December 2020

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No review was granted or denied during the month of December 2020.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 11, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. REX COAL CO., INC.	Docket No. KENT 2019-0302 A.C. No. 15-18869-492763

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On February 10, 2020, the Commission received from Rex Coal Co., Inc. ("Rex Coal") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment in this docket was delivered on June 10, 2019, and became a final order of the Commission on July 10, 2019. In its motion to reopen, Rex Coal says that it had placed its notice of contest in the mailbox outside the local post office on July 10.

The mail was not retrieved and postmarked until the next day, July 11.[1] The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Rex Coal's request and the Secretary's response, we find that the motion sufficiently explains the failure to timely contest the assessment here as the result of inadvertence, mistake, and excusable neglect. 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.

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

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

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

[1] The record shows that the operator paid its uncontested penalties before the expiration of the contest deadline, on July 7.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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December 11, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2020-0083 A.C. No. 12-00028-506029A
WILLIAM TACKITT	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On February 10, 2020, the Commission received from William Tackitt 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). [1]

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

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

[1] Mr. Tackitt was cited individually pursuant to section 110(c)of the Act, which provides that individuals cited under it are subject to the same penalties under section 110(a) as persons cited under section 105(a). The time limit for contesting penalties under section 105(a) thus also applies to those cited under section 110(c). *See* 30 U.S.C. §§815(a); 820(a) and (c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment in this docket was delivered to the operator on December 23, 2020, and became a final order of the Commission on January 23, 2020. In his motion to reopen, Mr. Tackitt, through counsel, says that the mine which employed him followed a reliable procedure to contest citations and orders from MSHA.

An affidavit by the mine's safety manager states that the notice of contest was not timely filed because the proposed assessment was delivered while the mine was closed, from December 20, 2019, to January 6, 2020. Further, the affidavit says the operator was confused because it had never received an assessment under Section 110(c) before, and had already contested the underlying assessments proposed against the mine. The motion to reopen was filed promptly upon discovery of the failure to contest. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Mr. Tackitt's request and the Secretary's response, we find that the motion sufficiently explains the failure to timely contest the assessment here as the result of inadvertence, mistake, and excusable neglect. 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.

/s/ Marco M. Rajkovich, Jr.
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William I. Althen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 11, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. SE 2019-0094 A.C. No. 00-00851
OAK GROVE RESOURCES, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 11, 2019, the Commission received from Oak Grove Resources, LLC ("Oak Grove Resources") a motion seeking to reopen an order that had become final pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

Under section 105(a) of the Mine Act, an operator who wishes to contest an order issued under the Act 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 within 30 days of receipt of the notification of the order, it is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the Section 104(b) order was issued on October 30, 2019, and became a

[1] The order was a non-assessable order issued under Section 104(b) of the Mine Act, 30 U.S.C. § 814(b).

final order of the Commission on November 30, 2019. Oak Grove Resources' motion says that it had conferenced the order, and had told the inspector at the time the order was issued that it intended to conference it. The operator states that it tried to get a response from MSHA about the result of the conference, and believed that it would not need to contest the order until after the conference process was complete. On February 20, 2020, MSHA told the operator that the order was being upheld. Oak Grove Resources contacted counsel, who filed the motion to reopen. The Secretary does not oppose the request to reopen.

Having reviewed Oak Grove Resources' request and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

/s/ Arthur R. Traynor, III
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 11, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2020-0221 A.C. No. 35-02479-505543
TIDE CREEK AGGREGATES, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 24, 2020, the Commission received from Tide Creek Aggregates, LLC ("Tide Creek") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment in this docket was delivered on December 18, 2019, and became a final order of the Commission on January 21, 2020. In its motion to reopen, Tide Creek says that it timely contested the assessments at issue, but inadvertently sent the notice of contest to MSHA's penalty payment office in St. Louis. The Secretary does not oppose the

request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Tide Creek's request and the Secretary's response, we find that the motion sufficiently explains the failure to timely contest the assessment here as the result of inadvertence, mistake, and excusable neglect. 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.

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

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

/s/ Arthur R. Traynor, III
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 11, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2020-0204 A.C. No. 46-09093-503554
MARFORK COAL COMPANY, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 9, 2019, the Commission received from Marfork Coal Company, LLC ("Marfork Coal") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 13, 2019, and became a final order of the Commission on December 16, 2019. Marfork Coal's motion says that it submitted its payment of uncontested penalties, which the Secretary acknowledges receiving on December 5, and marked the other penalties for contest. An executive assistant at Marfork Coal's parent company noted the deadline for submitting the contest; however, she left the office

for surgery on December 5, and did not submit the contest in time. The company discovered the failure and timely submitted its motion to reopen

The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future assessments are timely contested by mailing the forms to the address provided.

Having reviewed Marfork Coal's request and the Secretary's responses, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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December 11, 2020

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

v.

PANTHER CREEK MINING, LLC

Docket No. WEVA 2020-0258
A.C. No. 46-05437-505196

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we 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. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

/s/ Arthur R. Traynor, III
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 14, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2020-0270 A.C. No. 46-02805-499009
U.S. SILICA	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY Rajkovich, Chairman, and Traynor, Commissioner:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On February 25, 2020, the Commission received from U.S. Silica a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 16, 2019, and became a final order of the Commission on October 17, 2019. U.S. Silica asserts that its failure

was the result of a confusing set of circumstances.[1] The affidavit of the plant manager says that the plant's safety manager left the company on November 1, and that the plant had instructed him to contest the penalties in this matter when the proposed assessment was received in September, 2019. The affidavit further says that it assumed that the contest had been timely submitted before the safety manager left his job at the plant. Sometime later, the motion contends that the operator received confusing and inaccurate billing and payment statements from MSHA, and was working with the agency to correct those.

The affidavit states that the operator was unaware that the contest may not have been timely filed until it received a delinquency notice, which was mailed on December 2, 2019. The motion states that it made a check request to pay the outstanding balance MSHA claimed was due, and that it calculated the penalties due for the citations it did not wish to contest. The motion includes a copy of the contest form with the citations checked. However, the motion concedes that it does not appear that the contest form was filled out and submitted with the payment of uncontested penalties.[2] The affidavit mentions an investigation, but neither the motion nor the affidavit explains why the motion to reopen was not filed until nearly three months after the delinquency notice was mailed. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed U.S. Silica's request and the Secretary's response, we find that the operator has failed to fully explain its delay in filing its motion to reopen once it learned that the matters it wished to contest had become final. We have held that an operator must explain any delay in acting once it learns that a contest has not been timely filed. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010) "Further, we have emphasized the importance of the operator's explanation of the time it took to file for reopening after receipt of a notice of delinquency." *Lone Mountain Processing, Inc.* 35 FMSHRC 3342, 3346 (Nov. 2013) *citing Highland Mining Co.,* 31 FMSHRC 1313, 1315-17 (Nov. 2009). An operator's failure to explain any delay beyond 30 days in seeking relief is grounds for denial of the motion.

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[1] The motion itself is somewhat confused. It the opening paragraph, it asserts that "the respondent's Answer to the Secretary's Proposed Assessment of Civil Penalty . . . was not filed because the Secretary never issued a Proposed Assessment of Civil Penalty." Mot. to Reopen at 1. But the beginning of the next paragraph acknowledges that the proposed assessment "was issued by MSHA on 9/10/2019." *Id.* Later, the motion states that "The Secretary never filed the Proposed Assessment of Civil Penalty to which the respondent could have filed an Answer." It is possible that the operator has conflated the duty to answer a penalty *petition,* but that duty is irrelevant where, as here, the operator has never triggered the Secretary's obligation to file a petition by contesting the penalties in the first instance.

[2] The motion implies that the operator intended to send its payment and its notice of contest to the same address. However, the contest form instructions clearly state that notices of contest must be mailed to MSHA's Civil Penalty Compliance Office in Arlington, VA, whereas payments are sent to a different address in St. Louis. As we have noted in previous cases, this is a common misunderstanding among mine operators.

In this case, the motion was not filed until nearly three months after the Secretary mailed the delinquency notice. While the affidavit states that the operator investigated the matter, the motion cites no extraordinary circumstances or other explanation for its failure to act promptly once its failure was known

While the operator's excuse for its initial failure to contest the penalties is plausible and well-supported, it has failed to explain its delay in acting once it discovered it had not contested the penalties as it had intended. Therefore, in the interest of justice, we direct the operator to show cause within 20 days of the date of this order why the Commission should not deny this motion and dismiss this matter with prejudice due to the delay of approximately seven weeks beyond the 30 days the Commission has determined to be a reasonably prompt response upon discovering a default. If the operator fails to submit a reasonable explanation within the time provided by this order, the Commission shall dismiss this docket with prejudice and order payment of the outstanding penalties.

