, 2015. (Riverside Mot. at 8.) However, the Secretary disputes and asserts Pappas' harassment grievances had not been resolved up until late August 2015. (Opp. to Riverside at 4; Riverside Mot. Ex. 5 at 8–10.)

Regarding disparate treatment, Riverside states Pappas was treated identically to all Riverside employees during the asset sale as all employees were laid off. (Riverside Mot. at 8.) The record reflects, however, that Riverside did not recommend all its employees for hire. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Mot. at 8; Ambrose Decl. at 4.) Riverside has not addressed nor established that there are no genuine factual disputes as to the reasons behind Pappas' lack of recommendation.

After review of the record, I find that significant genuine issues of material fact remain as to the Secretary's *prima facie* case for discrimination, specifically related to Ambrose's intent and involvement in CalPortland's hiring process. I conclude that, when viewing the record in the light most favorable to the Secretary, Riverside has not established its right to summary decision as a matter of law.

## **B. CalPortland's Motion for Summary Decision**

### **1. CalPortland's Knowledge of Protected Activity**

CalPortland contends that it had no knowledge of any protected activity by Pappas and therefore could not have engaged in discrimination. (CalPortland Mot. at 1–2.) Specifically, CalPortland argues that Ambrose provided no information regarding Pappas' past work history and protected activity in her meeting with Antonoff. (*Id.* at 10.) Further, CalPortland claims that because Ambrose did not work for CalPortland during the hiring process, Ambrose's knowledge of Pappas' protected activity cannot be imputed to CalPortland. (*Id.* at 17.) Thus, CalPortland claims it is entitled to summary decision because there are no genuine issues of material fact in regard to it lacking knowledge of Pappas' protected activity. (*Id.* at 2, 19–20.)

In response, the Secretary disputes that CalPortland had no knowledge of Pappas' protected activity. (Opp. to CalPortland at 3.) Specifically, the Secretary suggests CalPortland learned about Pappas' history through conversations with several of Pappas' supervisors. (*Id.*) The Secretary also asserts that Ambrose's knowledge may be imputed to CalPortland as a matter of law. (*Id.* at 10.)

The Secretary notes that CalPortland had numerous occasions to learn about Pappas' protected activity. (Opp. to CalPortland at 3.) For example, the Secretary asserts CalPortland's plant manager Rich Walters met with and hired one of Pappas' supervisors, David Salzborn. (Opp. to CalPortland at 3–4.) The Secretary claims Salzborn was also in a position to influence CalPortland's hiring decision. (*Id.* at 4.) According to the Secretary, Salzborn referred to Pappas as a "poor performer" and "not a good employee" in a discussion with Walters. (*Id.*)

Additionally, the Secretary points to multiple conversations between Riverside's human resources manager, Ambrose, and CalPortland's Vice President of Human Resources, Antonoff. (*Id.*) Although CalPortland denies that Antonoff and Ambrose discussed Pappas' protected activity, the Secretary appears to question the credibility of their denials. (CalPortland Mot. at 8–9; Opp. to CalPortland at 5–6.) Specifically, the Secretary notes that Ambrose previously told MSHA Special Investigator Jackson that she did not talk to CalPortland about Riverside employees. (*Id.* at 5.) However, Ambrose has since admitted she met with Antonoff to discuss her recommendations for hire. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Mot. at 8; Ambrose Decl. at 4.)

As noted above, credibility determinations are not appropriate for summary decision. *KenAmerican Res.*, 38 FMSHRC \_\_\_, slip op. at 10 & n.11. Based on the record, I find that genuine issues of material fact remain in dispute as to CalPortland's actual knowledge of Pappas' protected activity.<sup>4</sup>

## **2. Successorship**

Further, CalPortland asserts that because the Secretary has not pled successorship for its action against CalPortland, the Secretary is precluded from claiming CalPortland is liable as a successor for any acts of discrimination made by Riverside at this stage of the proceeding. (*Id.* at 20–21.) CalPortland also argues that the successorship argument fails as a matter of law because CalPortland had no notice of Pappas' prior MSHA activity. (*Id.*)

In response, the Secretary contends its complaint may be amended to include a successorship theory up to the time of trial. (*Id.* at 13–16.) In this regard, the Secretary again notes that it disputes whether CalPortland had notice of Pappas' protected activity and argues

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<sup>4</sup> Because I have determine that material factual disputes exist over CalPortland's actual knowledge of Pappas' protected activity, I need not determine whether Ambrose's knowledge may be imputed to CalPortland for purposes of summary decision. I reserve my determinations on that issue for after hearing. I note, however, that the Commission has recognized that knowledge and animus may be imputed to an employer notwithstanding the actual decision-maker's ignorance of the protected activities. *Colorado Lava, Inc.*, 24 FMSHRC 350, 358 (Apr. 2002) (concurring opinion).

that CalPortland was placed on notice that the Secretary seeks to hold it liable for its predecessor's discrimination during the hearing on temporary reinstatement. (*Id.* at 14–15.)

