January 2016

TABLE OF CONTENTS

COMMISSION DECISIONS

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

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

Secretary of Labor v. Peabody Twentymile Mining, LLC, Docket No. WEST 2015-64, et al (Judge Simonton, November 3, 2015)

Secretary of Labor v. Bussen Quarries, Inc., Docket No. CENT 2015-385 (Judge Miller, December 17, 2015)

Secretary of Labor v. Pocahontas Coal Company, Docket No. WEVA 2014-1028, et al (Judge Miller, December 24, 2015)

Review was not denied in any case during the month of January 2016.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

January 28, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BLACK BEAUTY COAL COMPANY	Docket No. LAKE 2009-570

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). At issue is the validity of an original safeguard notice and its modification, issued to Black Beauty Coal Company by the Department of Labor's Mine Safety and Health Administration ("MSHA"), which served as the basis for four citations in this matter.

The Judge found the notice of safeguard and the modification to be valid, and affirmed the four related citations. Order Denying Respondent's Motion to Dismiss (Feb. 2011) (ALJ); 33 FMSHRC 1504 (June 2011) (ALJ).[1] Black Beauty seeks review of those portions of the decision and order in which the Judge found the safeguard notice and modification to be valid. Specifically, Black Beauty claims that the notice and modification do not meet the requirement that a valid safeguard notice must identify a hazard with specificity. Black Beauty accordingly requests that the four citations be vacated because they were issued pursuant to an invalid notice of safeguard. Black Beauty does not challenge the citations on any other grounds.

We conclude that the original safeguard notice is valid, and that when the safeguard notice and modification at issue are read together, the modified safeguard notice is also valid. Accordingly, the four citations are affirmed.

[1] Docket No. LAKE 2009-570 contains 63 citations and orders; the Judge resolved eleven on the merits, and approved settlement of the remainder. 33 FMSHRC at 1534-36.

I.

Legal Framework

Although an operator is usually cited for violations of mandatory safety and health standards developed through notice and comment rulemaking pursuant to Title I of the Mine Act, 30 U.S.C. § 811(a), Title III of the Mine Act also gives the Secretary the authority to issue safeguards in underground coal mines to reduce hazards associated with the transportation of men and materials. 30 U.S.C. § 874(b) (section 314(b) of the Act).[2] The Secretary implements this provision by authorizing an inspector to issue a safeguard notice on a mine-by-mine basis. A safeguard notice informs the mine operator about conduct that is mandated or prohibited. The inspector issues the safeguard in writing and indicates a time by which the operator must provide and subsequently maintain that safeguard. 30 C.F.R. § 75.1403-1(b). Uniform safeguard criteria guide the mine inspector's issuance of a safeguard as well as its content. *See* 30 C.F.R. § 75.1403-2 – 75.1403-11. If the operator does not comply with the safeguard the inspector issues a citation. 30 C.F.R. § 1403-1(b). Thus, issuances pursuant to section 314(b) are enforceable as mine-specific mandatory standards, as an operator may be issued a citation for failing to provide the required safeguard. *Wolf Run Mining Co.*, 659 F.3d 1197, 1201-02 (D.C. Cir. 2011), *aff'g*, 32 FMSHRC 1228 (Oct. 2010). When challenging such a citation, an operator may also challenge the validity of the underlying safeguard notice. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 2-4 (Jan. 1992) (*SOCCO II*).

The Commission has long held that a valid safeguard notice "must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard," and that "a narrow construction of the terms of the safeguard and its intended reach is required." *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) (*SOCCO I*). A narrow interpretive approach serves to balance the Secretary's broad grant of authority to effectively issue mine-specific mandatory standards without resorting to normal rulemaking procedures, with the operator's right to notice of the conduct required of it. *Id.*

The requirement to identify a "hazard" for purposes of section 314(b) is satisfied when the safeguard identifies a hazardous condition; it need not specify a particular harm or risk to miners. *American Coal Co.*, 34 FMSHRC 1963, 1967-71 (Aug. 2012); *Oak Grove Resources*, 35 FMSHRC 2009, 2014 (July 2013). We have "consistently treated safeguards that *specify hazardous conditions and specify a remedy* as valid safeguards." 34 FMSHRC at 1969 (emphasis in original). A valid safeguard notice must identify a hazardous condition and remedy with specificity in order to ensure that the operator has sufficient notice as to the conduct that is prohibited or required. *Id.* at 1967; *see also SOCCO I*, 7 FMSHRC at 512-13.

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

II.

Factual and Procedural Background

In May 2003, an MSHA inspector issued Safeguard No. 7591942 to Black Beauty at its Air Quality No. 1 Mine. The safeguard notice states:

> Rib coal and rib rock have fallen blocking the travelway along each side of the 2-A conveyor belt (3 West/1 Right) at cross cut #17. The fallen material along the east side of the belt has the travelway blocked for an approximate 15' distance. Fallen material along the west side of the conveyor has the travelway blocked for an approximate 20'-25' distance.
>
> This is a Notice to Provide Safeguard(s) requiring a clear travelway at least 24 inches wide [to] be provided on both sides of all belt conveyors. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway of at least 24 inches is required on the side of such support farthest from the conveyor.

Gov. Ex. 45 (*see* 30 C.F.R. § 75.1403-5(g)). In August 2007, an MSHA inspector issued the following modification:

> This is to modify the safeguard requiring a clear travelway of at least 24 inches along both sides of all conveyor belts. The above-referenced safeguard is hereby modified to require [ ] that the 24 inch travelway shall be clear of mud and water.

Gov. Ex. 46.

In 2009, MSHA issued four citations relevant to this proceeding, alleging violations of the modified safeguard notice. Citation Nos. 8415371, 8415372 and 8415373 allege failures to keep travelways free of mud and water, while Citation No. 8415735 alleges a failure to keep a travelway clear of mud, water, rock and coal.

Black Beauty filed a motion before the Judge to dismiss the four citations, arguing in part that the underlying safeguard notice and modification were invalid because they failed to identify a hazard with specificity. The Judge denied the motion, finding that the safeguard notice and modification did identify hazards affecting transportation of men and materials: namely, coal and rock in the travelway for the original issuance, mud and water accumulations in the travelway for the modification. Order at 2-3. The Judge subsequently issued a decision in which she reiterated the validity of the modified safeguard notice and affirmed the four citations.[3] 33 FMSHRC at 1517, 1530-31.

[3] Citation Nos. 8415371 and 8415735 were contested on the merits. The only defense Black Beauty raised with regard to Citation Nos. 8415372 and 8415373 was the invalidity of the safeguard. 33 FMSHRC at 1531.

Black Beauty filed a petition for discretionary review of the Judge's conclusion that the safeguard notice and modification identified a hazard with sufficient specificity. Review was granted, but briefing was stayed pending the Commission's decisions in *American Coal Co.*, 34 FMSHRC 1963 (Aug. 2012), and *Oak Grove Resources*, 35 FMSHRC 2009 (July 2013). Following the issuance of those decisions, the stay of briefing was lifted.

III.

Disposition

Because the validity of the safeguard notice and modification is a purely legal issue, we review the judge's decision *de novo*. *American Coal*, 34 FMSHRC at 1972. We conclude that when the original issuance and its modification are read in conjunction, the modified safeguard notice identifies a hazardous condition and modified remedy with sufficient specificity to provide the operator with notice as to the conduct that is prohibited or required. Accordingly, we find that the original safeguard notice and its modification are valid.

As an initial matter, we reaffirm our holding in *American Coal* and *Oak Grove Resources* that a notice of safeguard identifies a hazard for purposes of section 314(b) by identifying a hazardous condition, and need not specify a particular harm or risk to miners. 34 FMSHRC at 1969-70.

Black Beauty argues that, although the original Safeguard No. 7591942 "arguably describes the condition that gave rise to its issuance," it is invalid because it fails to also define the specific danger which the condition creates for miners. BB Br. at 7-8. The operator concedes that its position is "contrary to the Commission's holding in *American Coal*." BB Reply Br. at 6, n.2. Moreover, it fails to offer any new theories that would justify reconsidering the principle adopted therein.[4] The failure to identify a specific risk or harm to miners that might potentially result from the hazardous condition does not render Safeguard No. 7591942 or its modification invalid.