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 2, 2020

PETE TARTAGLIA, JR., Complainant, v. FREEPORT-MCMORAN BAGDAD INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2019-0382-DM MSHA Case No. RM-DM-2019-08 Mine ID: 02-00137 Mine: Freeport-McMoRan Bagdad Inc.

DECISION AND ORDER

Appearances: Pete Tartaglia, Jr., 8340 N. Thornydale Road #209, Suite 110, Tucson, AZ 85741

Laura E. Beverage, Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

Karl F. Kumli, Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

Before: Judge Simonton

This case is before me upon a complaint of discrimination filed by Pete Tartaglia, Jr. ("Tartaglia" or "Complainant") against Freeport-McMoRan Bagdad Inc. ("FMBI" or "Respondent"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 815(c)(3).[1] Tartaglia complains of numerous occurrences in which he believes FMBI has improperly discriminated or retaliated against him. In particular, he asserts that FMBI violated a settlement agreement reached in WEST 2018-0362-DM, wrongfully took money from his paychecks, and disciplined him in April 2019 in response to his protected activity. FMBI denies these claims and asserts that it fulfilled its obligations under the settlement agreement, properly recouped a double payment made to Mr. Tartaglia, and disciplined him in April 2019 solely because of his refusal to complete assigned work.

A hearing was held on March 11, 2020 in Phoenix, Arizona. Based on my full consideration of the testimony and exhibits presented at hearing, the stipulations of the parties, my observations of the demeanors of the witnesses, and the parties' post-hearing submissions, I find that neither party violated the settlement agreement reached in Tartaglia's prior section

[1] In this decision, the joint stipulations, transcript, the Complainant's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. C-#," and "Ex. R-#," respectively.

105(c) case. Further, I find that FMBI did not violate the Mine Act in recouping money erroneously paid twice to Tartaglia or in disciplining him on April 11, 2019.

I. STIPULATIONS

At hearing, the parties agreed to the following joint stipulations:

1. The Freeport-McMoRan Bagdad Inc. Mine, Mine I.D. No. 02-00137, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq*. (the "Mine Act").

2. Freeport-McMoRan Bagdad Inc. is an operator within the meaning of the Mine Act.

3. The Administrative Law Judge has jurisdiction of this matter.

4. Tartaglia was employed by Freeport-McMoRan Bagdad Inc. and was therefore a "miner" as defined by § 3(g) of the Act, at all times relevant to this proceeding.

5. Tartaglia filed a complaint under § 815(c) on or about March 20, 2019.

6. That complaint was investigated by MSHA and on or about May 20, 2019, MSHA indicated to Tartaglia that it would not pursue the claim. Tartaglia then initiated his Pro Se Discrimination Complaint on or around June 19, 2019.

7. Tartaglia filed a hotline complaint with MSHA on November 20, 2018.

Tr. 11–16.

II. ISSUES

Tartaglia's pleadings were unclear regarding the scope of the claims he would pursue at hearing. On December 30, 2019, FMBI filed a motion in limine to limit the scope of issues before the court, requesting that the issues to be tried be limited to those Tartaglia articulated in his March 20, 2019 complaint to the Mine Safety and Health Administration (MSHA) or that arose during the pendency of the investigation of that complaint. Following a conference call and a response submitted by Tartaglia, I enumerated the issues that would be entertained at hearing in a February 10, 2020 order. After further submissions and another conference call with the parties, some additions were made to that list. As announced and agreed to by the parties at hearing, the five issues before the court are:

1. Whether either party violated the settlement agreement entered into at hearing in WEST 2018-0362-DM.

2. Whether Tartaglia's allegation regarding FMBI's recovery of bonus money erroneously paid twice is time-barred under section 105(c)(2) of the Mine Act.

3. If not time-barred, whether the recovery of bonus money erroneously paid twice to Tartaglia is an adverse action motivated by protected activity.

4. Whether disciplinary action taken against Tartaglia on April 11, 2019, was an adverse action motivated by protected activity.

5. If a violation of section 105(c) is found, what remedies are available to Tartaglia.

Tr. 22–23.

III. FINDINGS OF FACT

A. Tartaglia's First MSHA Action and Settlement

The instant case is not Tartaglia's first action before this court. Tartaglia's prior section 105(c) case, assigned Docket No. WEST 2018-0362-DM, went to hearing before me on September 19–20, 2018. At that hearing, the parties reached a settlement and read the terms of the agreement into the record. The terms provided that (1) FMBI would make a cash payment to Tartaglia for housing costs, (2) FMBI would provide a neutral reference for Tartaglia from a Freeport-McMoRan employee outside of FMBI, (3) Tartaglia would maintain the confidentiality of the settlement terms, and (4) Tartaglia would release all pending and potential claims up to the time of hearing. Respondent's Post-Hearing Brief (Resp. Br.) at 3.

Following that hearing, FMBI produced a written version of the parties' agreement. The court held numerous conference calls to address concerns Tartaglia had with the details and language of the written version. After revisions were made, Tartaglia ultimately signed the written agreement, but later determined that he did not wish to adhere to its terms. FMBI elected not to submit the written agreement for review and approval. On January 14, 2019, I directed Tartaglia to either provide proof that he complied with the settlement terms reached orally at hearing or to notify the court that he wished to submit a post-hearing brief and pursue a decision on the merits. He failed to timely elect either option.

On January 25, 2019, FMBI submitted a motion to enforce the settlement agreement as stated on the record and to file that portion of the hearing transcript under seal. Tartaglia then submitted a brief response reiterating his intention not to comply with the settlement terms. On February 11, 2019, I issued a Decision Approving Settlement Under Seal and Order Enforcing Settlement Agreement finding that the agreement entered into at the hearing on September 20, 2018 was valid and enforceable. Tartaglia had not put forth any evidence that FMBI misrepresented or failed to comply with its responsibilities under the settlement agreement. Having received no valid legal justification to set aside the agreement and no request from Tartaglia stating he wished to pursue a decision on the merits, I granted Freeport's motion to enforce the settlement agreed to on the record at hearing.

In the present matter, Tartaglia alleges that FMBI violated the settlement agreement. Complainant's Complaint Letter received June 24, 2019. In particular, he asserts that FMBI stole

money from his paychecks and then paid that money out to him in his settlement check. *Id.*; Tr. 210, 223–24.

FMBI proffered evidence of its attempt to provide Tartaglia with the settlement money. Following my February 11, 2019 decision upholding the settlement and dismissing the first action, FMBI sent a check via certified mail on March 5, 2019 for the agreed-upon amount. Tr. 327–28; Ex. R-I. The check was accompanied by a letter signed by FMBI's human resources manager, Michelle Kessler, which referenced the docket number in that case and the confidential agreement the parties had entered. Ex. R-I; Tr. 327–28.

As he asserted at hearing in this case, Tartaglia had no interest in cashing the check because he believed the money was wrongfully taken out of his pay. Tr. 233. However, as explored in more detail below, the withdrawals made from his pay between November 11, 2018 and December 28, 2018 were unrelated to the settlement check. They were necessary due to an accounting error FMBI made when it economically reinstated Tartaglia pursuant to an arbitration decision issued in July 2018. The details of that error are discussed *infra*.

Following the March 11, 2020 hearing in this case, Tartaglia asked FMBI to send him a another check to replace the original one which he had not posted. Resp. Br. at 7, Attach. A. The replacement check was sent on March 25, 2020. Resp. Br. at 7, Attach. B. On April 11, 2020, after the replacement check had been sent but before Tartaglia had retrieved it, Tartaglia submitted a request to the court for a "Default Penalty Due to the Failure to Comply Accordingly." In the request, he asserted that FMBI had not paid him the settlement money. FMBI, through counsel, provided the court with the tracking information showing that the check had arrived at the post office on March 28, 2020. Having determined that Tartaglia's check had been available at the address he provided for over two weeks, I denied his request for a default penalty. Tartaglia then posted the check on April 16, 2020. Resp. Br. at 7, Attach. F.