It is the well-established practice of Commission Judges for “administrative pleadings [to be] liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party.” *CDK Contracting Co.*, 23 FMSHRC 783, 784 (July 2001) (ALJ); *Empire Iron Mining*, 29 FMSHRC 317, 326 (Apr. 2007) (ALJ); *New NGC, Inc.*, 35 FMSHRC 3225, 3226 (Sept. 2016) (ALJ). The Secretary may therefore raise the issue at hearing and amend the complaint. Moreover, the Secretary's discrimination complaint alleges Respondents Riverside and CalPortland were closely involved with each other in the decision for Pappas to not be retained at CalPortland. (Am. Compl. at 4–5.) The Secretary's complaint details facts regarding CalPortland's purchase of the Oro Grande mine from Martin Marietta. (Am. Compl. at 4.) This transaction and the relationship involving the two companies, one of which succeeds the other in taking over the mine, imply issues related to successorship.

Further, the Secretary pled the claim that CalPortland is a successor to Martin Marietta, Riverside's owner, in its initial application for temporary reinstatement filed on December 8, 2015. (App. Temp. Restatement at 2.) The issue and factors required to determine a successor-in-interest were discussed in my Decision and Order on Temporary Reinstatement. *Sec'y on behalf of Pappas v. CalPortland Co.*, 38 FMSHRC 53, 60–61 (Jan. 2016) (ALJ). I therefore determine that CalPortland has been provided adequate notice thereof and would not be prejudiced, especially given that CalPortland appears to have already anticipated the issue in its motion for summary decision and prepared its counter-arguments.

In regard to CalPortland's claim that any successorship argument fails as a matter of law, I have already determined above that material issues of fact exist over whether CalPortland had notice of Pappas' protected activity.

In conclusion, when viewing the record in the light most favorable to the Secretary, I determine that CalPortland has not established its right to summary decision as a matter of law.

## **VI. ORDER**

For the reasons stated above, Riverside's motion for summary decision is hereby **DENIED**. Additionally, CalPortland's motion for summary decision is hereby **DENIED**.

These matters will proceed to hearing in San Bernardino, California, as scheduled on December 6–9, 2016.

/s/ Alan G. Paez  
Alan G. Paez  
Administrative Law Judge

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/ivn

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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December 2, 2016

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

v.

CALPORTLAND COMPANY, and  
RIVERSIDE CEMENT COMPANY,  
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-264-DM  
WE MD 16-02

Mine ID 04-00011  
Mine: Oro Grande Quarry

## **ORDER DENYING RESPONDENTS' JOINT MOTION TO COMPEL**

This case is before me upon a complaint of discrimination filed by the Secretary of Labor (“Secretary”), on behalf of Jeffrey Pappas against CalPortland Company (“CalPortland”) and Riverside Cement Company (“Riverside”), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Review Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2). On February 12, 2016, the Secretary filed a discrimination complaint on behalf of Pappas to the Commission. Chief Administrative Law Judge Robert J. Lesnick assigned the matter to me on March 11, 2016. On March 11, 2016, the Secretary filed an amended complaint adding Riverside as a respondent to the proceeding. CalPortland and Riverside each filed an answer to the amended complaint on April 8, 2016. On April 14, 2016, I issued a Notice of Hearing, setting this matter for hearing on December 6–9, 2016, in San Bernadino, CA. The Notice of Hearing also provided guidelines to the parties for completing discovery in this proceeding.

On November 18, 2016, Respondents Riverside and CalPortland filed a Joint Motion to Compel Discovery Responses. The Secretary timely filed a response on November 29, 2016.

### **I. BACKGROUND AND ISSUES**

Respondents Riverside and CalPortland each served a set of discovery requests to the Secretary on August 2, 2016, and August 3, 2016, respectively. (Mot. at 2.) The Secretary responded to both discovery requests on September 26, 2016, and objected to certain requests based on privilege. (*Id.*) On October 7, 2016, the Secretary provided a privilege log, asserting the common interest privilege, government informant privilege, and attorney-client privilege as the basis for withholding certain documents. (*Id.*) Respondents now request an order compelling the Secretary to produce the withheld documents identified as Document Nos. 0047-0051, 0234, 0235, and 0236-0237.