Likewise, we reject Black Beauty's alternative argument that the original safeguard notice is invalid even under *American Coal* because it fails to identify a *hazardous* condition. Black Beauty concedes that the issuance describes "material blocking the travelway, rendering travel along a portion of the conveyor impassible," but claims that it is not a valid notice of safeguard because it "does not identify what hazard that creates, or that the condition was hazardous at all." BB Br. at 9. In essence, Black Beauty again argues that a valid safeguard notice must explicitly describe how a general condition will potentially harm miners, and we again reject that argument as contrary to *American Coal*. Safeguard No. 7591942 describes rock and coal blocking travelways and directs that the operator maintain 24 inches of clear travelway

[4] Black Beauty relies on earlier Commission caselaw and the use of the term "hazard" in MSHA's Program Policy Manual. Both were considered by the Commission in *American Coal*. The former was found to be consistent with our holding, and the latter was found not to be persuasive. 34 FMSHRC at 1970. The ALJ decisions cited by Black Beauty are not precedential and were decided before the issuance of *American Coal*.

on both sides of all belt conveyors. It specifies a hazardous condition and a remedy. Therefore, it is valid under *American Coal*.

In addition, we are not persuaded by Black Beauty's argument that the modification is invalid because it fails to describe a hazardous condition. If the modification is read in isolation, Black Beauty would be correct.[5] However, modifications do not exist independently; they inherently require an original to be modified. Safeguard notices and their modifications must be read together. *See, e.g.*, *American Coal*, 34 FMSHRC at 1977 (addressing a safeguard notice "as modified"); *see also Mettiki Coal Corp.*, 14 FMSHRC 29 (Jan. 1992). The relevant question is not whether the modification is valid. It is whether the *modified safeguard notice* identifies a hazardous condition and remedy with sufficient specificity as to provide adequate notice as to the conduct prohibited or required. 34 FMSHRC at 1967. We find that it does.

We acknowledge that the modified safeguard does not identify a specific observed condition for every specific remedy; in particular, it does not explicitly state that an inspector observed accumulations of mud and water. However, focusing on the broader concept of *type* of condition, the modified safeguard identifies accumulations of material (such as fallen rib coal and rib rock), and requires that travelways be kept clear of accumulations of material (such as rib coal, rib rock, mud and water). In other words, the modified safeguard identifies specific conditions at the mine which obstructed a travelway, and identifies similar conditions which should be avoided to prevent obstructions.[6] When the original safeguard and modification are read in conjunction, the modified safeguard notice identifies a hazardous condition and remedy.[7]

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[5] Chairman Jordan notes that the original safeguard notice (which was prompted by debris) directed the operator to keep a clear travelway of at least 24 inches along both sides of all conveyor belts. She is of the view that such directive also provided adequate notice to the operator that the travelway not be impeded by mud and water.

[6] The dissent states that without the additional context provided by an observed mud and water accumulation, it would be impossible for a reasonable person to understand the requirements of the safeguard. Slip op. at 10-11. We note that safeguards are written by, and for, those with knowledge of the relevant mine. While safeguards do have a specificity requirement, basic industry knowledge can also provide context when interpreting a safeguard. *See, e.g.*, *Oak Grove Resources, LLC*, 35 FMSHRC 2009, 2012 (July 2013) (citing *SOCCO I*, 7 FMSHRC at 512 n.2) (noting that "safeguards are written by inspectors in the field, not by a team of lawyers," and that "the requirement of specificity is 'not a license for the raising or acceptance of purely semantic arguments'").

Moreover, we note that if the phrase "clear of mud and water" to prevent obstructions was contained in a mandatory standard rather than in a safeguard, there would not be a question of lack of notice. Individual citations would be evaluated under the Commission's familiar "reasonably prudent person" standard stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) and reiterated in numerous other decisions of the Commission. We see no reason why the "reasonably prudent person" test would not be applicable to questions of notice which arise in the context of safeguards.

As to whether the conditions are identified with sufficient specificity, we have previously found other safeguard notices that follow the same pattern – identifying mine-specific examples of a problem, and then providing a more general solution – to be valid. For example, a safeguard notice found to be valid in *American Coal* stated:

> The active 13th West Long wall working section, 058 MMU, was not provided with a clear travelway between the long wall face conveyor and the shield bases for the entire length of the long wall face. Coal and gob was observed deposited in the walkway and on the shield bases at various depths. This is a notice to provide safeguard(s) requiring that all long walls at this mine shall maintain the walkways and shield bases, between the face conveyor and the shields, free of all extraneous materials that would affect the safe travel of miners.

34 FMSHRC at 1972. The Commission noted a similarly patterned notice in SOCCO I, which stated:

> A clear travelway at least 24 inches along the No. 1 conveyor belt was not provided at three (3) locations, in that there was fallen rock and cement blocks.
>
> All conveyor belts in this mine shall have at least 24 inches of clearance on both sides of the conveyor belts. This is a notice to provide safeguards.

34 FMSHRC at 1967, *citing* 7 FMSHRC at 510, 514. A safeguard can be sufficiently specific to put an operator on notice as to the conduct required, even where the remedy is broader than the specific conditions noted by the inspector. In the instant case, the provisions of the modified safeguard are sufficiently specific to notify the operator that accumulations of material such as

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[7] The Judge appears to have upheld the validity of the modification by inferring that a generic mine hazard existed from the modification's mandate (that travelways be clear of mud and water), rather than by looking to the original safeguard issuance for the hazard. Order at 3. The Secretary looks outside the text to support the modification, claiming that the operator was aware of the relevant hazardous condition because mine personnel were present when the modification was issued. Oral Arg. Tr. 14-15. Both methods are improper. Hazardous conditions must be in the text of the safeguard notice, rather than inferred or established through the record. *See, e.g.*, *American Coal*, 34 FMSHRC at 1978-79 (finding a safeguard notice invalid where, although one could infer that the inspector observed the conditions addressed in the remedy, those conditions were not explicitly described). However, the Judge's inference is harmless error. As discussed above, the modification is properly read in conjunction with the text of the original issuance; the Judge reached the correct conclusion regarding the validity of the modified safeguard notice.

rock, coal, mud and water in sufficient quantity to block travel are prohibited in travelways along conveyor belts.[8]

Perhaps it would have been preferable, in pursuit of extra clarity, if a description of the water and mud accumulations observed by the issuing inspector had been included in the text of the modification. However, the original condition and modified remedy are similar enough that they can logically be read together, and when read narrowly, they are sufficiently specific to provide notice as to the type of accumulations prohibited by the modified safeguard, i.e., those that prevent a clear travelway.[9] The notice of safeguard, as modified, is valid.

[8] Whether subsequent cited accumulations are indeed sufficient to prevent a clear travelway is a factual determination that is properly decided by the Judge. In this case, the Judge made those determinations. 33 FMSHRC at 1517-18, 1530-31. On appeal, Black Beauty has only challenged the facial validity of the safeguard, not its applicability to the relevant citations. Accordingly, the fact that the operator failed to comply with the safeguard is not in dispute. However, we would note that a cited condition need not exactly mirror the conditions described in the safeguard notice in order to constitute a violation. Notices of safeguard are intended to address *types* of conditions and/or conduct; limiting their application to an exact replica of the situation which led to their issuance would defeat their purpose, as a practical matter.

[9] This matter is distinguishable from *SOCCO I*, which noted a "dissimilarity" between water accumulations described in a citation, and solid debris described in the underlying safeguard notice. 7 FMSHRC at 513. In *SOCCO I*, the dissimilarity was between a citation and the underlying safeguard; we concluded that the safeguard *did not provide notice* that the cited accumulations were prohibited, and vacated the citation. Here, only the safeguard notice is at issue, and it was modified specifically to provide notice that water and mud accumulations are prohibited.

In support of its contention that a hazard of a travelway blocked by fallen materials is not relevant to a safeguard remedy to clear the travelway of water and mud, the dissent relies on the Commission's finding in *American Coal* that two safeguards which addressed fallen material and "water and slurry conditions" respectively were not duplicative safeguards. Slip op. at 15 n.5, citing 34 FMSHRC at 1975. However, the Commission's reason for rejecting the operator's duplication claim was that there was a need to provide notice that accumulated water was prohibited. 34 FMSHRC at 1975. In other words, the holding in *American Coal* does not prevent a single safeguard from addressing both types of accumulations, it simply confirms that the safeguard must put the operator on notice that both types of accumulations are prohibited. That is what the modification at issue accomplished.

IV.