B. Recovery of Tartaglia's Duplicate Bonus Payment

Prior to the September 2018 hearing, Tartaglia participated in FMBI's internal problem solving process which resulted in a July 6, 2018 arbitration decision. Resp. Br. at 2–3, 7. That decision required FMBI to reinstate Tartaglia to his former position and pay him for all lost wages and benefits, less interim earnings. *Id.* at 2–3. Tartaglia was economically reinstated effective July 29, 2018, and he returned to work on or about August 20, 2018. *Id.* at 3.

In economically reinstating Tartaglia, FMBI made a substantial error. Tartaglia was owed a $6,520.00 bonus, and the company mistakenly disbursed it to him twice. First, the bonus amount was added to an initial gross back pay calculation. Delbert Tso, a human resource specialist employed by Freeport-McMoRan in Phoenix, was responsible for calculating the back pay award owed to Tartaglia based on information provided to him "from various sources." Tr. 106–07; Resp. Br. at 4. Tso created a spreadsheet which showed the back pay owed to Tartaglia from October 2017 through his return to work in August 2018. Tr. 107–08; Ex. R-EE. The spreadsheet lists the regular earnings, overtime earnings, and $6,520.00 bonus Tartaglia was owed, as well as vacation and sick leave owed. Tr. 108; Ex. R-EE. Tso also incorporated into the spreadsheet a *deduction* of $6,240.00 for unemployment benefits Tartaglia received between his

termination and his reinstatement. Tr. 108–09; Ex. R.-EE. Deducting unemployment in this way is a standard practice. Tr. 109, 129.

Per Tso's calculations as displayed on the spreadsheet, Tartaglia was owed $50,896.53. Ex. R-EE. After approval from the mine site, benefits department, and legal department, Tso emailed the corporate payroll office for payout of the back pay award. Tr. 111. Tso's involvement in the process ended once he sent that email. Tr. 111.

Payroll supervisor Christina Jordan testified about the payout from FMBI to Tartaglia. Tr. 167–70. She explained that the $50,896.53 amount arrived at in the spreadsheet was the gross back pay award and did not reflect taxes or other deductions. Tr. 168–69. After $18,935.91 in taxes and $9,296.62 in other deductions, the $50,896.53 back pay award owed to Tartaglia totaled 22,663.80,[2] and that amount was paid to him via direct deposit on August 30, 2018. Ex. R-FF.

Tartaglia was mistakenly paid the $6,520.00 bonus a second time the following week, on September 7, 2018. Tr. 170–71. That check was for $4,410.78, reflecting the bonus amount less taxes and other deductions. Ex. R-GG. In explaining the error, payroll supervisor Jordan stated that her department's standard practice is to issue reinstatement amounts separately from bonus checks. Tr. 170. Of course, in this instance, the bonus amount had already been incorporated into the reinstatement amount. Human resources manager Kessler informed Jordan of the error after it occurred. Tr. 171.

Kessler did not discover the error, but testified that she was notified by her supervisor in Phoenix that the bonus had been paid twice. Tr. 340–42. Apparently, the mistake happened because the original back pay spreadsheet included the bonus, and then the compensation department sent over a "separate ticket," which initiated the mistaken second payment. Tr. 343. After she was notified of the error, Kessler called Tartaglia to inform him of what had happened. Tr. 350. As Kessler recalls, Tartaglia hung up on her before she could explain everything, so she called back and left a voicemail. Tr. 350.

Following the phone communication, Kessler sent Tartaglia a letter explaining the error and the recoupment options. Tr. 258, 342, 350–51; Ex. R-HH. Notably, this letter informing Tartaglia of the payment error was sent on September 17, 2018, just a few days prior to the September 19–20, 2018 hearing in WEST 2018-0362-DM. Tr. 258; Ex. R-HH. In the letter, Kessler presented Tartaglia with two options for correcting the error. Ex. R-HH. He could either provide payment for the net amount of $4,410.78 by September 28, 2018 or the company could deduct the total net amount from four paychecks in approximately equal amounts. *Id.* The letter requested that Tartaglia respond by September 28, 2018 to inform Kessler if he disputed the

[2] The court recognizes that $50,896.53 minus $18,935.91 minus $9,296.62 equals $22,664.00, not $22,663.80. However, in the check stub testified to by Jordan, Ex. R-FF, it appears that the starting number was $50,896.33, $0.20 less than the number arrived at in Tso's spreadsheet, Ex. R-EE. This minor $0.20 discrepancy was neither explained by FMBI nor challenged by Tartaglia, so I accept that $22,663.80 is the correct amount owed to Tartaglia after taxes and other deductions.

overpayment, or, if not, to advise Kessler which option he wanted to elect for repayment of the extra bonus. *Id.*

Tartaglia failed to timely respond to Kessler's letter. Tr. 354. Accordingly, as specified in the letter, Kessler assumed that Tartaglia did not dispute the overpayment and that he would prefer to have the $4,410.78 deducted from four paychecks. Tr. 354. The money was then deducted from five of Tartaglia's paychecks as follows:

Pay Date	Amount Withheld
11/02/2018	$1,304.00
11/16/2018	$1,304.00
11/30/2018	$1,304.00
12/14/2018	$800.63
12/28/2018	$1,807.37
TOTAL	**$6,520.00**

Ex. R-II; Tr. 173–74. The parties did not specifically address why five withdrawals were made instead of four, but Jordan testified that the fourth was for only $800.63 because Tartaglia did not have enough wages in that pay period to cover the full $1,304.00. Tr. 194–95. Jordan further testified that the gross bonus amount, $6,520.00, was deducted rather than the net amount because taxes "self-adjust." Tr. 174.

Prior to and at the hearing, Tartaglia disputed FMBI's assertion that the deductions were proper, maintaining instead that FMBI stole this money from his checks in order to pay his settlement. *See, e.g.*, Tr. 201, 224; Complainant's Post-Hearing Brief (Comp. Br.) at 3, 4. At Tartaglia's request, FMBI senior human resources generalist David Fendrich provided Tartaglia with requested copies of his check stubs and reviewed the back pay spreadsheet with him. Tr. 427–28, 436. Tartaglia remains unconvinced that the overpayment actually occurred and, thus, that the recoupment was proper. Tr. 339, 344; Comp. Br. at 3, 4; *see also* Tr. 261, 437. Tartaglia has put forth no evidence to support his assertion that he was not paid twice for the same bonus or that recoupment was improper. In fact, he acknowledged at hearing that he did receive two direct deposits in his bank account, one for $22,663.80 and a second for $4,410.78. Tr. 257; Ex. R-JJ. Though these numbers align with FMBI's position, Tartaglia seems to believe that the first disbursement was for wages only and the second was for a bonus. *See* Tr. 257.

On November 14, 2019, the parties returned to the arbitrator who issued the July 2018 reinstatement award to resolve this double payment issue and address the misunderstanding between the parties about the implementation of the award. Tr. 437–39; Resp. Br. at 5. On January 16, 2020, the arbitrator issued a decision upholding FMBI's calculated remedy and finding that Tartaglia was double-paid his bonus. Ex. R-DD; Tr. 439; Resp. Br. at 5.

C. Tartaglia's Complaints to MSHA

The parties agree that Tartaglia filed a discrimination complaint with MSHA on or about March 20, 2019. Jt. Stip. 5. The filing of that complaint marks the inception of this case. In that document, Tartaglia alleged that he was being discriminated against by FMBI because the

company was "still blaming" him for an incident that took place in October 2017, the payroll department was "wrongfully taking monies" from him, and company housing was "wrongfully taking monies" from his payroll. Ex. R-A. The complaint also made generic references to "criminal activity" and "interference in the work place." *Id.*

The parties further stipulated at hearing that Tartaglia called MSHA's hotline on November 20, 2018, four months before he submitted the March 20, 2019 complaint. Jt. Stip. 7. Tartaglia produced the MSHA Escalation Report documenting this hotline call in order to show that "the complaint was filed in a timely manner." Tr. 497. The report states that the caller, Tartaglia, called to report retaliation for going to court regarding safety issues he reported to MSHA. Ex. C-3. It notes that Tartaglia stated that the case was closed with a settlement and that FMBI was now taking money out of his paychecks and that he wanted an MSHA inspector to contact him. *Id.* No further evidence relating to this hotline complaint was introduced, so it remains unclear whether MSHA took any steps to investigate as Tartaglia requested on the call.