According to the Secretary’s privilege log, Document No. 0047-0051 contains an interview of Jeffrey Pappas by MSHA Special Investigator Kyle Jackson, for which the

Secretary claims the attorney-client, common interest, and government informant privileges. (Mot. Ex. 3 at 2.) Document No. 0234 contains documents from Pappas, for which the Secretary claims the common interest privilege. *Id.* Document No. 0235 contains an email from Pappas to Jackson, for which the Secretary claims the common interest and government informant privileges. *Id.* Lastly, Document No. 0236-0237 contains a memorandum from Pappas to Jackson, for which the Secretary claims the common interest and government informant privileges. *Id.*

## II. PRINCIPLES OF LAW

### A. Scope of Discovery

Under Commission Procedural Rule 56, parties may use depositions, written interrogatories, requests for admissions, and requests for documents or objects to “obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.” 29 C.F.R. § 2700.56(a)–(b). A party served with a request for production must respond within 25 days of service and state the basis for any objections in its answer. 29 C.F.R. § 2700.58(c).

Commission Judges may look to the Federal Rules of Civil Procedure for guidance on any procedural question not governed by the Mine Act, the Commission’s Procedural Rules, or the Administrative Procedure Act. 29 C.F.R. § 2700.1(b). Under Federal Rule 26(b)(1), a party may discover “any non[-]privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. P. 26(b)(1). The scope of discovery under the Federal Rules is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Commission Procedural Rule 56(e), 29 C.F.R. § 2700.56(e), allows parties to engage in discovery as long as it does not “unduly delay or otherwise impede disposition of the case” and is “completed at least 20 days prior to the scheduled hearing.” For good cause shown, Commission Judges may “extend or shorten the time for discovery.” *Id.*

### B. Limitations on Discovery: Privileged Matter

As noted above, Commission Rule 56(b) excludes privileged material from the scope of discovery. *See* 29 C.F.R. § 2700.56(b). The Federal Rules of Civil Procedure also limit discovery to “non[-]privileged” matter. Fed. R. Civ. P. 26(b)(1). However, parties withholding information on the basis of privilege must expressly make such a claim and “describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(A).

## 1. Attorney-Client Privilege

The Commission has noted that the attorney-client privilege generally protects communications made by a client in confidence to his attorney. *ASARCO, Inc.*, 12 FMSHRC 2548, 2559 (Dec. 1990). Attorney-client privilege serves to promote full and frank communication between attorneys and their clients. *Upjohn Co. v. United States*, 449 U.S. 383, 388 (1981). The privilege rests on the need for advocate and counselor to know all that relates to the client's reasons for seeking representation to effectively carry out his or her objectives. *Trammel v. United States*, 445 U.S. 40, 41 (1980). The party asserting the privilege has the burden to prove the privilege applies. *United States v. Layton*, 855 F.2d 1388, 1406 (9th Cir.1988); *United States v. Landof*, 591 F.2d 36, 38 (9th Cir.1978).

To establish the attorney-client privilege, a party must demonstrate that the communication was made by a client in confidence for the purpose of seeking legal advice from an attorney acting in the capacity of an attorney. *See Fisher v. United States*, 425 U.S. 391, 403 (1976); *United States v. Flores*, 628 F.2d 521, 526 (9th Cir. 1980). The party must also demonstrate that the privilege with respect to the communication has not been waived. *Flores*, 628 F.2d at 526.

The attorney-client privilege is generally waived when the privileged communication is voluntarily disclosed to a third party. *Clady v. Los Angeles Cnty*, 770 F.2d 1421, 1433 (9th Cir. 1985) (citing *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir.1981)). However, the attorney-client privilege may extend to third parties who have been engaged to assist the attorney in providing legal advice. *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) (citing *Smith v. McCormick*, 914 F.2d 1153, 1159–60 (9th Cir. 1990)); *see also United States v. Kovel*, 296 F.2d 918, 921–922 (2d Cir. 1961).

## 2. Common Interest Privilege

The common interest privilege is an extension of the attorney-client privilege. *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012); *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (“the ‘common interest’ . . . rule is an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other”). The privilege not only protects the confidentiality of communications passing from a party to his or her attorney, but also from “one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.” *United States v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005) (citing *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). The parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement, whether written or unwritten. *Pacific Pictures Corp.*, 679 F.3d at 1129. There is no requirement that actual litigation be in progress for the common interest privilege to apply. *Gonzalez*, 669 F.3d at 980 (citing *Cont'l Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964); *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996)).