Conclusion

For the reasons discussed above, we conclude that Safeguard No. 7591942, as originally issued and as modified, is valid. Accordingly, Citation Nos. 8415371, 8415372, 8415373 and 8415735 are affirmed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Commissioners Young and Althen, dissenting:

The Mine Act confers upon the Secretary's inspectors the right to issue, instantly, safeguards to protect miners from mine-specific hazards associated with the movement of miners or materials. However, the Commission has long recognized the need for safeguards to articulate clearly the hazard and the means for avoiding the articulated hazards. The amended safeguard at issue in this case falls far short of our standards in that regard. Accordingly, we dissent from the majority's approval.

I.

Safeguards Have the Force of Law and Must Clearly Impose Safety Obligations Based on Mine Specific Conditions.

In *Southern Ohio Coal Co.*, 7 FMSHRC 509 (Apr. 1985) ("*SOCCO I*"), the Commission recognized that a safeguard is a unique form of government action. A lone inspector on his or her own initiative unilaterally imposes a binding obligation upon a mine operator to take specified actions. There is no consultation between the inspector and operator; the inspector makes a wholly discretionary decision to issue the notice in response to his or her personal perception of a mine-specific hazard. Further, because a safeguard enforces an interim mandatory safety standard, an inspector may cite a subsequent violation of a safeguard as a significant and substantial violation.

Because there is no rulemaking, as there is with traditional mandatory safety standards, the Commission established basic requirements for valid safeguards: (1) they must identify with specificity the nature of the hazard; (2) they must specify the conduct required of the operator to counteract that specified hazard; and (3) they must be narrowly construed. *Id.* at 512; *BethEnergy Mines, Inc.*, 14 FMSHRC 17, 25 (Jan. 1992) ("[A] safeguard must be interpreted narrowly in order to balance the Secretary's unique authority to require a safeguard and the operator's right to fair notice of the conduct required of it by the safeguard.").

Safeguards also must meet the legal requirements for valid safety standards: they cannot be arbitrary and capricious and must provide fair notice of the prohibited or required conduct. *Green River Coal Co.*, 14 FMSHRC 43 (Jan. 1992) (finding a prohibition against placement of timbers that obstructed travelways insufficient to address obstructions caused by roof falls); *American Coal Co.*, 34 FMSHRC 1963, 1967 (Aug. 2012) (citing *SOCCO I*, 7 FMSHRC at 512) (a notice must be clear on the conduct required and the conditions covered by the safeguard). As a result, there must be a sufficient nexus between hazard and remedy so the operator receives fair notice of the specific conditions covered (hazard) and the conduct required (remedy).

The threshold issue before us is whether the safeguard itself, outside of the context of a specific citation, conforms to the standards we have imposed to ensure clarity in the law and fair notice. We would hold that it does not.

II.

The Amended Safeguard at Issue Does Not Clearly Identify The Hazard Arising from Mine-Specific Conditions and is Unclear on the Standard of Conduct Required by the Operator.

A safeguard that fails to provide adequate, reasonably-understood notice of the conditions to which it applies may not be saved by a *post-hoc* rationalization that it may apply to a specific hazard that was not contemplated or expressed in the written notice. Yet, that is the course the Secretary urges upon us here.

Safeguard No. 7591942 originally identified one specific hazard – namely, a blocked travelway resulting from fallen rib coal and rock material:

> Rib coal and rib rock have fallen blocking the travelways along each side of the 2-A conveyor belt (3 West/1 Right) at cross cut #17. The fallen material along the east side of the belt has the travelway blocked for an approximate 15' distance. Fallen material along the west side of the conveyor has the travelway blocked for an approximate 20'-25' distance.

In turn, the safeguard specified remedial conduct tailored to the blocking hazard caused by fallen rib coal and rib rock:

> This is a Notice to Provide Safeguard(s) requiring a clear travelway at least 24 inches wide[1] be provided on both sides of all belt conveyors. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway of at least 24 inches is required on the side of such support farthest from the conveyor.

A little more than three years later, an inspector determined that completing the tasks required by the safeguard could expose miners to dangers of adverse roof conditions. The inspector therefore modified the remedy specified in the original safeguard to provide an alternative means to deal with the fallen material:

> It has been determined that action to clean up a clear travelway of 24 inches would be hazardous to the miners due to adverse roof conditions. The above referenced safe guard [sic] is hereby modified to allow the material to remain in its present condition provided that [the] operator installs supplementary roof support on both sides of the fall area and installs start and stop switches

[1] Safeguard notices commonly require that travelways be maintained with 24 inches of clearance, specifically identifying conditions observed in the mine impairing travel. As we have repeatedly urged in the past, the cause of miner safety would be much better served by the promulgation of rules proscribing travel hazards in all mines, rather than relying on mine-by-mine safeguards.

> and cross overs or unders on both sides of the fall in the blocked travelway. Red reflectors shall be placed at each start/stop switch.

Order Denying Respondent's Motion to Dismiss, slip op. at 1 n.2 (Feb. 2011) (ALJ).

Nearly a year later, on August 9, 2007, another inspector again modified the safeguard. Once again, the specified hazard – fallen rib coal and rock blocking the travelway – was not modified. Rather, the second modification added a separate and new remedy to the existing safeguard, obligating the operator to ensure that "the 24 inch travelway shall be clear of mud and water." Gov. Ex. 46.

Consequently, the modified safeguard continues to describe the specific hazard as fallen rib coal and rock material blocking a travelway. However, the newly-prescribed remedy relates not to a blocking of the travelway by fallen rib coal and rock but instead to water and mud. The modified safeguard did not identify any hazard, specific or general, from mud and water. The remedy is broad, undefined, and, taken literally, may be impossible to achieve. These are fatal defects under the law.

A. The Modified Safeguard is Incoherent on the Hazard and the Conduct Required by the Operator.

The concise, literal expression of "clear of mud and water" is "dry." Read without reference to a specific hazard attributable to water or mud, the new "remedy" in the safeguard thus appears to demand something that is geologically impossible in a typical underground coal mine. We do not conceive that MSHA meant to go that far, but that is the problem. The safeguard does not give the operator sufficient notice of how far it actually *does* go. The remedy specified in the modification is non-specific and does not relate to fallen material blocking the travelway. It, therefore, fails to provide sufficient notice to the operator of its requirements.

Government mandates enforced by civil penalties must provide clear notice of the conduct that will result in their imposition. *See Kropp Forge Co. v. Sec'y of Labor*, 657 F.2d 119, 122 (7th Cir. 1981) (refusing to impose sanctions where the standard the regulated party allegedly violated "d[id] not provide 'fair warning' of what is required or prohibited"); *see also Dravo Corp. v. Occupational Safety and Health Review Comm'n*, 613 F.2d 1227, 1232-33 (3d Cir. 1980); *U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997); *Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976). Unsurprisingly, we have thus held that a safeguard must clearly specify the operator's duty under the law. *SOCCO I*, 7 FMSHRC at 512; *Green River Coal Co.*, 14 FMSHRC at 45 n.2.

In this regard, identification of the specific hazard addressed by a safeguard informs the operator of the requirements of the specified remedy in the context of the particular mine and location in the mine. Without identification of a specific hazard, it is impossible for a reasonable

person to understand the requirements of the specified remedy, and fair notice has not been provided.[2]

This case perfectly illustrates the problems arising from impermissibly vague expressions masquerading as legal "standards." Without the contextual support required by the law, a broad command to "keep a travelway clear of mud and water" is virtually meaningless, because it fails to make clear the hazard posed *by water or mud at this mine* and *the precise remedy for that specific hazard*.[3] Must the operator prevent "any" mud or water from being present on the travelway, to prevent slippery conditions that might arise thereby? The Secretary seems to believe so, and also seems to have persuaded the Judge that this would be sufficient. In denying the operator's motion to dismiss on grounds that the safeguard was invalid, the Judge stated that the requirement to keep the travelway "free of mud and water" was valid because "[a] miner should be able to travel along the belt without fear of slipping and falling." 33 FMSHRC 1504, 1517 (June 2011). Without doubt, "slipping" is a different hazard from the travelway blocked by fallen material set forth in the safeguard.