D. April 11, 2019 Disciplinary Action

At the time of his discharge by FMBI in October 2017, Tartaglia was classified as a Truck Driver I and had just successfully bid for the position of Shovel Operator I, though he had not yet started training for the shovel operator position. Tr. 235–37, 276; Ex. R-Y. Tartaglia was then reinstated pursuant to the July 2018 arbitration decision, and physically returned to work in August 2018. Tr. 410; Resp. Br. at 5.

Upon his return to work, Tartaglia resumed his previous position. He was retrained on a piece of equipment called a rubber tire dozer (RTD), which is one skill required for the Shovel Operator I position. Tr. 276, 370. Usually, miners progress from haul trucks to RTDs to shovels. Tr. 93, 414. Crucially, however, RTD is not a standalone position: RTDs support the shovel and are typically operated by haul truck drivers who have completed necessary RTD training. Tr. 92–93, 414–15; Ex. R-W. Tartaglia had operated an RTD prior to his termination, and completed task training in October 2018 to get requalified on it when he came back to work. Tr. 276.

Because RTD is not a standalone position, and since Tartaglia had bid successfully for the shovel position, he was then due to move on to shovel training after getting requalified on the RTD. Tr. 276, 373. He began Shovel Operator I training in December 2018, but quickly discontinued it because he felt there were too many ongoing issues with FMBI. Tr. 238, 276, 418–19. He was uncomfortable with continuing the training at that time. Tr. 203, 238.

Human resources generalist Fendrich, mine supervisor Steve Rusinski, and senior supervisor Tommy O'Neill all asked Tartaglia on various occasions whether he wanted to complete shovel operator training. Tr. 277, 417; Exs. R-K, R-L, R-M. Tartaglia testified that he wanted to continue operating a RTD, and he was surprised when the company told him that RTD operator was not a standalone position. Tr. 203, *see* Tr. 291–96. FMBI had another shovel coming online in 2019, and thus had a business need for more shovel operators. Tr. 412; Exs. R-J, R-K, R-L; Resp. Br. at 5–6.

On February 6, 2019, Rusinski had a conversation with Tartaglia about the shovel training. Ex. R-J. He told Tartaglia that the company needed to train someone on the shovel, so Tartaglia had to either begin training or give the company the go-ahead to train someone else. Tr. 277; Ex. R-J. Tartaglia told Rusinski that the company could go ahead with training someone else until he was done with his issues with FMBI. Tr. 279. Rusinski collected a written statement from Tartaglia to this effect. Ex. R-LL. Rusinski also asked Tartaglia to let him know if he wanted to run an RTD or a haul truck, and, according to Rusinski, Tartaglia communicated that he wanted to do both. Ex. R-J; Tr. 279–80.

On February 22, 2019, Fendrich and O'Neill had a conversation with Tartaglia during which O'Neill informed Tartaglia that the company needed a final answer from him regarding whether he wanted to move forward with his shovel operator bid or go back to his previous classification as a truck driver. Tr. 418–19; Exs. R-K, R-L. During that conversation, Tartaglia was presented with the two unambiguous options, but seemed unwilling to definitively select one. *See* Ex. R-L. He told O'Neill, as he had previously told Rusinski, that the company could train someone else on the shovel because he "didn't have time for any training." Tr. 419; Exs. R-J, R-L. Tartaglia seemed to think that someone could be trained on the shovel without Tartaglia losing his successful bid, but O'Neill informed him that that was not an option. *See* Ex. R-K. O'Neill told Tartaglia that he would be requalified on a truck and classified as a Truck Driver I and that he could re-apply for future shovel positions. *Id.* Fendrich then stated his belief that the next truck training class was scheduled to begin on April 1, 2019. Ex. R-L.

One month later, on March 22, 2019, Fendrich had another conversation with Tartaglia about truck training. Tr. 423. That day, Tartaglia was given a letter signed by O'Neill which memorialized the February 22, 2019 conversation and again presented Tartaglia with the two options. Ex. R-M. It communicated that the company "needs all employees in the Shovel Operator I position to complete their training promptly." *Id.* The letter clarified that it was Tartaglia's "final opportunity" to elect one of two options:

> (1) You will begin the shovel operator training no later than April 9, 2019 and complete such training within nine weeks. If you do not timely complete the training, you will receive a lateral transfer back to the position of Truck Driver I (no reduction in pay) and be required to take the next scheduled training necessary to requalify you on a truck and complete such training within six weeks of starting it.
>
> (2) You will receive a lateral transfer back to the position of Truck Driver I (with no reduction in pay) and be required to complete any training necessary to be requalified on a truck within six weeks of such transfer. Of course, as we discussed (assuming you're qualified), you may apply for any shovel operator bids that arise in the future.

Id. The letter directed Tartaglia to provide an "*unqualified* decision . . . *in writing*" to O'Neill or Fendrich by 5:00 p.m. on March 31, 2019. *Id.* It further notified Tartaglia that, if he failed to submit a decision on time, the company would assume that he selected the second option for a lateral transfer back to Truck Driver I. *Id.*

Tartaglia failed to submit a decision before the 5:00 p.m. deadline on March 31, 2019. At 6:39 p.m., he emailed Fendrich to declare that he was "not up for any training" and that he was "on the Rubber Tire Dozer and will stay there until everything is resolved . . . Final Response." Ex. R-N.

According to a letter from O'Neill, Tartaglia was instructed at the end of his shift on March 31, 2019 to attend haul truck training, and Tartaglia stated at the time that he would not attend the training. Ex. R-T. On April 1, 2019, Tartaglia reported to work and was again notified that he was scheduled to begin haul truck training that day. Tr. 280–81. Tartaglia then informed Rusinski that he was not going to attend the training because he had a lot going on with the company. Ex. R-Q. Rusinski understood Tartaglia's response to be a refusal to attend the training, and accordingly collected written statements from Tartaglia. Tr. 280; Exs. R-O, R-P. In one of the statements, Tartaglia stated that he had "made it clear to David Fendrich" that he was "not up for no training" because he had "hearing, deposition, investigations coming up." Ex. R-O. In the other, Tartaglia claimed that the actions FMBI was taking were retaliatory and noted that "[t]his will be reported as retaliation." Ex. R-P.

Based on his testimony at hearing, it appears that Tartaglia believes he did not need to attend the training because he had upcoming days off that had been approved by management. *See* Tr. 308–10. However, Tartaglia did not put forth any evidence to show that the training would have prevented him from taking his scheduled time off.

Following Tartaglia's refusal to go to the scheduled training, Rusinski placed Tartaglia on investigatory leave with pay (IWP). Tr. 285; Ex. R–R. On the top of the IWP form, Tartaglia wrote "This is under protest" and "This is not a refusal as well they are aware." Ex. R-R. Rusinski stated at hearing that Tartaglia "grabbed the paper and wrote that on there and gave it back to me." Tr. 285. Other than this statement, the evidence and testimony support that the haul truck training was a work assignment and that Tartaglia was unwilling to attend the training that day. *See* Tr. 280–82, 429; Exs. R-O, R-P, R-Q, R-T.

After an investigation, FMBI made a decision to issue a disciplinary action to Tartaglia. Tr. 432–33. On April 11, 2019, Tartaglia was issued a "final written warning" for his refusal to attend the April 1, 2019 training. Tr. 433; Ex. R-S. In both the written warning and in a letter issued by O'Neill the same day, the evolution of the problem was recounted. Exs. R-S, R-T. In the letter, O'Neill explained to Tartaglia that

> the Company has a business need for you, in your position of Truck Driver I, to complete your truck driver training and be certified to operate a Haul Truck. You will again be enrolled in the next available Truck Driver training class, to begin no later than May 20, 2019, and expected to attend this assigned work. Per the Company's Guiding Principles, for which you signed the most recent certification form on 12/19/2018, "Refusal to do assigned work . . ." is an action considered serious in nature and may result in discipline, up to and including termination.

Ex. R-T.

IV. DISPOSITION

Tartaglia alleges that FMBI violated the settlement agreement entered into in WEST 2018-0362-DM. He further asserts that FMBI violated the Mine Act when it recovered a duplicate bonus payment and when it disciplined him on April 11, 2019. FMBI contends that it did not violate the settlement agreement. Respondent also claims that the issue of whether the recovery of the duplicate bonus payment violated the Mine Act is time-barred. FMBI further maintains that neither the recovery of the duplicate payment nor the April 11, 2019 discipline were adverse actions motivated by protected activity under the Mine Act.

Below, I address the five issues enumerated and agreed to by the parties at hearing.

