December 2022

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 20, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CONSOL PENNSYLVANIA COAL COMPANY, LLC	Docket No. PENN 2019-0094

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). At issue is whether the Administrative Law Judge erred in affirming a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Consol Pennsylvania Coal Company, LLC ("Consol").

The citation alleges that Consol failed to locate its emergency lifeline "in such a manner for miners to use effectively to escape," in violation of 30 C.F.R. § 75.380(d)(7)(iv).[1] Sec. Ex. 2 (Citation No. 9076458). The citation further states that the lifeline was "located directly above [several hydraulic] hoses." *Id*. The citation was designated as being significant and substantial ("S&S").[2]

In affirming the citation, the Judge found that the evidence in the record established the violation under the language of section 75.380(d)(7)(iv) and Commission caselaw. 43 FMSHRC 120 (Mar. 2021) (ALJ). The Judge also affirmed the S&S designation associated with the citation, reiterating several of the same facts supporting the existence of the violation. *Id*. at 133-35. Consol filed a petition seeking discretionary review of the Judge's decision, which the Commission granted. For reasons set forth below, we affirm the Judge's decision.

[1] Section 75.380(d)(7)(iv) states that "[e]ach escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [l]ocated in such a manner for miners to use effectively to escape." 30 C.F.R. § 75.380(d)(7)(iv).

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

I.

Factual and Procedural Background

A. Factual Background

Consol operates the Harvey Mine, a bituminous coal mine located in Pennsylvania. On February 21, 2019, MSHA Inspector Joseph Vargo conducted his inspection at the mine. He traveled to the 5A longwall alternate escapeway, via the number two track entry. *Id*. at 122; Tr. 27, 32. The entry is the fastest route out of the section and is traversed daily by three shifts of miners traveling to and from the 5A longwall. Tr. 68-69. It contains a directional lifeline for miners to use in the event of an emergency. At the time of the citation, Vargo counted ten miners working in the area. Tr. 66-67.

Vargo took issue with the fact that the lifeline was hung directly over nine hydraulic hoses, creating what he deemed to be a slipping and tripping hazard. Tr. 33, 39. The hydraulic hoses extended out of a pump car (through a manifold), which had been parked in the 47 ½ crosscut for eight days.[3] Tr. 33, 39, 69-71.

According to Vargo, the hoses extended into the crosscut, blocking the route of the lifeline. Tr. 33, 40. The longest hose extended 43 inches laterally into the path of the escapeway. Sec. Ex. 2 (Vargo's notes), at 3, 5-6; Tr. 43. He measured the heights of the hoses as ranging from 14 to 38 inches (more than three feet) above the mine floor. Consol's witnesses did not dispute these measurements. Tr. 199.

The witnesses all testified that the hydraulic hoses would eventually droop down towards the mine floor and that Consol would typically place either rock dust bags or a metal ramp, if not both, on top of the lowered hoses to level out the walking surface. Tr. 46-47, 94-95, 100, 102. In this scenario, however, only rock dust bags were used where the hoses met the mine floor.

The lifeline was hung from the roof down the middle of the walkway. Tr. 167-68. The lifeline would be attached to roof bolts at various distances, using plastic art clips and zip ties, which would break away in an emergency. The flexible extensions were attached to the roof with an "S" hook. Tr. 168. When the lifeline was stored, it was held up about one foot from the roof by quick-release tension clips or zip ties. Tr. 54, 272.

The lifeline could be pulled diagonally from clips on the roof, with slack that permitted it to stretch out to 54 inches, due to its nylon-based flexibility. Sec. Ex. 2, at 5; Tr. 55, 57-58. The extensions were similar to a "bungee cord" except that when the lifeline was not in use, it would coil up like an old phone cord. Tr. 168. When deployed, the flexibility of the system was intended to allow miners to navigate past and around the hydraulic hoses and the pump car. Tr. 54-55, 272.

[3] The pump car was part of the longwall "mule train," which is a series of track-mounted cars. Tr. 36-37. It provides the electrical, emulsion and rock dust needs of the longwall, which are essential to its operations. Tr. 177, 246-47. *See also* CP Ex. 8A-8D (photographs of the hydraulic hoses, taken by Consol after the lifeline was removed).

Vargo acknowledged that, in addition to the miners being able to extend 54 inches due to the lifeline's flexibility, the length of the miners' arms (approximately 18-24 inches) would afford them additional flexibility while still maintaining contact with the lifeline. Tr. 97. Troy Hellen, the mine's Respirable Dust Coordinator, testified that, at the area where the citation was issued, miners "would never have to [let] go of the lifeline." Vargo testified, however, that even with the lifeline's extensions, there was still a slip, trip, and fall hazard underfoot from the hoses and the existence of uneven rock dust bags. Tr. 57-58, 100.

Vargo issued the citation in question, which alleged that the lifeline's location failed to allow miners to effectively escape in the event of an emergency.[4] Tr. 34, 48. He noted that it was reasonably likely that a miner would trip and fall over the hoses, potentially creating a "domino effect" in which other miners behind would also fall, possibly dropping their self-rescuers or hitting other objects in the process. Tr. 59-60; 63. He believed that miners would be walking quickly and may not be able to see where they are going, particularly in the event of smoke. Tr. 64. Vargo expressed specific concern about miners having difficulty maneuvering in a smoke-filled environment because their headlamps, flashlights, and reflectors would not help with such limited visibility. Tr. 64. Both Hellen and Consol Safety Inspector Chase Shaffer acknowledged that such limited visibility would create difficulty seeing obstacles in the mine. Tr. 187; 222; 250-51. Vargo concluded that a slip, trip, and fall hazard therefore existed, which was reasonably likely to cause injuries, including bruises, dislocations, sprains, lacerations, and contusions, with at least one person affected. Tr. 62-63.

Hellen acknowledged that he had received internal injury reports at the mine stating that in two recent prior instances, a slip, trip, and fall hazard had occurred, which had led to a twisted ankle in one scenario and the need for three stitches in the other. Tr. 203-204. The mine's history of assessed violations showed 230 violations in the 15-month period prior to the issuance of the citation. Sec. Ex. 4. The Judge characterized seven of those violations as involving a "similar standard."[5] 43 FMSHRC at 136. No other conditions were cited along the primary and secondary escapeways when the citation was issued. The mine was on a five-day spot inspection for methane. Tr. 25-27; 30 U.S.C. § 813(i).

Vargo testified that the condition had existed for eight days prior to the citation. Tr. 70. He found that three shifts of miners would have traveled through the number two track entry up and back each day while the condition existed. Tr. 69. MSHA proposed a penalty of $768.

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[4] The citation alleged that "[t]he continuous durable directional lifeline located at 47½ crosscut No. 2 track entry in the 5A operating longwall section MMU 001-0 is not located in such a manner for miners to use effectively to escape." Sec. Ex. 2.

[5] The Judge did not define what was meant by the phrase "similar standard," nor did the decision identify which violations might meet that criteria. The certified Violations History Report revealed that Consol was cited for one violation of 30 C.F.R. § 75.380(d)(7)(iv) (the same lifeline standard at issue here), as well as one violation of 30 C.F.R. § 75.380(d)(1) (requiring maintenance of the escapeway to avoid tripping hazards). Sec. Ex. 4.

B. The Judge's Decision

In affirming the violation, the Judge concluded that, despite the possible 54-inch extension in the lifeline, it was not "located in such a manner for miners to use effectively to escape." The Judge credited Vargo's testimony that under emergency circumstances and with limited visibility, the protruding hoses posed a tripping hazard that could cause injury. 43 FMSHRC at 131-32.

The Judge rejected Consol's argument that MSHA cited the wrong standard. *Id*. at 132-33. The Judge's holding was limited to "conditions that specifically relate[d] to the lifeline and whether miners could have used it as an effective means of escape." *Id*. at 132.

The Judge also affirmed the S&S designation associated with the citation. *Id*. at 133-35. In doing so, he reiterated several of the same facts supporting the existence of the violation. He found that during an evacuation emergency with limited visibility, a slip, trip, and fall hazard was "particularly" likely. *Id*. at 134. The Judge relied on testimony from both Vargo and the Consol witnesses explaining the difficulty miners have in maneuvering under limited visibility conditions. *Id*. He found that the fall injuries from a tripping hazard were "reasonably likely," citing to several examples of "strains, sprains, and fractures." *Id*. at 134-35. The Judge also noted that "fallen miners or equipment dislodged during the fall could become obstacles to others attempting to escape, increasing the likelihood of an injury occurring." *Id*. at 135. Finally, the Judge held that the trip-and-fall injuries would be reasonably likely to be serious, because of the fall itself, as well as it potentially delaying evacuation of other miners or creating a need for additional rescue efforts. *Id*.

II.

Disposition

A. We Affirm the Judge's Finding of a Violation.

The mandatory safety standard at 30 C.F.R. § 75.380(d)(7)(iv) requires lifelines to be "[l]ocated in such a manner for miners to use effectively to escape." The Judge found that the lifeline was located directly above hydraulic hoses which protruded into the escapeway and, therefore, the location of the lifeline would prevent miners from effectively escaping. 43 FMSHRC at 131-32.

We affirm the Judge's finding of a violation; the plain language of the standard prohibits locating the lifeline above hazards which impede effective escape. Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a

meaning would lead to absurd results.[6] *See Dynamic Energy, Inc*., 32 FMSHRC 1168, 1171 (Sept. 2010) (citations omitted). The Commission has noted that "[s]ection 75.380 contains extensive requirements as to the location and physical attributes of escapeways so that miners, including those disabled in a mine accident and needing assistance, can quickly and safely get from the start of the escapeway to the surface."[7] *The American Coal Co*., 29 FMSHRC 941, 948 (Dec. 2007).

The undisputed record evidence establishes that the lifeline was located directly above hydraulic hoses which extended out into the escapeway. 43 FMSHRC at 122-23, citing to Tr. 27, 33-43, 57-58 64, Sec. Ex. 2; CP Ex. 8A-8D (the photographs). The hoses extended out into the escapeway up to 43 inches laterally and up to 38 inches above the mine floor. The Judge found that the hoses were trip and fall hazards, which may cause injuries to miners or delay the evacuation of miners in an emergency situation. 43 FMSHRC at 122, 131-33, 135 (crediting the testimony of Inspector Vargo). In an emergency situation the mine may be filled with smoke, limiting visibility. Accordingly, the Judge concluded the location of the lifeline over trip and fall hazards prevented miners from effectively escaping the mine. We affirm the Judge's finding of a violation because it is supported by substantial evidence.[8]

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[6] MSHA promulgated the emergency mine evacuation safety standards at section 75.380 as a final rule in December 2006. Emergency Mine Evacuation, 71 Fed. Reg. 71430 (2006). The rule was promulgated after Congress amended the Mine Act, enacting the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), in response to three multiple-fatality mine disasters. Pub. L. No. 109–236, 120 Stat. 493 (2006). The MINER Act, in part, required operators to provide flame resistant and directional lifelines in escapeways "to enable evacuation." Pub. L. No. 109–236, 120 Stat. 493 (2006), *codified at* 30 U.S.C. § 876(b)(2)(E)(iv).

[7] In reaching his conclusion of a violation, the Judge referenced two Commission cases, *Black Beauty Coal Co*, 36 FMSHRC 1121 (May 2014) and *American Coal Co.*, 29 FMSHRC 941 (Dec. 2007). 43 FMSHRC at 132. Based on those cases, the Judge determined that the Commission has interpreted "effectively" to mean "quickly and safely" for purposes of section 75.380(d)(7). *Id.* While these prior decisions reasonably suggest that safe and quick egress are appropriate considerations in the context of lifeline and other emergency provisions, Commission precedent has not narrowly defined "effective" to mean "quick and safe." Nor do we find it necessary or appropriate to adopt such a narrow interpretation here.

[8] "Substantial evidence" only requires "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co*., 11 FMSHRC 2159, 2163 (Nov. 1989) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The Commission has long held that a Judge's credibility determination is entitled to great weight and may not be overturned lightly. *See Farmer v. Island Creek Coal Co*., 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co*., 3 FMSHRC 2767, 2770 (Dec. 1981); *Consol Pennsylvania Coal Co., LLC*, 43 FMSHRC 145, 151 (Apr. 2021).

Consol's arguments that the Judge erred in affirming a violation of the mandatory safety standard at section 75.380(d)(7)(iv) are unpersuasive. Consol asserts that the safety standard only requires the lifeline to be in an accessible location, e.g., accessible height, accessible position, etc.[9] Consol contends that the standard's requirements do not address hazards or obstructions. PDR at 14-18.[10]

We reject Consol's interpretation as it fails to account for the standard's plain language directive to select an *effective* location. A lifeline located above hazards and obstructions impedes escape. 43 FMSHRC at 132 ("even if miners never lost contact with the lifeline, its position would have required escaping miners to identify the protruding hoses as an obstacle and maneuver around them in order to escape quickly and safely."); *see also Cumberland Coal Res*., 33 FMSHRC 2357, 2361 (Oct. 2011), *aff'd* 717 F.3d 1020 (D.C. Cir 2013) (the "suspension of the lifelines by numerous J-hooks above cables and above track equipment did not comply with [the safety standard]."). Obstructions – whether necessary equipment or otherwise – must not impede effective use of the lifeline pursuant to section 75.380(d)(7)(iv).

B. <u>The Judge Properly Declined to Rely on any Abatement Considerations in Finding the Violation.</u>

To abate the citation, the lifeline was re-routed from the "walkway" side of the "mule train" to the "tight side" of the "mule train." Consol argues that its original lifeline placement was appropriate as compared to what Consol states is the less-safe abatement method of hanging the lifeline on the "tight side" of the mule train.[11]

Section 104(a) of the Act provides that inspectors issue citations for mandatory health and safety standards, and then separately notes that "the citation shall fix a reasonable time for the abatement of the violation." 30 U.S.C. § 814(a). Whether or not abatement occurs has no bearing on the underlying violation, but rather on whether the operator is subsequently issued a failure to abate order under section 104(b). *See Western Industrial, Inc*., 25 FMSHRC 449, 453

[9] While Consol argues that miners would not lose contact with the lifeline due to its lowered height and "accessibility," it concedes that this standard covers a lifeline's "location." Section 75.380(d)(7)(iv) is not solely limited to "height" and "accessibility."

[10] Nor are we persuaded by Consol's additional contentions that the Judge erred in affirming the citation because a different subsection of section 75.380 also may prohibit locating the lifeline near tripping hazards, and that the Judge's finding of a violation is unsupported because the escapeway was clear enough that it could have passed a stretcher test. *See* PDR at 20-22. Whether or not a different subsection of the standard would have also been applicable, has no bearing on whether the Secretary established a violation of section 75.380(d)(7)(iv) in this proceeding. Whether the escapeway met MSHA's separate stretcher clearance standard under 30 C.F.R. § 75.380(d) does not mean that it met the lifeline standard.

[11] While (as explained below) abatement and occurrence of a violation are distinct issues, we note that it is contrary to the fundamentals of safety for any abatement, regardless of who chose it or how it was implemented, to expose miners to a *worse* condition due to increased obstructions creating potential hazards.

(Aug. 2003) (holding the abatement method is irrelevant in determining whether violation occurred); *Bluestone Coal Corp*., 19 FMSHRC 1025, 1030 (Jun. 1997) ("We agree with the Secretary that the abatement requirements are irrelevant to the issue of whether the operating speed of Payne's truck violated the standard."). Simply put, whether and how a violation is abated is irrelevant to whether a violation occurred in the first place.

C. <u>The Judge Properly Found the Violation to be S&S.</u>

The "significant and substantial" terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission further explained:

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

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

The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co*., 6 FMSHRC 1834, 1836 (Aug. 1984). The application of step two of the *Mathies* test requires a determination of "whether [the] hazard was reasonably likely to occur given the particular facts surrounding this violation." *Newtown Energy, Inc.,* 38 FMSHRC 2033, 2041 (Aug. 2016). Furthermore, the Commission has emphasized that in evacuation standards, the third and fourth steps of *Mathies* should be evaluated in the context of an emergency. *Cumberland*, 33 FMSHRC at 2370, *aff'd* 717 F.3d 1020 (D.C. Cir. 2013). With respect to the third step, an evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co*., 7 FMSHRC 1125, 1130 (Aug. 1985).

Here, the lifeline was hung from the roof down the middle of the walkway, attached to roof bolts at various distances, allowing it to break away in an emergency. Nine hydraulic hoses extended out of a pump car through a manifold at the subject location. The lifeline was hung directly over those hoses with no ladders, stairways, ramps, or similar facilities present. While this condition existed, the testimony was that three shifts of miners would have traveled through the area up and back each day for a total of eight days. There was testimony that under emergency conditions, miners would be walking quickly and may not be able to see where they are going, particularly in the event of smoke. The Inspector testified to miners having difficulty

maneuvering in a smoke-filled environment since their headlamps, flashlights, and reflectors would not help with such limited visibility. Consol witnesses acknowledged that such limited visibility would create difficulty seeing obstacles in the mine.

As discussed, the first step of *Mathies* was met since substantial evidence plainly supports a violation—the location of the lifeline led miners directly to an unaddressed obstruction.

Regarding the second step of *Mathies*, the obstruction created "a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation." *Mathies*, 6 FMSHRC at 3-4. Assuming an emergency evacuation, there was a likelihood that miners following the lifeline into the path of the hoses would be tripped up and impeded in efforts to evacuate the area, given the existence of the violation and continued normal mining operations. The Judge found that even if it were possible for miners to pull the lifeline around the hoses, miners would need to "identify the protruding hoses as an obstacle and maneuver around them." 43 FMSHRC at 132. Substantial evidence supports the ALJ's conclusions regarding the cited violation's contribution to a discrete safety hazard.

Having determined that the second step of *Mathies* was met, we now turn to the third step. In the third and fourth steps, the violation is no longer the explicit concern of the analysis; the question instead is whether the previously identified hazard is reasonably likely to result in a reasonably serious injury. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365, 2370 (Oct. 2011), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013) (*citing Musser Eng'g, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). Substantial evidence supports the ALJ's finding of a reasonable likelihood that the hazard identified in the second step would have resulted in an injury of a reasonably serious nature, under the third and fourth step of *Mathies*. The Judge cited to other cases where injuries resulted from tripping and falling. 43 FMSHRC at 134-35.[12] The Judge also found that any delay in escaping a mine during an emergency is likely to result in serious injury or death.

Consol argues that not every emergency evacuation citation should be S&S. We certainly agree. *Cumberland*, 33 FMSHRC at 2369 ("Because the particular facts in a case may not establish that a violation of an evacuation standard contributes to a hazard which is reasonably likely to result in injury, not every violation of an evacuation standard will be S&S.") *citing Rushton Mining Co*., 11 FMSHRC 1432, 1436 (Aug. 1989) (reasoning that the Secretary failed to establish that an escapeway violation contributed to the existence of a "discrete safety hazard" in an emergency situation requiring evacuation in view of the specific facts of the violation). In contending that the violation was not S&S, however, Consol does not argue that the Judge misapplied the law, but simply reiterates its argument that no violation

[12] References were made to *Maple Creek Mining, Inc*., 27 FMSHRC 555, 562-63 (Aug. 2005) (affirming a Judge's finding that a trip and fall in a mucky escapeway would lead to leg or back injuries); *Buffalo Crushed Stone Inc*., 19 FMSHRC 231, 238 n.9 (Feb. 1997) (finding that slipping on a walkway would reasonably result in head injuries or finger or wrist fractures); *S. Ohio Coal Co*., 13 FMSHRC 912, 918 (Jun. 1991) (affirming a Judge's conclusion that a trip-and-fall accident would result in injuries such as "sprains, strains, or fractures").

occurred. For instance, Consol repeats its view that miners would "never lose contact with the lifeline," that miners could use the lifeline to effectively escape and that rock dust bags mitigated the hazard the hoses posed. PDR at 30-32. Nevertheless, the path of the lifeline led directly to the hoses, not the rock dust bags. Miners would still be led directly to an obstruction, and not to the means to navigate that obstruction.

Consol claims that "the vast majority of falls cause no injuries," arguing that gloves would protect miners. Whether or not that may be true as a statistical matter, this case turns upon the circumstances of miners attempting to escape during an emergency. *See, e.g.*, *Knox Creek Coal Corp*., 36 FMSHRC 1128, 1133 (May 2014), *aff'd*, 811 F.3d 148 (4th Cir. 2016) (holding that the Secretary was not required to produce quantitative evidence of the frequency of hazardous malfunctions for S&S). No rationale is provided as to how gloves would protect miners from serious injuries to the hands (or the body, as a whole) when encountering obstructions during an emergency.

Finally, Consol claims that the Judge misstated the facts in asserting that "the location of the pump car constantly changes," and that there is "simply no evidence of this in the record." CP Reply. Br. at 13.[13] Consol asserts that although the pump car retreats as the longwall retreats, the "basic *setup* does not change – the pump car is parked at a crosscut so the hydraulic lines can go through the crosscut." *Id*. It claims that the "mule train and pump car are always in this position relative to the section." *Id*. Based on this assertion, Consol claims that the trained miners would take appropriate precautions to avoid the protruding hoses, in the event of an emergency.

Commission precedent holds that miner precaution is not a relevant consideration under the *Mathies* test. *Sec'y of Labor v. Consolidation Coal Co*., 895 F.3d 113, 118 (D.C. Cir. 2018); *Newtown Energy, Inc*., 38 FMSHRC 2033, 2044 (Aug. 2016); *Eagle Nest, Inc*., 14 FMSHRC 1119, 1123 (July 1992). Furthermore, while most of the miners had worked there consistently for a lengthy period, not all of them did – and of course additional turnover can always occur. Tr. 261-62. There is also evidence that contractors may have been working in the section. Tr. 262. Any miners new to the section, or any of these contractors, would necessarily have had less experience with the environment of the section to know how to react when escaping the mine in

[13] Of record testimony, however, is Vargo's disagreement with the assertion that the pump car always ends up in a crosscut. Tr. 102-03.

an emergency scenario—particularly when utilizing a lifeline leading directly to the obstruction of the protruding hoses.

Accordingly, we affirm the Judge's S&S determination.

III.

Conclusion

For the reasons stated above, we affirm the Judge's finding that the operator violated the lifeline standard in 30 C.F.R. § 75.380(d)(7)(iv) and the S&S determination.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 6, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. PERRY COUNTY RESOURCES, LLC	Docket No. KENT 2022-0024

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2018). On October 5, 2022, a Commission Administrative Law Judge issued an order denying approval of a settlement motion filed by the Secretary of Labor and Perry County Resources, LLC in this proceeding. In that order the Judge also denied the Secretary's alternative motion to certify for interlocutory review the Judge's order denying settlement. On November 4, the Commission received the Secretary's petition for interlocutory review.

Commission Procedural Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission, and that the Commission may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

Upon consideration of the Secretary's petition, we hereby grant interlocutory review of the Judge's order of October 5, 2022, and the issue of whether the Judge abused his discretion in denying approval of the settlement motion based on the Secretary's refusal to provide a section 104(b) order that was associated with a citation that was a subject of the motion to approve settlement.

The Secretary shall file an opening brief with the Commission within 30 days of this order. If the operator wishes to file a brief, it shall file that brief 30 days after the filing of the Secretary's brief.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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December 6, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. GREENBRIER MINERALS, LLC	Docket No. WEVA 2022-0403

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018), is before us upon a Commission Administrative Law Judge's November 22, 2022, certification of his order denying the Secretary of Labor's motion to approve settlement. *See* 29 C.F.R. § 2700.76(a)(1)(i). The Judge denied the motion because he concluded that the Secretary had failed to provide sufficient information to support the removal of a "significant and substantial" ("S&S") designation.

Commission Procedural Rule 76(a) provides that the Commission "may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(2). Rule 76 further provides that "[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission." 29 C.F.R. § 2700.76(a).

Upon consideration of the Judge's certification, we hereby grant interlocutory review of the Judge's order denying approval of the settlement and the issue of whether the Secretary has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).[1]

[1] As the Judge recognized in his November 22 order, the same controlling question of law is currently on review before the Commission in *Knight Hawk Coal, LLC*, Docket No. LAKE 2021-0160.

The Secretary shall file an opening brief with the Commission within 30 days of this order. If the operator wishes to file a brief, it shall file that brief 30 days after the filing of the Secretary's brief.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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/s/ Timothy J. Baker
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 7, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Docket No. WEVA 2022-0176 A.C. No. 46-09222-548471
v.	
BLUESTONE OIL CORPORATION	Docket No. WEVA 2022-0350 A.C. No. 46-09222-548471

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018), is before us upon a Commission Administrative Law Judge's October 31, 2022, certification of his order denying the Secretary of Labor's motion to approve settlement. *See* 29 C.F.R. § 2700.76(a)(1)(i). The Judge denied the motion because he concluded that the Secretary had failed to provide factual support for the proposed removal of two citations' "significant and substantial" ("S&S") designations.

Commission Procedural Rule 76(a) provides that the Commission "may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(2). Rule 76 further provides that "[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission." 29 C.F.R. § 2700.76(a).

Upon consideration of the Judge's certification, we hereby grant interlocutory review of the Judge's order denying approval of the settlement and the issue of whether the Secretary has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).[1]

[1] As the Judge recognized in his October 31 order, the same controlling question of law is currently on review before the Commission in *Knight Hawk Coal, LLC*, Docket No. LAKE 2021-0160.

The Secretary shall file an opening brief with the Commission within 30 days of this order. If the operator wishes to file a brief, it shall file that brief 30 days after the filing of the Secretary's brief.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 12, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Docket No. WEST 2022-0189 A.C. No. 48-00152-548001
v.	Docket No. WEST 2022-0267 A.C. No. 48-00152-550854
GENESIS ALKALI, LLC	Docket No. WEST 2022-0268 A.C. No. 48-00152-550854

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2018). On November 17, 2022, a Commission Administrative Law Judge issued two orders certifying for interlocutory review her denial of the Secretary of Labor's amended motions to approve settlement in the captioned proceedings. On November 29, 2022, the parties submitted further amended motions to approve settlement.[1] On December 7, 2022, the Judge issued an order denying those motions and certifying her denial for interlocutory review. *See* 29 C.F.R. § 2700.76(a)(1)(i).

The Judge denied the November 29, 2022, settlement motions because she concluded that the submitted facts could not support a finding that the settlement terms were fair, reasonable, appropriate under the facts, or protective of the public interest. *See Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016). Regarding Docket No. WEST 2022-0189, the Judge particularly noted the Secretary's failure to account for the seriousness of a violation or justify deletion of a significant and substantial designation. Regarding Docket Nos. WEST 2022-0267 and WEST 2022-0268, the Judge noted that the parties provided no factual support in moving to preserve several citations and vacate the rest, and found that the Secretary had abused his authority to vacate citations.

Commission Procedural Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission, and that the Commission may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law

[1] The Secretary of Labor submitted an amended motion to approve settlement for Docket No. WEST 2022-0189. As for Docket Nos. WEST 2022-0267 and WEST 2022-0268, the parties submitted a joint "Stipulation of Dismissal" in which Genesis Alkali stated it was withdrawing its contest of seven citations and the Secretary stated he was vacating the remaining eighteen citations. The Judge interpreted this filing as an amended motion to approve settlement.

and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

In light of the parties' subsequent filings, the Judge's November 17, 2022, certifications for interlocutory review are moot.

Upon consideration by the Commission, the Judge's December 7, 2022, certification for interlocutory review is accepted. The Commission hereby grants interlocutory review on the issue of whether the Judge abused her discretion in denying the November 29, 2022, motions to approve settlement. The Secretary shall file an opening brief with the Commission within 30 days of this order. If the operator wishes to file a brief, it shall file that brief 30 days after the filing of the Secretary's brief.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
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December 15, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. RULON HARPER CONSTRUCTION, INC.	Docket No. WEST 2022-0249 Docket No. WEST 2022-0250 A.C. No. 42-02078-554812

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2018). On December 12, 2022, a Commission Administrative Law Judge issued an order certifying for interlocutory review her denial of the Secretary of Labor's amended motions to approve settlement in the captioned proceedings. The Judge denied the settlement motions concluding that the submitted facts could not support a finding that the settlement terms were fair, reasonable, appropriate under the facts, or protective of the public interest. *See Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016).

Commission Procedural Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission, and that the Commission may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

Upon consideration by the Commission, the Judge's December 12, 2022, certification for interlocutory review is accepted. The Commission hereby grants interlocutory review on the issue of whether the Judge abused her discretion in denying the motions to approve settlement.[1] The Secretary shall file an opening brief with the Commission within 30 days of this order. If the

[1] These proceedings also involve the same question currently on review before the Commission in *Knight Hawk Coal, LLC*, Docket No. LAKE 2021-0160, which we include in our review of these proceedings.

operator wishes to file a brief, it shall file that brief 30 days after the filing of the Secretary's brief.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
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/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
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December 16, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. APPALACHIAN RESOURCE WEST VIRGINIA, LLC	Docket Nos. WEVA 2022-0301 WEVA 2022-0428 A.C. No. 46-08930-551112

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018). On approximately October 14, 2022, the Secretary of Labor filed motions to approve settlement in these proceedings. On December 13, 2022, a Commission Administrative Law Judge issued orders certifying for interlocutory review the question of whether the Secretary is obligated, upon a Judge's request, to supply orders issued pursuant to section 104(b) of the Act, 30 U.S.C. § 814(b), that are associated with citations in a docket before the Judge on a motion to approve settlement.

Commission Procedural Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission, and that the Commission may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

Upon consideration of the Judge's December 13 orders and the case records, we conclude that, because the Judge has yet to rule on the Secretary's motions to approve settlement, the Judge's certification for interlocutory review is premature. *See Cty Line Stone Co.*, 44 FMSHRC 507, 508 (July 2022).[1]

In *Perry County Resources, LLC*, 44 FMSHRC ___, No. KENT 2022-0024 (December 6, 2022), the Commission granted interlocutory review on the issue of "whether the Judge abused his discretion in denying approval of the settlement motion based on the Secretary's refusal to

[1] The Commission granted the Secretary's *second* petition for interlocutory review, filed after the Judge issued orders denying the Secretary's renewed motions to approve settlement. *Cty Line Stone Co.*, 44 FMSHRC 548, 549 (Aug. 2022).

provide a section 104(b) order that was associated with a citation that was a subject of the motion to approve settlement." In contrast, in these proceedings, the Judge has yet to issue an order either granting or denying the Secretary's motions to approve settlement.