### 3. Informant's Privilege

Under the informant's privilege, the Secretary may "withhold from disclosure the identity of persons furnishing information of violations of law to [MSHA]." *Bright Coal Co.*, 6 FMSHRC 2520, 2522 (Nov. 1984); *see also* 29 C.F.R. § 2700.61 (prohibiting Commission Judges from disclosing or ordering disclosure of an informant's name to an operator "except in extraordinary circumstances.") Informants are people who have "furnished information to a government official relating to or assisting in the government's investigation of a possible violation of law, including a possible violation of the Mine Act." *Id.* at 2525. The informant's privilege protects from disclosure material that "tend[s] to reveal an informant's identity." *ASARCO, Inc.*, 14 FMSHRC 1323, 1330 (Aug. 1992) ("*ASARCO II*"). The Secretary must demonstrate why disclosure would tend to reveal the miner's identity, but his burden "is not necessarily high" and may be satisfied by an affidavit "setting forth how or why disclosure . . . would tend to reveal the identity of an informant." *Id.* at 1329-30.

A requesting party may overcome the informant's privilege if, in the totality of the circumstances, the information is "essential to fair determination." *Bright Coal*, 6 FMSHRC at 2526. To do so, the requesting party must demonstrate that its need for the information outweighs the Secretary's need to maintain the privilege to protect the public interest. *Id.*

### III. ANALYSIS AND CONCLUSIONS OF LAW

I note at the outset that the deadline to complete discovery in this matter was November 16, 2016. 29 C.F.R. § 2700.56(e). Respondents filed their joint motion to compel on November 18, 2016. Although I may extend the discovery period for good cause shown, Respondents' motion does not show any good faith attempt on Respondents' part to confer with the Secretary to resolve this discovery dispute since receiving the Secretary's privilege log on October 7, nor does the motion provide any explanation why Respondents waited over 40 days after receiving the Secretary's privilege log to file their motion. Respondents' motion is therefore untimely. Nevertheless, I address the parties' arguments in regard to each requested document below.

#### A. Document Nos. 0047-0051, 0235, and 0236-0237

The Secretary asserts the common interest and informant's privileges for Document Nos. 0047-0051, 0235, and 0236-0237.<sup>1</sup> (Mot. Ex. 3 at 2; Daquiz Decl. at 2.) The Secretary states these documents memorialize communications with Pappas aimed at furthering the Secretary's and Pappas' interests in this matter and neither party has waived its privileges. (Daquiz Decl. at 2.) The Secretary also states the documents contained information that could identify other confidential witnesses. (*Id.*) According to the privilege log, the documents contain an interview

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<sup>1</sup> The privilege log also lists the attorney-client privilege for Document No. 0047-0051. (Mot. Ex. 3 at 2.) The Secretary admits the Secretary is not Pappas' attorney for the purposes of this proceeding. (Resp. at 3, n.7.) However, the Secretary states the attorney-client privilege was identified as the basis for withholding documents because the common interest privilege extends the protections of the attorney-client privilege. (Daquiz Decl. at 2.)

with Pappas from MSHA Special Investigator Kyle Jackson, an email from Pappas to Jackson, and a memo from Pappas to Jackson. (Mot. Ex. 3 at 2.)

Respondents argue that Pappas and the Secretary do not have an attorney-client relationship, and therefore, the common interest privilege does not apply because the privilege only extends the attorney-client privilege. (Mot. at 3.) Respondents also argue that the government informant's privilege does not apply because the privilege only protects informants' identity and not the documents in their entirety. (Mot. at 4.) Respondents note the informant's privilege does not apply to Pappas because his identity has been revealed. (Mot. at 4.)

The common interest privilege protects communications from one party to the attorney for another party where a joint strategy has been decided upon and undertaken by the parties and their counsel. *Austin*, 416 F.3d at 1021 (citing *Schwimmer*, 892 F.2d at 243). Although Pappas has not retained separate counsel, he is his own legal representative and a party to this proceeding. The Secretary's decision to pursue Pappas' discrimination complaint pursuant to section 105(c)(2) of the Mine Act establishes a joint strategy agreed upon between the two parties. I therefore determine that the common interest privilege applies to confidential communications between Pappas and counsel for the Secretary.

The common interest privilege, by extension of the attorney-client privilege, also protects communications to third parties who have been engaged to assist attorneys in providing legal advice. *See Richey*, 632 F.3d at 566; *Smith*, 914 F.2d at 1159–60 (concluding that a defendant's communication with her psychiatrist was protected up to the point of testimonial use); *see also Kovel*, 296 F.2d at 921–922 (holding that the privilege extends to communications made by a client to an accountant employed by the attorney to assist in providing legal advice). While not an attorney, "the role of an MSHA investigator is to provide an opinion on the merits of a discrimination complaint which is provided to the Solicitor's Office in contemplation of potential litigation."<sup>2</sup> *McGlothlin v. Dominion Coal Corp.*, 36 FMSHRC 3052, 3053 (Nov. 2014) (ALJ). Consequently, the MSHA investigator may be deemed to be a subordinate of an attorney, whose communications with a prospective complainant are privileged. *See id.*