A. Neither party violated the settlement agreement reached in WEST 2018-0362-DM.

FMBI did not allege at any point in these proceedings that Tartaglia violated the settlement agreement. Accordingly, my analysis on this issue is limited to whether FMBI violated the agreement as alleged by Tartaglia in his filings and at hearing.

Tartaglia does not believe that FMBI erroneously disbursed the same bonus to him twice. Tr. 204, 225, 256, 257, 266. Rather, he believes that money was taken out of his paychecks in order to source the money for the settlement check FMBI owed him. *See* Tr. 201, 224. This assertion is without support. FMBI has shown that it did in fact pay Tartaglia twice for a bonus and that the amount withdrawn from Tartaglia's pay was equal to the amount mistakenly paid. Moreover, FMBI sent the notice regarding the erroneous double payment and Tartaglia's options for returning the excess money to him on September 17, 2018, *before* the hearing in the first case and thus *before* the settlement was reached. Ex. R-HH; Tr. 258. Though the timing may be suspect to Tartaglia, the evidence makes clear that the recovery of the duplicate bonus is unrelated to the settlement.

Per the terms of the settlement reached orally at hearing in Tartaglia's prior case, FMBI was obligated to pay Tartaglia a cash payment for housing expenses and to provide a neutral reference from a Freeport-McMoRan employee outside of FMBI. As explained above, FMBI sent a settlement check to Tartaglia on March 5, 2019. Ex. R-I. After refusing to cash that check for over a year, Tartaglia requested a replacement check following the hearing in this case. Resp. Br. at 7, Attach. A. One was provided to him, and he posted it on April 16, 2020. Resp. Br. at 7, Attach. B, Attach. F. Tartaglia made no allegations and put forth no evidence concerning FMBI's other obligation under the settlement—to provide him a neutral reference. Human resources manager Kessler testified that to her knowledge Tartaglia has not requested a reference from the company. Tr. 329.

FMBI has not claimed that Tartaglia violated the settlement agreement, and Tartaglia has put forth no evidence to suggest that FMBI failed to fulfill its obligations. Accordingly, based upon the evidence and testimony presented at hearing, I find that neither party violated the settlement reached in WEST 2018-0362-DM.

B. The issue regarding recovery of bonus money erroneously paid twice to Tartaglia is not time-barred.

Section 105(c)(2) of the Mine Act provides an avenue through which miners who believe they have been discriminated against may file a complaint with the Secretary alleging such discrimination. 30 U.S.C. § 815(c)(2). Complaints are to be filed "within 60 days after such violation occurs." *Id.* In this case, Tartaglia filed his section 105(c) complaint with MSHA on March 20, 2019. Jt. Stip. 5. This was some six months after FMBI's September 17, 2018 notice informing him that he had been erroneously paid twice for a bonus. Ex. R-HH. It was also more than 60 days after December 28, 2018, which was the date FMBI completed its recoupment of the erroneous payment. Ex. R-II. Thus, FMBI argues that the double bonus recovery issue is time-barred under the Mine Act. Resp. Br. at 16–19.

The 60-day time limit is intended to avoid stale claims, but the Commission has held that "a miner's late filing may be excused on the basis of 'justifiable circumstances.'" *David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984) (citation omitted). In urging the court to find that this claim is time-barred, Respondent draws comparisons to the Commission's decision in *Hollis v. Consolidation Coal Co.* Resp. Br. at 17–18. In that case, the complainant, Hollis, waited more than four months after his discharge to file a complaint with the Secretary. *Hollis*, 6 FMSHRC at 24. The judge did not find Hollis' claimed ignorance of his rights to be credible, since Hollis was chairman of his union's safety committee, had filed numerous safety complaints in the past, and had deliberately chosen to seek other avenues of relief during the 60-day period following his discharge. *Id.*

The upshot of *Hollis* is that "[t]imeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation." *Id.* While Tartaglia has previously filed a discrimination complaint under section 105(c), the facts of this case do not warrant a comparison to *Hollis*. Undoubtedly, Tartaglia missed the 60-day filing window by a substantial margin when considering he filed his complaint on March 20, 2019. However, Tartaglia made a call to the MSHA hotline on November 20, 2018, approximately 60 days after he was notified of the duplicate payment. Jt. Stip. 7; Ex. C-3. MSHA's documentation of that call states that Tartaglia called to "report retaliation" and assert that "the Mine is taking money out of his paychecks." Ex. C-3. It also notes that Tartaglia requested that an inspector get in contact with him. *Id.*

At hearing, in response to the court's admission of the MSHA hotline call, FMBI pointed to its Freedom of Information Act request response from MSHA, which indicates that Tartaglia's complaint was received by MSHA on March 27, 2019 and does not mention any investigation arising out of the November call. Tr. 496–97; Ex. R-KK. Respondent argues that the hotline call did not properly conform to the section 105(c) discrimination complaint process. *See* Resp. Br. at 16–19. I am unwilling to hold Tartaglia to the strict standard Respondent seems to urge given the absence of evidence regarding MSHA's actions in processing the hotline complaint. While Tartaglia has some experience with filing section 105(c) complaints, his familiarity with the process does not rise to the level shown in *Hollis*. FMBI has failed to establish that Tartaglia knew that a hotline call was an insufficient way to lodge a discrimination complaint with MSHA, and the court will not assume this fact. This is especially true with regard to both the time

requirements for perfecting his discrimination complaint and his misunderstanding that his hotline complaint met minimum filing requirements.

Accordingly, I find the November 20, 2018 MSHA hotline call to be a "justifiable circumstance" and excuse Tartaglia's late filing. The merits of the issue of the duplicate bonus recovery are analyzed below.

C. The recovery of the duplicate bonus payment was not an adverse action motivated by protected activity under the Mine Act.

Tartaglia asserts that FMBI did not pay him twice for the same bonus. Tr. 204, 225, 256, 257, 266. As discussed above, he believes that the withdrawals made from his paychecks were utilized to pay his settlement. *See* Tr. 201, 224. The evidence put forth by FMBI clearly shows that this is not the case, and that he was erroneously paid the same bonus twice. Exs. R-EE, R-FF, R-GG, R-HH.

Having established that the duplicate payment *occurred*, the issue here is whether FMBI violated the Mine Act in *recovering* the erroneous payment. For the reasons set forth below, I find that FMBI did not violate the Mine Act in recovering the money.

Section 105(c)(1) of the Mine Act provides that a miner shall not be discharged or otherwise discriminated against because they have made a complaint regarding an alleged safety or health violation. 30 U.S.C. § 815(c)(1). Under the traditional *Pasula-Robinette* framework, the Commission has held that a miner alleging discrimination establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that (1) the complainant engaged in protected activity, and (2) the adverse action complained of was motivated in any part by the protected activity. *Jayson Turner v. Nat'l Cement Co.*, 33 FMSHRC 1059, 1064 (May 2011); *Driessen v. Nev. 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); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817–18 (Apr. 1981).

If a miner establishes a prima facie case, the operator may rebut that case "by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSHRC at 1064. If the operator cannot rebut the prima facie case, it may nevertheless defend affirmatively by proving by a preponderance of the evidence that, although part of its motivation was unlawful, the adverse action was also motivated by the miner's unprotected activity *and* it would have taken the adverse action against the miner for the unprotected activity alone. *Id.*; *Pasula*, 2 FMSHRC at 2799–2800.

1. Protected Activity

Complainants bear the burden of establishing protected activity. *Pasula*, 2 FMSHRC at 2799–2800; *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1920–21 (2016). A miner has engaged in protected activity if they (1) have "filed or made a

complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) are "the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) have "instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) have "exercised on behalf of himself or others . . .any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

Tartaglia has engaged in numerous instances of protected activity. In WEST 2018-0362-DM, he filed a complaint which initiated proceedings under the Mine Act and culminated in a hearing on September 19–20, 2018 with a settlement reached at that hearing. In further proceedings in that case, the matter was remanded back to me by the Commission. I issued a decision upholding the settlement on February 11, 2019. Tartaglia's November 20, 2018 hotline call and his March 20, 2019 MSHA complaint filed in this matter also constitute protected activity. Accordingly, Tartaglia has satisfied this element of the prima facie case.

2. Adverse Action Motivated by Protected Activity

The Commission has defined "adverse action" as "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012) (citations omitted). The question of whether an employer's action qualifies as "adverse" is thus decided on a case by case basis. *Sec'y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2 (Aug. 1984).