For these reasons, we deny interlocutory review without prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

/s/ Timothy J. Baker
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August 30, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ALVARO SALDIVAR v. GRIMES ROCK, INC.	Docket No. WEST 2021-0178-DM

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2018) ("Mine Act").[1] On August 17, 2022, the Commission received from Grimes Rock, Incorporated ("Grimes Rock") a motion to stay the Administrative Law Judge's June 17, 2022 order enforcing the parties' settlement agreement for temporary economic reinstatement of miner Alvaro Saldivar. For the reasons that follow, we deny the operator's motion.[2]

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

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

[2] The Commission's denial of the motion to stay does not constitute a decision upon the merits of the issues currently on appeal in the Temporary Reinstatement proceeding.

1.
Factual and Procedural Background

Miner Alvaro Saldivar was terminated from his job at Grimes Rock in January 2021. The Secretary brought a section 105(c)(2) action on his behalf and sought temporary reinstatement. A Commission Administrative Law Judge granted the temporary reinstatement. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc*., 43 FMSHRC 287 (May 2021) (ALJ). Grimes Rock appealed, and the Commission affirmed the Judge's order on June 11, 2021. *Sec'y on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 307 (June 2021). While the appeal was pending, the parties agreed to temporary economic reinstatement, and the Judge approved the agreement on May 28, 2021. Under the agreement, because Saldivar had found work with another employer, Grimes was responsible for paying the difference between Saldivar's earnings at his present job and his earnings at Grimes Rock. Unpublished Order at 1 (May 28, 2021). The agreement was silent on what would happen if Saldivar no longer had other employment to offset Grimes Rock's payments. In July of 2021, the Secretary filed a complaint for discrimination on Saldivar's behalf.

While the parties awaited the Judge's decision on the merits of Saldivar's discrimination complaint, Saldivar was incarcerated and unavailable for work on two occasions. During these periods, Grimes Rock's payments were tolled pursuant to Saldivar's unavailability. After Saldivar's first incarceration, Grimes filed a motion to toll or terminate temporary reinstatement, which the Judge denied. Grimes appealed the decision, and it is currently pending before the Commission.

After Saldivar was first released, around November 2021, Grimes Rock resumed making payments, but there is dispute about what was owed pursuant to the temporary reinstatement. After the miner was released the second time in May 2022, Grimes Rock did not resume making payments. On May 27, 2022, the Secretary filed with the Judge a motion to enforce temporary reinstatement, which was granted on June 17, 2022. The Judge ordered Grimes Rock "to pay Saldivar the full wages as ordered in the Reinstatement Order during the periods of his availability to work between May 18, 2021 and June 17, 2022, offset by his wages earned from alternative employment during that period." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc*., 44 FMSHRC___, slip op. at 3, No. WEST 2021-0178, 2022 WL 2290543, (June 17, 2022). Simultaneous with her order granting enforcement, the Judge issued her decision in the merits case finding that Grimes Rock did not violate the discrimination provisions of the Mine Act and terminating temporary reinstatement as of the date of the decision.[3]

Grimes appealed the Judge's order granting the Secretary's motion to enforce on July 13, 2022, and the appeal is currently pending before this Commission. On August 15, 2022, MSHA issued a section 104(a) citation to Grimes for violating the Judge's order to enforce temporary reinstatement. 30 U.S.C. § 814(a). On August 17, 2022, Grimes Rock filed for immediate stay of the Judge's June 17 order granting enforcement.

---

[3] *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc*., 44 FMSHRC___, slip op. at 15, No. WEST 2021-0265, (June 17, 2022), 2022 WL 2290545.

II.
Disposition

Commission Procedural Rule 45(f) provides that, with respect to an order granting temporary reinstatement, "[t]he filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances." 29 C.F.R. § 2700.45(f); *Sec'y of Labor on behalf of Shaffer v. The Marion County Coal Co*., 40 FMSHRC 39, 45 (Feb. 2018); *Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2386 (Oct. 2011).

In *Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc*., 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay pending review of a temporary reinstatement decision or order must make an adequate showing with respect to the four factors set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958). These four factors are: (1) a likelihood that the moving party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. 259 F.2d at 925; *see also UMWA on behalf of Franks & Hoy v. Emerald Coal Res., LP*, 35 FMSHRC 2373, 2374 (Aug. 2013). The Commission made clear that a stay constitutes "extraordinary relief." 35 FMSHRC at 2374; *see also W.S. Frey Co.*, 16 FMSHRC 1591 (Aug. 1994). The burden is on the movant to provide "sufficient substantiation" of the requirements for the stay. *Stillwater Mining Co*., 18 FMSHRC 1756, 1757 (Oct. 1996).

We conclude that Grimes Rock has failed to demonstrate "extraordinary circumstances." We, therefore, deny its motion to stay.

A. Likelihood that Grimes Rock will prevail on appeal

Grimes Rock argues that the Judge retroactively modified the parties' settlement agreement by requiring the operator to pay the full reinstatement amount after Saldivar no longer had other employment, which was more than the agreed upon amount (the difference between Saldivar's earnings at his present job and his earnings at Grimes Rock). GR Mot. to Stay. at 6. It asserts that the Judge improperly interpreted the agreement to include implied terms that should only have been considered upon the Secretary's proper filing of a motion to modify the existing order. *Id*. at 6-7.

The operator's argument of retroactive modification is not sufficiently persuasive. This is especially so given the purpose of the temporary reinstatement provision, which is to put the miner, during the time he pursues his discrimination claim, in no worse a position than he was while working for the operator. *See North Fork Coal Corp*., 33 FMSHRC 589, 597-98 (Mar. 2011). Grimes Rock provides state contract law in furtherance of its contention, but it neglects to discuss this state law in the context of the Mine Act's temporary reinstatement provision. In fact, it completely fails to offer any support from the Mine Act or mine safety case law to support its argument. GR Mot. to Stay at 6-7. For purposes of this Motion to Stay, we conclude that it was not unreasonable for all involved to assume that in the event Saldivar were no longer

employed elsewhere, Grimes Rock's payments would automatically revert to the full amount under the Judge's Order, consistent with the purpose of temporary reinstatement. Thus, we conclude that the operator has not sufficiently substantiated its likelihood of prevailing.

However, even if Grimes Rock were to prevail on its argument that the Judge erred by retroactively modifying the parties' agreement, a stay is not warranted because Grimes Rock fails to establish the remaining three *Virginia Petroleum* factors. As the Commission has recognized, where a probability of success on the merits is established, an inadequate showing with regard to the other three factors nevertheless still prevents the grant of a stay pending review. *See Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 811, 812–13 (Apr. 2013) (citing *Virginia Petroleum*, 259 F.2d at 926).

B. Irreparable harm to Grimes Rock if Stay is denied

Grimes Rock argues that it will have no recourse to get its money back should it prevail on its appeals. GR Mot. at 7-8.[4] This argument too must fail. "It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Virginia Petroleum*, 259 F.2d at 925 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."); *Rodriguez*, 35 FMSHRC at 813. Moreover, the fact that Grimes Rock ultimately prevailed in the discrimination proceeding does not change the outcome here. As we have previously stated, to accept this argument "would effectively nullify the temporary reinstatement provisions of the Mine Act." *North Fork*, 33 FMSHRC at 597. Reinstated miners often are not ultimately successful on the merits of their discrimination claims, even when their claim is brought by the Secretary pursuant to section 105(c)(2). *Id.*; *Baird v. PCS Phosphate Co*., 33 FMSHRC 127, 129-30 (Feb. 2011). There is nothing in the Mine Act which contemplates that the miner would be expected to repay the amounts paid pursuant to the reinstatement order. *North Fork*, 33 FMSHRC at 597. Indeed, that would run counter to the intent of the provision, which is to provide immediate relief to a complaining miner while he or she waits for the case to be decided. *Id*.

In this case, the operator chose to forego the services of the miner and opted for economic reinstatement instead. As the Secretary points out, had Saldivar been temporarily reinstated to his work at the mine, the operator would not have been able to recoup the wages paid for his labor. The result is the same for temporary economic reinstatement. Furthermore, we have held that "if the operator chooses to pay the miner while foregoing the miner's labor, there is no right for the operator to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim." *Id.* at 593.

[4] Grimes Rock also contends that if there is no immediate stay, it will be subjected to every punishment and fine the Secretary can assert for non-compliance with an order that is before the Commission on appeal. GR Mot. to Stay at 7. However, the operator can properly challenge any citation or order before a Commission Administrative Law Judge in accordance with 30 U.S.C. § 815(a).

C. Adverse effect on Miner Saldivar

Grimes Rock argues that the Commission should find that the minimal amount of time Saldivar will have to wait for the Commission to decide the pending appeals pales in comparison to the significant amount of money the operator stands to lose. GR Mot. to Stay at 8-9. However, the temporary reinstatement provision was intended to protect the miner not the operator. In enacting the Mine Act, Congress stated the essential reasoning behind the temporary reinstatement remedy: "The Committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Rep. No. 95-181, at 37 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978) ("Legis. Hist.").

Here, Mr. Saldivar was lawfully awarded temporary reinstatement by a Commission Judge under the Mine Act, while he awaited resolution of his discrimination complaint. As previously stated, the purpose of the temporary reinstatement provision is to put the miner, during the time he pursues his discrimination claim, in no worse a position than he was while working for the operator. *See North Fork*, 33 FMSHRC at 597-98. Because Saldivar has not received the full wages he would have received if he had still been working at Grimes Rock, as contemplated by the Mine Act, this Commission cannot conclude that he would not be adversely affected.

D. Public interest

Grimes Rock argues that no public interest will be served by forcing it to pay Saldivar additional wages when the Judge has already determined that the miner was properly discharged. It asserts that "[e]xtorting" $12,533 may be in the best interest of the miner but not in the interest of the public. GR Mot. to Stay at 9.

First, the outcome of a discrimination proceeding has no bearing on the outcome of the temporary reinstatement proceeding. *See Grimes Rock*, 43 FMSHRC at 303 ("[T]he requirements for a full discrimination proceeding do not affect the 'not frivolously brought' standard in a temporary reinstatement case."). This is so even after the discrimination case has been decided and the temporary reinstatement case remains ongoing pursuant to an order of temporary reinstatement issued prior to the dissolution of the merits case.

Second, while the operator is correct that it is in the best interest of Saldivar to allow the enforcement order to proceed, we do not agree that such outcome is not also in the public's interest. Congress "clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 n.11 (11th Cir. 1990). The legislative history of the Mine Act indicates that section 105(c)'s prohibition against discrimination is to be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36, Legis. Hist. at 624. There is a clear public interest in protecting miners' temporary reinstatement rights. *See also Rodriguez*, 35

FMSHRC at 814. We thus conclude that the public interest is best served by denying a stay of the temporary reinstatement order, as opposed to granting the stay, which would only serve Grimes Rock's private interest.

III.

Conclusion

Miner Saldivar's ultimate failure to succeed in his discrimination case does not invalidate his previous award for temporary reinstatement, nor does it place him outside of the scope of miners contemplated by Congress in enacting the temporary reinstatement provision. Because Grimes Rock failed to demonstrate requisite extraordinary circumstances for the reasons discussed above, we deny the operator's motion to stay.

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

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 1, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), and JASON HARGIS, Complainants, v. VULCAN CONSTRUCTION MATERIALS, LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. SE 2022-0001 MSHA No. BARB-CD-2021-02 Mine ID. 40-00131 Mine: Wilson County Quarry
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. VULCAN CONSTRUCTION MATERIALS, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2022-0013 A.C. No. 40-00131-543032 Mine: Wilson County Quarry

DECISION AND ORDER AFTER HEARING

Appearances: Christopher M. Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner

Elaine M. Youngblood, Esq., Ortale Kelley, Nashville, Tennessee, for the Complainant

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, PC, Washington, District of Columbia, for the Respondent

William K. Doran, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, PC, Washington, District of Columbia, for the Respondent

Before: Judge Young

SUMMARY

Citation No. 9237452, 30 C.F.R. § 50.20(a): Failure to report an occupational injury as defined in 30 C.F.R. § 50.2(e). The Secretary alleges that the operator failed to report an injury that rendered the miner unable to perform all job duties on any day after the injury.

Fact of violation	Affirmed	p. 15 (Slip Op.)
Negligence	High	p. 18
Penalty	$300.00	p. 18

Complaint BARB-CD-2021-02, 30 U.S.C. § 815(c)(1): Discrimination against miner for exercise of rights protected under the Mine Safety and Health Act of 1977, as amended ("The Mine Act" or "The Act."). The Secretary alleges that Complainant was terminated for requesting to see a physician for treatment of an occupational injury, in violation of the Act.

Fact of violation	Dismissed	p. 18

INTRODUCTION

The above-captioned dockets were heard in Nashville, TN, April 12–14, 2022.[1] The Secretary alleges that the operator had failed to report an occupational injury, in violation of Section 50.20(a) of Title 30 of the Code of Federal Regulations, and that the operator had discriminated against miner Jason Hargis ("Complainant") for reporting his injury and requesting treatment by a physician, in violation of Section 105(c)(1) of the Mine Act. As explained below, I affirm the citation for failing to report an injury as required, but I hold that the operator did not discriminate against the Complainant under Section 105(c) of the Act.

I. STANDARDS

A. Burden of Proving Violation

The Secretary must prove the elements of an alleged violation by a preponderance of the evidence. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

B. Requirement to Report an "Occupational Injury"

The Secretary has defined an "occupational injury" as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary reassignment to other duties, or transfer to another job." 30 C.F.R. § 50.2(e) (2022). Operators

[1] Mr. Hargis filed a timely complaint of discrimination on June 7, 2021. Compl. ¶ 8. The Secretary found that Mr. Hargis' complaint for discrimination was not frivolously brought, and upon agreement of the parties, I entered an order temporarily economically reinstating him, effective July 27, 2021. Tr. 14:11–25.

"shall report each accident, occupational injury, or occupational illness at the mine." 30 C.F.R. § 50.20(a) (2022).

C. Discrimination

To prove that an operator has discriminated against a miner in violation of the Act, the Commission has required the Secretary (or an individual miner or applicant, if proceeding under section 105(c)(3)) to establish that the miner engaged in protected activity; that the miner suffered an adverse job action; and that the adverse action was motivated, in whole or in part, by the protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799–80 (Oct. 1980), *rev'd on other grounds sub nom.*, *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *see also Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 317–18 (6th Cir. 2013) (citing *Pendley v. FMSHRC*, 601 F.3d 417, 423 (6th Cir. 2010) (applying *Pasula-Robinette* to cases within the Sixth Circuit).[2] If this prima facie case is established, the operator may affirmatively defend against the charge of discrimination by proving that it would have taken the adverse action regardless of the miner's protected activity. *Id.* The miner may then rebut the defense by showing that it is pretextual. *Id.* The ultimate burden of proof does not shift under this analysis and remains with the Complainant. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064–65 (May 2011).

II. FACTS

A. Background, Witnesses, and Evidence

Respondent, Vulcan Construction Materials ("VCM" or "Respondent"), operates numerous aggregate and construction material mining, quarrying, and processing facilities throughout the United States. The mine at issue here is the Wilson Quarry, an aggregate facility in Wilson County, TN. Respondent's operations in the area including the Wilson Quarry include seven quarries and a truck shop. Tr. 502:1–4. Complainant had been employed as a miner at the Wilson Quarry.

The parties stipulated to all facts necessary to establish jurisdiction over this case and my authority to hear and decide it. S. Post Hr'g Br. at 3–4 (July 5, 2022). They also stipulated that Respondent discharged Complainant from employment on May 12, 2021. *Id.* at 4.

The Secretary called as witnesses Complainant, several of his co-workers at the mine, and two employees of the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA," "the Secretary" or "the Agency"). Complainant also called Respondent's safety director, Brandon Clemmons. Respondent's witnesses included Vulcan's area operations

[2] The Ninth Circuit recently decided that Commission discrimination cases must apply the standard established by the U.S. Supreme Court in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013). *Thomas v. CalPortland Co.*, 993 F3d 1204, 1210–11 (9th Cir. 2021). It is unknown whether the Commission will apply the *Gross-Nassar* standard to all cases within its jurisdiction, or only to cases in mines within the Ninth Circuit.

manager for the area including the Wilson Quarry, Philip Ellis; Mr. Clemmons; the company's human resources manager, Rex Lindsey; former plant manager, Anthony Humes; and current supervisor, Chris Williams.

In addition to the miner witnesses who testified at hearing, Complainant introduced two statements made to MSHA Special Investigator Kenneth McClung. The witnesses, former miners Kenny Hurst and Pat Woods, were subpoenaed by the Secretary. *See* Tr. 474:8–488:20.[3]

The Secretary appears to have properly issued and served subpoenas for these witnesses but did not inform the Court that they were unavailable until the Solicitor sought to introduce their written statements as exhibits. The Solicitor said that efforts to reach the witnesses had been unsuccessful. These hearsay statements were admitted over Respondent's objections. However, I noted that the unavailability of the witnesses could affect the weight I would give to the statements. Tr. 480:17–22, 482:6–9.

I credit the statements only to the extent that they are corroborated by other evidence and are not cumulative. First, there is hearsay within hearsay in some of the material statements made by the declarants. Second, some of the persons quoted in those statements were witnesses at the hearing and available to be cross-examined, but neither the Solicitor nor the Complainant produced admissions from the operator witnesses, and even the use of leading questions did not produce full support for the Secretary's theory from miner witnesses.

Third, the statements chosen by the Secretary for emphasis in his post-hearing brief were not the focus of the somewhat limited questioning of Special Investigator McClung. This prevented the operator from effectively cross-examining the witness who was present about the statements.

Finally, there was extensive discovery in this case. Uncorroborated statements purporting to show a general discouragement of reporting injuries or alleged targeting of Complainant, based largely on the subjective "personal belief," speculation, or sweeping generalizations of Mr. Hurst and Mr. Woods, is insufficient to counter the weight of the evidence that was gathered beforehand and presented by actual witnesses at the hearing.

Complainant was represented by an attorney from the Department of Labor's Office of the Solicitor as well as his own attorney. The parties introduced numerous exhibits during the three-day hearing. I have carefully considered all the evidence admitted at the hearing in deciding the issues before me.[4]

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[3] Mr. Hurst was personally served. Mr. Woods was served by certified mail. *Id.* at 487:11–488:20. The return receipt was returned and included with the subpoena as an exhibit; however, the receipt was unsigned. *Id.*

[4] Where necessary or appropriate, I have noted in my decision specific factors I considered in making credibility determinations or assigning weight to testimony or exhibits. The failure to do so for each witness or exhibit does not indicate that I did not fully weigh and evaluate all evidence in the record.

B. Complainant's Employment, Injury, Protected Activity, and Termination

1. Complainant's Work and Disciplinary History

Complainant was employed by VCM at the Wilson County Quarry from August 2018, until he was discharged on May 12, 2021. Compl. ¶ 3 (Oct. 1, 2021); Tr. 11:3–12. He mainly worked as a plant operator during the time relevant to this proceeding. Tr. 305:24–25. As plant operator, he controlled the operation of the plant, the crushing machinery used to break and size rocks mined at the quarry. *Id.* at 306:3–25. He was also responsible for cleaning and maintaining an area assigned to him under the company's "zone" policy. *Id.* at 348:22–24. As part of his duties, he was responsible for lubricating, or "greasing" the bearings daily. *Id.* at 415:1–11.

At hearing, miner witnesses praised Complainant's performance, testifying that he "did a good job" running the plant and that he was a highly efficient plant operator. Tr. 60:21. Mr. Ellis, VCM's area manager, agreed that Complainant operated the plant during its most productive period. *Id.* at 599:4–12.

Witnesses also testified that Complainant had a pleasant personality. One witness called him "one of the nicest guys I've ever met." Tr. 222:2–3. Another witness said he was a "normal, regular person," who was "not threatening" and always pleasant. *Id.* at 144:13–17. A third witness described him as "a big teddy bear" and "a pretty cool guy." *Id.* at 261:5–6.

During his employment as plant operator, Complainant worked under two direct supervisors, Kyle "K.B." Parr and Chris Williams, who worked as a fill-in supervisor following Mr. Parr's resignation. As plant manager, Anthony Humes managed the plant supervisors and was himself supervised by Area Manager Philip Ellis. At hearing, Complainant testified that Mr. Parr was a poor supervisor and that the miners felt "targeted" by management (micromanagement and disagreement with miners' complaints about it). Tr. 367:14–18.

Miners also generally agreed with Complainant's assessment of Mr. Parr as someone who did not know what he was doing. They testified that Mr. Parr was constantly urging Complainant to "run the plant hard," and noted that Complainant's discipline from Mr. Parr for failure to clean was imposed while the plant was old and in poor condition, causing constant leakage (although repairs were made to improve this). *See* Tr. 243:6–22 (testimony of Mr. Stultz).

Complainant acknowledged that greasing the equipment daily, which took about 35 minutes, was his job and that it was necessary to prevent damage to the equipment. Tr. 415:1–20. He said that he had been counseled about the need to clean more thoroughly, that he disagreed with Mr. Parr about this, and that he did not change what he was doing in response to Mr. Parr's input. *Id.* at 408:18–409:17.

Complainant also testified about his employment record. He said that he had been given a pay raise in April of 2021, shortly before being terminated. Tr. 343:20–24.[5] He also testified about a previous injury. Complainant said he had been hurt on the job while operating a skid steer. He testified that Mr. Ellis and Mr. Clemmons were both personally concerned, investigated the incident, and put Complainant on light duty. *Id.* at 326:14–327:14.[6]

Mr. Clemmons said this was done because the plant was down for maintenance and not because Complainant could not perform his duties. Tr. 466:25–467:4, 739:22–740:7. Complainant also said that Mr. Clemmons had asked him what they could do to keep him from going to the doctor after the skid steer injury. *Id.* at 324:25–325:8. Mr. Clemmons denies saying this. *Id.* at 740:8–10.

Before his discharge, Complainant had previously been disciplined under the company's progressive discipline policy, under which employees were verbally warned, then given a written warning, followed by a second written warning and three-day suspension. Ex. GX-7, 8. The second written warning provides that the employee may be terminated for any subsequent violation of company policies. Ex. GX-8.

Complainant's disciplinary issues were not related to his primary duties as plant operator. Rather, they stemmed generally from failures to completely clean and grease areas and equipment for which he was responsible before leaving work.

Complainant received his first written warning by Mr. Parr on Dec. 4, 2020. Tr. 347:8. He wrote on the warning notice, "I do not agree," and testified that he had told Mr. Parr it was not possible to clean his area "spotless" every day. *Id.* at 348:2–349:11. He said that sometimes the power would be shut down, and cleaning could not be accomplished. He also noted that some areas were rarely travelled. *Id.* at 349:12–25.

After he was cited by Mr. Parr, Complainant and others began taking photographs of their areas to document that they had been cleaned. Ex. GX-5; Tr. 207:11–25, 351:13–16. Complainant provided photographs at hearing. Ex. GX-5. He admitted, on cross-examination, that he did not take photographs of his area every day. Tr. 413:17–25.[7] Complainant testified that it was "obvious that [Mr. Parr] used this to start a paper trail to terminate me." *Id.* at 355:15–17.

Complainant received his second written warning on Feb. 8, 2021, for leaving work before the end of the shift without permission on Feb. 1. Complainant and other witnesses who

[5] Complainant's raise was $0.53/hour, from $19.10 to $19.63. Ex. GX-11. Mr. Ellis testified that comments made in the review process should have led to a reduced rating, and that the raise was made in error. Tr. 559:13–561:6. The recommendation and pay raise decision predated the injury and protected activity in this case and have no bearing on the outcome.

[6] Complainant had not requested to see a doctor for this incident. Tr. 443:16–25.

[7] None of the photographs were taken on any of the days for which Complainant had been disciplined for failing to clean his area.

were on the crew testified that on that day, Mr. Williams had stopped to talk to them and had told them that they could leave once the graduation pad was cleaned. *Id.* at 365:15–23. Witnesses said that finishing the cleaning of the pad was a two-person job. *Id.* at 168:14. The truck used for this purpose employed a high-pressure water cannon, and miners in the area not handling the cannon or in the truck could be in danger of injury. *Id.* at 359:8–11.

Complainant and Mr. Evans left before the crew completed its work cleaning the pad, and all four miners left before 4:30 p.m. Tr. 247:15–16. The miners who remained said that they completed the cleaning job. *Id.* at 249:16–17. Complainant was nevertheless given his final written warning and a three-day suspension. *Id.* at 356:24–357:2; Ex. GX-8. Complainant testified that there was no known policy requiring miners to leave together prior to February 2. Tr. 365:5–8. He said that he waved to Mr. Humes, his second-level supervisor, as he left. *Id.* at 361:1–9.[8]

Mr. Humes acknowledged seeing Complainant leave and waving to him, but he said he did not know what Mr. Williams had told the crew and would have stopped him if he had known. Tr. 621:13–622:12. Clint Evans was also on the crew and was threatened with a verbal warning but disputed it, and it was withdrawn after he argued to Mr. Williams that nobody had told the crew there was a set schedule. *Id.* at 169:5–16.[9]

Mr. Williams disputed the crew's account of events and said they had not finished cleaning the area as he had instructed and that he had to clean it himself. Tr. 768:7-8, 769:4–14.[10]

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[8] Complainant testified that Mr. Humes was on the phone when he waved to him.

[9] The evidence as to whether Mr. Evans was disciplined or merely counseled is ambiguous. Mr. Evans said Mr. Williams called him to the office and told him he was getting a verbal warning for leaving work early. Mr. Williams' testimony is unclear about whether Mr. Evans was disciplined, while Mr. Evans said that he argued that it was unfair to punish him. Tr. 170:16–25. He said that Mr. Williams relented, telling Mr. Evans not to worry about it, and that the discussion was "just us talking." *Id.* at 189:1–4. Mr. Evans had no disciplinary history at the time. *Id.* at 185:7–10. I credit his account of the meeting, which is fairly detailed and consistent with his work history. I also infer from Mr. Evans' account that Mr. Williams called him to the office with the intent to discipline him for leaving work early. Complainant had already been issued his second written warning and suspension when Mr. Evans met with Mr. Williams. *Id.* at 180:11–14.

[10] It is difficult to assess Mr. Williams' credibility as a witness. No witness had anything negative to say about his character, and in fact the miner and operator witnesses spoke very highly of his personal qualities and his ability as a supervisor. However, Mr. Williams was often a poor witness. His recall of events was uneven. His testimony contradicted itself at times. He was combative and argumentative over even minor points. His testimony disagreed with that of other witnesses who seemed credible and were generally disinterested. On the other hand, many of the important facts he testified to are either corroborated or unrebutted and consistent with other witnesses' accounts.

(continued…)

The next day, Mr. Williams told Mr. Humes that the miners had left early without cleaning the area and that Complainant had left work early, and he testified that he communicated his "frustration" to Mr. Humes. *Id.* at 769:18–23.

Mr. Humes said Mr. Williams told him the crew had been told not to leave until 4:30. Tr. 621:25–622:2. He said Mr. Williams was "kind of adamant" about wanting Complainant and Mr. Evans to be disciplined. *Id.* at 624:1–6. He insisted on meeting with human resources, and after he and Mr. Humes met with HR, the notice of suspension was prepared and overnighted to Mr. Humes, who gave it to Complainant the next day. *Id.* at 624:8–14.

While Complainant disagreed with the disciplinary actions against him and his supervisors' views on cleaning and greasing, Respondent produced evidence supporting its reasons for taking seriously the zone cleaning and greasing responsibilities assigned to Complainant. MSHA Special Investigator McClung acknowledged that a violation of the requirement to keep areas where miners work and travel clean and free from debris, codified as a mandatory safety and health standard, 30 C.F.R. § 56.20003 (2022),[11] could result in an S&S citation to the operator. Tr. 490:7–491:5.

Operator witnesses also testified about serious damage to the plant machinery caused by a failure to properly grease the equipment. There was a "catastrophic" failure of the rotor bearings in November 2020. Tr. 546:15–547:21. This required a "very costly" and extensive repair. *Id.* Inspection revealed that the bearings were "charred and smoked" due to a lack of grease. *Id.* at 547:17–21. Respondent attributed the failure to Complainant. *Id.* at 547:15–17, 615:1–14.

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[10] (…continued)

I note that counsel for Respondent told the Court Mr. Williams would be late for the hearing on the day of his testimony because he had been essentially trapped on his property by trees that had fallen in the previous evening's severe thunderstorms. There were in fact numerous downed trees in the local area following the storm, which was prolonged and powerful. When he arrived at the hearing, Mr. Williams was flushed, and his clothes were dirty and torn. He appeared to be highly agitated. He testified that he was uncomfortable as a witness adverse to his brother-in-law. I do not find that he was an untruthful or generally unreliable witness, but in some instances, I have not credited his testimony where it disagrees with others.

[11] The provisions of the standard relevant here require that:

> At all mining operations—(a) Workplaces, passageways, storerooms and service rooms shall be kept clean and orderly; (b) The floor of every workplace shall be maintained in a clean, and so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable . . . .

30 C.F.R. § 56.20003(a)–(b).

2. Management Issues at the Wilson Quarry

Mr. Parr was the plant supervisor until he resigned from VCM. Mr. Humes was the plant manager during Complainant's employment through his termination, until being terminated himself. Mr. Humes testified at the hearing, and Mr. Parr did not.

Complainant complained about management generally, saying that Mr. Parr had "no clue" about plant operations, and that the miners generally felt "targeted" by micromanagement and disagreement with miners' complaints about it. Tr. 367:14–18. Complainant, like other miners, said that Mr. Parr had threatened to replace him and testified about Mr. Humes threatening to fire and replace the entire crew. *Id.* at 368:4–5.