Thus, the citation in this case was grounded on water that "hindered the ability to travel," *id.* at 1516, an unsatisfactorily broad description of a yet-unspecified degree of water.[4] Indeed, the Judge in this case found that the water was a hazard, despite crediting operator witnesses who testified that the water was neither as deep nor as murky as the Secretary charged. *Id.* at 1518. While the Judge found that the water constituted a "hazard," she declined to affirm the S&S finding because the Secretary did not show that the particular violation would be reasonably likely to lead to an injury-causing event. *Id.*

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[2] A variety of factors are relevant to notice "including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency=s enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question." *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3088 (Dec. 2014), *quoting Lodestar Energy, Inc*., 24 FMSHRC 689, 694-95 (July 2002). Here, of course, the text of the safeguard is patently ambiguous, as it baldly requires the travelway be "clear of mud and water." There is no regulatory scheme or regulatory history from which to glean meaning and no record of consistency in MSHA's treatment of mud and water on underground travelways. Finally, without doubt, the operator did not have "ascertainable certainty" of the agency's intended meaning of the required conduct.

[3] As the majority correctly notes, it is improper to either infer a generic, unspecified hazard as the Judge did in this case or to look outside the text of the safeguard itself to provide contextual support that is left unexpressed. Slip op. at 6 n.7. However, both the Secretary and the Judge were compelled to grasp for meaning outside of the modified safeguard because it is amorphous and cannot be clearly understood as written.

[4] We do not suggest that water or mud may not present a hazard to the safe travel of miners. We merely remind the majority that the safeguard at issue in this case, arising from conditions at this mine, did not state such hazard with reasonable particularity, as we have always required.

By itself, this finding should be sufficient to invalidate the safeguard because it places the conditions observed in the mine during the inspection in sharp contrast against the conditions which prompted the original safeguard issuance and defined the hazard. The occlusion which prompted the initial issuance of the safeguard "blocked" the travelway for a length of 40 feet. Gov. Ex 45; slip op. at 3. While the majority asserts that the safeguard here is "sufficiently specific to notify the operator that accumulations of material such as rock, coal, mud and water in sufficient quantity to block travel" are prohibited, slip op. at 7, the record makes clear that the travelway was not "blocked," and that the Judge found that travel was not impeded to a degree that put miners at significant risk of serious injury.

This is more than a mere question of degree; it is a difference in kind. The material is different, the nature and type of impediment are not congruent and the type of hazard is not at all the same. Tolerating this degree of lassitude by inspectors charged with the inception of mandatory standards is inconsistent with the law as we have always interpreted it.

While the majority acknowledges, as it must, that "safeguards have a specificity requirement," slip op. at 5 n.6, it is unable to express specifically how the requirement to keep a travelway free and clear of mud and water relates to the original hazard of solid material blocking a travelway. The majority must feel a keen sense of irony in citing *Ideal Cement Co.*, 12 FMSHRC 2409 (Nov. 1990), for the proposition that a "reasonably prudent person" will know what the phrase means. Without itself being able to articulate its meaning, in a case where a Commission ALJ has affirmed a finding of violation based on conditions entirely unlike those which prompted the original safeguard, the majority nonetheless permits issuance of citations and imposition of penalties because some other hypothetical "reasonably prudent person" might understand the patently ambiguous requirement to keep an inevitably wet travelway "clear of mud and water." In sum, the majority recognizes the fatal deficiency in the safeguard and wholly fails in its attempted resuscitation.

B. The Secretary has Failed to Articulate a Nexus Between the Purported Hazard and the Suggested Remedy.

As one might expect, when a safeguard is only vaguely suggestive of the nature of the hazard, the operator will have difficulty discerning the relationship between the hazard and the conduct required to ameliorate it. That is certainly the case here, where the citing inspector and the Judge were similarly unclear about the conditions that prompted the original safeguard, and the supposed relationship between those conditions and the ones observed when the second modification was issued on the day the violation was cited.

Indeed, the second modification is silent on the conditions which led to its issuance. This left an open invitation to cite any degree of water based solely on the subsequent inspector's subjective definition of "clear of mud and water." We decline to join the majority in this misadventure.

In addition to the lack of clarity about the "hazard" and the interpretive stumbling and lack of notice it has occasioned, we further note that the safeguard is not valid because it does not establish any linkage between the supposed hazard and the remedy. Safeguards, as we have

noted, are unique, and the Commission has thus rigorously insisted upon a clear connection between the identified hazard and the conditions cited in the enforcement action, a requirement that is not satisfied by the mere fact that the remedy specified in the safeguard would abate the hazard described in the citation. *See Green River Coal Co.*, 14 FMSHRC at 47 (Commission refused to enforce a safeguard that addressed a hazard of roof supports impeding travel when an inspector applied the safeguard to accumulations of loose rock obscuring the travelway). In asserting the importance of this relationship, we held that a safeguard:

> must identify with specificity the nature of the hazard against which it is directed and the conduct required of the operator to remedy the hazard. Obstructions in travelways caused by the deliberate placement of roof supports *differ fundamentally in nature, cause, and remedy* from those that occur due to roof falls. We find, therefore, that the prohibition against obstructions in travelways caused by the placement of roof support timbers did not provide sufficient notice to Green River that obstructions caused by roof falls likewise were prohibited.

Id. (emphasis added). As in that case, there is a fundamental difference here between a travelway that is "blocked" by fallen material, to the point where a permitted remedy is a diversion around the impassable area, and a travelway that is "impeded" to an unspecified degree by water or mud in an undefined quantity.

Nor may the Secretary avoid the burden of demonstrating the nexus through use of a broad, all-encompassing prohibition. *See BethEnergy Mines Inc.*, 14 FMSHRC at 25 (rejecting the Judge's reliance on a published safeguard criterion as sufficient to establish the validity of a safeguard mandating 24 inches of clear travelway on both sides, and remanding the issues of notice and nexus).

In both *Green River* and *BethEnergy*, where the hazard identified in a citation differed from the hazard specified in the safeguard, we rejected it as the basis for an enforcement action. While the majority correctly points out that this case does not deal with a citation but with a facial challenge, the principles established in the cited cases support that the modified safeguard in this case is invalid due to the same failure to identify a relationship between the original and only identified hazard in the safeguard, and the remedy required in the modification.

Here, there is no nexus between the hazard specified in the safeguard (fallen rib material) and the remedy prescribed in the modification to keep the travelway free and clear of mud and water. Inevitably, any citation for mud or water will be founded on the type of "slipping, tripping, and falling hazards" identified in *BethEnergy*, *supra*, rather than the hazard specified in this case in the original safeguard, i.e., fallen rib coal and rock "blocking" a travelway. Even if one were to accept that a narrowly-interpreted safeguard might apply to mud and water "blocking" a travelway, those were not the conditions found by the Judge in this case, and the safeguard must fail because it was not drafted with a sufficiently close focus on the distinct hazards created by mud and water, or with a satisfactory description of the amount of mud and water found and the type of hazard(s) arising therefrom.

We held in *American Coal* that the Secretary's agents need not state the obvious when identifying hazards arising from observed conditions. In this case, however, the original safeguard is wholly unrelated to the cited conditions. The "remedy" of clearing water and mud has nothing whatsoever to do with the specified hazard of a travelway "blocked" by fallen material. Effectively, the modified safeguard is a remedy without an identified hazard, and without a properly defined hazard, the scope of the remedy cannot be properly limited in a way that facilitates compliance.[5]

[5] In *American Coal*, *supra*, the Commission relied upon the need for a nexus between the specific hazard and specific remedy to find separate safeguards not duplicative. Safeguard No. 4054826 specified a hazard of fallen or misplaced material such as rib rash, rock, etc. along the sides of the beltline. The specified remedy was very broad. Safeguard No. 4268263 specified a hazard arising from the lack of a clear travelway due to "water and slurry conditions in an excess of 16 inches." Essentially embracing the theory of the majority in this case, the operator argued that the two safeguards actually constituted one safeguard and were duplicative. The Commission disagreed. Distinguishing a safeguard identifying a hazard of fallen material from a safeguard dealing with a hazard of a wet travelway, the Commission found the safeguards were not duplicative because the hazard in the one safeguard (fallen material) was different from the hazard (wet conditions) in the other safeguard. 34 FMSHRC at 1975. Here, the Commission takes a directly contradictory position, finding that the original safeguard's identification of a hazard from fallen material is sufficient to identify a hazard from wet conditions. The problem with the safeguard under review is not that it sets forth two remedies but instead that the second remedy (keep travelways clear of mud and water) is not linked to any described hazard. In *American Coal*, the safeguards were not duplicative because the remedy required by each safeguard was linked to a different hazard in each safeguard that provided context and notice for the specific remedy. Here, the second prescribed remedy is not linked to any described hazard and, as a result, the need for and the scope of the remedy remains undefined.