Tartaglia has failed to show how the recovery of a bonus payment FMBI erroneously disbursed to him twice is an adverse action motivated by his protected activity. He proffered no evidence suggesting that the bonus payment subjected him to detriment in his employment relationship. For its part, FMBI has shown precisely how the error was made and how it went about correcting the error.

Imprudent as it was, I find that the double payment was simply an accounting error, a mistake made by the people in charge of Tartaglia's economic reinstatement. It does not rise to the level of an adverse employment action motivated in any part by Tartaglia's protected activity. Consequently, Tartaglia is unable to meet the elements of a prima facie claim of discrimination on the bonus recovery issue.

D. The April 11, 2019 discipline was not an adverse action motivated by protected activity under the Mine Act.

Tartaglia's second claim of discrimination involves the final written warning he was issued on April 11, 2019 for his refusal to attend truck training on April 1, 2019. Though this warning was issued several weeks after Tartaglia submitted his March 20, 2019 complaint to MSHA, it arose during the pendency of MSHA's investigation and was accepted as an issue in these proceedings. For the reasons that follow, I find that FMBI did not violate the Mine Act in issuing Tartaglia a final written warning.

1. Prima Facie Case

It bears repeating that to make out a prima facie case of discrimination, a complainant need only present "evidence *sufficient to support a conclusion* that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity." *Driessen*, 20 FMSHRC at 328 (emphasis added). "This burden is lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated." *Turner*, 33 FMSHRC at 1065. For the reasons that follow, I find that Tartaglia has met this initial, low burden and established a prima facie case of discrimination.

a. Protected Activity

FMBI argues that this claim does not involve protected activity and insists that Tartaglia's refusal to do the training is not protected under the Mine Act. Resp. Br. at 20. However, as noted above, Tartaglia engaged in numerous instances of protected activity between September 2018 and March 2019, including a call and complaint to MSHA and the engagement in the 105(c) process before this court. He has satisfied the protected activity element of the prima facie discrimination case.

b. Adverse Action Motivated by Protected Activity

Regarding this issue, Tartaglia has also shown that he was subject to an adverse action. The discipline he received on April 11, 2019 fits plainly within the Commission's definition of adverse action as "an action of commission or omission by the operator subjecting the affected minor to discipline or a detriment in his employment relationship." *Pendley*, 34 FMSHRC at 1930 (citations omitted).

In addition to protected activity and an adverse action, the prima facie case requires the Complainant to demonstrate that there is evidence sufficient to support an inference of a causal nexus—that is, that the protected activity motivated Respondent to take the adverse action.

A miner need not provide direct evidence of an operator's discriminatory motive, but may provide "circumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case." *Turner*, 33 FMSHRC at 1066–67 (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982)). In evaluating whether a causal connection exists between the protected activity and the adverse action, the Commission looks to four factors: "(1) the mine operator's knowledge of the protected activity; (2) the mine operator's hostility or 'animus' toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner." *Cumberland River Coal Co.*, 712 F.3d at 318; *see also Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–12 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I will examine these factors in turn.

i. Knowledge of Protected Activity

Tartaglia's engagement of the 105(c) process in his prior case before this court, his call to MSHA in November 2018, and his March 2019 complaint are all sufficient to establish that he engaged in protected activity. FMBI does not dispute these instances of protected activity. While I acknowledge that FMBI was unaware of the November 2018 MSHA hotline call for some time, I find that, all told, Respondent had knowledge of Tartaglia's protected activity.

ii. Animus or Hostility Toward the Protected Activity

Throughout the hearing, Tartaglia suggested that FMBI scheduled him for truck training in order to interfere with his upcoming, approved days off which he was taking in order to engage in depositions and other protected activity related to his claims against FMBI. *See, e.g.* Tr. 465, 474. However, Tartaglia did not put forth any evidence to demonstrate that the training schedule would interfere with his planned activities outside of work. Tartaglia's wholly unsupported allegations are insufficient to support an inference that FMBI had any animus or hostility toward his protected activity as it relates to his scheduled truck driver training.

iii. Timing

Tartaglia was disciplined on April 11, 2019, just a few weeks after he submitted his March 20, 2019 complaint to MSHA. Ex. R-S; Jt. Stip. 5. The Commission does not apply "hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Given the objectively short amount of time between this instance of protected activity and the adverse action, I find that a coincidence in time exists in Tartaglia's case.

iv. Disparate Treatment

Tartaglia has not shown that he was subject to disparate treatment. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Chacon*, 3 FMSHRC at 2512. It is unclear whether any other miners employed by FMBI have failed to attend training like Tartaglia. However, the evidence overwhelmingly shows that Tartaglia was given numerous opportunities to not only complete his required training but to choose which position he desired to hold and be trained for. Tr. 277, 417–19, 423; Exs. R-J, R-K, R-L, R-M, R-LL. Tartaglia's refusal to attend assigned training constitutes a "refusal to do assigned work," which under Freeport-McMoRan's "Guiding Principles" is a serious action which "may result in immediate discharge." Ex. R-Z, p. 23–24; Tr. 39, 408–09. The final written warning was less severe than the termination expressly permitted by the Guiding Principles for this type of infraction. I find that Tartaglia was not subject to disparate treatment.

v. Conclusion

Because the facts and evidence put forth in this case satisfy the knowledge and timing factors, and bearing in mind that the prima facie burden is minimal, I find that Tartaglia has put forth evidence that "*could* support an inference" that the adverse action was motivated, at least in part, by his protected activity. *Turner*, 33 FMSHRC at 1066 (citation omitted). As discussed below, however, I find that FMBI has successfully rebutted Tartaglia's prima facie case.

2. Rebuttal

The operator may rebut the miner's 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. *Id.* at 1064. Having already rejected FMBI's argument that no protected activity occurred, I turn to its motivation behind the adverse action.

The evidence in this case is clear. FMBI had a legitimate business need for a shovel operator, Tartaglia had an outstanding bid for that position, and Tartaglia was notified numerous times of the company's need for him to be trained on the equipment. Tr. 418, 236–37; Exs. R-M, R-T. Tartaglia started shovel training, discontinued it, and was asked several times whether he would be availing himself of his bid. Tr. 238, Exs. R-L, R-K, R-M. Tartaglia wished to continue operating the RTD, and was surprised to learn it was not a standalone position. *See* Tr. 203, 292. Tartaglia was then given a choice between Truck Driver I and Shovel Operator I. Ex. R-M. Both positions required Tartaglia to attend training and both paid the same amount. *Id.*

FMBI went to great lengths to allow Tartaglia the choice of which position he wanted to hold at the mine, and eventually presented the ultimatum with a deadline. *Id.* Tartaglia was informed that failure to make a timely decision would result in FMBI proceeding under the assumption that he wished to give up his bid and return to the truck driver position he had previously held. *Id.* He failed to make a selection by the deadline, and thus it should have been no surprise to Tartaglia that FMBI enrolled him in the next scheduled truck driver training.

Though he has shown coincidence in time between the protected activity and adverse action and FMBI's knowledge of his protected activity, Tartaglia has failed to sustain the ultimate burden of persuasion as to whether section 105(c) has been violated. FMBI has thoroughly established that Tartaglia's discipline was issued because of his refusal to do assigned work. The final warning was issued after Tartaglia was instructed numerous times over several months that he needed to attend training, either for the shovel operator position or for his return to a truck driver role. Because Tartaglia failed to proffer any evidence that the decision to discipline him was motivated by his protected activity, I find that FMBI has successfully rebutted Tartaglia's prima facie case.

E. FMBI has not violated section 105(c), so no remedies are available to Tartaglia.

The final issue enumerated for decision in this case is what remedies are available to Tartaglia if a violation of section 105(c) were found. Because Tartaglia has failed to establish

that FMBI either breached the settlement agreement or improperly discriminated against him, I need not reach the remedy issue.

V. ORDER

Accordingly, it is **ORDERED** that the complaint of discrimination brought by Peter Tartaglia, Jr. is hereby **DISMISSED**.

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 22, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. BLUFF CITY MINERALS, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. LAKE 2019-0389 A.C. No. 11-00122-498843 Mine: Bluff City Minerals

DECISION

Appearances: Emelda Medrano, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;

Dennis Sullens, Fred Weber, Inc., Maryland Heights, Missouri, for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against Bluff City Minerals, LLC, ("Bluff City"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of $121.00 for an alleged violation of his mandatory safety standard regarding protection of persons at switchgear.