The miner witnesses who testified also complained generally about Mr. Humes and Mr. Parr. Their testimony about Mr. Williams, who succeeded Mr. Parr at the Wilson Quarry after being temporarily reassigned there from another VCM operation, was generally positive.

Miners criticized Mr. Parr's ability as a manager. Andrew Tucker said Mr. Parr didn't know what he was doing. Tr. 59:2–11. Mr. Dycus characterized him as a "write-up happy person" who would try to "write people up for anything and everything." *Id.* at 207:3–8. Mr. Stultz said he was a "very bad man." *Id.* at 241:23.[12] Mr. Tucker said, "I think at one point in time, we all felt targeted" by Mr. Parr, *id.* at 65:14, and that he thought Mr. Parr was trying to create a "paper trail" against Complainant, *id.* at 64:24–25. He could not recall anything else that he would characterize as Respondent "targeting" Complainant. *Id.* at 65:16–19.

Mr. Dycus also testified that it "seemed" like Mr. Parr was targeting Complainant. Tr. 242:18–20. But he also said, "I believe that during that time period, every person was targeted by Anthony Humes." *Id.* at 256:13–15.

Mr. Tucker also testified that Mr. Parr had asked him to falsify a document, Tr. 61:3–12,[13] and that he believed Mr. Parr falsified the document himself, and witnesses generally believed he had resigned after the company opened an investigation into the incident. *Id.* at 113:19–114:7. Mr. Tucker discussed the incident in detail with Mr. Ellis, who said Mr. Parr resigned, and that he assumed that Mr. Tucker's complaint had been accurate. *Id.* at 570:17–571:19.

After Mr. Parr resigned, Anthony Humes assumed his duties. Miners were unhappy with him as well. Mr. Tucker said he first reported Mr. Parr's request to falsify the examination report to Mr. Clemmons because he said he did not trust Mr. Humes to act on them. Tr. 75:5–24. However, he also said his disagreements with Mr. Humes were never about safety, and that Mr. Humes never asked him to do anything unsafe. *Id.* at 101:8–13.

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[12] Mr. Stultz backtracked from this assessment, somewhat. Tr. 242:3–9.

[13] Subsequent testimony made clear that he was referring to a safety examination report concerning some guards that had not been repaired. Tr. 72:16–73:14.

Mr. Tucker and several other miner witnesses cited an incident in which Mr. Humes told the workforce that he would "fire everybody and start over himself." Tr. 64:1–21. He was characterized by Mr. Ellis and Mr. Lindsey as not being a good fit for the company. Mr. Ellis cited the company's desire to move to more "positive, coaching style" of management, and that Mr. Humes' focus on criticizing miners and style of communicating was "not appropriate." *Id.* at 566:1–14. He also cited input received directly from Mr. Stultz, in particular, about Mr. Humes' management. *Id.* at 567:20–25. Mr Ellis also testified about an incident in which Mr. Humes had said something inappropriate over the company radio. *Id.* at 568:7–11.

Mr. Ellis also cited several calls from miners and from Mr. Lindsey after Mr. Humes threatened to fire the whole workforce. Tr. 569:1–570:15. Mr. Humes was counseled and apologized for those remarks. *Id.* at 570:10–15. After Mr. Ellis was told about the radio incident, Mr. Ellis consulted with Mr. Lindsey and others in the company and made the decision to terminate Mr. Humes in July of 2021. *Id.* at 565:1–22.

While miners criticized Mr. Humes, they did not all agree that he was "targeting Complainant." *See* Tr. 85:24–86:5, 111:10–14 (testimony of Mr. Tucker); *id.* at 125:32–136:4 (testimony of Caleb Walker that Mr. Humes was reportedly out to fire him and Mr. Tucker). But Mr. Dycus testified that Mr. Humes had told him, while Complainant was on medical leave, that he would be replacing Complainant as plant operator. *Id.* at 208:17–24.

Mr. Dycus said his experience with Mr. Humes was "horrible." Tr. 219:15. Mr. Stultz said of Mr. Humes, "To be quite frank, he was a jerk." *Id.* at 257:22–25. He said he had felt personally targeted by Mr. Humes and had complained about him to senior management. *Id.* at 258:1–4.

Other miners were apparently comfortable complaining to management about their supervisors. Mr. Tucker said he contacted the company's HR manager and Mr. Ellis after Mr. Humes threatened to fire everybody. Tr. 148:12–22. Mr. Tucker complained to Mr. Clemmons and Mr. Ellis about Mr. Parr's pressuring him to falsify an examination report.

Mr. Williams was brought to the Wilson Quarry and assumed supervisory responsibility over the plant. Miners were "not happy" with the "zone" policy holding them accountable for a particular area, Tr. 102:25–103:13, but they generally respected and got along with him. *See id.* at 103:5–7 (testimony of Mr. Tucker). Miners agreed that he was trying to improve housekeeping and plant maintenance. *See id.* at 104:11–105:24. Mr. Dycus said Mr. Williams was a "great supervisor." *Id.* at 219:14–23. Mr. Stultz was also complimentary. *Id.* at 259:5–8.

Mr. Ellis also praised Mr. Williams. When asked what he thought about Mr. Williams as a supervisor, Mr. Ellis testified:

> I think Chris Williams is a great person. He -- he cares about the people that work for him. He likes to help people out. His style is leading by example. He -- in some instances, he's probably too involved. He gets into every issue and -- but I think

> Chris to be in a lot of ways a manager like I am suggesting Vulcan wants to encourage

Tr. 572:3–15.

While they were critical of their supervisors, the miner witnesses generally testified that Respondent was a safety-conscious operator. *See* Tr. 79:13–16 (testimony of Mr. Tucker saying the company's "biggest goal is to work safe and stay safe," and that the company did not have any major injuries during his seven years at the quarry). This included Complainant, who agreed that the "company, as a whole, if you brought up anything safety-wise that was dangerous, they would address them [sic] as quickly as they could." *Id.* at 397:25–398:2.

No evidence was introduced from which one could infer that any miner had ever been disciplined by Respondent for anything related to safety. On the contrary, Mr. Dycus said that Mr. Parr and Mr. Humes spread rumors about him having called MSHA to "stir up trouble," but that he was never disciplined for anything, although he did leave his job at the Wilson Quarry. Tr. 195:15–199:15.

Miner witnesses speculated that miners were put on light duty or sent to the break room to avoid reporting injuries. *See* Tr. 199:22–200:5 (testimony of Mr. Dycus); *id.* at 117:3–16 (testimony of Mr. Tucker). But there was testimony that this was used to see if the injury would get better, and that it was assumed that a miner would see a doctor if it did not. *See id.* at 130:23–131:8 (testimony of Mr. Walker).

3. Complainant's Injury, Request to See a Physician, and Discharge

Complainant testified that he was injured on Saturday, April 10, when passing liner plates to a co-worker, Andrew Tucker, who was working inside the crusher. Tr. 314:4–19. The plates weighed 35–50 pounds each, and Complainant had to reach, lean, and twist to pick up the plates and pass them into the crusher for installation. *Id.* at 315:3–16.

After completing his work with the crusher plates, Complainant said he mentioned to Chris Williams, his direct supervisor,[14] and Mr. Tucker that "something really hurt" in his back, but he did not immediately report an injury. He said that the injury, when it occurred, was "not immediately debilitating," and that he did not think it was serious at first. Tr. 314:14–316:6, 425:6–9.

Complainant said that he reported to Mr. Williams on Monday, April 12, that his injury was more serious than he thought, and that it was not responding to heat and ice. Tr. 316:11–25. He said he told Mr. Williams at this time that he needed to see a doctor, and that Mr. Williams told Complainant he "would get it turned in" to upper management. *Id.* at 317:6–20. Complainant further testified that Mr. Williams instructed him to "run the plant and do nothing else" that afternoon. *Id.* at. 317:22–24.

[14] Mr. Williams is also Complainant's brother-in-law. He said their relationship is not strained but that they are not close. Tr. 431:7-13.

On April 14, his last day of work before medical leave for his cardiac procedure, Complainant had a text message exchange with Mr. Clemmons. Mr. Clemmons asked about Complainant's condition, and Complainant replied that his back still hurt, and that Mr. Williams had told him to only run the plant and to do nothing else. Ex. GX-9. Mr. Clemmons acknowledged Complainant's response. *Id.* Complainant testified that his injury made running the plant uncomfortable and that other tasks, such as cleaning and greasing, were "very painful" to "unbearable." Tr. 323:2–12.

On direct examination, Complainant testified that the operator was striving for "zero [reportable] incidents," and that there was a general sense that reporting injuries was discouraged. Tr. 328:4–14. He said that miners "were discouraged from reporting any type of injury" short of profuse bleeding or broken bones. *Id.* at 324:8–17.

In contrast, Mr. Clemmons testified about a number of documented cases in which a miner had been injured and had requested to see a doctor after that proved ineffective. *See generally* Tr. 732–737; Ex. R-P. The accidents were reported to MSHA. *Id.* None of the miners involved were disciplined for requesting to see a physician. *Id.*

While still feeling the effects of his injury, Complainant took medical leave for an unrelated cardiac catheterization procedure. Tr. 380:1–2. He was on leave for two weeks, beginning on April 15, before returning to work on May 4. *Id.* at 379:19–24. Complainant was thus only at work for two days before a two-week absence for his cardiac procedure and the recovery prescribed by his cardiologist.

While Complainant did not see a physician for his back injury, he did seek treatment while on medical leave from a chiropractor, who recommended he see a doctor. Tr. 385:7–17. Complainant said the chiropractor took x-rays and told him he had a muscular injury to his thoracic spine. *Id.*

After returning from medical leave on May 4, Complainant said he recalls reporting to Mr. Williams and Mr. Humes that the pain from his injury was still interfering with his job duties but does not recall talking with Mr. Ellis. Tr. 382:5–12. Complainant said the operator took no further action to address the effects of his workplace injury. *Id.* at 382:14–25.

He routinely saw Mr. Williams and Mr. Humes in the company's morning meetings. Tr. 331:1–19. As part of those meetings, employees were encouraged, but not required, to stretch their major muscle groups before working. *Id.* at 330:6–8. Complainant's injuries prevented him from participating. *Id.* at 330:17–25.

Complainant testified that he told Mr. Williams, Mr. Humes, and his co-workers that he was still unable to fully perform all his duties without pain, and that Mr. Williams and Mr. Tucker helped the cleaning and lifting parts of his job. Tr. 382:8–383:9. However, in his Complaint to MSHA, Complainant said that he did not often ask for help because he could get most of the cleaning done with a water hose. *Id.* at 433:3–13; Ex. R-T.

He also testified that he told Mr. Clemmons, while the plant was shut down due to a vandalism incident on May 8, that his back was still hurting. Tr. 383:16–384:2. When Mr. Clemmons asked if it was from April, Complainant said that it was, and that he wanted to see a doctor, *id.* at 384:2–5; "[a]t which point, he did not respond to me at all. He just drove away." *Id.* at 384:5–6.[15] Mr. Clemmons denies that Complainant ever told him he needed to see a doctor. *Id.* at 748:9–21.

Mr. Williams and Mr. Humes testified that Complainant was not completing his assigned duties as required. Mr. Humes testified that Complainant and Mr. Walker were not cleaning their zones fully and were leaving hazards behind for the next morning. Tr. 612:15–613:14. This was discussed in "toolbox talks" and then with the miners one-on-one. *Id.*

Mr. Humes said Mr. Williams recommended Complainant be terminated for not cleaning his area and greasing the plant, and for leaving work without telling anyone these tasks had not been completed, on May 10 and 11. Mr. Humes said Mr. Williams reported the conditions to him on both days, that Mr. Williams cleaned the area and greased the plant on the morning of May 10, and that Mr. Humes personally went to the area to inspect on May 11, after Mr. Williams told him Complainant had again not cleaned the area. *Id.* at 630:17–631:3.

Mr. Humes called Mr. Ellis and explained the issue to him on the morning of May 11. He recommended Complainant be terminated because of failure to improve his cleaning and greasing performance. Tr. 631:9–14.

Complainant testified that he finally told Mr. Williams, after the morning meeting on May 12, "I've put up with this as long as I am going to. I need to see a doctor today." Tr. 332:1–3.[16] He said Mr. Williams' response was, "I will let them know." *Id.* at 332:8–9. After the morning meeting, Mr. Williams called Mr. Humes and told him Complainant had requested to see a doctor, and Mr. Humes relayed this to Mr. Ellis. *Id.* at 632:23–633:5.

Respondent's witnesses testified about its plans to terminate Complainant on May 12, based on Mr. Humes' recommendation the previous day. Tr. 508:20–509:17. In anticipation of the meeting, Mr. Ellis prepared written notes, which he intended to use as a script for the

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[15] Neither party questioned Complainant further on this exchange, and there was no testimony about any subsequent actions by the company or Complainant based on the alleged request.

[16] There was some confusion about the nature of Complainant's injury. Mr. Ellis said he thought Complainant had injured his ribs. Tr. 512:13–21. Complainant said he never claims his ribs had been "broken," and that the injury was the same back injury he had reported on April 12. *Id.* at 384:7–385:6. Mr. Williams' testimony on this point was confusing and ambiguous. He testified that he thought Complainant's ribs were injured, and his notes say that Complainant told him he had three broken ribs, but he acknowledged this was the same injury Complainant reported in April. I find that the injury reported on May 12 was the same muscular injury to Complainant's thoracic spine which had been reported on April 12. This confusion is not material to the matters in dispute here.

termination meeting, and contacted Mr. Lindsey, who also prepared for the meeting. *Id.* at 520:7–21. They intended for Mr. Williams to bring Complainant to the office after the morning meeting so they could tell him he was being discharged.

However, when Complainant asked to see a physician, Mr. Williams instead allowed Complainant to go to the plant to begin his shift. He then contacted Mr. Ellis and told him Complainant had requested to see a doctor. Mr. Lindsey said that Mr. Williams had to "pivot" from the original plan, and that he and Mr. Ellis decided to discuss the situation with risk management, which handles workers' compensation and liability issues for VCM. Tr. 671:13–672:11.

Mr. Ellis and Mr. Lindsey discussed the situation and contacted Mr. Clemmons and Andi Romano, Respondent's risk management officer. Tr. 682:22–683:14. After conferring, they decided to proceed with the termination, but to also provide Complainant with a list of physicians, as required by Tennessee workers' compensation law. *Id.*[17]

Mr. Ellis said he did not know Complainant had requested to see a doctor for his injury until the morning he was to be terminated, after the decision had been made. Tr. 509:23–25. He assumed that the request was for a new injury. *Id.* at 512:24–513:2.

Mr. Ellis also said that Respondent requested law enforcement officers be present during the termination. He said this decision was made based on input from Mr. Williams and Mr. Humes about Complainant possibly having a history of violence and gun possession and his reaction to previous discipline. Tr. 526:5–527:13.[18] Mr. Humes testified that Mr. Williams told him Complainant "normally had a gun on him."

Complainant said that Mr. Humes called him later that morning and said the company was trying to get him a doctor in Lebanon. Tr. 333:15–20. He said that he also spoke with Mr. Williams, who told him he was bringing a replacement to operate the plant so Complainant could go to the doctor. *Id.* at 334:8–15. Instead, Complainant was taken to the area outside of the

[17] Tennessee's workers' compensation law requires the employer to provide the employee with a group of three or more independent reputable physicians, surgeons, chiropractors, or specialty practice groups in the injured employee's community, or, if no such providers are available in the community, within a one hundred (100) mile radius of the employee's community. Tr. 716:11–14; *see also* TENN. CODE ANN. § 50-6-204 (2022). The exhibit introduced included three physician practice groups.

[18] Mr. Williams testified he had seen Complainant carry a gun "at times," but never at work. Tr. 814:2–21. Neither Mr. Williams nor Mr. Humes said anything about Complainant having a history of violence. I note that such a characterization would be inconsistent with the testimony of Complainant's co-workers and the demeanor I observed during the hearing. It is difficult to fault an employer for being concerned about a possible workplace violence issue, and it appears Mr. Ellis may have drawn an inference about Mr. Hargis from the way the information may have been reported to him, but the way the termination was carried out was unfortunately embarrassing and should not be taken as a reflection on Mr. Hargis' character.

mine's offices, where Mr. Ellis, Mr. Humes, and two Wilson County deputy sheriffs were waiting. *Id.* at 335:24–336:4. The group summoned him, and Complainant was informed that he was being terminated "due to a couple of previous write-ups and poor performance." *Id.* at 336:12–15.

Rex Lindsey, the company's area human resources director, was on the phone during the meeting. Tr. 337:9–14. He informed complainant of the "finer points" relating to his termination, including Complainant's last-chance notice. *Id.* at 337:21–338:5. Mr. Ellis did give complainant a list of doctors that he could see for his injury. *Id.* at 338:19–25. The form, Ex. GX-6, indicated that complainant had suffered an occupational injury. Respondent did not report the injury to MSHA until after it had been cited for failing to do so. *See id.* at 446:10–15, 468:24–469:1.

III. Disposition

A. Respondent Failed to Timely Report an "Occupational Injury" to MSHA.

1. Finding of Violation

Complainant was injured while performing maintenance on the operator's crushing plant. I credit his testimony that he felt pain while handing 35–50-pound liner plates to Mr. Tucker, who was working to install the plates inside the machine. Tr. 314:4–19. While Mr. Tucker testified that he does not recall Complainant saying that day that he had injured himself, Complainant claims that he told Mr. Williams about the injury in passing that day and reported it to him again on Monday, April 12. *Id.* at 315:14–316:3.

The nature of the injury and the operating environment do not support a finding that Complainant clearly reported an injury on Saturday, April 10. However, I find that he did tell Mr. Williams the following Monday, April 12, that his injury was worse than he had thought, and that he wanted to see a doctor.[19]

Complainant's ongoing pain after April 12, and Respondent's knowledge of and response to his complaints, show an awareness of an occupational injury at least as early as April 14, 2021. On that date, Complainant had a text message exchange with Mr. Clemmons. Ex. GX-9. In that exchange, Mr. Clemmons asked Complainant how his back was, and whether he was "still taking it easy?" *Id.* Complainant replied that he was, and that his supervisor, Mr. Williams, had

[19] My finding that Complainant requested to see a doctor at this point is based largely on the fact that Mr. Williams did not clearly contradict him but only said he did not recall Complainant ever requesting to see a doctor until the day he was terminated. Tr. 774:18–20. However, as discussed below, I do find it unusual that there was no apparent effort to elevate this initial request. I also do not find this request, by itself, to have produced any negative response from any of Respondent's agents, including Mr. Williams. None of the other witnesses acknowledged hearing about this initial request, and Mr. Williams placed Complainant on light duty and arranged for other miners to clean and grease Complainant's zone after he reported the injury.

told him to "run the plant and do nothing else." *Id.* Mr. Clemmons acknowledged this message. *Id.*

First, I find that Complainant suffered an "occupational injury" as the agency has reasonably defined that term. He was injured while working in a mine. The Agency's general definition of "occupational injury" has been affirmed by the Commission and the D.C. Circuit Court of Appeals. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 464 (D.C. Cir. 1994) (noting approval of definition of "occupational injury" and affirming finding that accident was reportable even if injury occurred while miner was at mine but not working when injured).

The only possible issue is whether Complainant's injury was serious enough to require reporting. The definition includes a requirement to report an injury that gives rise to an "inability to perform *all* job duties on any day after an injury." 30 C.F.R. § 50.2(e) (emphasis added).

Respondent claims that it limited Complainant's work out of "kindness," Tr. 539:5–10, but the record establishes that Complainant was in fact placed on light duty. The operator admitted as much in its answer. Ans. ¶ 5. Mr. Humes testified that Complainant had been placed on light duty. Tr. 628:5–14. This was a decision made by his supervisor, and VCM's safety manager was aware of the decision. *See* Ex. GX-9.

It is well-established by the record that Complainant's job duties included more than running the plant. Indeed, the record establishes that he was highly efficient as plant operator but was disciplined for his alleged failure to perform other duties adequately, including cleaning his area. Thus, an inability to clean his area supports a finding of occupational injury.

Complainant testified that his ability to perform several of his required tasks was impaired by his injury. Climbing stairs was "painful," using a hose to clean his area was "very painful," and "[s]hoveling was just basically unbearable." Tr. 323:8–12. On at least three days, his supervisor, Chris Williams, did the cleaning for him. *Id.* at 323:20–22. As noted above, Mr. Williams told Complainant to "run the plant and do nothing else," and Mr. Clemmons was aware of this directive. I therefore find that Complainant was unable to perform all of his required tasks due to his injury, and that his employer's management was aware of this disability.

As safety director for Respondent, Mr. Clemmons was also aware of MSHA's injury reporting requirements. *See* Tr. 732–40, Ex. R-P (discussing reports of occupational injury and illness and admitting exhibit containing those reports). I hold that he must have at least been constructively aware of the definition of "occupational injury" used by the agency to require reporting of such injuries.

The evidence shows that Respondent took pride in its safety record and spotlighted its favorable history of occupational injuries to shareholders. *See* Ex. GX-4. The evidence also shows that the operator knew of its duty to report occupational injuries and had a program for recording and reporting them. After Complainant contacted the MSHA District Office about his injury, the office apparently contacted someone at the plant, who admitted that Complainant had

been injured on the job. Tr. 284:18–285:23. Yet it did not file an MSHA Form 7000-1. *Id.* at 284:23–24.[20]

Finally, the evidence shows that the operator had a policy of seeking to treat minor ailments with the so-called "RICE" method—rest, ice, compression, and elevation. There is nothing wrong with this, in and of itself. But at least in this instance, it appears that an over-reliance on the "RICE" concept seemed to have been used as an alternative and not an adjunct to the operator's duty to investigate and report accidents and occupational injuries.[21]

While the incident resulting in Complainant's injury does not meet the definition of "accident" for immediate reporting purposes under Section 50.2(h), the Mine Act uses a broader definition of the term "accident," and the statutory definition includes an "injury to . . . any person." 30 U.S.C. § 802(k) (2022). This is significant because the operator is required to investigate, record, and report *all* accidents. 30 U.S.C. § 813(d) (2022). Because Congress took care to define "accident" in the Act, I find the statutory definition controls this responsibility.

Respondent was obviously aware of this duty because Mr. Clemmons and Mr. Ellis had in fact conscientiously investigated a previous minor injury to Complainant, involving a skid steer he had been driving. Tr. 327:11–14. It is thus inconceivable that Mr. Clemmons would not have known of his duty to investigate, record, and report the accident and occupational injury to the Complainant in this case.

Yet Respondent did not report the occupational injury in this case within 10 days of April 14—a date on which the evidence conclusively establishes Mr. Clemmons' knowledge of the occupational injury that prevented Complainant from performing all his duties on that date. I impute that knowledge to Respondent.

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[20] The inspector testifying, Otis Carroll, did not speak to Complainant or anyone at the quarry but was advised by the District office to cite the operator for failing to report the injury. Although this was hearsay testimony, it is corroborated by other facts and was unrebutted by the operator. I find Inspector Carroll's testimony to be credible and that it is reasonable to believe that someone in a management position at the quarry acknowledged Complainant had been injured on the job and admitted that no MSHA Form 7000-1 had been filed.

[21] "RICE" was cited repeatedly by Mr. Clemmons in his testimony. However, there is no evidence that Complainant was provided with the means for compressing the site of his injury or that he was ever assisted in elevating the injury. Due to its location (the thoracic spine), elevation could either be considered to have occurred naturally while he was standing, or not to have occurred because there is a therapeutic means for doing so that was not used. I thus conclude that the operator's approach consisted at most of merely providing ice that the complainant could use himself and limiting his activities while he was recuperating. In other words, he was only provided with rest and ice, and reciting "RICE" as a mantra is singularly unpersuasive. At some point, when this approach proved ineffective, the operator was duty-bound to treat Complainant as having suffered an occupational injury.

Indeed, it does not appear that the operator ever reported the injury, even after it provided a physician referral to complainant on the day he was terminated. When the operator did finally report the injury to abate the citation, the report appears to be incomplete and inaccurate. *See* Ex. GX-3.[22] This is inexcusable. MSHA takes seriously the duty to report occupational injuries, as well as the potential that such injuries will be under-reported. That is why the agency audits operators to ensure their reports are accurate. *See generally Big Ridge, Inc.*, 34 FMSHRC 1003, 1011–22 (May 2012), *aff'd*, 715 F.3d 631 (7th Cir. 2013). However, the agency cannot audit every operator, and must generally rely on self-reporting of accidents, occupational injuries, and illnesses.

I do not find that the operator generally suppressed reporting of accidents and injuries, as suggested by the Complainant. Nor do I find sufficient evidence that the operator engaged in a pattern of under-reporting occupational injuries. But the evidence in this case does at least give rise to an inference that the operator may have diverted a miner to "RICE" to forestall medical treatment of a minor injury, and that in this case—at least—it did not fulfill its duty to report a relatively minor injury once it became aware that the injury affected the miner's ability to perform all his duties.[23] Though the injury was minor, it could carry the same statistical weight in the operator's record as a more serious lost-time injury.

2. Penalty

Several of the statutory penalty factors have been stipulated to, including the size of the operator, its record of previous violations, and the effect of the proposed penalty on the operator's ability to remain in business. The gravity of this violation is not such that it would result in an injury to any miners. However, it is a serious violation. The Act requires mine operators to assume primary responsibility to prevent unsafe conditions and practices. 30 U.S.C. § 801(e) (2022). Where the Secretary has expressly required the operator's assistance in this effort, by requiring occupational injuries to be recorded and reported, the failure to do so affects the integrity of the enforcement program.

I agree with the inspector's characterization of the negligence as "high." Tr. 288:8–21. However, I note that the operator was contacted by MSHA and admitted to not having filed the form prior to the citation being issued but did not file the form until after it received the citation. I therefore find that the operator should not be credited with rapid compliance after the fact for an affirmative duty it ignored until its failure had been cited. Instead, I find that the penalty

[22] The MSHA Form 7000-1 report of accident does not reflect any attempt to investigate the accident and gives the return-to-work date as April 14, even though Complainant continued to complain about his injury after this date, and Mr. Clemmons was aware of the complaints of injury and that Complainant's supervisor had placed him on limited duty.

[23] I have considered Respondent's difficulty in evaluating Complainant's condition. He was on the job for only three days after his injury and was then absent for two weeks on medical leave for an unrelated condition. But before the medical leave, VCM was aware that Complainant's supervisor had placed him on restricted duty due to his injury, giving rise to the duty to report it.

proposed does not adequately reflect the aggravated lack of care in failing to report the injury when it knew of it, and I assess a penalty of $300.00.

B. Complainant Was Not Terminated Because of His Protected Activity.

Complainant's discrimination complaint fails because the evidence at trial did not establish discrimination under the *Pasula-Robinette* or *Gross-Nassar* standards.[24] As noted above, the Commission has thus far only required that *Gross-Nassar* be employed in mines within the Ninth Circuit, but the Commission or other circuit courts may determine that the test must be employed. In the interest of judicial economy, I have considered both standards in reaching my conclusion.

Under either standard, the Secretary and the Complainant must prove by a preponderance of the evidence that Complainant engaged in protected activity, that he suffered an adverse employment consequence, and that there was a causal connection between his exercise of protected activity and the adverse action.

As explained below, I find that Complainant failed to meet his burden of proving a violation under *Pasula-Robinette*. While I do find that the bare minimum standard for a prima facie case has been met, the inference drawn for causation cannot withstand Respondent's well-supported explanation for its decision to discharge Complainant, and Complainant failed to demonstrate that the operator's cited performance issues were pretextual.

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[24] A *Gross-Nassar* analysis requires the movant to establish that the impermissible motivation was a "but for" cause of the adverse employment action, i.e., the action would not have been taken but for a complainant's protected activity. Under *Pasula-Robinette*, the complainant must carry the burden of persuasion on the prima facie case of protected activity, discrimination, and a causal nexus between them. But then the burden of persuasion supposedly "shifts" to the operator, who may prove that it would have taken the adverse action for unprotected reasons alone.

While the Commission has continued to rely on *Pasula*, generally, citing the legislative history of the Act, *see Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914 (Aug. 2016), *Riordan* also noted that the Judge's correct application of *Pasula* was effectively a "but for" test. 38 FMSHRC at 1921, n.10; *see also Consolidation Coal Co. v. Marshall*, 663 F.2d 1211, 1222 (Sloviter, J., dissenting) (expressing opinion that Commission had effectively applied the "now accepted 'but for' rule in mixed-motivation cases.").

There may not be much of a practical distinction between the supposed burden-shifting under *Pasula* and the natural effect of evidence introduced in the normal course of a hearing. The Commission noted that the result would have been the same under either standard in *Riordan*, and the ALJ on remand in *Thomas v. CalPortland Co.* rather easily harmonized Commission precedent with the Ninth Circuit's decision. 43 FMSHRC 531, 540–41 (Dec. 2021) (ALJ) (citing *Sec'y of Labor on behalf of Thomas Robinette*, 3 FMSHRC 803, 818, n.20 (Apr. 1981) ("The 'ultimate burden of persuasion' on the question of discrimination rests with the Complainant and never 'shifts.'")).

Considering the evidence under *Gross-Nassar*, I conclude Complainant was not terminated because of any consideration by the operator of any protected activity. I find that he did engage in protected activity, that the operator was aware of this activity, and that he was terminated from employment. However, there is no proof that would support a reasonable inference that his protected activity was a "but-for" cause of his termination.

As the Supreme Court has explained, "but-for" causation may be determined by isolating the possible rationales offered for an adverse employment action and determining how the outcome may be affected. *See Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1739 (2020). ("[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.") In the present case, the possible reasons Complainant was separated from his employment include the disciplinary and performance issues cited by the operator, and Complainant's request to see a physician, which he claims is an activity protected against discrimination under the Act.

There is no evidence that Complainant's request for medical care played any role in a termination that was already underway when the persons making the termination decision learned about the request. There is thus no causal connection, and the analysis under the *Gross-Nassar* standard would produce the same result as under *Pasula-Robinette*.