MSHA assigned Jackson to conduct an investigation after MSHA received Pappas' discrimination complaint alleging he was improperly discharged. (Am. Compl. at 5.) The purpose of Jackson's investigation was for MSHA to identify whether Pappas had a claim for discrimination and to inform the Secretary whether an action may be brought. I thus determine that Jackson, although not an attorney, was engaged to assist the Secretary's counsel in providing legal advice. The common interest privilege therefore extends to confidential communications that Pappas made to Jackson as a party engaged to assist the Secretary's counsel.<sup>3</sup>

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<sup>2</sup> Although the judge's decision is not binding, I take his reasoning as persuasive authority.

<sup>3</sup> I also note that the Secretary's counsel does in fact represent MSHA in this matter, and thus attorney-client privilege also protects communications between Jackson, as MSHA's representative, and the Secretary's counsel.

Further, the government informant's privilege protects the identity of informants who furnished information to the government regarding possible violations of the law. *Bright Coal Co.*, 6 FMSHRC at 2522-25. The Secretary states that the requested documents contain information that could identify confidential witnesses other than Pappas. (Daquiz Decl. at 2.) Respondents have not addressed how producing such information would be essential to fair determination to overcome the privilege. I therefore determine that Respondents' need for the information does not outweigh the need to maintain the privilege to protect the public interest.

For the reasons above, I determine that the common interest privilege applies in regard to the confidential interview, email, and memo provided by Pappas to Jackson. Additionally, I conclude that informant's privilege applies to the portions of these documents that tend to reveal the identity of government informants other than Pappas.

**B. Document No. 0234**

The Secretary asserts the common interest privilege for Document No. 0234. (Mot. Ex. 3 at 2; Daquiz Decl. at 2.) The Secretary also states Document No. 0234 memorializes communications with Pappas aimed at furthering the Secretary's and Pappas' interests in this matter. (Daquiz Decl. at 2.) The Secretary states that the Secretary and Pappas have not waived the privilege. (Daquiz Decl. at 2.) The privilege log identifies Document No. 0234 as documents from Pappas. (Mot. Ex. 3 at 2.)

Respondents assert the same arguments made for the other documents, claiming that Pappas and the Secretary do not have an attorney-client relationship, and therefore, the common interest privilege does not apply. (Mot. at 3.)

As determined above, the Secretary has established the existence of a joint strategy with Pappas in his decision to pursue Pappas' discrimination complaint under section 105(c)(2) of the Mine Act. Because the documents contain confidential communications between Pappas and the Secretary made to further their joint legal interests, I determine the common interest privilege also applies to these documents.

**IV. ORDER**

Based on the reasons above, Riverside and CalPortland's joint motion to compel is hereby **DENIED**.

/s/ Alan G. Paez  
Alan G. Paez  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 27, 2016

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

v.

COMMONWEALTH MINING, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2015-621  
A.C. No. 33-04642-387266

Mine: Tinsley Branch HWM 61

## **AMENDED ORDER DENYING MOTION FOR SUMMARY DECISION**

The above-captioned case is before me upon the Secretary's petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d) ("the Mine Act" or "the Act").

### Procedural Background

At issue in this proceeding is a single citation that was issued to Commonwealth Mining, LLC ("Commonwealth") under section 104(d)(1) of the Mine Act after a fatal accident occurred at its mine. On April 13, 2016, the case was stayed at the parties' request pending resolution of a related criminal proceeding against a foreman who was involved in the fatal accident. After the foreman entered a guilty plea in August 2016, the stay was lifted and this civil penalty proceeding was scheduled for hearing on March 28-29, 2017.

On November 25, 2016, before discovery had been completed, the Secretary filed a Motion for Summary Decision asking me to find that Commonwealth violated the Mine Act as set forth in the citation and to assess a penalty of \$126,800.00 for the violation. The Secretary contends that summary decision is appropriate because, based on the entire record, there is no genuine issue of material fact and he is entitled to summary decision as a matter of law. At this stage in the proceedings, the record consists of the parties' pleadings and the materials submitted by the parties on summary decision, including a copy of the plea agreement from the related criminal case, which is the primary basis for the Secretary's Motion for Summary Decision.

Commonwealth opposes the Motion for Summary Decision. Commonwealth argues that material facts remain in dispute, including facts pertaining to the unwarrantable failure and flagrant designations and to the six statutory penalty criteria upon which I am required to make findings pursuant to 30 U.S.C. § 820(i), and that the record has not yet been developed on these issues. Commonwealth contends that the plea agreement in the related criminal case has no preclusive effect in this proceeding and asserts it is entitled to a hearing.