III.

Conclusion

Safeguards are site specific and are aimed at specific hazards identified by individual inspectors. Thus, they do not admit of broadly worded rules amounting, in effect, to a mandatory safety standard for which rulemaking must be required. The majority decision is a deviation from this sound, well-established principle. We therefore dissent.

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 12, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. SPECIALTY SAND COMPANY	Docket No. CENT 2015-169-M A.C. No. 41-01143-338044

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 12, 2015, the Commission received from Specialty Sand Company ("Specialty") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was mailed on January 25, 2014, was returned unclaimed on March 6, 2014, and became a final order of the Commission on April 7, 2014. Specialty asserts that it never received the proposed assessment. However, Specialty also concedes that it intends to pay the full assessment amount, and wishes to reopen this matter simply to avoid paying collection costs. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on May 21, 2014, and the case was referred to the U.S. Department of Treasury for collection on September 11, 2014. The Secretary asserts that the operator was made aware of the proposed assessment and confirmed its mailing address on file prior to the mailing of the proposed assessment on January 25, 2014. However, the postal service was unable to deliver the proposed assessment to this address.

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See*, *e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the delay in responding to MSHA's delinquency notice amounted to more than 30 days. While Specialty explained its failure to timely contest the proposed assessment, it failed to explain its delay in filing this motion to reopen after receiving the delinquency notice. This lack of explanation is grounds for denial.

Accordingly, we deny Specialty's motion.

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

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

/s/ William I. Althen
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January 12, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. HIGHLAND MINING COMPANY, LLC	Docket No. KENT 2015-643 A.C. No. 15-02709-386414

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 20, 2015, the Commission received from Highland Mining Company, LLC ("Highland") a motion to reopen Docket No. KENT 2015-643. Highland thereafter requested to withdraw its motion to reopen in Docket No. KENT 2015-643.

We hereby grant Highland's motion to withdraw in Docket No. KENT 2015-643. Accordingly, this case is dismissed.

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

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

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

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

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January 12, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. SOUTH RIVER STONE, LLC	Docket No. VA 2015-287-M A.C. No. 44-06309-371526

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 10, 2015, the Commission received from South River Stone, LLC ("South") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 7, 2015, and became a final order of the Commission on February 6, 2015. South asserts that the individual responsible for reviewing proposed assessments was on a leave of absence, due to an illness in the family, when the proposed assessment was delivered. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on March 30, 2015, and the case was referred to the U.S. Department of Treasury for collection on May 28, 2015.

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See*, *e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the delay in responding to MSHA's delinquency notice amounted to more than 30 days. While South explained its failure to timely contest the proposed assessment, it failed to explain its delay in filing this motion to reopen after receiving the delinquency notice. This lack of explanation is grounds for denial.

Accordingly, we deny South's motion.

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

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

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

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January 12, 2016

DANIEL B. LOWE	
v.	Docket No. WEST 2014-614-DM
VERIS GOLD USA, INC.	

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

ORDER

BY THE COMMISSION:

In this proceeding arising under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3), a Commission Administrative Law Judge issued a Decision and Request for Direction from the Commission, in which he upheld a complaint of discrimination filed by Daniel Lowe against the operator of the mine at which Lowe was employed, Veris Gold USA, Inc. 37 FMSHRC 2337 (Oct. 2015) (ALJ). The Judge directed Lowe to provide documented damages within 30 days of the decision so that the Judge could issue a final disposition in the proceeding, awarding damages and providing relief. *Id.* at 2350.

In his decision, the Judge noted that, around the time of the June 18, 2015, hearing on the complaint, the operator had received bankruptcy protection and its assets had been sold.[1] More specifically, the Judge summarized a newspaper article reporting that a Canadian bankruptcy court had ordered Veris Gold to sell its assets; Veris had sold its mines to Jerritt Canyon Gold LLC; Jerritt Canyon owns 80% of Veris Gold's assets; and 20% of Veris Gold's assets is owned by Whitebox Asset Management. *Id.* at 2348 n.9. The Judge sought direction from the Commission about how to proceed because Veris Gold's successor had never been joined as a party to the proceeding. *Id.* at 2348-49.

[1] We note that there are currently other discrimination matters pending against Veris Gold before the Commission and at the trial level. *See, e.g., Jennifer Morreale v. Veris Gold USA, Inc.*, Docket Nos. WEST 2014-788-DM and 793-DM (pending motion to reopen discrimination case and pending motion for expedited consideration, motion to reopen and motion to amend before the Commission); *Matthew Varady v. Veris Gold USA, Inc.*, Docket No. WEST 2014-307-DM (discrimination matter pending before ALJ).

The Judge's October 15 decision was not a final decision ending the Judge's jurisdiction over this matter. *See Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 35 FMSHRC 2056, 2057 (July 2013). Rather, the Judge's decision was an interlocutory decision pending his final decision awarding damages and providing relief. *See id.; Estrada v. Runyan Constr., Inc.*, 36 FMSHRC 886 (April 2014).

As an administrative body created by statute, the Commission may permissibly act only within the scope of its authority as set forth in the Mine Act, 30 U.S.C. § 801 et seq. (2012), and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See, e.g., Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860 (Aug. 2012). We find no provision of the Mine Act or the Commission's Procedural Rules that would permit the Commission to provide guidance to the Judge regarding the Judge's interlocutory decision or the manner in which the Judge should fashion relief in his final decision.

The Commission may not provide direction to the Judge under section 113(d)(2) of the Mine Act, 30 U.S.C. § 823(d)(2).[2] Section 113(d)(1) of the Mine Act provides that a Judge shall "make a decision which constitutes his final disposition of the proceedings" and that the decision "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 by the Commission in accordance with paragraph (2)." 30 U.S.C. § 823(d)(1). Paragraph (d)(2) provides two avenues of review by the Commission: under subparagraph (d)(2)(A), through a party's filing of a petition for discretionary review, and, under subparagraph (d)(2)(B), through the Commission's direction of review within its own discretion in the absence of the filing of a petition. Here, the Commission may not provide either type of review because paragraph (d)(2) provides review of only those decisions that constitute a Judge's "final disposition of the proceedings."

Nor may the Commission provide direction to the Judge under the Commission's rule pertaining to interlocutory review, Procedural Rule 76, 29 C.F.R. § 2700.76. Pursuant to Rule 76, the Commission may review a Judge's ruling, prior to the Judge's final decision in the case, only if certain conditions are met. First, pursuant to Rule 76(a)(1), either the Judge must certify that

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[2] 30 U.S.C. § 823(d)(2) provides in relevant part:

> * * * * *
>
> (A)(i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. . . .
>
> * * * * *
>
> (B) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion . . . order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. . . .

his or her interlocutory ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding, or the Judge must deny a party's motion for certification of the interlocutory ruling to the Commission and the party must file with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification. Second, under Rule 76(a)(2), a majority of the Commission members must conclude 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. In this case, none of these conditions have been met.

For the foregoing reasons, we conclude we are without jurisdiction[3] to provide the Judge with direction regarding his October 15 decision.[4]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

[3] On December 28, 2015, Lowe filed a Motion for Expedited Consideration from the Commission with the Commission's Office of Administrative Law Judges. In the motion, Lowe moves the Commission for "expedited consideration from the Commission to assist Judge Moran with finalizing his decision in the Complainant's discrimination action . . . ." Because we do not have jurisdiction over this proceeding, we are foreclosed from providing the assistance Lowe requested.

[4] Commissioner Commissioner Cohen notes that the Complainant may file a motion to
(continued...)

[4] (…continued)
Commissioner Cohen notes that the Complainant may file a motion to amend the complaint to add as parties the entities which now have a successor interest in the mine formerly owned by Veris Gold. *See Tolbert v. Chaney Creek Coal Corp.,* 12 FMSHRC 615 (Apr. 1990). Moreover, the Federal Rules of Civil Procedure may present several potential avenues of relief for the Complainant. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"). For instance, under Rule 21, a Judge may *sua sponte* grant a post-hearing joinder of a new party. Fed. R. Civ. P. 21 ("the court may at any time, on just terms, add or drop a party"). In addition, Federal Rule of Civil Procedure 15 permits a party, with the court's leave, to amend a complaint more than 21 days after the pleading is served "when justice so requires." Fed. R. Civ. P. 15(a)(2). The parties and the Judge should be cognizant of these potential options.