1. Complainant's request to see a doctor for an occupational injury is protected activity under the Act.[25]

The Act protects miners against discrimination or interference because of their exercise of their *statutory* rights, including those enumerated in Section 105(c)(1) as well as "any [other] statutory right afforded by this Act." 30 U.S.C. § 815(c)(1) (2022). Thus, whether the Act affords miners the right to request medical treatment for an occupational injury is a threshold question in this case.

The Commission has apparently not held that a request to see a physician, standing alone, qualifies as protected activity. However, it has found that the reporting of injuries is protected against discrimination, even if there is no safety complaint associated with the report. *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994).

[25] The Complaint in this matter cites only the request to see a doctor as protected activity. *See* GX-1. A miner may introduce evidence of other protected activity outside the scope of his complaint only if the evidence was investigated by MSHA. *Hatfield v. Colquest Energy, Inc*., 13 FMSHRC 544, 546 (Apr.1991); *see also Thomas v. CalPortland Co.,* 42 FMSHRC 43, 51 (Jan. 2020) (declining to modify *Hatfield*). Complainant did not produce other evidence of protected activity in this case. The scope of my decision is thus constrained by the report of protected activity cited in the Complaint—the request to see a physician—but I do consider each of Complainant's alleged requests, and not merely the May 12 request on which the Complaint appears to rest, because such requests arising from the same injury at issue would naturally be within the scope of inquiry by a competent investigator.

I find that the Act does protect requests for medical care, even if the injury did not result from an unsafe condition or practice or was not made in conjunction with a miner's report of an alleged danger or safety and health violation. In addition to the reasoning in *Swift,* I rely on the text, structure, and purpose of the Act's anti-discrimination provisions.

As noted previously, Section 103(d) of the Act requires operators to investigate *all* accidents. 30 U.S.C. § 813(d). If the report of an occupational injury is the event which gives rise to this duty, it would thwart the clear and express intent of the statute to permit mine operators to suppress the recording and avoid the investigation of accidents by discouraging or punishing the report of occupational injuries.

Extending the Act's protection to requests for medical care is consonant with the protection of other rights under the Act. When a miner requests to see a physician, the report may affect the operator's safety record, either because the complainant will require and receive medical treatment (as opposed to evaluation) or because the treating physician may proscribe activities necessary for the miner's job.

The Mine Act is a remedial statute, and its terms must be understood broadly to effectuate Congress' purpose—to eliminate unsafe and unhealthful conditions and practices in mines, relying primarily on the active involvement of operators in the prevention of such conditions and practices. 30 U.S.C. § 801(d)–(e); *see also Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914 (Aug. 2016). The Commission's embrace of activities beyond those enumerated in the Act has been consistently and broadly inclusive. *See Emery Mining Corp.*, 10 FMSHRC 276, 283, 293 (Mar. 1988) (permitting walkaround inspection participation under Section 103(f)); *So. Ohio Coal Co.*, 5 FMSHRC 729, 759 (Apr. 1983) (ALJ) (permitting post-inspection conference participation under Section 103(f)); *Sec'y of Labor on behalf of Bennett v. Emery Mining Corp.*, 3 FMSHRC 2648, 2657 (Nov. 1981) (ALJ) (requiring operator-provided training under Section 115).

Further, the D.C. Circuit has consistently (and recently) relied on the intent to achieve the goals of the Mine Act in affirming miner's rights. In *Marshall County Coal Co. v. FMSHRC*, the court recognized a miner's Section 103(g) rights—enabling the raising of anonymous complaints—as a basis for a protected activity in an interference claim. 923 F.3d 192, 195, 201 (D.C. Cir. 2019). The operator activity complained of there was a requirement to report complaints to management. *Id.* at 197.

In *Harrison County Coal Co. v. FMSHRC*, the court denied the operator's petition for review because there was substantial evidence of six protected activities—mostly regarding reporting health, safety, and discrimination complaints. 790 Fed. Appx. 210, 212, 213 (D.C. Cir. 2019). The court reiterated that reporting is a right bolstered by its importance to achieving the Act's purpose:

> Since the participation of miners in reporting unsafe working conditions is essential to the effectiveness of the Mine Act, Congress explained miners "must be protected against any possible discrimination which they might suffer as a result of their participation."

Id. at 212 (quoting S. Rep. No. 95-181, at 35, *reprinted in* Senate Subcomm. on Labor, Committee on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 626 (1978)). This is in line with the Commission's reliance, in *Swift,* on the command of Section 2(e) that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such miners." 30 U.S.C. § 801(e).

Consistent with Commission and court precedent and Congress' clearly expressed intent, I find that a mine operator may not discourage, interfere with, or discriminate because of a miner's request to see a doctor because he was injured at the mine.

2. The Operator was aware of Complainant's protected activity.

I credit Complainant's testimony that he twice communicated a request to see a doctor to his supervisor, Chris Williams. His testimony regarding his requests is discussed more thoroughly below, but he at least made the requests on April 12, the Monday after he was injured, and on May 12, the day he was terminated. Mr. Williams, an agent of Respondent, was aware of both requests. The managers who made the decision to terminate Complainant were aware of the request he made on May 12.

3. Complainant suffered an adverse employment consequence in this case.

Complainant's employment was terminated. Discharge from employment is expressly prohibited by Section 105(c) of the Mine Act and is the classic example of an adverse employment action. 30 U.S.C. § 815(c)(1).

4. The evidence is insufficient to support an inference that Complainant was terminated because of his request to see a physician.

The burden of producing sufficient evidence to support a prima facie case of discrimination is not especially great in the abstract. A complainant may provide direct evidence that the adverse employment action was discriminatory. But if such evidence is unavailable, as is usually the case, the Complainant is only required to demonstrate that the available circumstantial evidence *could* support an inference of discriminatory treatment. *Turner,* 33 FMSHRC at 1065–66.

I find that the Complaint for discrimination fails because there is no direct evidence of discriminatory intent and no reasonable basis for inferring that his discharge from employment could have been causally related to Complainant's protected activity. This is true under either legal standard the Commission might apply to his discrimination claim.

a. There is no direct evidence of discriminatory intent or motivation.

The operator has denied that Complainant was discharged because of his protected activity. The Secretary and the Complainant must show at the prima facie stage that the protected

activity could have motivated his discharge, and then carry the burden of proving by a preponderance of the evidence that his discharge was so motivated.

Complainant could not provide any direct evidence of discriminatory motive. However, the absence of direct evidence is not fatal to Complainant's case. "'[D]irect evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent.'" *Con-Ag, Inc. v. Sec'y of Labor*, 897 F.3d 693, 700 (6th Cir. 2018) (quoting *Sec'y of Labor on behalf of Howard v. Cumberland River Coal Co.,* 34 FMSHRC 1396, 1397 (June 2012)).

Therefore, I must consider whether inferences reasonably drawn from the evidence in the case may be used to support Complainant's contention that he was fired because he engaged in protected activity. Such inference may be supported by the following factors:

> (1) [T]he operator's knowledge of the protected activity; (2) the mine operator's hostility or 'animus' towards 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.

Id. (quoting *Cumberland River Coal Co.*, 712 F.3d at 319; *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)).

b. The record does not support an inference that Complainant was discriminated against because of his protected activity.

1. There is scant evidence of disparate treatment of the Complainant.

The record in this case is replete with complaints by miner witnesses of unfair, arbitrary, and harsh treatment by lower-level supervisors. However, this was a burden borne by the entire workforce. There is little evidence that Complainant was an especial target of abuse, and no evidence that any protected activity may have motivated Respondent's agents.

On the contrary, miner witnesses testified that everyone in the workforce felt targeted by poor supervisors who did not know their jobs well. Some miners did testify that Complainant's supervisors had "targeted" him for termination, but the bases for their assertions are grounded in actions that predated any protected activity in this case.

When questioned about the operator's management, the miner witnesses complained about generally arbitrary and unfair supervision of employees by Mr. Parr and Mr. Humes. In fact, Complainant and several other witnesses noted that at one point Mr. Humes threatened to fire and replace the *entire* workforce.

It was clear that none of the miners felt genuinely intimidated by these threats. After Mr. Humes' tirade, witnesses noted that "every employee called [human resources] that day;" Tr. 86,

and Mr. Ellis noted that he had discussed the situation with several miners and the company's human resources department, and he required Mr. Humes to apologize.

There is some evidence that Complainant was treated less favorably than other miners. However, he himself testified this began under Mr. Parr—who was separated from his employment before claimant requested to see a physician. On cross-examination, Complainant admitted that he had been verbally counseled by Mr. Parr for failing to thoroughly clean his area. Mr. Parr subsequently issued a written warning to Complainant for the same issue.

Complainant testified that he believed Mr. Parr was trying to make a "paper trail" to terminate him. Even if this were true, however, any motivation Mr. Parr might have had to harass or oppress Complainant could not have been related to protected activity that had yet to occur. It is thus not logically possible to infer that Mr. Parr targeted claimant because of his protected activity.

Complainant subsequently was formally disciplined again, by a different supervisor, before his termination. However, the second written warning and suspension also took place before his injury and subsequent protected activity. When Complainant was injured, he was therefore already on a "last chance" letter, having been suspended by the operator and told, in writing, that *any* future violation of policies or failure on his part could lead to termination.

I have considered the possibility that Complainant was the only miner disciplined for leaving work early when he was suspended. At least one other miner, Mr. Evans, left at the same time as Complainant, and all four miners on Complainant's crew left without completing the cleaning tasks assigned to them, according to Mr. Williams. But this suspension also occurred well before the injury upon which Complainant's claim of protected activity rests, and Complainant's discipline here was thus entirely unrelated to his request to see a doctor for an injury that had not yet occurred.

Furthermore, while Mr. Evans may not have been formally disciplined, it appears that Mr. Williams at least intended to do so. Mr. Evans was summoned to the office, where Mr. Williams told him that he was going to be issued a verbal warning. Because Mr. Evans had no prior disciplinary history, his treatment under the company's progressive disciplinary policy was equivalent to Complainant's. While he may have talked his way out of formal discipline, Mr. Williams did not ignore the actions of the other employee whose actions were the same as Complainant's.

Additionally, Complainant's discipline does not appear to be inconsistent with that assessed to other miners for similar conduct. Mr. Walker had a similar disciplinary history and had also received a second written warning and three-day suspension for the same alleged failures that led to Complainant's suspension. Tr. 548:24–549:10; Ex. R-L. There was no evidence that Mr. Walker had ever engaged in protected activity before his suspension.

In summary, there is insufficient evidence to support the contention that Complainant was treated more harshly than other miners, and no evidence at all for inferring that any actions of his supervisors had anything to do with mine safety or health. There is thus no basis for me to

impute an improper motive for any of the predicate disciplinary actions on which Complainant's termination was grounded.

In fact, this hypothesis is refuted by Respondent's treatment of Complainant before and after he engaged in protected activity—which might be a more appropriate consideration than alleged disparate treatment of Complainant and other similarly situated miners. *See Riordan*, 38 FMSHRC at 1927 (finding of pretext upheld where written record of miner's performance was inconsistent with reasons given for termination).

Before his protected activity, Complainant was formally disciplined three times, by or at the insistence of three different supervisors, for failure to complete cleaning and greasing tasks that Respondent had assigned to him as part of his job. After his injury and earliest request to see a physician, Complainant was discharged for the same conduct that he had been disciplined for at least three times prior to his injury and protected activity.

The discharge was consistent with company policy, and Complainant had been warned when he was suspended that he could be discharged for any future failing or violation of company policy. He himself admitted that he had not fully cleaned his area or greased the plant on May 9 and 10, and he does not know whether anyone else did so. Tr. 422:13–22.[26]

My decision is mindful of the Commission's admonition that operator justifications in discrimination cases should not "be examined superficially or be approved automatically when offered," but that my careful analysis may not "substitute [my] business judgment or sense of 'industrial justice' for that of the operator." *Cumberland River Coal Co.*, 712 F.3d at 320 (quoting *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982)).

In this case especially, I note the performance issues cited by the operator may be vital to its safe and efficient operation. Special Investigator McClung testified that a violation could be cited as an S&S violation of MSHA's housekeeping standards. Tr. 490:7–491:5. It would be contrary to the Act's purpose and text to punish an operator for holding miners accountable for compliance with a mandatory safety and health standard. And the operator provided credible testimony about the severe costs and inconvenience produced by a failure to grease the plant bearings and other equipment, which is a daily requirement.

His disciplinary history left Complainant in a precarious position, where any subsequent violation of company policies would result in his termination. As noted, acts predating the protected activity cited in this case could not have been motivated by that activity. Complainant nevertheless could have established a basis for inferring a nexus between his protected activity and his discharge but was unable to prove that the operator's termination decision—which was

[26] Complainant also testified fellow employees, including Mr. Williams, helped him to clean his area after he returned to work on May 4. Even if true, this cannot be reasonably related in any way to a hostility toward his protected activity. Although one might question whether it would be fair in a general sense to discharge an employee who had been led to believe others would help him clean his area, Complainant did not report to his supervisor that he had been unable to clean or grease on May 9 or 10.

consistent with its policies and Complainant's work history—was ever treated differently because of activity protected under the Act.

2. The record does not support an inference of animus toward the Complainant because of safety or health related issues or general animus toward safety and health concerns.

While the record does not support an inference that he was treated differently because of his protected activity, Complainant could have provided a reasonable basis for inferring his termination was motivated by improper animus against safety and health generally, or against him for his involvement in or advocacy on safety and health issues. There is not a basis in the record for this inference, either.

First, there is no evidence at all that Complainant ever engaged in any advocacy on safety and health issues.[27] Nor does he appear to have had any specific, material involvement in those issues during his employment.

There is also no evidence that Respondent harbored any animus against safety and health generally. On the contrary, witnesses almost without exception testified that the company tried to operate safely and to correct hazardous conditions that were brought to its attention. Complainant himself provided such testimony. *See* Tr. 397:25–398:2.

I also note the weight of circumstantial evidence undermining any inference of hostility to safety and health. Respondent held "morning stretch" sessions for employees, which testimony acknowledged as having a safety purpose. Tr. 147:3–5. Employees apparently felt comfortable calling human resources and senior managers to complain about their supervisors. When Mr. Humes supposedly posted a new policy requiring workers to leave the jobsite at the same time at the end of their shift, an employee removed the message so that he could bring it to the morning meeting for discussion.

Testimony by other miners also refutes any notion that Respondent was hostile to safety and health complaints. Mr. Dycus testified that it was generally known that he had made a complaint to MSHA, and yet was never disciplined by the company for anything. Even more telling is the incident where Mr. Parr allegedly tried to persuade Mr. Walker to falsify an examination report before an inspection, Mr. Walker's refusal, and his reporting the incident to Respondent's management. VCM opened an investigation. Mr. Parr then resigned. The inescapable inference is that miners believed they could report safety matters to management, and that when they did so, those matters would be properly addressed.

Nor is there any evidence that the Company showed any hostility toward Complainant because of his request to see a doctor. As noted, every prior disciplinary action occurred before

[27] While not advocacy per se, Complainant did testify about reporting safety issues to his supervisors and management. However, he acknowledged that Respondent's agents were responsive to those reports, and there was no evidence of any hostility to them.

his injury and protected activity. When Complainant requested to see a doctor, there was no adverse response to the request from anyone in mine management.

At worst, Complainant's request for medical care was ignored. If Complainant's previous requests had any effect, it was to have him placed on limited duty due to his injury. Mr. Williams and Mr. Clemmons both inquired about Complainant's injury after that. There is no conduct from which I could infer any hostility arising from his injury.

Complainant's request for medical care on May 12 certainly had no effect on a termination decision that was well underway before the decisionmakers were aware of it. Mr. Ellis testified that he made the decision to terminate Complainant, with input from Mr. Humes and Mr. Lindsey. They had intended for Mr. Williams to bring Complainant to the office after the morning meeting so that they could communicate the decision to him.

Mr. Ellis prepared notes in anticipation of that action. While Mr. Ellis testified that Mr. Williams was not involved in the termination decision, his notes suggest otherwise.[28] His unrebutted testimony shows that he took those notes before he learned of the request to see a physician in preparation for the meeting at which Complainant was to be terminated, the next day. The context and the content of the notes together clearly support his testimony.

There is no evidence that Mr. Ellis was aware that Complainant requested to see a doctor before making the decision to terminate his employment, or that he discussed any previous requests with Mr. Humes, Mr. Williams, or Mr. Clemmons. Nor is there any evidence that any of the other individuals involved in the decision to discharge Complainant ever evinced anything worse than indifference in response to his request to see a doctor.

This evidence supports Respondent's contention that it took seriously safety and health issues brought to its attention. I thus find that there is no evidence in the record from which one could reasonably infer any hostility to protected activity, including Complainant's request to see a doctor.

3. Coincidence in time between Complainant's request to see a doctor and his termination raises a superficial inference of potential discriminatory intent that does not survive evidence raised in response to his prima facie case.

Coincidence in time between protected activity and an adverse employment action justly creates suspicion that there may be a relationship between the two. A miner may establish a

[28] The Secretary has suggested that this should detract from Mr. Ellis' credibility. S. Post Hr'g Br. at 20. However, the wording of the question, the answer, and Mr. Ellis' notes leaves open the possibility that Mr. Humes told Mr. Ellis he had discussed the issue with Mr. Williams. *See* Tr. at 517:17–22 (testimony of Mr. Ellis, stating that information was given to him "by Chris through Anthony"). Whether and to what extent Mr. Williams was involved in the decision is not material because there is no evidence suggesting that Mr. Williams, or any of Respondent's other agents, may have been motivated by Complainant's protected activity.

prima facie case where the adverse employment action is imposed soon after the exercise of protected activity. *See Turner,* 33 FMSHRC at 1066 (citing *King v. Rumsfeld*, 328 F.3d 145, 150–51 (4th Cir. 2003) (reversing trial court's conclusion that plaintiff failed to make out a prima facie case of retaliatory discharge based on evidence proffered by the plaintiff that "his termination came so close upon his filing of [an EEOC] complaint giv[ing] rise to a sufficient inference of causation to satisfy the prima facie requirement")).

The Commission has held that coincidence in time, combined with knowledge of a miner's protected activity, may establish discriminatory motivation. *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May1997); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982 (June 1982). I credit Complainant's testimony that he requested to see a physician on May 12, the morning he was terminated. It is undisputed that all of those involved in the decision to terminate Complainant were aware of the protected activity on May 12.

Mr. Williams, who provided input to Mr. Humes in support of the latter's termination recommendation, testified about the request to see a physician. Mr. Humes, who made the recommendation to terminate Complainant, was also aware of the request before the termination was carried out. Mr. Ellis and Mr. Lindsey, who made the decision to terminate Complainant, also knew of the request because Mr. Williams reported it to them.

Here, as in *Knotts*, the Complainant was terminated soon after his protected activity. Indeed, he was discharged almost immediately after requesting to see a physician on May 12. This close proximity in time is sufficient to establish a prima facie case of discrimination, because in the absence of other evidence, a causal relationship is strongly suggested by the timing of the two events.

While Complainant has provided sufficient proof for a prima facie case, the analogy to *Knotts* cannot survive close scrutiny. In *Knotts,* the miner/complainant had an extensive conversation with a representative of the mine's owner. 19 FMSHRC at 834. Subjects of the conversation included safety, equipment and production problems, morale, mine policy, and other subjects. *Id.* The mine's vice president was working underground and listened to the conversation by phone. *Id.*

The next day, Mr. Knotts was discharged. 19 FMSHRC at 835. Knotts said the vice president told him that the company had suspected that Mr. Knotts had been talking to the mine owners for some time. *Id.* The vice president's own testimony indicated he was upset that Mr. Knotts had criticized mine management in the conversation. *Id.* While the company argued that Mr. Knotts was fired for engaging in a lengthy conversation instead of doing his job, the ALJ found otherwise. *Id.*

In affirming the ALJ's rejection of the operator's affirmative defense, the Commission noted that there was no evidence of past discipline or performance issues in Mr. Knotts' work record. 19 FMSHRC 838. In fact, the company admitted he was "one of the best employees." *Id.*

That is practically the inverse of the situation in the present case. Here, Complainant's disciplinary record placed him on a "last chance" agreement before he was injured or engaged in

any protected activity. The disciplinary record was based on his alleged failure to clean and grease his zone and his alleged early departure from work on February 1, 2020, for which he was suspended.

Even if the previous disciplinary actions were questionable, there is no evidence that they were motivated in any part by any activity cognizable under the Act. To the extent safety was implicated at all, even MSHA's investigator acknowledged that the failure to clean areas where miners work or travel could lead to S&S violations.

Complainant nonetheless could have shown that the final action taken by the operator, ending his employment with Respondent, was motivated by his protected activity. However, the coincidence in time turns out to be just that—a coincidence—and is insufficient to overcome the operator's explanation for Complainant's discharge. It appears that the request to see a physician did not influence, but rather interrupted, the execution of the termination decision.

4. Respondent acted consistent with its business practices, and the record does not support a finding that its explanation was pretextual.

The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC at 1937–38). In this case, Respondent's evidence explains the coincidence in time, and the termination process was consistent with VCM's progressive disciplinary policy and its maintenance and housekeeping policies.

The operator's witnesses gave consistent, credible accounts of the termination and their consideration of Complainant's request to see a physician. The plan to terminate Complainant was already in motion when the key management players learned of Complainant's request to see a physician. Termination was the logical next step under Respondent's progressive disciplinary policy.

In accordance with its internal procedures, the operator had choreographed an elaborate, scripted plan for carrying out the termination. But when they heard that Complainant had requested to see a doctor, VCM's management paused to consider its plan and decided to provide a list of physicians to the Complainant in addition to proceeding with the planned termination.

Respondent did not fire Complainant "because" he had asked to see a doctor. Rather, its management continued with an already-formulated plan to terminate him, but made a slight modification to that plan, providing him with a list of physicians he might see about his injury.

Thus, instead of summoning Complainant from the morning meeting, the operator made a "pivot" after Mr. Williams told them he had requested to see a doctor. This request on May 12 could not have motivated a plan that was already under way, based on a decision that was made the previous day.

I have also considered that Complainant's first request could have motivated a discriminatory response by Respondent. *See Riordan,* 38 FMSHRC at 1924 (citing *Gorzynski v.*

JetBlue Airways Corp., 596 F.3d 93, 110 (2d Cir. 2010); *Pero v. Cyprus Plateau Mining Corp*., 22 FMSHRC 1361, 1365 (Dec. 2000) (holding a gap of several months between protected activity and discharge to be probative of animus)). But nothing in the record suggests that it did.

The first request to see a doctor was made to Mr. Williams, who was an agent of Respondent. But there is no evidence that Mr. Williams told anybody else about that request, or that any of the persons involved in the termination decision—Mr. Ellis, Mr. Lindsey, or Mr. Humes—were otherwise aware of the request.[29]

Mr. Williams himself did not respond adversely to Complainant's protected activity. After Complainant had requested to see a doctor, but before he was terminated, Mr. Williams asked about Complainant's back nearly every day. Tr. 430:23–431:2.

This case is thus unlike *Riordan*. As the Commission noted, the complainant/miner in that case was disciplined immediately after his most recent protected activity, and then terminated months later. *Riordan*, 38 FMSHRC at 1927 ("*Taken together,* these two incidents raise an inference that Riordan's termination was not coincidental.") (emphasis added). There are no corroborating facts to support such an inference in this case.

Complainant testified that he made his request on two other occasions. While Complainant only cited as protected activity his May 12 request to see a physician, Ex. G-1; Tr. 439:21–440:2, any previous requests would have been within the scope of MSHA's investigation.

Furthermore, credible testimony about previous requests could be used to establish knowledge and might be a basis for finding that the operator's business justification was pretextual. I have therefore considered Complainant's testimony that he told Mr. Clemmons on May 8, and that he told Mr. Humes, on a day he could not recall, over the radio.[30]

Complainant's recollection of these requests is oddly vague and does not reflect a progression or escalation of his concern with the company's failure to refer him to a doctor for an injury serious enough to affect his work. He also testified that his pain from the injury was so serious that he could not sleep and that it was "affecting everything about [his] daily life." Tr. 332:4–7. Yet he does not appear to have followed through or complained about the operator's alleged inaction on his request until May 12.

[29] Despite having the opportunity to depose witnesses in discovery and subpoena and question witnesses at the hearing, Complainant produced no evidence that Mr. Williams had ever discussed his initial request or any subsequent conversations about his need for medical attention with anybody else in the company.

[30] Complainant also says that after he returned to work in early May, following his April 15 cardiac procedure, he told Mr. Williams, Mr. Humes, and his co-workers in passing that his back was still hurt and that he could not complete all his tasks. Tr. 382:3–25.

I do not credit Complainant's testimony that he told Mr. Clemmons he needed to see a doctor on May 8. Mr. Clemmons allegedly asked if this was due to his injury in April, and when Complainant said it was, Complainant said Mr. Clemmons drove away without responding. Tr. 384:2–6.

This testimony is inconsistent with other facts in the record, as well as human nature and common sense. Complainant said that his injury was serious enough to have affected him profoundly for more than a month. He knew Mr. Clemmons was aware of the injury. Mr. Clemmons had previously investigated an incident in which Complainant was injured. Mr. Clemmons had also inquired about Complainant's condition while he was recovering from the injury at issue in this case. Yet there was no follow-through with Mr. Clemmons, or anyone else, until the day he was discharged.

Perhaps realizing the weakness of his case, Complainant also claimed Mr. Clemmons had previously asked what could be done to keep him from going to the doctor after the skid steer injury. Mr. Clemmons denied this, and Complainant's testimony is at odds with his own testimony about the investigation into the incident, which characterized the investigation as careful and thorough.

Furthermore, the comment seems out of character with Mr. Clemmons' text messages to Complainant, evincing what appeared to be genuine concern about his injury. In that context, I credit Mr. Clemmons' denial, in part because the record includes incidents where other miners had requested to see a doctor and had their requests granted. *See* Ex. R-P. Some of these requests were for relatively minor injuries, contrary to Complainant's claim that the reporting of anything short of "profuse bleeding or broken bones" was discouraged.

Complainant also claims to have told Mr. Humes over the radio that he wanted to see a doctor. I am skeptical of this for several reasons.

First, Mr. Humes denied that Complainant ever told him he wanted to see a doctor. Tr. 625:1–4. I found Mr. Humes to be a disinterested witness who was forthright and candid about his own shortcomings, and I credit his testimony here because it is more consistent and reasonable than Complainant's version of events

Second, Complainant says he cannot remember how Mr. Humes responded to the request, and there is again no linkage made between this request and other requests that were allegedly made. He did not testify that he had told Mr. Humes about his earlier request to Mr. Williams, shortly after his injury. As with the requests allegedly made to Mr. Clemmons and Mr. Williams, the testimony relates a solitary statement that the operator's management allegedly ignored, and Complainant did not testify about any effort to follow up on or escalate his requests.

Finally, the record establishes that comments made over the radio could be heard by other persons generally. Mr. Humes was discharged from employment in part because of something offensive he said over the radio that was heard by employees. Yet none of the other miner witnesses testified that Complainant ever made a request to see a physician over the radio.

There is also no testimony about or basis for inferring a correlation between the alleged previous requests and any consideration of them by Respondent's management when it decided to discharge Complainant from employment. As the party with the burden of proof, it is incumbent on the Complainant to not only suggest an inference, but to support it with credible evidence. Even accepting that all his requests to see a doctor were made as stated, there is no evidence that anyone might have considered them when Respondent made the decision to terminate him.[31]

The operator relied on input from Mr. Williams and Mr. Humes in making that decision. I have credited Complainant's testimony that he had previously told Mr. Williams on April 12 that his injury was not improving and that he needed to see a doctor. But even Complainant did not testify that Mr. Williams reacted adversely to this request, or that he attempted to discourage or interfere with his pursuit of medical treatment.

Mr. Williams claims not to have made a recommendation to fire Complainant, and Mr. Humes claims responsibility for the recommendation. But the termination decision was the last in a chain of disciplinary actions, undertaken by or with input from three different supervisors. Each of the previous disciplinary actions preceded Complainant's request to see a physician, and there was no protected activity or evidence of any other relevant health and safety activities or views that could have influenced those decisions.

It therefore appears that Complainant was discharged for the same type of performance issues that contributed to his adverse disciplinary record. He himself acknowledged that he failed to clean or grease the plant on May 9 or 10, as reported by Mr. Williams to Mr. Humes. He said that the company had obtained a new grease gun for him to use. Tr. 435:13–436:2. Although Complainant said that grease gun had the "wrong" tip and could not be used, he acknowledged that other grease guns were available. *Id.*

Greasing the plant was part of Complainant's job and was an important, daily responsibility. Mr. Williams notes—in a statement of some significance—that Complainant did not tell him that the plant had not been greased at the end of his shift, and that this is something that he believed Complainant should have told him, because it was vital that the plant be greased every day. Tr. 785:2–4.

Given the costs and inconvenience created by the catastrophic damage to the plant bearings after a previous such failure, I credit Respondent's proffered justification for its decision to terminate Complainant as reasonable. Complainant produced no evidence that suggests the operator's justification is pretextual. Instead, it appears that the suggested

[31] I also find it odd that Complainant was under the care of physicians for a cardiac procedure unrelated to his employment but testified he did not discuss his occupational injury with his treating physicians. While he was seen by a cardiologist for a specialized procedure, any person who has been provided with medical care is aware of the general requirement to provide a detailed medical history before receiving that care. It is not necessary to my decision that I take administrative notice of this common imposition, but this is another instance where the absence of evidence is not helpful to Complainant's credibility.

connection between the final request to see a physician and the discharge from employment is not a causal nexus but merely a *post hoc, ergo propter hoc* fallacy.

CONCLUSION

The evidence in this case leaves open the possibility that Complainant may have been treated unfairly by his employer prior to his protected activity. Accepting as true his account of events, he received a written warning, which he disputed, from a supervisor who was widely disliked and who eventually resigned under unfavorable circumstances. Complainant was then suspended when other workers who engaged in similar conduct were not disciplined. He was fired for not performing some of his duties during a time when he was injured, and when there appeared to be at least some understanding that other people would assist him with those tasks while he recovered.