## Legal Principles Governing Summary Decision

Commission Procedural Rule 67, which is analogous to Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to grant summary decision when the entire record shows that “there is no genuine issue as to any material fact” and that “the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b); see *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The record must be viewed in the light most favorable to the nonmoving party and the judge may not weigh the factual evidence or engage in fact-finding beyond those facts that are established in the record. *W. Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015); *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4 (Jan. 2007). Summary judgment should not be granted “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

## Discussion and Conclusions of Law

On October 7, 2014 a fatal accident occurred at Commonwealth’s Tinsley Branch HWM 61 mine when miner Justin Mize entered into the highwall mining hole to retrieve a cutter-head chain in violation of 30 C.F.R. § 77.1502.<sup>1</sup> The foreman on duty was Anthony Cornett. The violation was assessed as significant and substantial (S&S), an unwarrantable failure and flagrant.

On August 25, 2016, Cornett entered a guilty plea in the United States District Court for the Eastern District of Kentucky – Southern Division at London. The plea agreement crafted by the U.S. Attorney and counsel for Cornett included an unsworn statement upon which Cornett was adjudged guilty. The statement simply said he “knowingly and willfully” permitted Mize to enter the mining hole. Sec.’s Mot. Ex. B. Cornett was sentenced to a term of two years’ probation and \$25.00 in costs. *Id.*

From these two words, “knowingly and willfully,” used in the context of an unsworn statement entered as a proffer to support a guilty plea between the United States attorney and Mr. Cornett, the Secretary argues all of the elements charged in the instant violation have been established. Without the benefit of a trial, the Secretary argues that he has met his burden of proof, viewing the “facts” most favorable to the non-moving party, establishing that Commonwealth has committed a violation of the Mine Act that is significant and substantial, an unwarrantable failure and flagrant. The Secretary also asserts that the proposed penalty is appropriate. There being no material issue of fact remaining, he argues, he is entitled to summary decision.

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<sup>1</sup> 30 C.F.R. § 77.1502 provides: “No person shall be permitted to enter an auger hole except with the approval of the MSHA Coal Mine Safety and Health District Manager of the district in which the mine is located and under such conditions as may be prescribed by such managers.”

As Commonwealth correctly sets forth in its brief in opposition, there are numerous major flaws with this unusual theory of the Secretary's. The most obvious ones are that there are no "facts" of record and the parties to the Federal District Court criminal proceeding are different than those involved in this civil matter. The criminal matter was not an adjudication, no evidence was produced and the Court made no findings of fact. The unsworn statement of Mr. Cornett was the sole basis for the finding of guilt. The Secretary has provided nothing in addition to Cornett's guilty plea to constitute a record in this matter such as submission of deposition transcripts, responses to interrogatories or admissions, or sworn affidavits upon which to support a finding of facts, disputed or otherwise. Commonwealth has not stipulated to any facts at this point in the proceedings.

The only legal bases upon which the facts adduced at a prior court proceeding would be binding upon a later proceeding would be if the doctrines of res judicata or collateral estoppel applied. The doctrine of res judicata applies to prevent the re-litigation of claims in a "second suit involving the same parties or those in privity with them, based upon the same claim." *Faith Coal Co.*, 19 FMSHRC 1357, 1365 (Aug. 1997) (quoting *Nevada v. United States*, 463 U.S. 110, 129-30 (1983)). If the two actions are not identical, res judicata does not apply. In *Faith*, the company was charged with several roof support violations. The foreman involved had pled guilty previously in criminal court to a roof control violation under the Mine Act and was awarded probation with the proviso that he engage in no further serious unwarrantable violations of the Act. *Id.* at 1363. Following a subsequent violation, the magistrate held an evidentiary probation revocation hearing at which two MSHA inspectors testified and the magistrate issued a memorandum of findings concluding that the defendant had violated probation by committing "serious life threatening violations." *Id.* In the civil matter before the Commission, the Secretary argued that the magistrate's findings prohibited the operator from contesting the roof control violations before the ALJ. However, the Commission found res judicata did not apply as the magistrate's memorandum of findings did not indicate that he found the defendant had committed the specific violations that were before the ALJ. *Id.* at 1365-66.