The Mine Act provides a Judge broad remedial powers to address instances of discrimination as may be appropriate. 30 U.S.C. § 815(c)(3) (providing that if a Judge sustains charges of discrimination he may grant "such relief as [he] deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate"). Accordingly, Commissioner Cohen notes that the Commission has been granted more discretion in fashioning an appropriate remedy by the Mine Act than the Judge initially recognized. The Judge concluded that reinstatement of a miner to a successor in interest is *not possible* under the Mine Act. 37 FMSHRC at 2347. However, the remedy of reinstatement may be imposed on an operator's successor in interest. *Sec'y of Labor on behalf of Corbin v. Sugartree Corp.,* 9 FMSHRC 394 (Mar. 1987), *aff'd sub nom., Terco v. Fed. Coal Mine Safety & Health Review Comm'n,* 839 F.2d 236 (6th Cir. 1987), *cert. denied,* 488 U.S. 818 (1988); *Simpson v. Kenta Energy,* 11 FMSHRC 770, 778 (May 1989).

Moreover, it is not clear to Commissioner Cohen that the bankruptcy proceeding filed by Veris Gold is effective against Lowe. It appears that in filing its bankruptcy petition, Veris Gold may not have given Lowe proper notice of the filing. Indeed, Lowe – together with other former employees of Veris Gold who have discrimination complaints before the Commission under section 105(c) of the Mine Act – filed a motion in the U.S. Bankruptcy Court for the District of Nevada in Case No. 14-51015 gwz in which they made this allegation. Even if the bankruptcy filing was effective against Lowe, this fact does not necessarily foreclose the Commission from providing relief against the successors in interest of Veris Gold. In *International Technical Products Corp.,* 249 NLRB 1301 (Jun. 1980), the NLRB held that a company which purchased all of the assets of a predecessor company "free and clear of all liens, claims and encumbrances" pursuant to an order of a bankruptcy court could be held responsible for the predecessor's backpay liability under federal labor law. In 2010, the Board reaffirmed the *International Technical Products Corp.* holding in *Leiferman Enterprises, LLC,* 355 NLRB 364 (Aug. 2010), *incorporating by reference* 354 NLRB 872 (Oct. 2009), *aff'd sub nom. NLRB v. Leiferman Enterprises, LLC,* 649 F.3d 873 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012).

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January 12, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. CHASE CRUSHING, LLC	Docket No. WEST 2015-762-M A.C. No. 26-02406-371115

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 13, 2015, the Commission received from Chase Crushing, LLC ("Chase") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 8, 2015, and became a final order of the Commission on February 9, 2015. Chase asserts that it inadvertently failed to timely contest the proposed assessment. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on March 25, 2015, and the case was referred to the U.S. Department of Treasury for collection on May 28, 2015.

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See*, *e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the delay in responding to MSHA's delinquency notice amounted to more than 30 days. While Chase explained its failure to timely contest the proposed assessment, it failed to explain its delay in filing this motion to reopen after receiving the delinquency notice. This lack of explanation is grounds for denial.

Accordingly, we deny Chase's motion.

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

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

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

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January 12, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. APOGEE COAL COMPANY, LLC	Docket No. WEVA 2015-608 A.C. No. 46-08939-338084

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 23, 2015, the Commission received from Apogee Coal Company, LLC ("Apogee") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 12, 2013, and became a final order of the Commission on January 13, 2014. Apogee asserts that it failed to timely contest the proposed assessment due to a clerical error. Apogee further asserts that it contested the underlying citation on May 22, 2013 and filed a motion to permit late filing of the contest to the proposed assessment on February 3, 2014. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on February 26, 2014, and the case was referred to the U.S. Department of Treasury for collection on June 19, 2014.

When reviewing an operator's motion to reopen a proposed assessment, we consider whether the operator has contested the citation underlying the proposed assessment. As stated above, Apogee had contested the underlying citation. However, as we noted in *Lone Mountain Processing, Inc.,* 35 FMSHRC 3342, 3347 (Nov. 2013), "[t]he challenging of a citation does not inevitably excuse the failure to contest the penalty."

Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c). This motion to reopen was filed more than one year after the final order. Therefore, under Rule 60(c), Apogee's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny Apogee's motion.

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

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

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

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January 29, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. SOUTHERN OHIO SAND	Docket No. LAKE 2015-193-M A.C. No. 33-04427-362138

BEFORE: Jordan, Chairman; Cohen, and Nakamura, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 18, 2014, the Commission received from Southern Ohio Sand ("Southern") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 24, 2014, and became a final order of the Commission on October 24, 2014. MSHA mailed a delinquency notice to the operator on December 9, 2014. Southern asserts that it did not receive the proposed penalty until it contacted MSHA to request a copy on November 21, 2014. Southern claims that it filed a contest the same day, and the Secretary confirms that a contest was mailed on November 21, 2014. The operator has since implemented changes to its contest procedures. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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January 29, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. THELEN SAND & GRAVEL, INC.	Docket No. LAKE 2015-221-M A.C. No. 11-01228-363652

BEFORE: Jordan, Chairman; Cohen, and Nakamura, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 31, 2014, the Commission received from Thelen Sand and Gravel, Inc., ("Thelen") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 10, 2014, and became a final order of the Commission on November 10, 2014. Thelen asserts that its general counsel took a leave of absence beginning in September of 2014. Thelen's president absorbed the work of reviewing and deciding whether to contest MSHA citations, and the citation involved in this matter was the first proposed assessment that the operator received during that period. Although the operator intended to contest the citation, it was not sent directly to the president's attention and he was unable to locate it, resulting in a delay in filing. The operator has since made changes to its filing procedures. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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January 29, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. U.S. SILICA COMPANY	Docket No. LAKE 2015-374-M A.C. No. 11-01013-372173

BEFORE: Jordan, Chairman; Cohen, and Nakamura, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 27, 2015, the Commission received from U.S. Silica Company ("U.S. Silica") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 15, 2015, and became a final order of the Commission on February 17, 2015. U.S. Silica asserts that additional paperwork and responsibilities related to an impact inspection caused its personnel to miss the contest deadline. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

We note that the operator's legal counsel contacted the operator about the citation around the time of the deadline. The operator stated its intent to contest the penalty at that time. In spite of this reminder from counsel, the operator failed to meet the contest deadline and filed a motion to reopen 38 days after the penalties became a final order. This inaction goes beyond the mistake, inadvertence, or excusable neglect contemplated by Rule 60(b).

Moreover, the Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103. 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining* Co., 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). Receiving an unusually large number of citations should not excuse an operator's failure to contest a citation on time. The problems that U.S. Silica experienced reflect that the operator's staffing levels after the impact inspection were not adequate to deal with the citations that were issued.

Accordingly, we deny U.S. Silica's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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January 29, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. LEE MECHANICAL CONTRACTORS, INC.	Docket No. SE 2015-43-M A.C. No. 08-01287-359405

BEFORE: Jordan, Chairman; Cohen, and Nakamura, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 3, 2014, the Commission received from Lee Mechanical Contractors, Inc. ("Lee") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 25, 2014, and became a final order of the Commission on September 24, 2014. Lee asserts that the company's Safety Coordinator usually files MSHA paperwork himself, but due to a heavy workload, he delegated the mailing of the contest form for this case to an employee in accounts payable. Lee claims that the accounts payable employee resigned unexpectedly, and Lee then discovered that this employee had not completed or mailed large amounts of paperwork, including the contest form for this case. Since the contest form was discovered, the company has made changes to its filing procedures. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Lee's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.[2] Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[2] Chairman Jordan concurs in the decision to reopen the case, but would dismiss the case as moot rather than remanding it to the Chief Administrative Law Judge because MSHA's Mine Data Retrieval System indicates that the penalty for this case has been paid in full.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 8, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2015-306-M A.C. No. 40-00039-380677
v.	
BUZZI UNICEM USA, Respondent	Mine: Bennett's Lake Quarry

DECISION AND ORDER

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

Timothy A. King, Buzzi Unicem USA, Chattanooga, Tennessee, for the Respondent

Before: Judge Rae

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor ("the Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). At issue is a single citation, Citation Number 8835889, issued to mine operator Buzzi Unicem USA ("Buzzi" or "the Respondent") under section 104(a) of the Mine Act.