However, there is no evidence that improper discriminatory motivation played any role in any of these disciplinary actions. I therefore find that Respondent did not discriminate against the Complainant in violation of Section 105(c)(1) of the Act, and his complaint is **DISMISSED.**

The order of temporary reinstatement entered July 27, 2021, is hereby **DISSOLVED.**

Citation No. 9237452 is **AFFIRMED**. Respondent is **ORDERED TO PAY** the Secretary of Labor $300.00 within 30 days of the date of this decision.[32]

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

[32] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check of 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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 5, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2021-0118 A.C. No. 36-07230-541358 Mine: Bailey Mine

DECISION AND ORDER

Appearances: Ryan M. Kooi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner,

Kenneth J. Polka, CLR, U.S. Department of Labor, MSHA, Mt. Pleasant, Pennsylvania, for the Petitioner,[1]

James P. McHugh, Esq., Hardy Pence LLC, Charleston, West Virginia, for the Respondent.

Before: Judge Sullivan

I. INTRODUCTION

This case is before me upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against CONSOL Pennsylvania Coal Company, LLC ("CONSOL" or "Respondent"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). After my August 25, 2022 Decision Approving Settlement of three of the four penalties in this docket, at issue remains a citation alleging a violation of 30 C.F.R. § 77.205(b), for which the Secretary seeks a civil penalty of $791.00.

The parties presented testimony and documentary evidence for the single citation during a hearing on August 17, 2022, in Pittsburgh, PA. MSHA Inspector Robert W. Swope testified on

[1] On July 13, 2022, I issued an Order Granting Request to Practice for Mr. Polka, a Conference and Litigation Representative ("CLR"). With this Order, Mr. Polka was permitted to conduct this hearing with the understanding that Mr. Kooi would accompany him per the long-standing practice of the U.S. Department of Labor.

behalf of the Secretary and CONSOL Compliance Supervisor Keith Woncheck testified on behalf of the Respondent. Both parties subsequently filed post-hearing briefs on October 24, 2022.[2]

II. GENERAL FACTUAL AND PROCEDURAL BACKGROUND

CONSOL owns and operates the Bailey Mine, which is located in Greene and Washington Counties in Pennsylvania and crosses into Marshall County, West Virginia. The Bailey Mine includes a large prep plant, divided into five "subplants" with up to nine floors, some with half floors in between. On July 28, 2021, Inspector Swope conducted part of MSHA's quarterly EO1 regular inspection of the prep plant. Tr. 30-31.

During his inspection that day, Inspector Swope issued two citations. The first and only citation that is relevant to this proceeding, Citation No. 9204511, was issued because a 38-inch-wide walkway located in the coal preparation plant was covered with a combination of wet coal slurry and fine magnetite. Tr. 41. Sec'y Ex. P-1. This alleged violation of 30 C.F.R. § 77.205(b) was designated as significant and substantial (S&S). To terminate the citation, CONSOL "cleaned all of the extraneous material from the walkway[] and replaced the missing overhead light to improve the illumination of [the] area." Sec'y Ex. P-1, at 001. At issue here is that alleged violation and its associated findings, including whether the violation was S&S, and if the violation is upheld, the penalty to be assessed.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 9204511 for Alleged Violation of Section 77.205(b)

1. Fact of Violation

Before beginning his inspection that day, Inspector Swope notified the Safety Director's Office of his presence and offered for someone to travel with him throughout the facility. CONSOL Compliance Supervisor Woncheck accompanied Inspector Swope during his review of the plant and facility. Tr. 31-32. Inspector Swope began his inspection on the sixth floor and moved on to the fifth and a half floor before proceeding down a set of stairs to the fifth floor of the 2C subplant. Tr. 89, 161.

Attached hereto as Appendix A is Resp't Ex. R-C.1, a map showing the main details of the fifth floor of the plant, as annotated by Woncheck at hearing. The annotations include the route that the two men took on the floor to reach the 2A subplant. Tr. 164, 167. As is shown, when arriving on the fifth floor, Inspector Swope, followed by Woncheck, walked past four coal screens, made a right past two more coal screens and three feeders, and proceeded to make a quick left before turning right onto the right-side concrete walkway of the platform for two other coal screens, identified as A1 and A2. Tr. 167-69; Resp't Ex. R-C.1.

[2] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Sec'y Ex. #," and "Resp't Ex. #" respectively.

At the end of the walkway, Inspector Swope and Woncheck turned 90 degrees to the left and stepped up onto the 15- to 18-foot long metal-grated catwalk that ran across the front of the A1 and A2 coal screens. Tr. 91-93, 101, 169-70. The A1 and A2 coal screens were surrounded by catwalks and concrete on all sides. Tr. 91. On the right side of the coal screens was a step up onto the catwalk, and on the left side of the coal screens (or at the opposite end of the catwalk) was a step down. The catwalk provided access to the front of the A1 and A2 raw coal screens and the catwalk could only be accessed from the rear, via the right or left side pathways. Resp't Ex. R-C.1.

Before continuing down the catwalk in the direction towards the downward step, both men noticed a "material" that was "raining down" like a "shower" from above, and because "slurry was built up" on the surface underneath, they did not proceed further. Tr. 45, 171. Woncheck stated that he called to have the problem—a plugged pipe that was leaking—fixed. Tr. 170.

Once the pipe was fixed from the floor above, which took about 20 minutes, the men went around to the other (left) side of the coal screens to view the accumulation. With his cap lamp, Inspector Swope was able to see that the slurry had "started out about ten feet." Tr. 45, 170.

According to Inspector Swope, given the angle of the walkway on that (left) side, the slurry had "built up just about to the top of the metal walkway in front . . . to the point where it was either running out somewhere else or running over top of the toe boards of the expanded metal," approximately five to six inches deep. Tr. 45-57. Inspector Swope also noted that the handrails which would guide a miner downwards were also covered with "a lot of slop." Tr. 44. At hearing, Inspector Swope described the material as "very wet slurry." Tr. 55.

Woncheck described the slurry as a combination of magnetite, water, and ultrafine coal material, that was "real wet," having the consistency of a "milkshake," and "soup," and not slippery but gritty "like sandpaper." Tr. 198-99. Woncheck disagreed with Inspector Swope on how deep the slurry accumulation was, stating that it was not built to the top of the toe boards but rather "a good inch or two below" that point. He measured it to be four-and-a-half inches. Tr. 209-11; Resp't Ex. B-3, B-5, B-6.[3] At hearing, Woncheck circled on the map where the step on the left side of the catwalk was located, to indicate where the material had built up. Tr. 171-72; Resp't Ex. R-C.1.

In addition to the accumulation, Inspector Swope noted that an overhead light in the area was missing, which he believed made it even harder to see the accumulated material and necessitated his use of a camera flash to produce clear photographs of the area. Tr. 44, 56, 123; Sec'y Ex. P-2, at 005 & 009. Woncheck acknowledged the missing overhead light but stated that "there was plenty of light," he could see the spillage "just fine," and he did not need to utilize the flash feature on his camera when taking photos of the area. Tr. 179.

[3] After Inspector Swope had taken photos and completed his inspection, Woncheck "wanted to do his own investigation" and took additional photos, which were admitted at hearing as Resp't Ex. B-1 to B-6.

Inspector Swope subsequently issued Citation No. 9204511 alleging that CONSOL violated section 77.205(b), in that:

> The 38[-]inch[-]wide concrete travelway on the left side of the Plant 2A raw coal screen was not being kept clear of all extraneous material and other stumbling, slipping, or tripping hazards. A combination of extremely wet coal slurry and very fine magnetite was covering the entire width of the walkway (38 inches wide), and 8 [to] 10 feet long. The mixture of materials was built up to the top of the toeboards (6 inches high) at the end of the left side walkway. There is a 6 [to] 7 inch step up to the expanded metal walkway that runs across in front of the elevated metal walkway. The overhead light, directly above the affected (sic) was missing, which significantly reduced the illumination and visibility at the turn and step down in the walkway. There was also a significant overhead leak of water, coal slurry, and magnetite directly in the walkway. Standard 77.205(b) was cited 15 times in two years at mine 3607230 (10 to the operator, 5 to a contractor).

Sec'y Ex. P-1, at 002.[4]

In designating the citation as S&S, Inspector Swope indicated that the presence of accumulated material was reasonably likely to cause an injury that could be reasonably expected to result in lost workdays or restricted duty of one miner. Sec'y Ex. P-1, at 002. Moreover, Inspector Swope categorized the violation as resulting from CONSOL's moderate negligence. *Id.*

2. Analysis

Section 205, titled "Travelways at surface installations," provides in pertinent part that:

> (a) Safe means of access shall be provided and maintained to all working places.
> (b) Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or tripping hazards.

30 C.F.R. § 205(a)-(b). There is no dispute that the cited area – the catwalk that provided access to the front of the two raw coal screens and the adjoining pathways to that catwalk – constituted a "[t]ravelway" or "platform" that provided a "means of access to areas where persons are required to work or travel."

As for whether the mixture that was falling from the overhead pipe and accumulating on the travelway and platform below should be considered "extraneous material," that term is not defined in the regulations, so its ordinary meaning applies in this instance. *Peabody Twentymile Mining Co. v. Sec'y of Labor*, 931 F.3d 992, 997 (10th Cir. 2019) (holding that in "[t]he absence of a definition in the standard . . . . we apply the ordinary or dictionary definitions of the terms.") "Extraneous" is defined as "1. Not constituting a vital element or part. . . . 3. Coming from the outside. . . ." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 629 (4th ed.

[4] At hearing, the inspector explained that he meant the material had built up to bottom of the metal grating of the catwalk. Tr. 117.

2009). In the context of the cited area and the purpose it served at the plant, the material in question was clearly "extraneous," so, at a minimum, a technical violation has been established in this instance.

In its post-hearing brief, CONSOL admits as much and thus now concedes a violation. Resp't Br. at 8. In challenging the S&S designation, however, CONSOL otherwise takes issue with the inspector's description of the violation. CONSOL does not agree that the extraneous material in this instance posed any stumbling, tripping, or slipping hazard. *Id*. at 8-10. Consequently, before determining whether the violation was S&S, I address the extent to which the Secretary established the scope of the alleged violation of section 77.205(b).[5] My findings are as follows.

As discussed, the two witnesses differed markedly on whether the conditions posed a stumbling or slipping hazard to miners. I note at the outset, as will be discussed further herein, that between the two men, Wonchek was substantially clearer on the details of how the inspection of the raw coal screen area unfolded. With respect to the extent of the violation, however, the tangible evidence of the cited area's actual conditions at the time of the inspection is of more probative value.

At hearing, each man relied on the photographs he had taken of the conditions during the inspection and soon afterwards. Having reviewed all of those photographs, I conclude that, although the photographs may not substantiate all the details of the citation, they supply sufficient support for Inspector Swope's fear that, given the nature and amount of the fallen material and where it had accumulated, in theory a miner traveling across the catwalk from right to left might not perceive that there was a step down while making a turn onto the adjoining concrete pathway, and lose his footing upon stepping down unexpectantly. The gray, watery nature of the accumulated material and its tendency, if viewed from close range in the reduced lighting, to blend in with the left side edge of the catwalk, would have largely if not totally obscured the step down. This can be seen most clearly in Sec'y Ex. P-2, at 004 & 013, as well as Resp't Ex. B-2 & B-3.

It is true that the photographs taken from farther away, down the adjoining concrete pathway, tend to show that the difference in height between the catwalk and the pathway remained perceptible. Sec'y Ex. P-2, at 007, 010, & 011; Resp't Ex. B-1. However, as Inspector Swope explained, the risk the conditions posed was not to a miner coming from the direction that those photographs were taken, because a miner coming from that direction would have noticed the accumulated material. Tr. 75. Rather, at risk was any miner coming across the catwalk from its *other* end to round the corner onto the concrete, who would have a significantly worse

[5] In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc*., 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co*., 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has defined the Secretary's burden as a preponderance of the evidence, "which simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG Cumberland Res. Corp*., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152 (Nov. 1989).

vantage point to appreciate how the fallen material had obscured the step down. Tr. 51-52, 56, 75.[6]

Again, however, the foregoing establishes little more than a technical violation in this instance, for the record shows that it was unlikely a miner would have traveled across the catwalk to get to the point where he would turn the corner and take the step down. That is because, as the citation states and Swope testified, there was an ongoing "significant overhead leak of water, coal slurry, and magnetite" that caused the cited conditions. Sec'y Ex. P-1, at 001; Tr. 45-46, 103-04. There is no evidence that either of the two men considered walking through the material that was falling at such a rate that Wonchek compared it to a "shower" that was "raining down." Tr. 171, 180. Indeed, the evidence is that both men circled back and walked around to access the catwalk at its other end even *after* the leaking pipe was addressed from a floor above, and the material had stopped falling. Tr. 59, 70, 171-72, 195, 232-33. Swope testified that he did not consider it advisable to walk into the material from either direction. Tr. 56-57, 75-76, 86, 105, 141, 143.

Reading the citation in light of Swope's description of the conditions as he found them, it is possible he may have been concerned that, at some point, the leak might have ceased on its own prior to the discovery of the conditions, and a miner would travel across the catwalk and thus have to navigate the step down at its end through the accumulated material. In such circumstances, remote as they may have been, I find that in addition to the material at issue being "extraneous" in this instance, it posed the stumbling hazard which the inspector was reasonably concerned about.[7]

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[6] CONSOL argues that the design of the handrails running along both sides of the turn from the catwalk to the pathway provided an independent indication that a downward step existed. Resp't Br. at 9. Given the conditions, particularly the reduced illumination resulting from the missing light, I conclude that it would have been too much to expect a miner traveling across the catwalk to necessarily pick up and quickly process that the handrail design indicated that there was a step down onto the catwalk.

[7] I note that at hearing, Swope did not at all acknowledge that the material ceased falling from above before he issued the citation. While Wonchek explained that the leaking pipe was repaired from the floor above, and that repairs were completed *before* the two men proceeded further to examine the conditions in the raw coal screen area (Tr. 170-71), Swope's telling included no such sequence of events. Rather, in response to my questioning on his view of the steps necessary to abate the cited violation, he recounted that, upon issuing the citation, he left the area, expecting it to be first cleaned up, at which point only then the leak (and, afterwards, the missing light) could be addressed. Tr. 70-71, 85. In my view, Wonchek's version in which the leaking pipe was repaired earlier makes much more sense. This is particularly so considering the citation identifies the "Action[s] to Terminate" as only cleanup of the material and replacement of the overhead light, thus entirely omitting mention of stopping the overhead leak described earlier in the citation. Sec'y Ex. P-2, at 001. This contradicts Swope's testimony on his abatement expectations, thereby providing further support for Wonchek's version of events.

3. S&S and Gravity of the Violation

A violation is S&S if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). In *Mathies*, the four elements or steps required for an S&S finding were expressed as follows:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted). More recently, the Commission restated *Mathies* Step 2 in terms of finding that "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016).[8]

a. *Mathies* Step 1 & Step 2

Step 1 of the Commission's S&S analysis is satisfied above, as noted in my conclusion that the basic elements of a section 75.205(b) violation were conceded by CONSOL and the evidence further established at least a theoretical stumbling hazard as set forth in the citation.

To satisfy Step 2, the Secretary must establish that there was at least a reasonable likelihood that a miner would step into the accumulated material, not realizing there was a step down to the concrete pathway and be subject to the stumbling hazard against which the standard is directed. Importantly, an S&S determination is based upon the particular facts surrounding the violation, existing at the time of the citation issuance, and, in general, assumes normal mining operations will continue. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984); *Northshore Mining Co.*, 38 FMSHRC 753, 757 (Apr. 2016) (ALJ). It is thus to be made "without any assumptions as to abatement." *Mach Mining,* LLC, 40 FMSHRC 1, 6 *aff'd*, 748 Fed. Appx. 347, 2019 WL 275718 (D.C. Cir. 2019).

The Secretary argues that if the conditions were "permitted to exist unabated under continued normal mining, it is reasonably likely that a miner would have walked into the area and stumbled or slipped on the walkway." Sec'y Br. at 10. Tellingly, the Secretary's analysis wholly omits a very significant fact that the inspector included in the citation: the "significant leak" of material from above. As previously discussed, that made it very much *unlikely* any miner would have attempted to cross the catwalk while the material continued to rain down in such an obvious manner.

[8] Here it makes no difference which version of Step 2 is applied. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148-49 & n.6 (Apr. 2021).

As with the violation, and because he did not directly address the issue in his testimony, I am again left to infer that the inspector may have presumed that there was a possibility that at some point the material could have ceased falling without any action by CONSOL. This would have raised the risk that, prior to discovery of the accumulated material, its clean up, and repair of the light, a miner would cross the catwalk and step onto the pathway without realizing there was a step down.

Such a theoretical possibility, while it may be acceptable in the context of determining whether the alleged violation has been established, does next to nothing to advance the notion that there was a "reasonable likelihood" under Step 2 of *Mathies* of it coming to fruition and occurring. That is particularly true here, where the Secretary offered no evidence on the possibility that the leak could have ceased without action by CONSOL.

Instead, the Secretary solely focused on establishing the reason *why* a miner may have had to cross the catwalk to the lower pathway. The inspector offered an array of reasons for a miner to have done so.

The inspector first cited what appeared to be his overriding concern: the likelihood of the catwalk being used simply due to the large number of employees working throughout all parts of the plant, including the contractor employees who he described as subject to high turnover rates, given the unpleasant working conditions. Tr. 46-51, 78, 85, 146-47. As can be seen in Appendix A, however, the A1 and A2 raw coal screens and surrounding catwalk and concrete pathways were in large part set off on their own platform area, and the inspector eventually agreed that it was an area that would only be accessed if there was a specific task or tasks to be done there. Tr. 91, 94, 134, 136-38; Resp't Ex. R-C.1.

As for what those tasks could be, the inspector's initial explanation was that a miner might go to "check" on the overhead leak. Tr. 47, 52. If such a "significant" leak was ongoing, however, it was unlikely a miner would cross the catwalk underneath it, much less go entirely across it to reach the step down onto the pathway. Moreover, because the leak was fixed from the floor above, there was no need to cross the catwalk for that reason either. Tr. 170-171.

The inspector was on more solid footing when describing the potential for a miner to have to go to the area to service the raw coal screens, such as, for instance, when dust is thrown off the drive motors onto the screens, resulting in plug ups, or for the periodic need to adjust the skirting around the screens. Tr. 47, 52, 69, 85.[9] Lastly, Inspector Swope discussed the possibility that the missing light might be noticed from outside the area, and perhaps a miner would go, or be sent, to repair the light via the catwalk without appreciating that the material had covered the step down. Tr. 52, 69, 72, 85, 129-31.

[9] In response, Wonchek explained how some of these tasks could be accomplished without necessarily having to set foot on the catwalk, such as the maintenance done on screens from the concrete pathways on either side of the platform. Tr. 175-76; Resp't Ex. R-C.1. He further explained that access to the raw coal screens via the catwalk in front of them was only necessary when an electrician had to reset a "tilt switch" upon an indication of material buildup on a screen. Such would occur "once every two, three months, maybe, depending on conditions." Tr. 172-74.

However, I need not reach a conclusion with respect to the respective evidence on the likelihood of a miner having a reason to cross the catwalk and be subject to a stumbling hazard upon missing the obscured step down to the pathway. Any evidence that a miner may have had a reason to cross the catwalk to begin with is simply too greatly outweighed by the evidence that the falling material would have deterred that miner from making it to the end of the catwalk. That latter evidence prevents the Secretary from establishing *Mathies* Step 2 in this instance.[10]

b. *Mathies* Step 3 & Step 4

Inspector Swope testified that if a miner were to turn the corner leaving the catwalk and step onto the pathway without realizing there was a six- or so inch step down, the miner's resulting loss in balance could cause knee or ankle injuries or injuries stemming from falling into a handrail. Inspector Swope characterized these injuries as reasonably serious and could result in lost workdays or restricted duty. Tr. 56, 77-78. Given the conditions, I agree with the inspector on this, and find that *Mathies* Steps 3 and 4 have been satisfied by the Secretary in this instance. *See also Wolf Run Mining Co.*, 36 FMSHRC 1951, 1958-59 (Aug. 2014) ("not[ing] that an inspector's judgment is an important element in an S&S determination" as part of *Mathies* Step 3 and under Step 4 crediting inspector's testimony regarding the severity of injuries that had resulted to miner).

Due to not satisfying *Mathies* Step 2, I conclude that the Secretary has failed to establish that the violation of section 77.205(b) was S&S. I further conclude that an injury in this instance was unlikely, and that any injury would result in lost workdays or restricted duty.

4. Negligence

The Commission "may evaluate negligence from the starting point of a traditional negligence analysis." *Brody Mining*, 37 FMSHRC at 1702. This analysis asks whether an operator has met "the requisite standard of care—a standard of care that is high under the Mine Act." *Id.* Considerations include "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulations." *Id.*; *see also A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). The Commission has explained that an ALJ "is not limited to an evaluation of allegedly 'mitigating' circumstances" and should consider the "totality of the circumstances holistically." *Id.; see also* 30 C.F.R. § 100.3(d) (stating that operators must be "on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.").

[10] Importantly, the Secretary does not argue that it would only be through the exercise of caution that a miner would avoid walking through the falling material. The possibility that a miner would take precautions is an impermissible consideration in determining S&S. *See, e.g., Newtown*, 36 FHSHRC at 2044; *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992). Rather, the evidence, including that introduced by the Secretary, is that all it took was basic common sense to not walk through the falling material.

Here, CONSOL is not challenging Inspector Swope's assessment of moderate negligence. In determining that CONSOL was moderately negligent, Inspector Swope testified that he had recently seen an increase in section 77.205(b) violations, specifically that "the same standard was cited 15 times in less than two years at the plant." Tr. 78-79; Sec'y Ex. P-1 at 001. Additionally, Inspector Swope noted that spills occurred "everywhere through the plant" and had been "getting worse … over the last several years." Tr. 118. These conditions, in conjunction with Inspector Swope's understanding that individuals go through and look at the plant "on all three shifts" support his determination of moderate negligence. Tr. 47, 79, 85. Woncheck himself stated that in his role as compliance supervisor, he travels every area of the plant every day. Tr. 158-59, 220-21. Thus, I credit the inspector's explanation and affirm the negligence finding.

IV. PENALTY

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

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

In the fifteen months preceding the issuance of Citation No. 9204511, MSHA issued 13 violations of section 77.205(b) to the Bailey Mine (seven to operator, four to contractors). *See* MSHA, *Mine Data Retrieval System*, https://www.msha.gov/mine-data-retrieval-system (last visited November 25, 2022). CONSOL agreed in conjunction with the Secretary that the proposed penalty would not affect its ability to continue in business. Jt. Stip. 6.

For Citation No. 9204511, the Secretary proposed a penalty of $791.00. I determined CONSOL's negligence to be moderate. *See* discussion *supra* Part III.A.4. I also determined the gravity of the violation to be non-S&S, that an injury in this instance was unlikely, and that if an injury did occur, it would result in lost workdays/restricted duty to one person. *See* discussion *supra* Part III.A.3. Moreover, CONSOL demonstrated good faith by fixing the leaking pipe and cleaning up the area promptly. Tr. 83, 149-50, 170. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of $375.00 for Citation No. 9204511.

V. CONCLUSION AND ORDER

It is hereby **ORDERED** that Citation No. 9204511 is **MODIFIED** to reduce the gravity from "reasonably likely" to "unlikely" and to remove the S&S designation. Respondent

CONSOL is hereby **ORDERED** to pay a penalty of **$375.00** within 30 days of the date of this decision.[11] Accordingly, this case is **DISMISSED.**

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

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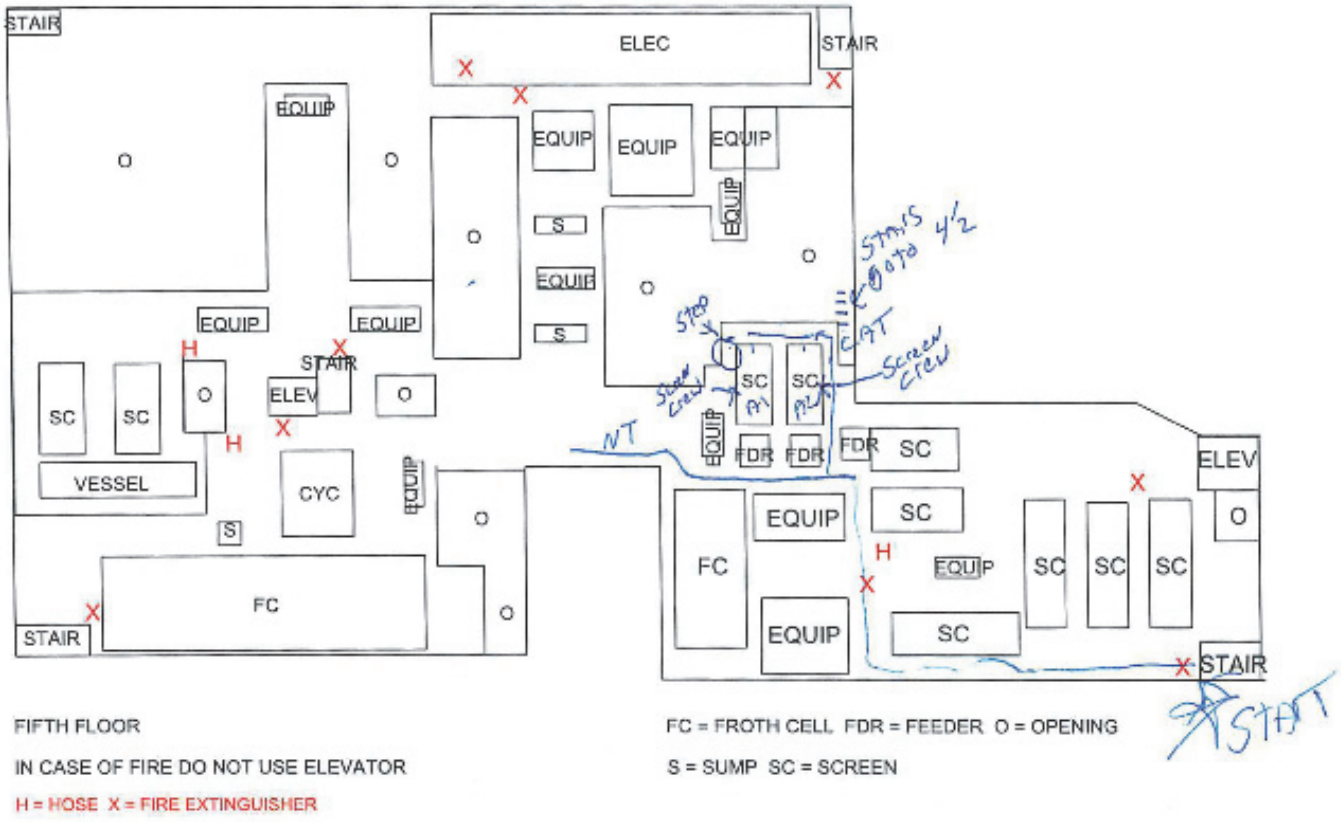
Attachments:

Appendix A: Respondent's Exhibit R-C.1

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

APPENDIX A



FIFTH FLOOR

IN CASE OF FIRE DO NOT USE ELEVATOR

H = HOSE X = FIRE EXTINGUISHER

FC = FROTH CELL FDR = FEEDER O = OPENING

S = SUMP SC = SCREEN

R-E.1

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577/FAX 303-844-5268

December 13, 2022

SECRETARY OF LABOR, MSHA on behalf of MOSES ORTIZ, Complainant v. MARIO SINACOLA & SONS EXCAVATING INC. AND ITS SUCCESSORS, Respondent	DISCRIMINATION PROCEEDING Docket No. CENT 2022-0028-DM MSHA Case No. SC-MD-2021-06 Mine: Midlothian Quarry & Plant Mine ID: 41-00071 J348

DECISION

Appearances: Lacee Caitlyn Eakins, Esq. and Jennifer Johnson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Complainant, Harold Jones, Esq., Polsinelli PC, Dallas, Texas for Respondent.

Before: Judge Manning

This case is before me upon a complaint of discrimination brought by the Secretary of Labor on behalf of Moses Ortiz under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the "Mine Act") against Mario Sinacola & Sons Excavating Inc. and its successors ("Sinacola") pursuant to sections 105 and 110 of the Mine Act. 30 U.S.C. §§ 815 and 820. A hearing was held in Fort Worth, Texas. The parties presented testimony and documentary evidence and filed post-hearing briefs. For reasons set forth below, the complaint of discrimination brought by the Secretary of Labor on behalf of Moses Ortiz is **DENIED** and this proceeding is **DISMISSED**. Although I have not included a detailed summary of all the evidence or each argument raised, I have fully considered all the evidence and arguments.

I. STATEMENT OF THE CASE

On April 20, 2021, Ortiz filed a complaint of discrimination under section 105(c) of the Mine Act. Following an investigation, the Department of Labor's Mine Safety and Health Administration ("MSHA") filed a complaint with the Commission on Ortiz's behalf. This case was assigned to me after Sinacola filed its answer to the complaint.[1]

[1] On July 20, 2021, the Secretary filed an application for temporary reinstatement in Docket No. CENT 2021-0184-DM. On August 24, 2021, I granted the parties' joint motion to approve the settlement in that case and ordered Sinacola to provide temporary economic reinstatement. As of this date, my order of temporary reinstatement is still in effect.

Ortiz, in his complaint, alleges Sinacola discriminated against him when he was terminated in retaliation for making safety complaints and asserting his right to contact MSHA with safety concerns.

II. SUMMARY OF THE EVIDENCE

A. Background

Sinacola is a construction company that conducted mining operations at the Midlothian Quarry and Plant. Ex. C5 p. 40. [2] In May 2010 Sinacola hired Ortiz as a laborer at its Frisco construction site.[3] Tr. 18, 28. In 2012, at Ortiz's request, Sinacola transferred Ortiz to the Midlothian Quarry and Plant (the "mine).[4] Tr. 28. Harry Bonds supervised Ortiz at the mine.[5] Tr. 18-19, 28, 160.