A remote hearing was conducted over Zoom. The Secretary presented testimony of two witnesses, and had seven exhibits entered into evidence. Bluff City appeared without legal counsel, presented no testimonial or documentary evidence, and elected to prove its case solely by cross-examination of the Secretary's witnesses. The following issues are before me: (1) whether Bluff City violated 30 C.F.R. § 57.12020; and, if so, (2) the appropriate penalty. The parties' Post-hearing Briefs are of record.

After consideration of the evidence, and observation of the witnesses and assessment of their credibility, I **AFFIRM** the citation, as issued, and assess a penalty against Respondent for the reasons set forth below.

I. Joint Stipulations

The parties have stipulated as follows:

1. The Administrative Law Judge has jurisdiction in this matter.

2. Bluff City Minerals, LLC, ("Bluff City") is the operator of the Bluff City Minerals Mine, Mine ID: 11-00122, located in Alton, Illinois.

3. Bluff City is a mine, as defined in Section 3(a) to the Mine Act, 30 U.S.C. § 802(h).

4. Bluff City engaged in mine operations in the United States, and its mining operations affected interstate commerce.

5. The citation at issue in this proceeding is listed in Exhibit A of the Petition, and was issued on the date set forth therein.

6. Pursuant to Section 110(i) of the Mine Act, 30 U.S.C. § 20(i), the Secretary has assessed a civil penalty in the amount of $121.00 against Respondent.

7. Citation No. 9387334 was properly served by a duly authorized representative of the Secretary upon an agent of Bluff City, and may be admitted into evidence for the purpose of establishing its issuance.

8. On July 17, 2019, at the time of the inspection, the insulated mat at the start-up switch and disconnect of the S-11 water pump had water spraying on it.

9. The S-11 water pump is an automatic pump, and the float turns it on and off.

10. From July 10, 2019, through July 17, 2019, the S-11 pump was checked "okay" on the workplace examination book.

11. From July 10, 2019, through July 17, 2019, the wet insulated mat was not identified on any workplace examination book.

12. From July 10, 2019, through July 17, 2019, the pipe leaking water onto the wet insulated mat was not identified on any workplace examination book.

13. The payment of the assessed penalty would not affect the mine's ability to continue in business.

14. The gravity of the violation was "unlikely" to cause an injury reasonably expected to be "fatal."

15. The negligence was "low."

Tr. 8-10, 123.

II. Factual Background

Bluff City owns and operates the Bluff City Minerals Mine ("mine"), an underground limestone mine in Alton, Madison County, Illinois. Jt. Stip. 2. On the morning of July 17, 2019, MSHA inspector Phillip Walker arrived at the mine to conduct an E01 inspection. Tr. 21-22. The inspection party included safety supervisor Austin Subke, underground superintendent Terry Roberts, and miners' representative Trevor Kroeschel. Tr. 35. During the beginning of the inspection, while the inspection party was traveling underground, Walker spotted a water leak, and the inspection party exited the truck to check on the condition. Tr. 27-29, 35. Walker identified a waterline valve as the source, and observed water spraying on the insulated mat situated below the start-up switch and disconnect for the S-11 water pump. Jt. Stip. 8; Tr. 27-33, 36-37, 40-41. After discussing the instillation's grounding with Kroeschel and inspecting it, Walker informed the inspection party that he would be issuing a citation. Tr. 41-42, 48-51. To eliminate the alleged hazard, the S-11 pump was turned off, the wet mat was removed to dry, and parts were ordered to repair the valve. Tr. 48-49. Just shy of two weeks later, the citation was terminated. Ex. P–2.

III. Findings of Fact and Conclusions of Law

Inspector Walker issued 104(a) Citation No. 9387334 on July 17, 2019, alleging a violation of section 57.12020 that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Bluff City's "low" negligence.[1] Ex. P–2. The "Condition or Practice" is described as follows:

> The insulated platform at the start-up switch and disconnect for the water pump S-11 had water spraying on the platform creating a shock hazard. This pump is in [sic] automatic, and a float turns it on and off. Miners rarely turn the auto switch on unless [sic] a problem with the pump. The startup box for the pump was

[1] 30 C.F.R. § 57.12020 provides that "[d]ry wooden platforms, insulating mats, or other electrically-nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, non-current-carrying parts of the power switches to be operated may be used."

> grounded. A miner is at risk of a fatal electrical shock with water spraying on the insulated platform.

Ex. P–2. The citation was terminated on July 31, 2019, after the replacement parts were installed on the valve.

A. Fact of Violation

In order to establish a violation of the Mine Act, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

The Secretary maintains that Bluff City violated section 57.12020 by failing to maintain a dry insulated mat at the S-11 water pump switch. Sec'y Br. at 8-10 (citing *Markey Mines, Inc.*, 6 FMSHRC 2659, 2673 (Nov. 1984) (ALJ) (finding a violation where there was no insulating material for protection at a switchbox); *Black River Sand & Gravel, Inc.*, 3 FMSHRC 2340, 2343 (Oct. 1981) (ALJ) (finding a violation where the platform and insulating mat for a series of electrical switches were buried under wet sand and mud); *Union Rock & Materials Corp.*, 2 FMSHRC 3289, 3291 (Nov. 1980) (ALJ) (finding a violation where a rubber mat for an electrical switch and the surrounding area were wet, explaining that in the event of a short, the wet mat and surrounding water would serve as conductors).[2] Conversely, Bluff City argues that it did not violate the standard, contending that the term "dry" only applies to "wooden platforms." Resp't Br. at 1-2.

1. Summary of Testimony

MSHA Inspector Phillip Walker testified that he arrived at the mine on July 17, 2019, to conduct an E01 inspection, and that safety supervisor Austin Subke, underground superintendent Terry Roberts, and miners' representative Trevor Kroeschel accompanied him during inspection. Tr. 21-22, 35. Walker stated that from the vantage point of the truck transporting the inspection party, he observed a water spray and that, as they approached the condition on foot, he told Roberts, "I believe that's going to be a violation." Tr. 27-32, 35-37. He testified that he identified a leaky valve in the waterline used for refilling water trucks, spraying water on the insulating mat for the S-11 water pump switch and disconnect, that the mat and the ground around it were covered with water, and that the mat was on top of a polyurethane pallet. Tr. 27-32, 36-37, 40-41, 53, 60-62; Ex. P–4. He explained that water spraying around electrical equipment is dangerous because it can cause a short, a fire, or a fatal electrical shock, if contacted. Tr. 36-37. Walker testified that Kroeschel told him that the power switch was double grounded, that he inspected the instillation and determined that it utilized a ground wire in the power cable and peg grounding, and that he explained to him that there was only one sufficient path to ground

[2] The Secretary notes that there are no cases addressing section 57.12020 specifically, and cites to ALJ cases concerning the predecessor regulations for underground and surface electrical instillations, sections 57.12-20 and 56.12-20, which are identical to sections 57.12020 and 56.12020. See Sec'y Br. at 9 n.5.

because MSHA does not recognize peg grounding as an independent form of grounding. Tr. 41-50. He stated that, at this point, the pump was turned off without his prompting and that, at his instruction, the mat was moved so that it could dry, allowing him to see water on the sides and underneath it, and on the pallet. Tr. 44-45, 48-53, 56, 60-62. He explained that these actions eliminated the hazard, but that it was necessary to order parts for the valve in order to terminate the citation. Tr. 48-49; Ex. P–2. Walker stated that based on his observations, he determined that exposure to the hazard would have been minimal because the power switch was used only twice a day and a float allowed the pump to turn on and off automatically, but that contact with 480 volts would likely result in a fatality, and Bluff City exhibited low negligence because the condition had not been reported at the time of inspection. Tr. 38-40. He opined that the standard is crucial for miners' safety because the mat provides insulation from electrical shock in the event of a short occurring during operation of the pump switch, and that a wet mat defeats the protective purpose of having an insulator since water is highly conductive. Tr. 47-48. Walker also explained that if an electrical instillation is double grounded, it is not required to have a dry insulating mat. Tr. 64, 66, 68-69. In response to Bluff City's cross-examination about whether rain would cause a violation at surface instillations, he opined that without an analysis of a particular situation, a determination cannot be made, and explained that surface mines can have main control areas where power to electrical instillations can be shut down. Tr. 53-56.