At the request of the parties a telephonic hearing was held on November 5, 2015, at which time testimony was taken and documentary evidence was submitted. The parties also filed written closing comments. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a detailed summary. Based upon the entire record, I vacate Citation Number 8835889 for the reasons set forth below.

II. FACTUAL BACKGROUND

The parties have stipulated to the following facts:

1. Buzzi is an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

2. The Bennett's Lake Quarry Mine, Mine Identification Number 40-00039, is a "mine" as that term is defined by section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. Buzzi's operations at the Mine are subject to the jurisdiction of the Mine Act.

4. The hearing of the above-referenced docket is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission ("the Commission") and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.

5. Inspector Edward White was acting in his official capacity as an authorized representative of the Secretary when he issued the citation.

6. The total proposed penalty for this docket will not affect Buzzi's ability to remain in business.

7. The proposed assessment (Form 1000-179) accurately sets forth:
    a. Buzzi's size, in hours worked;
    b. The size, in hours worked, of the mine at which the citation was issued;
    c. The total number of assessed violations for the 15 months preceding the month of the referenced citation; and
    d. The total number of inspection days for the 15 months preceding the month of Citation Number 8835889.

Tr. 5.[1]

Bennett's Lake Quarry is a small limestone pit located in Jasper, Tennessee. GX 5. The quarry operates for one shift each day beginning early in the morning. Tr. 29-30. The material extracted at the pit is processed onsite and the finished product is loaded onto barges on a lake to the south of the facility to be hauled away by tugboat. Tr. 31.

The citation at issue in this proceeding was written by MSHA Inspector Edward White[2] during a regular inspection of the quarry and charges the Respondent with failing to maintain sufficient illumination in the area where the barges are docked. GX 3. Inspector White arrived at the quarry to perform the inspection around 7:30 AM on March 16, 2015. Tr. 28. He observed the barges tied together in a tight bunch on the lake. Tr. 30, 40. A satellite image produced at hearing shows the barges' typical docking configuration: two barges are docked parallel to the

[1] In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered GX 1 to GX 9 and the Respondent's exhibits are numbered R-1 to R-8.

[2] White is a metal/non-metal mine inspector who works out of MSHA's satellite office in Tallahassee, Florida. He was hired by MSHA in June 2013 and trained at the Mine Academy in Beckley, West Virginia to become an inspector. Previously, he worked as a greaser, dredge operator, plant operator, and foreman at a sand and gravel mine for approximately sixteen years. Tr. 7, 12, 15-16, 20-21.

shore with other barges tied to them broadsides to form a stack several barges deep. Tr. 32-34. At some point during the inspection, a miner told White that it was impossible to see beyond the second barge before sunrise, yet employees are required to walk the barges to check the cables at approximately 6:30 AM each morning when it is still dark outside. Tr. 41-43; GX 2. Employees wear cap lights when working on the barges, and at the time of the inspection there was a tower light at the dock that provided illumination to the east and west, but there was no diffuse light source pointing south toward the lake and barges. Tr. 43-45, 62-64, 79. Based on the miner's statement that he could not see past the second barge and his own concerns about a trip and fall hazard due to insufficient illumination, White issued Citation Number 8835889. Tr. 42-43, 49. The citation was terminated later that day with notation that the company had rented a portable light system for the barge storage area until permanent lighting could be installed. GX 3.

White returned to the mine before sunrise the next day and observed the rented lights in operation. However, because he did not turn the lights off, he was unable to observe or measure the level of illumination without them. Tr. 64, 74.

The Secretary seeks a penalty of $100.00 for the alleged violation. GX 6. The Respondent disputes that a violation occurred.

III. FINDINGS OF FACT AND ANALYSIS

The mandatory safety standard alleged to have been violated is 30 C.F.R. § 56.17001, which states: "Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." The Commission has stated that the issue of what constitutes "illumination sufficient to provide safe working conditions" requires the judge to make a factual determination based on the working conditions in the cited area and the nature of the illumination provided. *Capitol Aggregates, Inc.*, 3 FMSHRC 1388, 1388 (June 1981), *aff'd*, 671 F.2d 1377 (5th Cir. 1982) (unpublished table decision).

In this case, the working conditions in the cited area require employees to maneuver across the dock and the decks of floating barges to pull cables, reposition the barges, and check moorings, sometimes before sunrise. Tr. 32, 38-41, 72. The decks run around the edges of the barges. The interior of each vessel comprises a hold with 6-foot walls along its length and 3-foot walls on each end. Tr. 77; GX 4; RX 2. Employees are not required to load the barges by hand, as this is accomplished using a conveyor belt system. Tr. 31. Timothy King, the safety and health manager for the quarry, testified that employees working on the barges wear self-righting life vests that inflate automatically upon contact with the water. Tr. 68. He also stated that barge tenders always work in pairs, with a barge loader present inside the control room on the dock, and remain in radio contact with each other. Tr. 68-69, 77.

As for the nature of the illumination in the cited area, employees wore cap lights at night, and diffuse lighting for the barge docking area was supplied by a tower light fixture at the control room with lights pointing to the east and west. Inspector Smith did not visit the area before sunrise until after additional lights had been added, so he was unable to measure or describe the scope or quantity of illumination provided by the tower light. Tr. 64-66, 73-74. He noted that the fixture was wired for a south-facing light that had never been installed. Tr. 63.

However, King testified that the company had in fact installed a south-facing light in the past, but the barge tenders at the time had removed it because it "caused a blinding effect when they were on the barges." Tr. 67.

The Secretary argues that the illumination described above was insufficient to provide safe working conditions in that it would not have allowed the operator to locate miners and effectuate a swift rescue in the event of an emergency. Sec'y's Post-Hr'g Br. 7. Inspector White's primary concern was that a miner could trip and fall into the lake unnoticed in the dark. White took photographs showing equipment on the deck of the barge, which presented a tripping hazard, and testified that a prior trip-and-fall injury had occurred at the facility's barge docking area in December 2014. GX 4; Tr. 46-47.

Although the evidence offered by White shows why insufficient lighting at the barge docking area could be hazardous, the Secretary has failed to present enough reliable, objective evidence to establish that the lighting was actually insufficient. The Secretary relies solely on the evidence from Inspector White, but White's testimony bears indicia of unreliability which diminish the weight of his opinions regarding the nature and sufficiency of the lighting in the cited area.

To begin with, White was unfamiliar with the layout of the barge docking area and the work performed there. For example, he cited the tower light for lacking a north-facing light and did not realize until the hearing that the barges were actually located in the opposite direction and the empty light socket was pointing southward. Tr. 62-64. He did not recall that the south-facing light had previously been removed by barge tenders because it created glare, even though this had been brought to his attention during the inspection, according to King. Tr. 67-68. White misidentified which building was the control room on the satellite map shown at hearing, which is significant because the tower light was located at the control room. Tr. 35-36, 43-44, 57. He incorrectly guessed the height of the lips around the barge holds, which were so tall that King suggested they effectively block the view from the shore no matter what time of day it is or what lighting is provided. Tr. 53-54, 77. White also did not know what type of life jackets the barge tenders wore and was unaware that they maintained radio contact with the other employees and worked in teams of two so that a buddy system was in place in the event of an accident. Tr. 51, 68-69, 77.

In addition, some of the concerns that spurred White to issue the citation seem to have been unfounded. At hearing, he initially emphasized that he believed management should have taken action because employees had been complaining about the lighting for three weeks. Tr. 52, 54-56. But he later admitted that his notes showed "the three barge tenders had not spoken to management yet actually, but had been speaking amongst themselves." Tr. 67. Also, although White indicated that his concerns about the lighting were motivated in part by a prior trip-and-fall injury in which an employee had stumbled over rigging on a barge deck, the company's internal accident report shows that inadequate illumination played no role in that injury. The injured employee stumbled over unseen rigging because he was walking backwards and had failed to check his work area for tripping hazards beforehand. He was disciplined for his failure to examine his work space. RX 3; Tr. 69-72.