Ortiz and Bonds had a contentious relationship at times. Ortiz testified he did not like the way Bonds spoke to him and felt Bonds assigned him unfavorable tasks and harbored ill will

[2] For purposes of this decision, the page numbers referenced in exhibits C3, C4 and C5 correspond to the page number included on the bottom right-hand side of each page in the format "SINACOLA_00000[page number]".

[3] At hearing, much was made about the veracity of an answer to a question on Ortiz's job application to work for Sinacola. Ortiz testified he applied for the job at Sinacola over the phone and never filled out or reviewed an application document. Tr. 34, 36, 71-72. The written Application for Employment asks, "[h]ave you ever been convicted of a felony?" Ex. C4 p. 21. "NO" is selected on Ortiz's application. *Id*. There is no dispute Ortiz had a criminal history that included three felonies. Tr. 77-79. Sinacola asks the court to infer that Ortiz was untruthful on his application and that this untruthfulness is indicative of Ortiz's general lack of credibility. I decline to make this inference. Rather, I find Ortiz's testimony on this particular issue to be credible. Ortiz did not recall being asked during the call if he had been convicted of a felony. Tr. 71, 81. Moreover, he denied that the signature at the bottom of page two of the application form was his. Ex. C4 p. 22, 25; Tr. 39, 70-73. Although expert witnesses are often needed to properly compare signatures, in the court's opinion the signature at the bottom of page two of the application form is entirely different from the signature Ortiz identified as his own on other Sinacola documents. *Id*.

[4] Ortiz initially drove a truck at the mine but became a loader operator in 2018. Tr. 18, 161.

[5] Bonds had a reputation with mine management as a safety minded individual with a good leadership style and history of avoiding injuries and lost workdays. Tr. 97-98, 104, 106-107, 152. Bonds has over 53 years' experience in the construction industry and testified he was tough on safety because he had seen people hurt and killed. Tr. 162.

toward him because of Ortiz's criminal past.[6] Tr. 24, 41-42. According to Ortiz, there were times Bonds yelled and saliva would end up on Ortiz's face. Tr. 42.

Bonds testified that, although he tried to work with Ortiz[7], Ortiz did not like the way Bonds supervised him. Tr. 163. According to Bonds, Ortiz did not respect Bonds' supervisory authority and instead thought Bonds "was just another hand." Tr. 163. Bonds described Ortiz as a "decent" loader operator who was hard on the equipment and struggled to follow proper procedure. Tr. 167-168. Bonds testified it was difficult to know what Ortiz wanted and noted that although Ortiz initially wanted to operate a loader, Ortiz later complained and expressed his desire to be "off the loader." Tr. 165.

Ortiz testified that in approximately 2016 Bonds refused to look at a doctor's note that placed work restrictions on Ortiz because of a hernia he suffered. Tr. 21, 27, 44. According to Ortiz, when presented with the doctor's note, Bonds instructed Ortiz to talk to a member of Sinacola's safety department, which he did, and was then "made" to do labor despite the note. Tr. 21.

Ortiz described another incident in 2020 where Bonds allegedly berated Ortiz for not picking up his phone when Bonds attempted to call him. Tr. 21-22, 27. According to Ortiz, although Sinacola had a policy that employees were not to use their phones when operating machinery, Bonds stated that he did not care if it was company policy and ordered Ortiz to have his phone accessible. Tr. 21-22. Ortiz testified that he complained to one of the mine's superintendents about the conduct. Tr. 22.

Both Ortiz and Bonds testified about an incident in which Ortiz struck a rock with a loader he was operating, causing damage to the loader. Tr. 24, 58, 59, 168. Their accounts of the incident differ, with Ortiz alleging that Bonds purposefully placed the rock in such a way as to cause the damage, and Bonds denying as much and blaming Ortiz for not keeping the area around the loader clear.

During his time at the mine, Ortiz was formally disciplined two times. First, in 2014 Ortiz was involved in a physical fight at the mine. Tr. 50. Bonds, who had the power to terminate Ortiz and intended to do so following the fight, ended up only suspending Ortiz for a week and issuing a written disciplinary warning after speaking with the mine superintendent and human resources personnel. Tr. 164-165. Bonds testified that the fight was the only incident that caused him to consider terminating Ortiz. Tr. 164. Second, in approximately 2020 Ortiz was issued a disciplinary warning after he struck Bonds' truck with a loader. Tr. 74. Ortiz testified that at the time of the incident he was not sure he hit the truck, but acknowledged the bumper was offset

[6] Bonds testified he knew Ortiz had been "locked up" but did not know any specifics. Tr. 168-170. At the hearing, Ortiz admitted that he was convicted of three serious, violent felonies between 1992 and 1995 for which he was incarcerated. Tr. 78-79.

[7] Bonds testified he talked to Ortiz about his family, gave Ortiz time off and extended breaks when needed, and allowed Ortiz and other loader operators the opportunity to reassign work duties among themselves. 166-167.

and contacted Bonds as a result. Tr. 74. According to Ortiz, Randy Werbig, Sinacola's head of safety, investigated the incident and thanked Ortiz for his honesty. Tr. 82.

Eric Kain, Sinacola's mine division manager,[8] testified that he was aware of friction between Ortiz and Bonds. Kain knew Ortiz felt that Bonds picked on Ortiz and was holding Ortiz back from getting raises and career development opportunities at the mine. Tr. 99-100. However, Kain also knew how much Ortiz was getting paid and testified that Ortiz received normal raises and was never prevented from getting a raise. Tr. 100-101. According to Kain, Ortiz never seemed satisfied with his job. Tr. 110. When asked about the incident where Ortiz struck Bonds' truck with loader, Kain testified he probably should have terminated Ortiz at that point but decided not to do so after Bonds "praised" Ortiz for reporting it. Tr. 103-104.

Tony Phillips, the vice president of human resources for Sinacola since 2019, testified that Ortiz "had a reputation of being a loudmouth, a troublemaker" and had allegedly circulated a petition with other coworkers to "get rid of" Bonds.[9] Tr. 144, 149. Phillips testified Ortiz's grievances were not about safety, but rather about other things like pay and what equipment he was required to operate. Tr. 149-150. Phillips testified that Ortiz's pay during the time he worked at the mine was "right in line general increases . . . [which are] looked at annually." Tr. 150. Phillips attributed the trouble caused and complaints lodged by Ortiz as being at least partially a result of a "personality difference[]." Tr. 149-150.

B. Conciliation Meeting

At some point in early 2021 Ortiz's growing frustration with Bonds prompted Ortiz to call Werbig to complain about Bonds threatening to fire Ortiz on several occasions and failing to wear a seatbelt at times.[10] Tr. 23-24, 27, 65. In response to the call, Werbig proposed a conciliation meeting.[11] Tr. 23-24.

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[8] Kain has worked for Sinacola since 2004 and has been the mine division manager for over a decade. Tr. 85-86. As mine division manager he, among other things, oversaw the mine, supervised Bonds, and indirectly supervised Ortiz. Tr. 86.

[9] On cross-examination Ortiz denied the existence of the petition. Tr. 32. However, Kain confirmed he also had heard about Ortiz attempting to garner support from other miners for a petition to have Bonds removed from the mine. Tr. 102, 119.

[10] Ortiz testified he complained to management more than once about Bonds not wearing his seatbelt. Tr. 22, 27. Although Ortiz claimed that he saw Bonds not wearing a seatbelt at times, he also opined that Bonds was not wearing a seatbelt at other times based on Ortiz hearing a "ding" sound while on the radio with Bonds. Tr. 22, 68.

[11] Werbig brought the idea of the conciliation meeting to Phillips. Tr. 149. According to Phillips, Werbig indicated Ortiz was causing trouble at the mine and Werbig believed the meeting could be an opportunity to "build a bridge" and get an understanding of Ortiz's complaints and figure out a way for Ortiz and Bonds to "work harmoniously." Tr. 149, 157. Despite the unusual

(continued…)

On February 1, 2021, Ortiz, Bonds, Kain and Werbig met to discuss issues Ortiz was having with Bonds. Tr. 23, 91. Ortiz testified that during the meeting he voiced concerns about Bonds threatening to fire him, Bonds driving without a seatbelt, his belief that Bonds had purposefully caused damage to Ortiz's loader and blaming it on Ortiz, and Bonds forcing him to work with a hernia despite work restrictions. Tr. 23-24, 44, 65. During the meeting, Ortiz acknowledged that Bonds had never asked him to operate unsafe equipment or equipment he was not adequately trained on. Tr. 43. According to Ortiz, Bonds was given an opportunity to speak, after which Werbig and Kain left the room so that Ortiz and Bonds could forgive each other. Tr. 24-25. Ultimately, Ortiz and Bonds shook hands and embraced. Tr. 24-25. In addition to agreeing to improve their communications with each other, Ortiz affirmatively stated Bonds was his boss and had authority over him. Tr. 61.

Kain, who was present during the meeting in his role as a facilitator, did not recall a discussion of any safety complaints.[12] Tr. 92, 100; Ex. C1 pp. 5-12. He viewed the meeting as a means to address discord between Bonds and Ortiz that stemmed from Ortiz's perception that he was not being paid appropriately or given advancement opportunities. Tr. 100. Despite participating in the meeting, Kain believed Ortiz was someone who could not be satisfied and, as a result, was not optimistic that the agreement reached by Bonds and Ortiz would last. Tr. 101.

At the end of the meeting the parties agreed to take specific steps going forward, including having open communication channels and Ortiz affirmatively recognizing Bonds' supervisory authority over him. Tr. 159, Ex. C1 p. 11-12.

C. Events of April 20, 2021

According to Ortiz, while riding with Bonds in a truck on or about April 20, 2021, Bonds raised his voice, was hostile toward Ortiz, and criticized Ortiz for improper machine operation and not "keeping the grade." Tr. 20, 62-63. At some point Ortiz told Bonds to stop the truck so Ortiz could exit and walk. Tr. 20. Ortiz believed getting out of the truck was the best way to "diffuse the confrontation." Tr. 49. Instead, according to Ortiz, Bonds accelerated until the truck was moving too fast for Ortiz to get out. Tr. 20.

Following the incident in the truck, Ortiz called Kain to complain about Bonds. Tr 25. Ortiz and Kain offered conflicting accounts of what was said on the call. Ortiz testified he called

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[11] (…continued)
request, Phillips was optimistic that the meeting could be beneficial and allowed Werbig to proceed. Tr. 157-158.

[12] Although Kain did not recall a discussion of any safety complaints, Werbig's notes from the meeting, which were entered into evidence at the hearing, include a brief mention of a statement made by Ortiz that "[s]ometimes when [Bonds] calls [Ortiz] on the radio [he] know[s Bonds] doesn't have his seatbelt on because [Ortiz] can hear it beeping when [Bonds is] in his truck." Ex. C1 p. 9. The notes include a response from "R," presumably Randy Werbig, stating "[c]ompany policy and MSHA regs. we all know if we are operating vehicles or equipment w/o seatbelts this is not acceptable. Anything else?" To which Ortiz responded "No." *Id*.

Kain to complain about the truck incident involving Bonds, but never got to explain what happened. Tr. 19-21. According to Ortiz, at some point during the call Kain cut off Ortiz and said something to the effect of "how do we know that you're not a problem, how do we know it's Harry, Harry Bonds, and not you." Tr. 19, 49. To which Ortiz allegedly responded, "if I would have been a problem I would have called MSHA a long time ago." Tr. 19. At hearing, Ortiz agreed that he was telling Kain that "[he] believed that [he] had good excuses to call MSHA in the past and . . . [he] didn't" try to contact MSHA. According to Ortiz, Kain did not ask what Ortiz could have contacted MSHA about, and instead again cut off Ortiz, said he would not be threatened and terminated Ortiz. Tr. 19, 23.

Kain offered a different account of the phone call. Kain testified that Ortiz called to complain about Bonds' refusal to stop a truck so Ortiz could exit the truck and walk back to the yard along the road.[13] Tr. 89-90. Kain testified it would have been "completely unsafe" for Bonds to let Ortiz walk along the road given all the equipment traveling there. Tr. 89. In response to Ortiz's statement, Kain offered Ortiz the opportunity to transfer to another job within the company where Ortiz would have a different supervisor.[14] Tr. 90, 111. However, Ortiz immediately refused the offer and instead demanded that Kain remove Bonds from the mine. Tr. 90, 102-103, 112. Ortiz then stated he could have contacted MSHA in the past but did not state what exactly he could have contacted MSHA about. Tr. 88, 102, 123. Kain responded by saying Ortiz had the right to contact MSHA at any time and Kain was not going to "be coerced into moving Harry Bonds off the mine site[.]" Tr. 91. Kain, who understood Ortiz's rejection of the transfer offer to be final, terminated Ortiz over the phone. Tr. 86-87, 91, 102-103. According to Kain, he never asked what Ortiz could have contacted MSHA about. Tr 88.

Notably, during direct examination, Ortiz did not mention Kain's offer to transfer Ortiz to another of Sinacola's worksites. Tr. 31. However, on cross-examination, Ortiz acknowledged an offer was made.[15] On cross-examination Ortiz also denied that he ever made a statement that he wanted Bonds removed from the mine. Tr. 67. Following the telephone call with Kain, Ortiz immediately contacted MSHA. Tr. 21, 26.

D. Proffered Reasons for Termination and Additional Background

Kain testified he had no plans to terminate Ortiz prior to the April 20 call, but he considered Ortiz's demand to remove Bonds from the mine an act of insubordination and agreed it was violation of the conciliation agreement which required Ortiz to follow the directions of his

[13] When asked at hearing if Kain spoke with Bonds about the events in the truck, Kain stated that he did not, but said that the previous day Bonds had mentioned that Ortiz was upset about the loader he was operating and that Ortiz wanted to be trained to operate a dozer. Tr. 90.

[14] Phillips testified that Sinacola needed equipment operators and transfers were not unusual. Tr. 151. Had Ortiz accepted Kain's transfer offer, Phillips would have signed off on it. Tr. 151. According to Kain, on April 19 he spoke to a superintendent about the possibility of transferring Ortiz to another location. Tr. 122.

[15] Ortiz testified he could not work at the alternate location for personal reasons because of the longer commute. Tr. 31, 32, 49.

supervisor. Tr. 109, 122. Kain testified he had never had an employee demand that the employee's supervisor be terminated. Tr. 109. It was Kain's opinion that Ortiz could not work at the mine if he could not accept that Bonds was his boss. Tr. 110. Although Kain agreed insubordination was a longstanding issue with Ortiz and that Ortiz could have been written up in the past, he acknowledged that Ortiz had never been written up for insubordination. Tr. 118.

Phillips testified it was his understanding Kain terminated Ortiz because Ortiz demanded that Kain terminate Bonds. Tr. 147. He explained that such a demand is unacceptable because if employees can threaten supervisors, then management has no control over the business. Tr. 147-148.

It was never clear to Phillips what exactly Ortiz's statement regarding MSHA was about. Tr. 148. According to Phillips and Kain, it is "extremely easy" for a Sinacola miner to make a complaint. Tr. 99. Information on how to contact MSHA is posted on the bulletin board at the mine office, and miners are trained when they are hired and throughout their employment. Tr. 99, 148-149. Additionally, Sinacola employees have access to a complaint hotline and can speak directly with their safety representative. Tr. 148-149.

Phillips testified that Ortiz was a problem from a human resources standpoint given his history. Tr. 152. Phillips, who did not join Sinacola until 2019, opined that had he been with Sinacola in 2014 when Ortiz got into the fight or when Ortiz hit Bonds' truck with the loader, Ortiz would not have been employed with Sinacola after those incidents. Tr. 152

Ortiz testified generally that he was trained to only contact MSHA as a "very last resort." Tr. 83. However, he conceded Sinacola trained him on miners' rights, how to make a complaint to MSHA, and was not discouraged from going to MSHA or making a complaint. Tr. 34, 47, 83. Moreover, Ortiz acknowledged he could have gone to MSHA in the past but chose not to do so. Tr. 83.

At hearing, Mark Shearer, MSHA's special investigator assigned to investigate the case, testified that Ortiz claimed to have made multiple safety complaints and was ultimately terminated after telling Kain he would have called MSHA if he wanted to start trouble. Tr. 127-128. Based on his investigation, Shearer determined Ortiz was fired for asserting his right to contact MSHA. 131. On cross-examination Shearer agreed that context matters when conducting an investigation and that it takes more than a mere mention of the word "MSHA" for a statement to be considered protected activity. Tr. 132, 138. Nevertheless, he acknowledged that during his investigation he did not speak to anyone with Sinacola and relied entirely on Sinacola's position statement for context. Tr. 132-133, 142. According to Shearer, he believed Ortiz was credible because Shearer did not "catch[] him in any . . . lies or any mistruth" during the investigation. Tr. 141.

III. DISCUSSION AND ANALYSIS OF THE ISSUES

A. Credibility and Resolution of Critical Disputes of Fact

My decision in this matter hinges to a large degree on credibility determinations and resolution of critical disputes of fact. My findings of fact are based on the record as a whole and the court's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the court has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimony of the witnesses. In evaluating the testimony of each witness, I have also relied upon the witness's demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

As an initial matter, I find both Kain and Bonds to be credible witnesses. Both Kain and Bonds had knowledge of key facts and provided testimony that was internally consistent as well as consistent with other credible testimony. Moreover, both displayed a sincere and forthright demeanor when testifying. Consequently, as a general matter, I find that the veracity of their testimony is not in question.

Sinacola attacked Ortiz's credibility for a number of reasons but relied heavily upon his alleged failure to disclose his extensive criminal background on his employment application and his lack of candor and inconsistencies when discussing this background at the deposition and the hearing. Although I find that Ortiz's testimony concerning his prior felonies was inconsistent, I primarily reach my conclusion that Ortiz lacks credibility for the reasons discussed below.

Ortiz's testimony regarding what occurred during the April 20 call defies logic and is self-serving. At hearing, Ortiz claimed he called Kain to complain about Bonds speaking in a hostile voice while criticizing Ortiz and then preventing Ortiz from getting out of a moving truck. Although Ortiz testified the intent of his call was to discuss this incident, he also claimed he never had an opportunity to do so before Kain terminated him. Moreover, Ortiz claimed that during the call he did not make a demand that Bonds be terminated. Nevertheless, Ortiz asserted Kain made a comment during the call along the lines of "how do we know that you're not the problem, how do we know its Harry, Harry Bonds, and not you." Tr. 19. It is unlikely that Kain would make a comment like this if Ortiz had not described the incident and/or made a demand that Bonds be removed from the mine. In addition, Ortiz's recollection of the call on direct examination included no mention of Kain offering a potential transfer to another Sinacola site, and instead characterized the call as one in which Kain repeatedly cut-off Ortiz before immediately firing Ortiz after he made a comment about contacting MSHA. However, on cross-examination Ortiz conceded a transfer offer was made. I find that Ortiz's evasiveness on the issue of the transfer offer, and illogical recollection of what was said on the call, significantly damages his credibility.

Conversely, I find Kain's testimony regarding what occurred on the call consistent, logical, and credible. Kain testified Ortiz called to complain about the incident in the truck and

described the incident to Kain. In response, Kain offered to transfer Ortiz to another job within Sinacola. Ortiz declined the transfer offer, demanded that Bonds be removed from the mine, and said he could have previously contacted MSHA. In response, Kain told Ortiz he could call MSHA at any time and that he would not be coerced into removing Bonds. Kain then terminated Ortiz.

I credit Kain's testimony regarding what was discussed on the April 20 call. Specifically, I find that Ortiz called to complain about the incident in the truck and that Ortiz described the incident to Kain. I further find that Kain, in an effort to diffuse the personality conflict between Ortiz and Bonds, offered Ortiz the opportunity to transfer to another Sinacola site. Furthermore, I find that Ortiz declined the offer and instead demanded that Bonds be removed from the mine.

Finally, I find that although Ortiz did state he could have[16] called MSHA in the past, the statement was not made in isolation and cannot be analyzed that way. Rather the statement was inextricably tied to Ortiz's demand that Bonds be removed from the mine. The statement and demand, when looked at together, were an attempt to leverage a veiled threat about contacting MSHA to achieve Ortiz's goal of having Bonds removed. This finding is critical to my analysis of the issues below. I further find that Kain perceived the MSHA statement and demand to remove Bonds the same way as I have, i.e., a veiled threat unrelated to safety but one Ortiz believed, or at least hoped, could manipulate management into removing Bonds from the mine.

In addition to his testimony surrounding the events of April 20, I also find that Ortiz's testimony regarding Sinacola discouraging miners from contacting MSHA is not credible. On one hand, Ortiz testified that Sinacola trained him to only contact MSHA as a "last resort." However, almost immediately after that testimony, Ortiz conceded that no one discouraged him from going to MSHA. Moreover, he acknowledged that he was trained multiple times on miner's rights and how to make a complaint and had in the past made his own choice to not contact MSHA about potential safety complaints. Although Ortiz attempted to paint a picture that Sinacola was averse to MSHA involvement in safety matters and miner's rights, his own testimony, as well as the testimony of Kain and Phillips, painted a different picture. Given these inconsistencies, I decline to credit Ortiz's testimony on this issue.

B. Discrimination Claim

Section 105(c) of the Mine Act prohibits discrimination against a miner for exercising a right established under the Mine Act. 30 U.S.C. § 815(c)(1). In order to establish a prima facie case of discrimination the Complainant must prove by a preponderance of the evidence that (1)

[16] At hearing and in the briefs, much was made about whether Ortiz said he "could have" contacted MSHA, or "would have" contacted MSHA. Ortiz testified that he stated, "if I would have been a problem I would have called MSHA a long time ago." Counsel and other witnesses used the phrase "could have" in place of "would have." In stating that he "would have" called MSHA if he wanted to be a problem, one can infer that Ortiz's mindset was that he was not a problem but, rather, Bonds was the problem. Although I decline to read too much into the choice of words, it is clear Ortiz saw himself as a victim of unfair treatment in the supervisor/subordinate relationship with Bonds.

he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity.[17] *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 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328-29 (Apr. 1998); *Robinette* at 818 n. 20. In addition, the operator may defend affirmatively by proving that the adverse action was in part motivated by unprotected activity and that it would have taken the adverse action based on the unprotected activity alone. *Driessen*, 20 FMSHRC at 328-29.

For Ortiz to succeed in establishing a prima facie case, he must prove by a preponderance of the evidence that he engaged in protected activity and that his termination was motived in any part by the protected activity. For reasons set forth below, I find that Ortiz failed to prove by a preponderance of the evidence that he engaged in protected activity. Moreover, assuming arguendo that Ortiz engaged in protected activity, I would nevertheless dismiss his claim because Sinacola succeeded in proving its affirmative defense.

i. Protected Activity

What is the alleged protected activity at issue?

The parties disagree what should be considered protected activity for purposes of establishing a prima facie case in this matter. On one hand, the Secretary, in his brief, asserts Ortiz engaged in protected activity when he complained to management about multiple incidents involving Bonds, as well as when Ortiz asserted his right to contact MSHA during the call on which he was terminated. Sec'y Br. 6-8. On the other hand, Sinacola asserts "Ortiz's statement that he 'could have called MSHA a long time ago' if he were a problem – is the only alleged protected activity at issue." Sinacola Reply Br. 4 (emphasis removed). In making its argument, Sinacola asserts the Secretary is bound by a stipulation limiting the time in which alleged potential protected activities occurred. I agree with Sinacola about the stipulation but my decision in this case would be the same if the stipulation had not been offered by the Secretary.

There is no dispute that during Ortiz's deposition the Secretary stipulated that "[f]or the purposes of this proceeding, the Secretary is not seeking redress for anything more than 60 days prior to the date Mr. Ortiz complained to MSHA." Sec'y Reply Br. 1; Sinacola Reply Br. 3. Although the Secretary qualified the stipulation by stating that additional alleged instances of

[17] Sinacola argues that the court should apply the "but-for causation" standard recently endorsed by the Court of Appeals for the Ninth Circuit in *Thomas v. CalPortland*, 993 F.3d 1204 (9th Cir. 2021). However, because Sinacola's operation is not located within the Ninth Circuit, that standard is not binding on the Commission. Accordingly, I have applied the Commission's longstanding *Pasula-Robinette* test. Nevertheless, I find that applying the "but-for causation" standard would lead to the same conclusion.

protected activity could be considered for "background purposes," it is clear the Secretary represented to Respondent that only those activities that occurred within 60 days prior to Ortiz's complaint to MSHA were to be considered for purposes of establishing that protected activity occurred which could have motivated Ortiz's termination.

Ortiz filed his complaint with MSHA on April 20, 2021, i.e., the same day he was terminated. February 19, 2021, marks 60 days prior to April 20, 2021. Accordingly, I will not consider whether activities occurring before February 19, 2021, amounted to protected activity, except to provide context to the events that followed.[18]

The only potential protected activity in the subject time period was Ortiz's April 20 comment to Kain about contacting MSHA. All other potential protected activity referenced in the Secretary's brief occurred prior to February 19, 2021.[19]

Did Ortiz engage in protected activity?

The Secretary asserts Ortiz engaged in protected activity by asserting his right to contact MSHA during the April 20 call with Kain. As support, the Secretary cites multiple decisions, including one of this court, in which Commission judges found that asserting one's right to contact MSHA was protected activity. Conversely, Sinacola argues Ortiz's comment did not constitute protected activity. Sinacola asserts Congress intended the discrimination provisions of the Mine Act to encourage miner participation in enforcement, and courts should limit the definition of protected activity to protect only those employees who act in furtherance of MSHA's purpose. Here, protected activity cannot be expanded "to include every alleged safety violation that Ortiz 'could have' reported." Sinacola Br. 15. By saying that he "could have" contacted MSHA, but did not, Ortiz was doing the opposite of what Congress intended and was not participating in enforcement.

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[18] Sinacola, in its reply brief, understandably stated that it relied on the Secretary's stipulation "during Ortiz's deposition, in preparation for hearing, during the hearing, and in" Sinacola's post hearing brief. Sinacola Reply Br. 5. I agree with Sinacola that it would be "wholly unfair" to allow the Secretary to renege on the stipulation. *Id*.

[19] Even if I were to consider events that occurred before the stipulated time period, I find that the Secretary did not establish that those events were protected or that they played any role in Ortiz's termination. First, Ortiz's complaint about having to work with a hernia occurred too far back in time to be relevant. Second, the Secretary failed to establish that Ortiz's alleged complaint that Bonds required Ortiz to keep his cell phone on was related to the safe operation of the loader. Finally, although Ortiz did briefly raise the seatbelt issue at the conciliation meeting, I find that the Secretary failed to establish that Ortiz raised the issue at any other time. Ortiz's testimony regarding alleged other instances he raised the seatbelt issue was not clear regarding when those complaints were made or to whom they were made. Moreover, even if I were to consider Ortiz raising the seatbelt issue at the conciliation meeting, I would find that it played no role in his termination. Specifically, and as set forth more fully below, I find that Kain did not recall and, in turn, did not consider any mention of the seatbelt issue during the conciliation meeting when deciding whether to terminate Ortiz.

Section 105(c)(1) does not include the term "protected activity," but it does identify certain activities that are protected.[20] Although asserting one's right to contact MSHA is not explicitly listed among those activities, this court and others have determined that certain threats to contact MSHA are protected activity.[21] Had Ortiz's statement that he "could have" contacted MSHA been made in a vacuum, an argument could be made that the statement was protected activity. However, as discussed above, Ortiz's statement was not made in a vacuum. Rather, the statement that he "could have" contacted MSHA was coupled with a demand that Bonds be removed from the mine.

In *Collins v. FMSHRC*, 42 F.3d 1388, 1994 WL 683938 at *5 (6th Cir. 1994) (unpublished per curiam decision), the Sixth Circuit held that although Congress intended courts to interpret "protected activity" broadly, the term should not be interpreted "in a way which would foil the [Mine] Act's aim." In *Collins* a miner kept a record of safety hazards for the sole purpose of protecting his job. There the court, in finding that the miner had not engaged in

[20] A miner engages in protected activity if (1) he "has filed or made a complaint under or related to this Act, including a complaint … of an alleged danger or safety or health violation[;]", (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101[;]", (3) he "has 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) he has exercised "on behalf of himself or others … any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

[21] The Secretary, in his brief, cites four Commission ALJ decisions and argues that asserting one's right to contact MSHA is a protected activity. However, I find the facts of those cases distinguishable from the case at hand. In each of those cases the miner was asserting their right to contact MSHA in the future about allegedly unsafe conditions. In *Sec'y of Labor on behalf of Coffee v. Txoma Mining, LLC*, 40 FMSHRC 615 (Mar. 2018) (ALJ), I found, in the context of a temporary reinstatement proceeding, that a miner had alleged that they engaged in protected activity when they threatened to contact MSHA because mine management refused to purchase needed safety equipment. In *Sec'y of Labor on behalf of Williamson v. CAM Mining,* LLC, 33 FMSHRC 1980 (Aug. 2011) (ALJ), Judge Paez found that a miner engaged in protected activity when the miner made a statement that was "tantamount to stating he was going to make a safety complaint" to MSHA. In *Metz v. Wimpey Minerals and Tarmac America, Inc.*, 18 FMSHRC 1087 (June. 1996) (ALJ), former Judge Melick found that a miner engaged protected activity when he stated he would contact MSHA if certain allegedly unsafe equipment was allowed to continue to operate. Finally, *in Adams v. J.L. Owens III, Contracting a/k/a J.L. Owens III, a/k/a Eastern Aggregates, Inc.*, 7 FMSHRC 299 (Feb. 1985 (ALJ), former Chief Judge Merlin found that a miner engaged in protected activity when the miner threatened to call MSHA about unsafe electrical wiring. Here, unlike those cases, Ortiz's comment was not a threat to contact MSHA in the future, but rather a veiled threat that he "could have" contacted MSHA about past safety complaints. Moreover, although each of the cases cited by the Secretary involves a situation in which the miner threatened to contact MSHA because the miner had safety concerns that were not being addressed, I have already found that the intent of Ortiz's comment had nothing to do with safety and, rather, was an attempt to leverage a veiled threat in order to have Bonds removed from the mine.

protected activity, stated that Congress intended the discrimination provision to "encourage miner participation in the enforcement of the Act" and that "[t]he congressional objective of eliminating unsafe mining practices is hardly promoted by rewarding a miner for committing and then recording safety violations that he neither reports nor intends to report." 1994 WL 683938 at *4.