The Commission similarly rejected the application of res judicata in a discrimination hearing where the complainant had previously filed a discrimination suit with the West Virginia Coal Mine Safety Board of Appeals. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 987 (June 1982). The board had issued a decision stating that "the dispute between Mr. Bradley and his superior did not involve safety matters and at no time did the matter of the individual safety of the miner arise." *Id.* at 985. Pending appeal from that decision, Bradley filed a discrimination action under the Mine Act which the respondent sought to dismiss under the doctrines of res judicata and collateral estoppel. The Commission rejected the res judicata argument, finding that the claims were not identical. The Mine Act, it found, may create entirely different rights and duties and address different wrongs arising out of the same set of facts. *Id.* at 986-89. Additionally, the decision of the State board was "extremely brief and conclusory" and "contain[ed] no findings of fact, credibility resolutions, or explanations for the conclusions reached" and therefore did not preclude litigation of the matter before the Commission. *Id.* at 989.

The Commission in *Bradley* also rejected the application of collateral estoppel, which precludes re-litigation in a second suit of issues that were actually litigated and necessary to the

outcome of the earlier suit. The Commission made clear that the party asserting the doctrine must specifically raise collateral estoppel and show that the precise issues involved in the second action were actually and necessarily decided in the first. *Bradley*, 4 FMSHRC at 990.

Neither the doctrine of res judicata nor collateral estoppel applies here. The Secretary has not specifically raised the doctrine of res judicata but makes a vague argument that the facts have been established by virtue of Cornett's guilty plea thus attributing them to Commonwealth as admissions of fact. Apparently, the Secretary confuses the legal authority for imputing the negligence of a foreman to the operator on an agency theory with being able to impute imprecise words used in a plea proffer to Commonwealth for the purposes of establishing all elements of the violation charged in this civil matter by MSHA against Commonwealth. This simply does not work. The parties involved in the criminal matter are not identical to, or in privity with, the parties in the instant civil matter. It can hardly be argued that Commonwealth had any involvement in the abbreviated criminal proceeding involving the U.S. Attorney, Cornett and his counsel that would have satisfied its due process rights to confront witnesses against it or raise defenses on its behalf. It also cannot be shown that the two actions are identical, one being a criminal proceeding against an individual and the other being a civil matter against the company involving issues of negligence, gravity and appropriate civil penalties. Res judicata does not apply.

Similarly, collateral estoppel cannot be used to support the Secretary's position here. Aside from the fact that the Secretary did not specifically raise the issue in his motion before me, the Commission has recognized that "[u]nder the doctrine of collateral estoppel, **a judgment on the merits** in a prior suit may preclude the relitigation in a subsequent suit of any issues **actually litigated and determined** in the prior suit." *BethEnergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992) (emphasis added). Because Cornett's unsworn statement supporting his guilty plea does not constitute a judgment on the merits of an issue actually litigated, it does not support application of the doctrine of collateral estoppel.

Assuming the federal court had issued findings of fact with respect to Cornett's involvement in a "willful and knowing" violation of the Mine Act, such findings still would not involve litigation of any of the salient issues at trial here, making both res judicata and collateral estoppel unavailable to the Secretary. Without delving into an extensive discussion of case law regarding unwarrantable failure or flagrant violations, the words "willful and knowing" used by Cornett for the purposes of supporting a guilty plea cannot be twisted to fit the elements necessary to find the negligence or gravity involved in this violation charged by MSHA against Commonwealth. The Secretary attempts to rely on dictionary definitions of these two words to satisfy the elements necessary for a finding of unwarrantable failure and a flagrant violation under the Mine Act. There are elemental problems with this. When analyzing an unwarrantable failure assessment, the ALJ must examine the circumstances of the case and make detailed findings as to the extent of the violation and length of time it existed, whether it was obvious or posed a high degree of danger, whether the operator had been placed on notice that greater effort was needed at compliance and whether the operator had made attempts to abate the condition before the violation was issued. The ALJ must also determine the weight to be assigned to each of these factors. *See Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009); *San Juan Coal Co.*, 29 FMSHRC 125 (Mar. 2007); *Martin County*

*Coal Corp.*, 28 FMSHRC 247 (May 2006); *Enlow Fork Mining Co.*, 19 FMSHRC 5 (Jan. 1997). No interpretation of these two words can address any of these factors.

With regard to the flagrant assessment, the Commission has stated that the gravamen of a flagrant violation as opposed to an S&S one is the language “repeated or reckless failure to make reasonable efforts to eliminate a known violation.” *American Coal Co.*, 38 FMSHRC 2062, 2070 (Aug. 2016). The statute focuses more forcefully on violations that are known to the operator and what it has done to address the violations. “These factors, and not the degree of danger posed by a violation, are what distinguish the flagrant provision.” *Id.* In analyzing the meaning of the word “repeated” as it applies to this issue, the Commission in *American Coal* found that the term does not have a plain meaning and that dictionary definitions are not dispositive in this context. *Id.* at 2073. There is nothing in the use of the words “willfully and knowingly” in the proffer, even considering any plain meaning or dictionary definition of those words, that would establish the element of “repeated or reckless failure to make reasonable efforts to eliminate a known violation” that is necessary to make a finding with regard to the flagrant assessment here.