MSHA electrical specialist Bub Whitfield testified that he reviews electrical citations, answers questions from inspectors and supervisors, and conducts inspections of electrical systems, and that he was called to review the insulated mat and grounding issues in this case. Tr. 71-72, 76-77. Regarding the requirements of the standard, he stated that based on his training and experience, it is clear that "dry" applies to all of the listed insulating materials, explaining that if an insulating mat is connected to the earth by any amount of conductive material, such as water, it is no longer insulating. Tr. 90, 94, 114-18. He clarified that while distilled water is not a good conductor, mine water is particularly conductive. Tr. 104-05. He explained that MSHA's Program Policy Manual for the cited standard distinguishes between high-, more dangerous, voltage and low-voltage instillations; low-voltage instillations, such as Bluff City's 480-volt pump switch, require either a form of insulation and a path to ground or, alternatively, two or more good paths to ground. Tr. 79-83, 97, 101, 114, 116; Ex. P–5. He testified that Bluff City utilized a ground conductor in the power cable and a grounding electrode bonded to the framework of the instillation, called "peg grounding," and that, together, they made-up one good grounding system. Tr. 82-85, 91; Ex. P–6. In describing peg grounding, he referenced an MSHA technical paper that explains its dangers and unreliability, and he went on to explain that peg grounding is not considered a sufficient independent path to ground by MSHA because it does not return directly to the power source. Tr. 80-84, 91; Ex. P–6. He stated that the only scenario in which an insulating mat could be wet is if the mine were to employ a double grounding system, rendering the mat redundant. Tr. 112-13. He explained that while sections 57.12020 and 56.12020 contain identical language, it can be more difficult to have two effective paths to ground in underground instillations than in surface instillations that are more likely to be permanent, and that underground instillations commonly employ an insulating mat and a single ground. Tr. 80-84, 88, 93-94, 100-03. In response to a line of hypothetical questions regarding rain at surface instillations, Whitfield described some of the ways in which surface operations keep mats dry, and stated that electricians typically do not use electrical equipment in the rain,

and that surface operations typically can turn off power in electrical control rooms upstream from electrical instillations. Tr. 93-95, 100-02, 108-09.

2. Analysis

The Secretary contends that the plain language of section 57.12020 requires Bluff City to maintain a dry insulating mat at the S-11 pump switch. Sec'y Br. at 13-14.[3] Bluff City argues that the regulation only requires wooden platforms to be kept dry, asserting that insulated mats cannot absorb water and, therefore, do not create a risk of shock when wet. Resp't Br. at 1-2.

When the language of a provision is plain, the plain language is the meaning of the provision, and the sole function of the courts is to enforce the language, as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Section 57.12020 provides, in pertinent part, that "*[d]ry* wooden platforms, *insulating mats*, or other electrically-nonconductive material shall be kept in place at all switchboards and power-control switches where *shock hazards exist*." 30 C.F.R. § 57.12020 (emphasis added). Considering that mine water is highly conductive and that the objective of the standard is prevention of electrical shock, the term "dry" clearly modifies all of the alternatives that follow. Accordingly, in situations where this standard is applicable, insulated mats and other electrically-nonconductive material, in addition to wooden platforms, must be kept dry. Moreover, the plain language reading of section 57.12020, requiring all nonconductive materials to be kept dry, is reasonably based on an understanding of electricity's properties, and is consistent with the protective goals of the Mine Act; the reading that Bluff City urges not only ignores the conductivity of mine water, but clearly subverts the Mine Act's underlying objectives. As the Commission has noted, "safety standards 'must be interpreted so as to harmonize with and further . . . the objective[s] of' the Mine Act." *Nally & Hamilton Enters.*, 38 FMSHRC 1644, 1649 (July 2016) (quoting *Emery Mining Corp.*, 744 F.2d 1411, 1414 (10th Cir. 1984)). Here, the clear wording of the standard protects miners from electrical shock at switchboards and power-control switches, and the evidence establishes that the wet insulated mat at the S-11 water pump switch created the exact hazard that the standard was intended to prevent.

While Bluff City correctly identifies some factual differences distinguishing *Black River Sand* and *Union Rock* from the matter at hand, violations were found in both cases where insulating mats were wet, cutting against Bluff City's theory of non-culpability. *See Black River Sand*, 3 FMSHRC at 2343; *Union Rock*, 2 FMSHRC at 3291.

MSHA's Program Policy Manual provides guidance for section 57.12020, explaining that "two or more good paths to ground for fault current would eliminate the need for insulating mats at power switches rated 650 volts or less." Ex. P–5. Bluff City does not affirmatively pursue any argument that peg grounding is a sufficient second path to ground and that the mat was

[3] Despite contending that the standard has a clear meaning, the Secretary raises a deference argument, which is not addressed herein. See Sec'y Br. at 11-15; *see also Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) ("[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference." (citations omitted)).

redundant, but simply notes that if an instillation is double grounded, no mat is needed. See Resp't Br. at 2-3. Indeed, no evidence was presented to rebut the clearly established evidence that peg grounding is not recognized as a stand-alone form of grounding, and that well-known dangers are associated with it.[4] Moreover, Bluff City's utilization of the insulated mat makes reasonable the conclusion that the operator recognized that it had only one effective grounding system in place. Accordingly, the 480-volt water pump switch was required to have either a dry wooden platform, a dry insulating mat, or some other dry electrically-nonconductive material to protect miners from shock hazards.

Bluff City's contentions that examining the identical surface regulation is instructive, and that compliance on the surface would be impossible if it were raining, are unavailing. See Resp't Br. at 2, 4. While the language of section 56.12020 is identical to section 57.12020, surface and underground electrical instillations operate in dissimilar environments, and there are different considerations in achieving compliance. Unrebutted testimony establishes that finding two paths to ground generally proves more difficult underground, that surface instillations are more likely to be permanent, and that electricians working underground have concerns that are peculiar to underground methods of mining.

At this juncture, it is important to note that Bluff City's cross-examination of the Secretary's witnesses was heavily weighted by its opinions about compliance and, as such, elicited very little, if any, support for its position. The facts in this case are uncontested: that the inspection party came upon water actively spraying on the insulating mat for the 480-volt pump switch in the underground instillation, that water covered the surface of the mat and its sides, and that the mat's underside, the pallet, and the area around the instillation were wet also. Additionally, Bluff City only employed one recognized grounding system at the pump switch. Consequently, I find that a shock hazard existed at the S-11 water pump switch and disconnect, and that Bluff City violated section 57.12020.

B. Gravity and Negligence

The evidence establishes that the S-11 water pump switch typically was used twice a day, that the pump was on a float enabling it to turn on and off automatically, and that the water leak had been unreported prior to inspection. While exposure to this hazard was unlikely, contacting 480 volts without adequate protection would be reasonably expected to result in a fatality. Given these considerations, the parties have stipulated that the violation was unlikely to cause a fatal injury, and that Bluff City's negligence was low, stipulations that I accept as appropriate to the facts in this case. Jt. Stips. 14, 15.

IV. Penalty

While the Secretary has proposed a civil penalty of $121.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act: "(1) the operator's history of previous

[4] MSHA's technical guidance states that, "[w]hen a system is being supplied power from a grounded power system and "peg grounding" is employed, *a single ground fault* is all that is necessary to initiate a *potentially fatal situation*." Ex. P–6 (emphasis added).

violations; (2) the appropriateness of the penalty to the size of the business of the operator; (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) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation." 30 U.S.C. § 820(i); *see Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the *Sellersburg* penalty criteria, and based on a review of MSHA's online records, I find that Bluff City is a medium-sized operator, with an overall history of violations that is a mitigating factor in assessing the appropriate penalty.[5] The record indicates that Bluff City demonstrated good faith in achieving rapid compliance after notice of the violation, and the parties stipulated that imposition of the proposed penalty will not adversely affect Bluff City's ability to remain in business. Jt. Stip. 13.

The remaining criteria involve consideration of the gravity of the violation and Bluff City's negligence in its commission. While the likelihood of contact with the water pump switch at the time of an electrical fault in the system is low, because it could result in electrocution, this is a serious violation. The hazardous condition had not been reported during workplace examinations and, because there is no evidence as to its duration, Bluff City's negligence was low. Therefore, considering my findings as to the six penalty criteria, I find that a penalty of $150.00 is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Citation No. 9387334 is **AFFIRMED**, and that Bluff City Minerals, LLC, **PAY** a civil penalty of $150.00 within thirty days of this Decision.[6] **ACCORDINGLY**, this case is **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

[5] In the fifteen months preceding inspection, the operator had never been cited for a violation of section 57.12020. Ex. P–1.

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

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