As the court in *Collins* made clear, context matters when analyzing whether something is protected activity.[22] Shearer, the MSHA special investigator who investigated Ortiz's complaint, confirmed as much during his testimony when he implied that it takes more than a mere mention of "MSHA" for a statement to be considered protected activity. Here, the context of Ortiz's statement that he could have contacted MSHA was that it was made in conjunction with a demand to have Bonds removed from the mine. Ortiz acknowledged that he could have gone to MSHA in the past about safety complaints but chose not to do so. Instead, Ortiz sat on those potential complaints until he believed they could benefit him in the form of leverage to get Bonds removed from the mine. Moreover, Kain credibly testified he had no idea what the MSHA comment was in reference to and he immediately told Ortiz could contact MSHA any time Ortiz wanted to do so.[23] Ortiz's desire to remove Bonds from the mine had nothing to do with safety and everything to do with the conflicting personalities and styles of work.

If Ortiz believed that his alleged safety complaints were being ignored by management, he should have complained to MSHA. Rewarding Ortiz for sitting on potential safety complaints until those complaints could be used as leverage to have Bonds removed from the mine would frustrate the purpose of the Act's discrimination provision, which is meant to encourage miner participation in enforcement. Accordingly, like the court in *Collins*, which found that a miner did not engage in protected activity when he maintained a record of safety hazards for the sole purpose of protecting his job, I find that Ortiz did not engage in protected activity when he made

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[22] While Sinacola's operation is not located in the Sixth Circuit where *Collins* was decided, I find the court's reasoning persuasive.

[23] Based on the record evidence, I find Kain's testimony on this point both reasonable and credible. Although Werbig's notes from the conciliation meeting briefly mention Ortiz's concern about Bonds not wearing his seatbelt, I credit Kain's testimony that he did not recall a discussion of any safety complaints. In reaching this conclusion, I am particularly mindful of the conclusory nature of Ortiz's statement on the seatbelt issue during the meeting, as well as the cursory and superficial way in which the issue was raised. Ortiz's statement was not that he had witnessed Bonds failing to wear a seatbelt, but rather that when speaking to Bonds over the radio Ortiz could hear a beeping sound, which indicated to Ortiz that Bonds was not wearing a seatbelt. Ex. C1 p. 9. Moreover, the issue was only very briefly mentioned during the meeting, as evidenced by only a short exchange between Ortiz and Werbig in the meeting notes. Kain's testimony, as well as the notes, confirm that the purpose of the meeting was to diffuse the ongoing personality conflicts between Ortiz and Bonds. Absent other credible evidence and, given Kain's demonstrated credibility, I decline to infer that Kain had knowledge of any of the safety complaints allegedly raised by Ortiz. Accordingly, I find that the Secretary failed to establish that Kain, who made the decision to terminate Ortiz, had knowledge of, or considered, any safety complaints when making that decision.

a veiled threat that he could have contacted MSHA for the sole purpose of creating leverage to have Bonds removed from the mine.

I conclude that Ortiz did not engage in protected activity. As a result, a prima facie case of discrimination was not established. Consequently, I find that Ortiz's discrimination complaint must be denied. Nevertheless, for the sake of completeness, and assuming arguendo that Ortiz's claimed statement to Kain that "if [he] would have been a problem [he] would have called MSHA a long time ago[,]" was protected activity, I have also analyzed whether his termination was motivated by that statement in any part.

ii. Adverse Action and Motivation

The Commission has recognized that although direct evidence of discriminatory intent or motivation is rarely available, a nexus between the protected activity and adverse action may be inferred where indicia of discriminatory intent exists, including (1) knowledge of protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the miner. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009); *see also Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

Here, the Secretary asserts that both direct and circumstantial evidence establish that Ortiz's termination was motivated by his protected activity. First the Secretary argues that direct evidence of discriminatory motive exists because, even if Sinacola's version of events is accepted, "Ortiz's assertion to contact MSHA prompted the termination." Sec'y Br. 8. Second, the Secretary argues discriminatory intent can be inferred because Sinacola had knowledge of Ortiz's protected activity, Sinacola management demonstrated animus toward Ortiz, there was a temporal nexus because Ortiz was terminated immediately after making the comment about contacting MSHA, and Ortiz suffered disparate treatment since he was the only employee disciplined or terminated for his alleged involvement in the petition to have Bonds removed.

If I assume for the sake of this analysis that Ortiz's statements were protected activity, I must determine whether his termination was motivated in some part by that protected activity. For the reasons set forth below, I find that the Secretary did not establish by a preponderance of the evidence that Ortiz's termination was motivated in any part by protected activity.

Direct Evidence of Discriminatory Intent

The Secretary argues that Kain's and Phillip's characterization of Ortiz's MSHA comment as a "threat" are direct evidence of discriminatory intent. I disagree. Although both individuals referenced a threat in their respective testimony, I find that the Secretary misinterprets their testimony. It is clear from the testimony that those individuals did not consider Ortiz's comment about contacting MSHA as *the* threat. Rather, a review of their testimony reveals that Kain and Phillips saw the "threat" not as a complaint about safety at the mine but as a tactic that Ortiz was trying to use to demand that Bonds be removed from the mine.

First, the Secretary cites Kain's testimony on page 122 of the hearing transcript as support. The pertinent part of that page includes the following exchange:

> Q: Mr. Kain, you said it wasn't the mere mention of MSHA that was threatening. What was the threatening coercive part of that conversation for you?
> A: He – I felt like Moses was using, I'm going to call it MHSA or else. He's free to call MSHA any time he'd like.

Tr. 122.

Although the Secretary focuses on the "MSHA" part of the statement as being the threat that prompted the termination, he does so at the expense of ignoring the "or else" portion. Here, when looked at in the context of Kain's other testimony, I interpret the phrase "or else" to be in reference to the demand to remove Bonds from the mine.[24] As discussed above, the statement and demand must be considered together. Here, I find that Kain perceived the demand, and not the statement about contacting MSHA, as the coercive and threatening part of the conversation with Bonds.

Second, the Secretary cites Phillip's testimony on page 159 of the hearing transcript as support. The pertinent part of that page includes the following exchange:

> Q: Is – what part of that conciliation agreement is the part where he was going against?
> A: Well, I think that he was supposed to recognize the authority and supervision of – of Harry Bonds. And – and I—and there was also one of those points to really open up the communication channels, and it does not seem to – you know, his – his call to Eric Kain and making a threat is not – it seems to fly in the face of that.

Tr. 159. Even though Phillips used the term "threat," it is clear that the threat he referenced was not Ortiz's comment about contacting MSHA. Rather, Phillips answer was given in the context of a discussion about Ortiz's non-safety related conflicts with Bonds and how, despite the conciliation meeting and agreement, Ortiz was still complaining about Bonds. Although Phillips did not explicitly state that, it is clear that this is what he meant.[25]

While Kain and Phillips may have characterized Ortiz's statements as a "threat," it is clear from their testimony that the threat they perceived and referenced was Ortiz's effort to get Bonds removed from the mine. Moreover, simply characterizing a statement as a "threat" does

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[24] Notably, Kain, when asked if he felt that Ortiz mentioning MSHA was a threat, responded "No." Tr. 121.

[25] Phillips was not present during the call during which Kain terminated Ortiz. As a result, his testimony regarding motivation is mostly second-hand. Accordingly, I accord it less weight than Kain's testimony on this point.

not by itself establish discriminatory motive in context of the Mine Act. Accordingly, I find that the Secretary's argument regarding direct evidence lacks merit. I now turn my attention to whether sufficient circumstantial evidence exists such that I can infer discriminatory intent or motivation.

Knowledge of Protected Activity

The Commission has held that "an operator's knowledge of a miner's protected activity is probably the single most important aspect of a circumstantial case." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999) (quoting *Chacon*, 3 FMSHRC at 2510).

The Secretary argues Sinacola had knowledge of Ortiz's protected activity because Ortiz asserted his right to contact MSHA directly to Kain, the mine division manager.[26] Although I have already found that Ortiz's statement was not protected activity, for purposes of this analysis I agree, and Sinacola does not dispute, that the statement was made directly to Kain and, therefore, Sinacola had knowledge. Consequently, had the statement been protected activity, this factor would weigh in favor of Ortiz's claim that Sinacola had knowledge of this activity.

Animus or Hostility Toward the Protected Activity

The Secretary argues that statements made at hearing by Kain and Phillips describing Ortiz as "difficult," a "loudmouth," and "troublemaker" demonstrate animus toward Ortiz. Meanwhile, Sinacola argues that Ortiz's reputation was well-earned and had nothing to do with safety related activity.

The statements by Kain and Phillips certainly demonstrate frustration with Ortiz. However, I find that their frustration was unrelated to any protected activity and was instead related to, among other things, Ortiz constantly voicing lack of satisfaction with his job and his personality and other non-safety related conflicts with Bonds.

Kain testified that Ortiz was never satisfied and repeatedly complained about pay and what equipment he was ordered to operate. However, both Kain and Phillips credibly testified that the complaints about pay were unfounded, with Phillips stating that Ortiz's pay was "right in line general increases . . . [which are] looked at annually[,]" and Kain confirming that Ortiz received normal raises and was never prevented from getting a raise. Tr. 100-101, 150. Moreover, Ortiz had a history of complaining about what equipment he was tasked with

[26] Although the Secretary attempts to link other potential protected activities to the knowledge element of this analysis, those other instances of potential protected activity occurred outside of the timeframe stipulated to by the Secretary and relied upon by Sinacola. Moreover, aside from Ortiz's conclusory allegation during the conciliation meeting that he believed Bonds drove without a seatbelt because Ortiz could hear a beeping sound over the radio, there is no credible evidence that would allow me to infer Kain, who terminated Ortiz, had any knowledge concerning Ortiz's purported complaints. However, for reasons discussed above, I have already credited Kain's testimony that he did not recall any discussion of safety complaints during the conciliation meeting.

operating and had complained just prior to his termination about the loader he was assigned to operate and wanting to be trained on a dozer. However, Ortiz's job title was "loader operator" and his complaints about equipment assignments were unrelated to safety, as evidenced by his agreement both during the conciliation meeting and at hearing that he was *never* asked to operate unsafe equipment or equipment that he was not trained on. Ex. C1 p. 7; Tr. 43.

Further, both Kain and Phillips were frustrated by the persistent personality conflict between Ortiz and Bonds.[27] Notably, Phillips' testimony that "Ortiz had a reputation of being a loudmouth, a troublemaker," which the Secretary's cites as evidence of animus, was a response to a question asked about whether Phillips knew what caused Werbig to propose the conciliation meeting. The meeting, as I have already found, was aimed at diffusing the personality conflict and almost devoid of discussion related to safety.[28] If Phillips and Kain had animus toward anything, it was the persistent conflict that existed between Ortiz and Bonds and not protected activity. The conflict was such a problem that Phillips agreed to dedicate significant staff resources and time toward trying to resolve it via the conciliation meeting, which he described as an "unusual" method. Given that the conciliation meeting clearly did not resolve the conflict, I find their frustration reasonable.

Additionally, both Kain and Phillips credibly testified regarding general awareness of the rumor that Ortiz was involved with a petition to have Bonds removed from the mine. Moreover, it was no secret Ortiz had been in a physical altercation at the mine and had damaged both a loader and his supervisor's truck.

Although Kain's and Phillip's statements certainly demonstrate frustration with Ortiz, that frustration was warranted for reasons unrelated to protected activity. With this information in mind and given the lack of relevant evidence of a connection between their testimony and the

[27] The personality conflict was quite evident at hearing. Among other things, Bonds voiced his frustration with Ortiz failing to recognize the supervisor/subordinate relationship, and Ortiz complained about the tone Bonds would use when speaking to Ortiz. One illustrative example of how the conflict played out at the mine can be seen in the conflicting testimony the two offered regarding how a loader Ortiz was operating became damaged. At hearing, Ortiz accused Bonds of intentionally placing a rock in an area where Ortiz would run over it with his loader. Bonds, on the other hand, testified he could not have moved the rock in the area. Rather, Bonds attributed the damage to Ortiz's failure to use his loader to keep the work area clean. I find Ortiz's testimony on this incident unsupported and farfetched. I credit Bonds' testimony on this issue. Accusing one's boss of sabotage, without support, is the type of conduct that poisons a relationship.

[28] Although Ortiz testified that he raised multiple safety complaints during that meeting, I decline to credit that testimony and instead find, relying on Kain's testimony and the notes Werbig took during the meeting, that the only discussion of a potential safety complaint was Ortiz's conclusory statement that Bonds must not have been wearing a seatbelt at times when on the radio with Ortiz because Ortiz could hear a beeping sound. Ex. C1 p. 9.

alleged protected activity at issue in this proceeding, I find that the Secretary failed to establish that Sinacola exhibited animus toward any protected activity.

Coincidence in Time

The Secretary argues that there was a coincidence in time between the protected activity and adverse action because Ortiz was terminated immediately after he asserted his right to call MSHA. There is no dispute that Ortiz was terminated almost immediately after he stated he would have contacted MSHA if he wanted to cause trouble. Clearly, there was a coincidence in time.

Disparate Treatment

The Secretary argues that Sinacola treated Ortiz differently from miners who did not make safety complaints. Specifically, the Secretary asserts there is no evidence to show that any other miners were disciplined or terminated for alleged involvement in the petition to have Bonds removed from the mine. Moreover, the Secretary asserts that Phillips' testimony that Ortiz was the only person making complaints at the mine indicates Ortiz was treated differently for making those complaints.

Both of the Secretary's arguments on this factor lack merit. First, Ortiz was not terminated or disciplined because of his involvement in the rumored petition. Although Kain and Phillips were aware of the alleged rumor, no credible evidence was presented at hearing regarding action taken against Ortiz or any other miner for their alleged involvement in the petition. In fact, up until near the end of the April 20 call, Kain had not even considered disciplining or terminating Ortiz for anything. Rather, as evidenced by the transfer offer extended to Ortiz during the call, Kain was instead interested in attempting to find a solution to the persistent conflict between Bonds and Ortiz.

Second, although Phillips did testify that the "only complaint out of the mine in my time at the company" came from Ortiz, that statement lacks context. Tr. 150. Immediately prior to that statement, Phillips, when asked what the cause of the tension was between Ortiz and Bonds, testified that "it's more than just personality. It was – you know, I had heard since I started with Sinacola that, you know, [Ortiz] wasn't happy with his pay, he wasn't happy with the piece of equipment that he was on. It – it seemed to always be something." Tr. 150. Given the context in which the statement was made, Phillips was not talking about safety complaints. Consequently, I find the Secretary failed to establish that Ortiz was the subject of disparate treatment. The situation with Ortiz was unique. Accordingly, it is not strange that there are no similar situations involving other employees to compare it with.

Taking into consideration each of the items discussed above and, again, assuming that Ortiz's statement to Kain was protected activity, I find that the Secretary did not establish by a preponderance of the evidence that Ortiz's termination was motivated in any part by protected activity. However, again, for the sake of completeness, and assuming arguendo that Ortiz engaged in protected activity and that his termination was motivated in some part by that

protected activity, I now turn my attention to whether Sinacola established an affirmative defense.

iii. Affirmative Defense

The Commission has explained that an operator may establish an affirmative defense by proving that the adverse action was motivated by unprotected activity and it would have taken the action based solely on the unprotected activity. *Pasula* at 2799-2800. "An operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). Nor should the judge "substitute his business judgment or sense of 'industrial justice' for that of the operator." *Id*. In reviewing the defense, the judge should determine whether the justification is credible and, if so, whether the operator would have been motivated as claimed. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Complainant may demonstrate that the alleged non-discriminatory reason is mere pretext for the adverse action by showing that the "asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Sinacola argues that, even if the Secretary can establish a prima facie case, Ortiz was terminated for reasons other than his MSHA comment. Specifically, Sinacola argues Ortiz was terminated because he refused a to accept an offer to be transferred to a different Sinacola facility, made an inappropriate demand of management to terminate Bonds, had a history of conflict with other employees, and refused to follow the directions of his supervisor.

The Secretary argues Sinacola failed to establish it would have terminated Ortiz for unprotected activities alone. The Secretary points to a lack of evidence regarding prior consistent discipline for similar infractions and Ortiz's limited disciplinary history. The Secretary asserts that despite testimony that Ortiz was a "troublemaker" and insubordinate, there is no documentation of this alleged insubordination, and no disciplinary action was taken against Ortiz based on management's belief that Ortiz had started a petition to have Bonds terminated. Here, Ortiz was not terminated until he mentioned MSHA. The other reasons cited by Sinacola are merely pretext for firing Ortiz after he asserted his right to contact MSHA.

Even if I assume that Ortiz established a prima facie case of discrimination, I nevertheless find Sinacola provided a valid affirmative defense. As discussed previously, I credit Kain's testimony regarding what was said on the April 20 telephone call. Kain credibly testified Ortiz refused Kain's offer of a transfer, demanded that Bonds be removed from the mine, and stated he "could have" contacted MSHA. Even though the exact context regarding what Ortiz "could have" contacted MSHA about was unknown by Kain, Ortiz was clearly attempting to leverage that statement to get what he wanted, i.e., Bonds removed from the mine. As far as Ortiz was concerned, if anyone should be transferred to a different facility it should be Bonds. Kain's response to Ortiz's veiled threat is telling. Rather than take the bait and immediately

terminate Ortiz for a perceived threat about contacting MSHA, Kain instead told Ortiz he could contact MSHA at any time. In the court's opinion, Kain paid no attention to the statement that Ortiz could have contacted MSHA and instead based his termination decision on Ortiz's demand to have Bonds removed from the mine. Demanding that one's supervisor be removed because of a personality conflict is not protected activity.

I accept Kain's explanation that he viewed Ortiz's demand to remove Bonds as an act of insubordination. Kain credibly testified he had never experienced an employee directly demand that their supervisor be fired or transferred. I agree with Kain that Ortiz's demand to remove Bonds was patently unreasonable.[29] Tr. 115. As Phillips credibly explained, if employees can demand that their supervisors be fired because they do not like them, then management has no control over the organization. Here, I find that Kain correctly perceived Ortiz's demand as stemming from his personality conflict and inability to work with Bonds in a supervisor/subordinate relationship.

I further find that Kain reasonably believed he had no other option than to terminate Ortiz at that time. When Ortiz refused the transfer offer and demanded that Bonds be removed from the mine, he eliminated other options that may have otherwise been available to Kain. Given Ortiz's persistent personality conflict with Bonds, I find that Kain reasonably believed Ortiz and Bonds could never work together again after Ortiz demanded that Bonds be removed. With transfer not an option, and having no legitimate reason to terminate Bonds, I accept Kain's explanation and agree that he had no other choice but to terminate Ortiz.[30]

It should come as no surprise that Sinacola was unable to offer much in the way of evidence of prior consistent discipline for such an unusual act, i.e., demanding that one's supervisor be removed because of significant non-safety related conflicts. However, I find that Ortiz's past work record as well as the informal warning about insubordination he received during the conciliation meeting are additional evidence that demonstrates Sinacola would have terminated Ortiz for unprotected activity alone. Specifically, I find that Sinacola warned Ortiz about insubordination during the February conciliation meeting, even if the word insubordination was not used during the meeting. Werbig's meeting notes clearly indicate Bonds' expressed concern about Ortiz not listening to Bonds' direction and Ortiz "push[ing] back when asked to do things." Ex. C1 p. 9. Notably, at the end of the meeting, the first item the participants agreed to was to "follow supervisors direction[.]" *Id*. at 11. The meeting was clearly an attempt by management to, among other things, diffuse the conflict and ensure Ortiz acknowledged he was the subordinate of Bonds. In addition, Ortiz's disciplinary record, while not lengthy, was far

[29] Although Ortiz may have believed his complaint about Bonds' tone and the refusal to allow him to get out of the truck along a mine road warranted Bonds' removal, Kain disagreed. In fact, Kain opined that, it would have been incredibly unsafe for Bonds to let Ortiz out of the truck to walk the route back to the yard.

[30] Even if alternative means of discipline existed, the Commission has stated that its judges should not substitute their views of what is good business practice for that of the operator with regard to whether the adverse action was "'just' or 'wise.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2517 (Nov. 1981).

from spotless and included documented instances of Ortiz damaging company equipment as well as his involvement in a physical fight with another employee. Although Sinacola did not present evidence of any formal personnel rules or practices forbidding employees from engaging in insubordination like what occurred here, common sense dictates that such conduct is entirely inappropriate.

Finally, I find that Sinacola's justification for terminating Ortiz was not pretextual. Ortiz's demand to remove Bonds was unreasonable and inappropriate. As discussed above, with transfer not an option, and having no legitimate reason to terminate Bonds, Kain's options were at best extremely limited. In *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982), the Commission stated that both it and "its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." Here, Kain made a rational business decision, based on the information available at that time, to terminate Ortiz. That decision was both plausible and expected given the options available.

Based on the above discussion, I find that Sinacola has proven its affirmative defense, and that the reasons given for Ortiz's termination were not pretextual.

IV. ORDER

For the reasons set forth above, the complaint of discrimination brought by the Secretary of Labor on behalf of Moses Ortiz is **DENIED** and this proceeding is **DISMISSED**.[31]

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

[31] My August 24, 2021, Decision Approving Settlement and Order of Temporary Economic Reinstatement in CENT 2021-0184 remains in effect until this decision on the merits of the discrimination complaint becomes a final decision of the Commission. *Sec'y on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (Sept. 1999). Section 113(d)(1) of the Act states "[t]he decision of the administrative law judge … shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed …." 30 U.S.C. § 823(d)(1).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 13, 2022

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0301 A.C. No. 46-08930-551112
v.	
APPALACHIAN RESOURCE WEST VIRGINIA, LLC, Respondent	Mine: Grapevine South Surface Mine

ORDER CERTIFYING CASE FOR INTERLOCUTORY REVIEW

This case is before the Court on a Petition for the Assessment of a Civil Penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d), filed May 31, 2022, and the Secretary of Labor's Motion to Approve Settlement, filed October 14, 2022. The Secretary has refused to provide the 104(b) orders associated with seven 104(a) citations in this docket.[1] The absence of the associated 104(b) orders frustrates the Court's ability to faithfully review the record and properly evaluate the proposed settlement. Further, the idea that the Secretary may unilaterally decide to secrete public records from the official file for a Petition for the Assessment of Civil Penalty he filed, is inimical to the Congressional structure and purpose of the Mine Act.

Accordingly, for the reasons which follow, the Court **CERTIFIES**, under Commission Procedural Rule 76, 29 C.F.R. § 2700.76, that this interlocutory ruling involves a controlling question of law – whether the Secretary is obligated, upon a judge's request, to supply the 104(b) orders associated with 104(a) citations in a docket before the judge on a Motion to Approve Settlement – for which, in the Court's opinion, immediate review will materially advance the final disposition of the proceeding.

Background

Docket WEVA 2022-0301 originally included 33 citations issued under Section 104(a) of the Mine Act, of which eight citations are listed in Exhibit A as having associated 104(b) Orders. Pet. for a Civil Penalty at 12-13. The docket was subsequently reallocated and thereby split into

[1] A separate deficiency, the Court noted that a citation's termination sheet was also missing from the file. The Secretary did not provide the termination sheet for another citation that did not have an associated 104(b) order. However, Counsel for the Respondent provided the document.

two dockets. That reallocation created a new docket WEVA 2022-0428.[2] Seventeen (17) citations remained with WEVA 2022-0301, of which *seven* of those citations had associated 104(b) Orders issued for those now-admitted violations. However, the Petition does not include the seven 104(b) Orders associated with those 104(a) citations.[3] Those citations are: Citation Nos. 9563136, 9563137, 9563138, 9563141, 9563142, 9563143, and 9563146.[4]

The conditions found by the issuing inspector are briefly summarized here:

Citation No. 9563136: Haulage truck with defective rear tire and oil leak from a rear inside tire; Citation No. 9563137, another haulage truck with various signal and brake light issues and audible alarm, all not functioning; Citation No. 9563138, five separate defects affecting safety on dozer; Citation No. 9563141, five separate defective lights and non-functioning horn on haulage truck; Citation No. 9563142, 13 thirteen (13) defects affecting

[2] Order for Docket Reallocation, June 29, 2022. For the 16 citations exported to the new docket, one of original eight citations which had an associated 104(b) Order was moved to the new docket, WEVA 2022-0428. As that new docket also had the deficiency of a missing section 104(b) order, Citation No. 9563157, which Order the Secretary also refused to provide to the Court, and as that missing Order is within the separate, newly created docket, the Court has today issued a separate Certification for Interlocutory Review for Docket No. WEVA 2022-0428. It is also noteworthy that for the reallocated citations making up the newly created Docket WEVA 2022-0428, eight of the sixteen citations in that docket involved mobile equipment related violations: Citation No. 9563189, pertained to multiple defects on the Volvo fuel and oil service truck, No. 900; Citation No. 9563183 involved a damaged seat belt on the Freightliner Truck No. MT 664; Citation No. 9563174 identified 8 separate defects on 785C Caterpillar haulage truck; Citation No. 9563173 addressed platform steps to access 785D Caterpillar haulage track which were cracked on both sides and had a broken toe board and hand rail to driver's side door; Citation No. 9563172 found multiple defects on D11R Caterpillar Dozer; Citation No. 9563159, involved a defective parking brake on a blasting truck; Citation No. 956156 found the Caterpillar 993 K Front end loader not operating in safe condition with five separate defects identified; and Citation No. 9563155 also identified five separate defects regarding safe means of access to 993K Caterpillar front end loader.

[3] That it is undeniable that this mine had a lot of vehicle-related violations is further demonstrated by the fact that among the other nine violations remaining within WEVA 2022-0301 for which no (b) orders were issued, six of them involved an assortment of vehicle defects: Citation No. 9563139 involved other non-functioning lights on the D10R Caterpillar Dozer Co. No. D007; Citation No. 9563145 spoke to the 980 G Caterpillar front-end loader, No. 1893, with multiple defects; Citation No. 9563149 similarly found multiple defects on 992G Caterpillar front-end loader; Citation No. 9563151, identified five separate defects on a fuel and oil truck, No. GT 400; Citation No. 9563153, found horn and reverse lights not functioning; and Citation No. 9563154 discovered an inoperative reverse alarm on 993K Caterpillar front-end loader, No. L465.

[4] The full texts of the citations for the now-admitted violations missing the associated (b) orders are included in the Appendix to this order.

safety on haulage truck; Citation No. 9563143, fourteen (14) defects affecting safety on haulage truck; Citation No. 9563146, ten (10) defects affecting safety on haulage truck. Accordingly, it is inarguable that these now-admitted violations reflect that the mine had numerous problems with its mobile equipment.

In light of the missing document(s), on November 9, 2022, the Court e-mailed the parties, requesting the missing information for this docket, as well as the missing information for the reallocated docket, WEVA 2022-0428.

On Tuesday, November 15th, the Secretary's non-attorney representative, conference and litigation representative David Trent, responded, speaking to the missing documents from both dockets:

> For the violations listed [by] Judge Moran request[ing] the terminations, no penalty is being compromised except for Citation No. 9563141. Therefore, the Secretary will not provide the terminations for these violations. For Citation No. 9563141 there is no termination to provide for this violation.[5]

E-mail from CLR Trent to the Court, November 15, 2022.

On the same day as Mr. Trent's response, Counsel for the Respondent, Attorney K. Brad Oakley, taking a cooperative approach, emailed the Court, responding that he could only locate a termination sheet for Citation No. 9563139, which termination sheet he attached to his email. He added that the violation was terminated upon repairs being made to lights on a dozer and that there was no (b) order associated with it.

E-mail from Attorney Oakley to the Court, November 15, 2022.

Attorney Oakley also informed in the same email that he had not been able to locate the termination sheets in the package of citations that his client provided to him, nor in the petition filed by Mr. Trent and that he believed that all of the remaining citations have 104(b) orders associated with them. For that reason, he opined that it was possible that MSHA did not issue terminations for the underlying citations. *Id.* Attorney Oakley confirmed, and it is not in dispute, that (b) orders were issued for the following citations in WEVA 2022-0301:

> 9563136 – B order 9563148 issued on 1/13/22 and terminated on 1/19/22
> 9563137 – B order 9563147 issued on 1/13/22 and terminated on 1/19/22
> 9563138 – B order 9563177 issued on 2/1/22 and terminated on 2/3/22
> 9563141 – B order 9563182 issued on 2/1/22 and terminated on 2/8/22
> 9563142 – B order 9563181 issued on 2/1/22 and terminated on 2/8/22
> 9563143 – B order 9563178 issued on 2/1/22 and terminated on 2/10/22

[5] Mr. Trent was referring to a citation found in the original docket. Thus, it remained with Docket No. WEVA 2022-0301 and therefore was *not* reallocated to WEVA 2022-0428.

9563146 – B order 9563180 issued on 2/1/22 and terminated on 2/2/22
9563157[6] – B order 9563179 issued on 2/1/22 and terminated on 2/10/22

On November 28, 2022, the Court, via email, repeated its request for the Secretary to provide the missing (b) orders for both dockets. E-mail by the Court to the Parties (November 28, 2022). Thereafter, also on November 28, 2022, the CLR responded via e-mail, reiterating that the Secretary would not provide the missing termination sheets.

Analysis

The foregoing problem with the incomplete record in this case may be succinctly summarized. For this docket, Docket No. WEVA 2022-0301, the Secretary refuses to provide the 104(b) orders issued for seven citations. The Court believes that once a matter is before the Commission, per section 110(k), the entire matter is within its domain under the Mine Act. That means that the Secretary may not secrete section 104(b) orders from the view of the Commission, miners or the public. That the citations have been settled, as assessed, without modifications to them, is irrelevant to the Secretary's obligation not to hide orders issued in connection with the admitted violations. This is especially true because, as explained below, 104(b) orders create certain obligations upon the Secretary which he is not free to ignore.