Turning briefly to the penalty issue, the Secretary makes the argument that based upon the R-17 Assessed Violation History attached to his brief, the mine is small but its controller is large and therefore the penalty appears to be appropriate for its size. He also states that the burden rests on the operator to “introduce evidence” demonstrating that the penalty would adversely affect its ability to remain in business. The Commission has been quite clear in its directive that its judges must consider and make specific findings *de novo* on all statutory penalty factors contained in 110(i) of the Act. *Sellersburg Stone Co. v. Fed. Mine Safety & Health Review Commission*, 736 F.2d 1147, 1150-52 (7th Cir. 1984); 29 C.F.R. § 2700.30(a). It is extremely difficult to determine how Commonwealth could introduce evidence of an inability to pay the proposed penalty without the benefit of a hearing. Certainly, the criminal court did not address it with Mr. Cornett. Likewise, there is no other record addressing any of the 110(i) factors nor are there any stipulations by Commonwealth. There are no facts established by the record, uncontested or immaterial, to support a finding that the proposed penalty is appropriate.

For all the reasons set forth above, I find that summary decision is inappropriate in this matter. Accordingly, the Secretary’s motion for summary decision is **DENIED**.

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

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December 29, 2016

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

v.

C.R. BRIGGS,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2015-0082  
A.C. No. 04-05275-356398

Mine: CR Briggs

**DECISION DENYING MOTION  
FOR APPROVAL OF SETTLEMENT**

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”). The Court has considered the representations submitted in this case under Section 110(k) of the Act. For the reasons which follow, the settlement is rejected because the Court may not approve a penalty of zero dollars.

The parties have filed a joint motion to approve settlement. The originally assessed amount was \$29,691.00, and the proposed settlement is for \$0 (zero dollars.) The parties propose that the penalty amounts for the 13 citations at issue in this case be reduced to zero dollars, apparently because the Respondent is in bankruptcy proceedings.<sup>1</sup> The parties reason that by doing so, a record of the violations will be preserved in the mine’s violation history.

It has long been established that separate bankruptcy proceedings do not alter the Commission’s power to fix the amount of liability in Mine Act cases, barring judgments on the

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<sup>1</sup> The motion states in relevant part, “The basis for the agreement between the parties is the evidence provided by the Respondent, and attached hereto as Exhibits 1 through 3, that the Respondent is in dire financial circumstances, having filed for the protection of the U.S. Bankruptcy Court. Respondent has indicated that the assets of the CR Briggs mining operation are in the process of being disposed of through the Trustee. The Secretary, in an effort to preserve the record of the violations as mine violation history in case of even the remote possibility that there could be a resumption of mining, has agreed to eliminate the proposed penalties in exchange for the Respondent’s acceptance of the citations as written.”

enforceability of those judgments in other fora.<sup>2</sup> However, Section 110(i) permits consideration of bankruptcy as relevant evidence of an operator's "ability to continue in business;" one of the six penalty factors named in the Act.<sup>3</sup> Therefore this Court may recognize and consider an ongoing bankruptcy when the Secretary determines that it is appropriate to reduce proposed penalties in part because of a respondent's bankruptcy status.

Yet, while the Court may authorize a reduction of penalty amounts, it does *not* have the option to authorize a settlement amount of zero dollars. As Section 110(a) of the Act states, "The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, *shall be* assessed a civil penalty..." 30 U.S.C. § 820(a)(1) (emphasis added). The imposition of civil penalties should not be conflated with the separate issue of whether such penalties are, in fact, ultimately collected.

Approving a settlement that imposes no penalty for over a dozen violations of the Act would run contrary to the purposes of the Act, and the Court has no authority to do so. Therefore, the motion for approval of settlement is **DENIED**.

The parties are **ORDERED** to provide a status update on this matter within 30 days of this order regarding whether they intend to submit a revised settlement motion.

**SO ORDERED.**

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

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<sup>2</sup> *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1530 (Aug. 1990); *see also Big Laurel Mining Co.*, 37 FMSHRC 1997 (Sept. 2015) (finding that civil penalty proceedings by the Secretary fall within the 11 U.S.C. § 362(b)(4) exemption from the bankruptcy code's automatic stay provision).

<sup>3</sup> *Georges Colliers, Inc.*, 23 FMSHRC 822, 825 (Aug. 2001); *see also Green Coal Co.*, 18 FMSHRC 1594 (Sept. 1996) (finding that bankruptcy does not justify failure to timely contest penalty, but suggesting it may be relevant to penalty amount).