The structure of the Mine Act underscores the importance of 104(b) orders. As the Court noted in its June 22, 2022 Order in *Perry County Resources*, 44 FMSHRC 501 (June 2022),

> The Court does not believe that the fact a violation is paid in full, with no modifications made to the issuing inspector's evaluation, is the end of the matter. The principle behind this view is very basic, in carrying out its review responsibilities under 30 U.S.C. §820(k), the Court is obligated to be fully informed about the circumstances surrounding the issuance of a citation or an order. [The Citation in issue] is part of this docket, but the documentary record concerning this admitted violation is incomplete. This is because a section 104(b) order was issued by the inspector in connection with that Citation . . . The Secretary may not decide to selectively secrete such information from the Court, the public and especially from the miners it is charged to protect. From this Court's perspective, such a stance is inimical to the spirit of the Mine Act.
>
> A Section 104(b) order is an important feature of the Mine Act. Section 104(b) of the Mine Act states:
>
> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein … and (2) that the period of time for abatement

[6] Citation No. 9563157 represents the lone citation in reallocated Docket No. WEVA 2022-0428 for which a (b) order was issued and for which the Secretary refuses to supply the (b) order paper.

should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

As the Commission has noted, such orders have significance in their own right. It has observed that:

First of all, section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. Absent any language in the statute suggesting that the Secretary cannot propose a penalty in connection with a section 104(b) order, we will not interpret the phrase "order under section 104" in section 105(a) to exclude section 104(b) orders.

Secondly, contrary to her claim, the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent part:

If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty…. 30 U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA's regulations authorize the Secretary to assess steep daily penalties. *See* 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) ("Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than $6,500 for each day during which such failure or violation continues.").

Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed. The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):

[T]he Secretary is to similarly notify operators and **miners' representatives** when he believes that an operator has failed to abate a violation within the specified abatement period. *In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)]*. The notice of proposed **penalty** to operators in such cases shall state that a [**104(b)**] **order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This **penalty** shall be proposed in addition to the **penalty** for the underlying violation required by*

Section [110(a)] of the Act. S. Rep. No. 95-181, at 34-35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622-23 (1978).

In addition, even if no separate penalty for failure to abate a violation is assessed, the failure to abate allegation upon which a section 104(b) withdrawal order rests, if established, increases the amount of the penalty that is ultimately assessed for the underlying violation. As Judge Zielinski recognized in his first decision, 'the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation is one of the factors that the Commission must consider in fixing the amount of a civil penalty.' 28 FMSHRC at 413 (quoting section 110(i) of the Mine Act, 30 U.S.C. § 820(i)). Thus, the sanction for a failure to abate is not only a withdrawal order, but, likely, a higher penalty when the Secretary eventually assesses a penalty for the original violative condition that allegedly was not abated in a timely fashion. *See NAACO Mining Co.*, 9 FMSHRC 1541, 1545 (Sept. 1987) ('Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed.').

UMWA v. Maple Creek Mining, 29 FMSHRC 583, 592-594 (July 2007) (emphases added).

Per the above decision, the Commission recognized the independent importance of 104(b) orders may be the subject of a penalty in their own right, citing section 104(b)(1)(A). The legislative history, as also cited by the Commission, makes this plain: "[t]he notice of proposed **penalty** to operators in such cases shall state that a **[104(b)] order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This **penalty** shall be proposed in addition to the **penalty** for the underlying violation required by Section [110(a)] of the Act.*" *Id.* at 593. (emphases in original Order).

Though no additional reasons are needed to require disclosure of the (b) order in this matter, the record does not reveal if the Secretary met his obligation to notify the miners' representatives when, as here, he believed that an operator has failed to abate a violation within the specified abatement period.

This Court is well-aware that its review of settlements is presently cabined within the terms of the Commission's decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) and that under those decisions the Court's review role has become statistically perfunctory. However, there is still an obligation and duty to examine *each* citation *and order* within a submitted docket, even if the citation is not contested and paid as originally assessed. The responsibility to ensure that there is *a complete record* is separate and apart from, and not mutually exclusive to, the review of violations that have settled, whether such settlements are for the full amount proposed or some lesser amount.

> Frankly, the Court is at a loss to understand why the Secretary of Labor is not in full support of providing the *full record* of the enforcement actions taken in connection with an admitted 104(a) citation. In this matter that involves hiding the inspector's issuance of a 104(b) order in connection with that citation. The apparent decision to secrete such information from the Court, the public and especially from the miners it is charged to protect is perplexing and at odds with the admonition from several federal courts invoking Justice Louis D. Brandeis' remark that "Sunlight is said to be the best of disinfectants." *See, for example*, *Argus v. U.S. Dept Agriculture,* 740 F.3d 1172 (8th Cir. 2014), wherein Argus invoked the federal law meant to bring disclosure sunlight to the government bureaucracy, in its request to see spending information from the U.S. Department of Agriculture under the Freedom of Information Act, *5 U.S.C. § 552.* To the same effect as the Secretary has done here, the Department of Agriculture, with little explanation, refused disclosure. Reversing the lower court's determination that the information sought was exempt from disclosure, the Eighth Circuit took note of Justice Louis D. Brandeis' remark about the disinfecting benefit of sunlight. *Id.* at 1173, citing *Other People's Money* 92 (1914).
>
> *Id.* at 503-506 (footnotes omitted).

Conclusion

For all of the above stated reasons, the Court certifies upon its own motion that this interlocutory ruling involves a controlling question of law for which, in the Court's opinion, immediate review will materially advance the final disposition of the proceeding,

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

APPENDIX

The text of the citations for the now-admitted violations concerning which the Secretary has refused to supply the associated 104(b) orders are presented here.

Citation No. 9563136

Citation No. 9563136 was issued on January 10, 2022, for a violation of 30 C.F.R. § 77.1606(c). Titled "Loading and haulage equipment; inspection and maintenance," this standard specifies that "[e]quipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c).

The citation stated:

> The following defects affecting safety existed on the 777D Caterpillar Haulage Truck Co. No. M03-546:
> 1. A large knot existed on the side wall area of the left rear outside tire.
> 2. Oil was leaking from the right rear inside wheel area.
> This truck was being operated in the Grapevine North Pit Area. Defects affecting safety shall be corrected before the equipment is used.
> Standard 77.1606(c) was cited 44 times in two years at mine 4608930 (44 to the operator, 0 to a contractor).

Pet. for a Civil Penalty at 19.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "low."

Citation No. 9563137

Citation No. 9563137 was issued on January 10, 2022, for a violation of 30 C.F.R. § 77.1605(d). Titled "Loading and haulage equipment," the standard specifies that "[m]obile equipment shall be provided with audible warning devices. Lights shall be provided on both ends when required." 30 C.F.R. § 77.1605(d).

The citation stated:

> The following conditions existed on the 777D Caterpillar Haulage Truck Co. No. M03-546:
> 1. Both front marker/signal lights were not functioning when tested.
> 2. Both rear brake lights were not functioning when tested.
> 3. The left rear signal light was not functioning when tested.
> 4. The Level 3 audile warning alarm which is located inside the operators cab was not functioning when tested.
> This truck was being operated in the Grapevine North Pit Area. This truck is

> operated before and after daylight hours. Mobile equipment shall be provided with audible warning devices.
> Lights shall be provided on both ends when required
>
> Standard 77.1605(d) was cited 16 times in two years at mine 4608930 (16 to the operator, 0 to a contractor).

Petition at 20.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "low." *Id*.

Citation No. 9563138

Citation No. 9563138 was issued on January 10, 2022, for a violation of 30 C.F.R. § 77.1606(c), *supra*.

The citation stated:

> The following defects affecting safety existed on the D10R Caterpillar Dozer Co. No. D007:
> 1. A gap existed in the top corner of the right hand door to the operators cab. With the door closed completely the outside of the cab was still visible.
> 2. Bolts were missing in the floor board allowing the floor board to be loose and not properly sealed.
> 3. Oil was leaking out the right side final drive.
> 4. Oil could be seen leaking on the right side out of the frame of the dozer.
> 5. The seat in the operators cab is bottomed out.
> This dozer was being operated in the Grapevine North Pit Area. Defects affecting safety shall be corrected before the equipment is used.
> Standard 77.1606(c) was cited 44 times in two years at mine 4608930 (44 to the operator, 0 to a contractor).

Petition at 21.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to be "permanently disabling," affecting one person. *Id*. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "low." *Id*. The citation was continued on January 13, 2022, with the justification that:

> Repairs are still being conducted at this time. Most of the repairs have been completed. The mine operator removed the dozer from service until the repairs could be completed, so more time has been granted.

Id. at 22. The citation was continued again on January 18, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 23. The citation was continued again on January 24, 2022, with the justification that:

> Repairs are still being conduct at this time. The following repairs have been completed 1, 2, 4, and 5. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 24.

Citation No. 9563141

Citation No. 9563141 was issued on January 11, 2022, for a violation of 30 C.F.R. § 77.1605(d), *supra*. The citation stated:

> The following conditions existed on the 785D Caterpillar Haulage Truck Co. No. RT111:
> 1. The left and right side front signal/marker lights are not functioning when tested.
> 2. The left side high beam light is not functioning when tested.
> 3. The left and right side rear signal lights are not functioning when tested.
> 4. The left and right side brake lights are not functioning when tested.
> 5. The horn was not functioning when tested.
> This truck was being operated in the Mill Seat Pit Area (Alma). This truck operates before and after daylight hours. Mobile equipment shall be provided with audible warning devices,
> Lights shall be provided on both ends when required. These conditions have been recorded on the Pre-Operational Examinations and reported to the mine operator. Standard 77.1605(d) was cited 18 times in two years at mine 4608930 (18 to the operator, 0 to a contractor).

Petition at 29.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to be "fatal," affecting one person. *Id*. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "high." *Id*. The citation was continued on January 18, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 30. The citation was continued again on January 24, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 31.

Citation No. 9563142

Citation No. 9563142 was issued on January 11, 2022, for a violation of 30 C.F.R. §77.1606(c), *supra*.

The citation stated:

> The following defects affecting safety existed on the 785D Caterpillar Haulage Truck Co. No. RT111:
> 1. Right front strut is leaking oil.
> 2. Right rear strut is leaking oil.
> 3. Oil is leaking from the right rear inside wheel area.
> 4. Oil is leaking from the right rear outside wheel area.
> 5. Oil is leaking from the left rear inside wheel area.
> 6. Excessive slack existed in the rear stabilizer bar (dogbone).
> 7. Excessive slack existed in the center arm pin.
> 8. The left front strut is leaking oil.
> 9. Oil is leaking from the right front brake caliber area.
> 10. Oil is leaking excessively from the steering oil tank onto the deck and down onto the right side of the engine compartment area.
> 11. Oil is leaking excessively from the area located behind the hydraulic tank.
> 12. Three gussets located on the right side of the truck was cracked and separated.
> 13. The right rear inside tire has excessive damage to the tire.
> This truck was being operated in the Mill Seat Pit Area (Alma). Defects affecting safety shall be corrected before the equipment is used.

> Standard 77.1606(c) was cited 46 times in two years at mine 4608930 (46 to the operator, 0 to a contractor).
>
> Petition at 32-33.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. at 32. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was continued on January 18, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 34. The citation was continued again on January 24, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 35.

Citation No. 9563143

Citation No. 9563143 was issued on January 11, 2022, for a violation of 30 C.F.R. § 77.1606(c), *supra*.

> The citation stated:
>
> The following defects affecting safety existed on the 785C Caterpillar Haulage Truck Co. No. RT269:
> 1. The mud flap located underneath the operators cab is bent down, allowing mud to get on the
> drivers side rear view mirror and onto the window glass of the drivers side door.
> 2. The truck frame is cracked across the bottom and back side of the frame. The crack is located on the rear of the truck above where the stabilizer bar (dogbane) is located.
> 3. The right rear strut is leaking oil.
> 4. The right side rear wheel is leaking oil on the inside area of the wheel.
> 5. The left side rear wheel is leaking oil on the inside area of the wheel.
> 6. Oil is leaking from the steering oil tank area which is located on the top deck above the engine compartment. The oil is leaking down onto the right side of the engine compartment area.

7. Excessive slack existed in the right side steering jack inside ball stud. The slack is visible when the truck is steered in either direction.
8. Excessive slack existed in the left side steering jack inside ball stud. The slack is visible when the truck is steered in either direction.
9. The front brake canister is over stroked. There is no warning alarm or warning light on inside the operators cab.
10. The handrail located on the front bumper to the right side step is bent and missing a bolt.
11. The hood is broke near the offside door to the operators cab. This hood is also used as a walkway (deck) to access the offside door to the operators cab.
12. The fuel gauge located inside the operators cab was not functioning when tested.
13. Paper towels are wrapped around the door striker to the drivers side door to the operators cab.
14. Paper towels are installed around the top corner to the drivers side door to the operators cab.
This truck was being operated in the Mill Seat Pit Area (Alma). Defects affecting safety shall be corrected before the equipment tis used.

Standard 77.1606(c) was cited 46 times in two years at mine 4608930 (46 to the operator, 0 to a contractor).

Petition at 36-37.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably result in "lost workdays or restricted duty," affecting one person. *Id*. at 36. The violation was found not to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*.

The citation was continued on January 18, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampere3d by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 38. The citation was continued again on January 24, 2022, with the same justification. *Id*. at 39.

Citation No. 9563146

Citation No. 9563146 was issued on January 12, 2022, for a violation of 30 C.F.R. § 77.1606(c), *supra*.

The citation stated:

The following defects affecting safety existed on the 785D Caterpillar Haulage Truck Co. No. RT112:

> 1. An excessive oil leak existed on a hose located on the right front area of the truck. Oil was spraying out the hose.
> 2. An excessive oil leak existed in the area behind the hydraulic tank area. A steady streams of oil was coming from this area.
> 3. Oil was leaking from the right rear wheel. The inside area of the wheel was covered in oil and running down the sidewall of the tire.
> 4. The mud flap is missing from underneath the drivers side of the operators cab. The mirror and window glass of the drivers side door was covered in mud.
> 5. Oil was leaking from the filter area of the steering oil tank and running down onto the right side of the engine compartment.
> 6. Left rear brake temperature error indicator is coming on inside the operator's cab.
> 7. The warning light located next to the digital display is taped over.
> 8. The action warning light located on the dash board is staying on at all times.
> 9. Excessive slack existed on the right side steering jack inside ball stud. This slack was visible when the truck was steered in either direction.
> 10. The right side fender is damaged where the front head lights are located causing the lights to not face forwards completely.
> This truck was being operated in the Mill Seat Pit Area (Alma). Defects affecting safety shall be corrected before the equipment is used.
>
> Standard 77.1606(c) was cited 48 times in two years at mine 4608930 (48 to the operator, 0 to a contractor).

Petition at 44-45.

For gravity, likelihood of injury was found to be "unlikely," and injury could reasonably be expected to result in "lost workdays or restricted duty," affecting one person. *Id*. at 44. The violation was not found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was continued on January 18, 2022, with the justification that:

> Repairs are still being conduct at this time. Some of the repairs have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 46. The citation was continued again on January 24, 2022, with the justification that:

> Repairs are still being conduct at this time. Repairs to items 1, 2, 4, 6, 7, 9 and 10 have been completed. Repair work has been hampered by parts availability and limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed.

Id. at 47.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 13, 2022

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0428 A.C. No. 46-08930-551112
v.	
APPALACHIAN RESOURCE WEST VIRGINIA, LLC, Respondent	Mine: Grapevine South Surface Mine

ORDER CERTIFYING CASE FOR INTERLOCUTORY REVIEW

This case is before the Court on a Petition for the Assessment of a Civil Penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d), filed May 31, 2022, and the Secretary of Labor's Motion to Approve Settlement, filed October 14, 2022. The Secretary has refused to provide the 104(b) order associated with a 104(a) citation in this docket. The absence of the associated 104(b) order frustrates the Court's ability to faithfully review the record and properly evaluate the proposed settlement. Further, the idea that the Secretary may unilaterally decide to secrete public records from the official file for a Petition for the Assessment of Civil Penalty he filed is inimical to the Congressional structure and purpose of the Mine Act.

Accordingly, for the reasons which follow, the Court **CERTIFIES** under Commission Procedural Rule 76, 29 C.F.R. § 2700.76, that this interlocutory ruling involves a controlling question of law – whether the Secretary is obligated, upon a judge's request, to supply a 104(b) order associated with a 104(a) citation in a docket before the judge on a Motion to Approve Settlement – for which, in the Court's opinion, immediate review will materially advance the final disposition of the proceeding.

Background

This docket was originally part of a larger docket, Docket No. WEVA 2022-0301, which consisted of 33 citations. By virtue of an Order for docket reallocation, dated June 29, 2022, this new docket was created. Order for Docket Reallocation at 1. It consists of 16 citations moved from that original docket. Upon examination of the motion for approval of settlement and Exhibit A, the Court discovered that the record was incomplete for one of the citations, Citation No. 9563157, in that a section 104(b) order issued in connection with that citation was absent. The Citation involved a now-admitted violation of 30 C.F.R. § 77.1606(c). That standard directs that equipment defects affecting safety shall be corrected before the equipment is used. It is no

exaggeration to say that the citation was a doozy. Issued January 18, 2022, it reported the following 10 equipment defects affecting safety:

> The citation states:
>
> The following defects affecting safety existed on the 785C Caterpillar Haulage Truck Co. No. RT263:
> 1. The left rear strut is bottoming out.
> 2. The bed gusset located near the left side of the bed hinge pin area is cracked.
> 3. The bed gusset located near the right side of the bed hinge pin area is cracked.
> 4. Excessive slack existed from the right side top hoist cylinder. This is where the cylinder connects to the truck bed.
> 5. An excessive antifreeze leak existed from the left side are of the engine. Steady streams of antifreeze could been seen running down from the left side.
> 6. The left side front strut is bottoming out.
> 7. The right front strut is leaking oil.
> 8. A wire was disconnected front he right rear brake canister over stroke switch.
> 9. The drivers side window would not roll up when tested.
> 10. Drivers side door seal was damaged and paper towels were stuffed in areas to seal the door in the back corner. Also the door striker is taped up to keep the door closed completely.
> This truck was being operated in the Grapevine North Pit Area. Defects affecting safety shall be correct before the equipment is used.
>
> Standard 77.1606(c) was cited **53 times** in two years at mine 4608930 (53 to the operator, 0 to a contractor).
>
> Pet. for a Civil Penalty at 66-67.

For gravity, likelihood of injury was found to be "unlikely," but the injury could reasonably be expected to result in "lost workdays or restricted duty" affecting one person. *Id*. at 66. The violation was not found to be significant and substantial. Understandably, the negligence was found to be "high." *Id*. at 68.

Nearly a week after issuance of the citation, on January 24, 2022, the inspector issued a "Subsequent Action," in which he informed that the "[r]epair work has been hampered by limited personnel to complete the repairs. The mine operator has removed the equipment from service until these repairs can be completed." Citation No. 9563157-01, Petition at 68. The inspector extended the date for correcting the multiple defects until January 28, 2022.

After that, the file, in a manner of speaking, went dark. Exhibit A, however, gives away that there was subsequent action in that a section 104(b) order was issued.

The Secretary moved to keep the citation as issued, with no reduction in penalty. Mot. to Approve Settlement at 3. The penalty was assessed at $4,624.00.

In light of the missing 104(b) document(s), on November 9, 2022, the Court e-mailed the parties, requesting the missing information pertaining to Citation No. 9563157. Though the subject of a related Order certifying for interlocutory review arising out of the parent document, WEVA 2022-0301, also issued today, it is worth noting that there are seven (7) missing (b) orders from that document. To be clear, as originally constructed, for the 33 citations initially constituting WEVA 2022-0301, there were eight (8) instances in total where the (b) orders are absent. This Order speaks solely to the missing document(s) for Citation No. 9563157, which is part of WEVA 2022-0428.

On Tuesday, November 15th, the Secretary's non-attorney representative, conference and litigation representative David Trent, responded, speaking to the missing documents from *both* dockets:

> For the violations listed [by] Judge Moran request[ing] the terminations, no penalty is being compromised except for Citation No. 9563141. Therefore, the Secretary will not provide the terminations for these violations. For Citation No. 9563141 there is no termination to provide for this violation.[1]

E-mail from CLR Trent to the Court, November 15, 2022.

On the same day as Mr. Trent's response, Counsel for the Respondent, Attorney K. Brad Oakley, taking a cooperative approach, emailed the Court, responding that he could only locate a termination sheet for Citation No. 9563139, which termination sheet he attached to his email. He added that the violation was terminated upon repairs being made to lights on a dozer and that there was no (b) order associated with it. E-mail from Attorney Oakley to the Court, November 15, 2022.

However, that citation is not part of this docket, Docket No. WEVA 2022-0428. Rather, it is part of Docket No. WEVA 2022-0301 which is the subject of the Court's separate certification for interlocutory review, also being issued today.

Attorney Oakley also informed in the same email that he had not been able to locate the termination sheets in the package of citations that his client provided to him, nor in the petition filed by Mr. Trent and that he believed that all of the remaining citations have 104(b) orders associated with them. For that reason he opined that it was possible that MSHA did not issue

[1] Mr. Trent was referring to a citation found in the original docket and *not* reallocated to this docket, WEVA 2022-0428. No explanation was provided for the lack of any termination paper. It will be mentioned in the Court's companion certification for interlocutory review regarding Docket No. WEVA 2022-0301. The settlement for this citation represents another incongruity with the Secretary's position, as he stands by the inspector's evaluation in all aspects, yet accedes to a penalty reduction in the face of five (5) independent defects on a haulage truck. The justification presented by the mine operator is that there were other lights working on the truck. All lights, however, are not the same. Here, among the defective lights, brake lights weren't working and, an independent concern unrelated to lights, the truck's horn was also not working.

terminations for the underlying citations. *Id.* To the Court, that makes sense as the (b) orders would supersede the (a) citations.

On November 22, 2022, the Court e-mailed the parties again, advising, in relevant part, that for Docket No. WEVA 2022-0428, the documents related to Citation No. 9563157 continued to be missing the section 104(b) order. Subsequently, on November 28, 2022, the Court updated the status of information missing from that docket, advising that a new deficiency had been discovered, namely that Citation No. 9563158 was missing entirely from the Petition. Accordingly, the Court advised that "[i]n addition to supplying the court with copies of the missing 104(b) orders, as previously requested, the Court also requests a copy of Citation No. 9563158." E-mail by the Court to the Parties (November 28, 2022). Thereafter, also on November 28, 2022, the CLR responded via e-mail, providing the missing citation, while reiterating that the Secretary would not provide the missing termination sheets. E-mail from CLR Trent to the Court (November 28, 2022).

Analysis

As explained below, the Court believes that this matter pertains to a bedrock principle of the Mine Act and the Commission's role in protecting the safety and health of miners. Further, in no way does it conflict with the Commission's interpretation of its review responsibilities under its decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018).

Simply put, the question is whether the Secretary of Labor has the authority to deprive the Commission, miners and the public from seeing section 104(b) orders issued in connection with citations. The Secretary's legal position is that if a citation is paid in full and without any modifications, it may withhold such orders from the Commission's eyes and everyone else.

To the Court at least, such a position is inimical to the unique statutory provision created by Congress under section 110(k) of the Mine Act. As the Court views the Secretary's posture, it may be compared to a police officer telling a curious onlooker at the scene of a violation to 'move along, nothing to see here.' The problem with such an imperious attitude is that it is the Commission, acting through its 'front line oversight' by the Court of the settlement process, that makes it far more than an onlooker. Rather, under Congressional mandate, once a petition for the assessment of a civil penalty has been filed, it is not the Secretary but the Commission which occupies the role as the overseer of the settlement process.

One would think that the Secretary, who has the important initial role in protecting the safety and health of miners, would be on the same page as this Court on the issue of disclosure of the record of citations and any orders which may ensue from them. However, regrettably and inexplicably, that is not the case.

As this Court remarked in *Perry County Resources,* 44 FMSHRC 501 (June 2022), a matter which also involved the Secretary, again acting through a non-attorney representative, refusing to provide a section 104(b) order issued following a section 104(a) citation. In that case the Court expressed that it did not believe:

that the fact a violation is paid in full, with no modifications made to the issuing inspector's evaluation, is the end of the matter. The principle behind this view is very basic, in carrying out its review responsibilities under 30 U.S.C. §820(k), the Court is obligated to be fully informed about the circumstances surrounding the issuance of a citation or an order [for a citation which] is part of this docket . . . the documentary record concerning this admitted violation is incomplete. This is because a section 104(b) order was issued by the inspector in connection with that Citation . . . The Secretary may not decide to selectively secrete such information from the Court, the public and especially from the miners it is charged to protect. From this Court's perspective, such a stance is inimical to the spirit of the Mine Act.

A Section 104(b) order is an important feature of the Mine Act. Section 104(b) of the Mine Act states:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein … and (2) that the period of time for abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

As the Commission has noted, such orders have significance in their own right. It has observed that:

First of all, section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. Absent any language in the statute suggesting that the Secretary cannot propose a penalty in connection with a section 104(b) order, we will not interpret the phrase "order under section 104" in section 105(a) to exclude section 104(b) orders.

Secondly, contrary to her claim, the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent part:

If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty…. 30

U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA's regulations authorize the Secretary to assess steep daily penalties. *See* 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) ("Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than $6,500 for each day during which such failure or violation continues.").

Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed. The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):

[T]he Secretary is to similarly notify operators and **miners' representatives** when he believes that an operator has failed to abate a violation within the specified abatement period. *In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)]*. The notice of proposed **penalty** to operators in such cases shall state that a [**104**(**b**)] **order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This **penalty** shall be proposed in addition to the **penalty** for the underlying violation required by Section [110(a)] of the Act.* S. Rep. No. 95-181, at 34-35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622-23 (1978).

In addition, even if no separate penalty for failure to abate a violation is assessed, the failure to abate allegation upon which a section 104(b) withdrawal order rests, if established, increases the amount of the penalty that is ultimately assessed for the underlying violation. As Judge Zielinski recognized in his first decision, 'the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation is one of the factors that the Commission must consider in fixing the amount of a civil penalty.' 28 FMSHRC at 413 (quoting section 110(i) of the Mine Act, 30 U.S.C. § 820(i)). Thus, the sanction for a failure to abate is not only a withdrawal order, but, likely, a higher penalty when the Secretary eventually assesses a penalty for the original violative condition that allegedly was not abated in a timely fashion. *See NAACO Mining Co.*, 9 FMSHRC 1541, 1545 (Sept. 1987) ('Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed.'). *UMWA v. Maple Creek Mining*, 29 FMSHRC 583, 592-594 (July 2007) (emphases added).

Per the above decision, the Commission recognized the independent **importance** of **104**(**b**) **orders** may be the subject of a penalty in their own right, citing section 104(b)(1)(A). The legislative history, as also cited by the Commission, makes this plain: "[t]he notice of proposed **penalty** to operators in such cases shall state that a [**104**(**b**)] **order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This **penalty** shall be proposed in addition*

*to the **penalty** for the underlying violation required by Section [110(a)] of the Act.*" *Id.* at 593. (emphases added).

Though no additional reasons are needed to require disclosure of the (b) order in this matter, the record does not reveal if the Secretary met his obligation to notify the miners' representatives when, as here, he believed that an operator has failed to abate a violation within the specified abatement period.

This Court is well-aware that its review of settlements is presently cabined within the terms of the Commission's decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) and that under those decisions the Court's review role has become statistically perfunctory. However, there is still an obligation and duty to examine *each* citation *and order* within a submitted docket, even if the citation is not contested and paid as originally assessed. The responsibility to ensure that there is *a complete record* is separate and apart from, and not mutually exclusive to, the review of violations that have settled, whether such settlements are for the full amount proposed or some lesser amount.

Frankly, the Court is at a loss to understand why the Secretary of Labor is not in full support of providing the *full record* of the enforcement actions taken in connection with an admitted 104(a) citation. In this matter that involves hiding the inspector's issuance of a 104(b) order in connection with that citation. The apparent decision to secrete such information from the Court, the public and especially from the miners it is charged to protect is perplexing and at odds with the admonition from several federal courts invoking Justice Louis D. Brandeis' remark that "Sunlight is said to be the best of disinfectants." *See, for example*, *Argus v. U.S. Dept Agriculture,* 740 F.3d 1172 (8th Cir. 2014), wherein Argus invoked the federal law meant to bring disclosure sunlight to the government bureaucracy, in its request to see spending information from the U.S. Department of Agriculture under the Freedom of Information Act, *5 U.S.C. § 552.* To the same effect as the Secretary has done here, the Department of Agriculture, with little explanation, refused disclosure. Reversing the lower court's determination that the information sought was exempt from disclosure, the Eighth Circuit took note of Justice Louis D. Brandeis' remark about the disinfecting benefit of sunlight. *Id.* at 1173, citing *Other People's Money* 92 (1914).

Id. at 503-506 (footnotes omitted).

The Secretary, seeking what appears to be more territorial gain in the Commission's presently limited review role for settlement motions, now is attempting to further limit that role by foreclosing the Commission's ability to even see relevant documents associated with citations, in this case (b) orders. The public purpose behind the Secretary's decision to prevent the Commission, miners, and the public from seeing these relevant documents is unfathomable.

Given the Secretary's obligations, as stated above, when 104(b) orders have been issued his refusal to disclose them creates the appearance of something being askew. It is noteworthy that the Secretary is not asserting that he does not have the documents. Instead, the Secretary is contending that the Commission may not view them. To the Court, this is a position at odds with the Commission's unique gatekeeper role per section 110(k) of the Mine Act.

For the reasons stated above, the Court certifies upon its own motion that this interlocutory ruling involves a controlling question of law for which in the Court's opinion, immediate review will materially advance the final disposition of the proceeding,

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

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