Most significantly, Inspector White did not actually observe the illumination in the cited area himself except during daylight hours. When he arrived at the quarry the morning the citation was issued, the sun had already risen. Tr. 28; RX 6. He had the opportunity to see what light was available when he returned to the quarry before sunrise the next morning. However, although he observed the temporary lights the Respondent had installed to abate the violation, he viewed the docking area only from a distance and did not turn the new lights off to determine how effective the original tower lights were. Tr. 64, 74, 76. At no time did he measure the illumination levels in the cited area or make any firsthand observations about visibility conditions in that area at night. Tr. 64-65, 73-75. He relied solely on the statement of one barge hand who said he could not see beyond the second barge. Judges have uniformly declined to find insufficient illumination in cases such as this one where the inspection occurred during daylight hours and the Secretary has presented no firsthand evidence regarding illumination levels or the nature of the illumination provided. *See Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 341-43 (Feb. 2011) (ALJ); *Jim Walter Res., Inc.*, 31 FMSHRC 1208, 1211-13 (Oct. 2009) (ALJ); *W.S. Frey Co.*, 16 FMSHRC 975, 1008-09 (Apr. 1994) (ALJ), *aff'd*, 57 F.3d 1068 (10th Cir.) (unpublished table opinion); *USX Corp., Minn. Ore Operations*, 15 FMSHRC 2333, 2341-44 (Nov. 1993) (ALJ).

In *W.S. Frey Company*, a case involving a fatal fall that occurred in a coal shed at night, the inspector alleged the lighting at the coal shed was insufficient in that miners working there was not visible to others. 16 FMSRHC at 1009. The judge vacated the citation, explaining that the pertinent inquiry under § 56.17001 was what a miner working in the location of the cited fall hazard at night would be able to see and that the evidence was deficient on this point. *Id.* Similarly, in the instant case, the focus is on what the miners working on the barges could see because they would be the employees exposed to the trip and fall hazard identified in the citation. Not only has the Secretary failed to produce sufficient evidence as to the effectiveness of the tower light, but it is also undisputed that miners working in the barge docking area wore bright cap lights, which would be sufficient to illuminate trip and fall hazards at their feet on the barge decks where they were working. Tr. 43-45, 75, 79.

For all the foregoing reasons, I find that the Secretary has failed to establish a violation of § 56.17001.

ORDER

Citation Number 8835889 is hereby **VACATED** and this proceeding is **DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 12, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JEFFREY PAPPAS, Complainant, v. CALPORTLAND COMPANY, Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEST 2016-156-DM WE-MD 16-02 Oro Grande Quarry Mine ID 04-00011

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Abigail G. Daquiz, Esq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington, on behalf of Complainant;

Brian P. Lundgren, Esq., David Grimm Payne & Marra, Seattle, Washington, for Respondent.

Before: Judge Paez

This case is before me upon the application for temporary reinstatement brought by the Secretary of Labor ("Secretary") on behalf of Jeffrey Pappas ("Pappas") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2). The application seeks the temporary reinstatement of Pappas as a laborer at the mine known as Oro Grande Quarry, a cement production facility owned by CalPortland Company ("CalPortland" or "Respondent"), pending final disposition of the discrimination complaint Pappas filed with the Mine Safety and Health Administration ("MSHA") on October 12, 2015.

Both section 105(c) of the Mine Act and Commission Procedural Rule 45(d), 29 C.F.R. § 2700.45(d), limit the scope of a temporary reinstatement proceeding to whether the discrimination complaint has been "frivolously brought." To prevail, the Secretary must provide sufficient evidence to establish that the complaint is nonfrivolous. *See, e.g.*, *Sec'y of Labor on behalf of Deck v. FTS Int'l Proppants*, 34 FMSHRC 2388, 2390 (Sept. 2012) (discussing the "frivolously brought" standard); *Sec'y of Labor on behalf of Ward v. Argus Energy WV*, 34 FMSHRC 1875, 1877–78 (Aug. 2012) (comparing "frivolously brought" standard to the "reasonable cause to believe standard"). Furthermore, the Commission has emphasized that it is not the Administrative Law Judge's duty to resolve conflicts in testimony at this preliminary stage of proceedings. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

I. PROCEDURAL HISTORY

On December 8, 2015, the Federal Mine Safety and Health Review Commission ("Commission") received an application for temporary reinstatement filed by the Secretary on behalf of Pappas. Chief Administrative Law Judge Robert J. Lesnick assigned this matter to me on December 10, 2015. On December 17, 2015, CalPortland filed a request for hearing pursuant to Commission Procedural Rule 45(c), 29 C.F.R. § 2700.45.[1]

The Secretary's application alleges that Respondent did not "rehire" Pappas at the Oro Grande mine after CalPortland acquired the mine on October 1, 2015, because Pappas had previously filed a discrimination complaint in April 2014 against Martin Marietta Materials, the mine's previous owner, resulting in a reinstatement to his position at the Oro Grande mine. (Appl. for Temp. Reinstatement at 2–3.) The Secretary contends that Respondent CalPortland's actions constitute a discriminatory act in violation of section 105(c)(1) of the Mine Act. (*Id.*)

I held an expedited hearing on January 5, 2016, in San Bernardino, California. The Secretary presented testimony from Jeffrey Pappas and Kyle Jackson, a special investigator for MSHA. CalPortland presented testimony from three witnesses: John Gillan, associate general counsel for Martin Marietta Materials; Steve Antonoff, vice president of human resources for CalPortland; and Mark Rock, vice president of risk management at CalPortland.[2]

II. ISSUES

The Secretary asserts that the current complaint filed by Pappas is not frivolous. (Appl. for Temp. Reinstatement at 2.) The Secretary emphasizes that Respondent CalPortland assumed the entire operations of the Oro Grande mine and is a successor-in-interest to the former owner, Martin Marietta, and thus liable for Martin Marietta's past discrimination. Consequently, CalPortland's failure to "rehire" Pappas at the Oro Grande mine was also discriminatory.

In contrast, CalPortland asserts that Pappas is not a miner for the purposes of section 105(c)(2) of the Mine Act, but merely an applicant and thus not eligible for reinstatement. (Resp't Request for Hearing at 2–3.) CalPortland further asserts that its acquisition of the Oro Grande mine's cement operation was limited to the facility's physical assets. CalPortland objects to the term "rehire" and emphasizes it was under no obligation to hire any miner at the Oro

[1] Under Commission Procedural Rule 45, a temporary reinstatement hearing must be held within ten calendar days of an operator's request. 29 C.F.R. § 2700.45(c). In a Motion for Extension of Time accompanying its hearing request, CalPortland requested that the hearing be postponed until January 5, 2016, so its main witnesses could attend. (Resp't Mot. at 2–3.) Counsel for the Secretary consented to this delay upon the agreed stipulation that any subsequent order directing the Temporary Reinstatement of Complainant would be effective December 28, 2015. (*Id.* at 3.)

[2] In this decision, the hearing transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Ex. C–#," and "Ex. R–#," respectively.

Grande cement plant, including Pappas, because CalPortland was careful not to acquire the mine's entire labor force from Martin Marietta.

Accordingly, the following issues are before me: (1) whether the Secretary has demonstrated that Pappas was a miner eligible for temporary reinstatement, and, if so, (2) whether the Secretary has shown that Pappas's current discrimination complaint was not frivolously brought.

III. SUMMARY OF THE EVIDENCE

In its request for hearing, Respondent stipulated –

1. Respondent admits that it is the operator of [the Oro Grande Quarry mine] located at 19409 National Trails Highway, Oro Grande, California, 92368.

2. Respondent admits that it is an operator as defined by section 3(d) of the [Mine Act.]

3. Respondent admits that the operation and products of the mine affect commerce and that the mine is subject to the Mine Act.

(Resp't Request for Hearing at 1–2.)

A. Background of the Oro Grande Quarry Cement Plant

The Oro Grande cement plant is a facility associated with the Oro Grande Quarry in San Bernardino County, California. (Tr. 25:4–8.) The cement plant operates on several revolving shifts, employing a total of approximately 105 employees. (Tr. 42:16–24, 141:14–16.) Because of the difficulty of shutting down and restarting the cement plant's kiln, the facility operates around the clock. (Tr. 136:20–137:6.)

Martin Marietta owned the Oro Grande mine through a subsidiary named Riverside Cement. (Tr. 82:23–83:7.) On October 1, 2015, Martin Marietta completed the sale of nearly all the assets of Riverside Cement, including the Oro Grande Quarry and cement plant, to CalPortland. (Tr. 83:15–84:6.)

Jeffrey Pappas worked at the Oro Grande cement plant for 16 years. (Tr. 24:23–25:3.) In his time there, Pappas worked in nearly every hourly-wage position at the plant, excluding managerial positions. (Tr. 25:11–26:3.) In early 2014, Pappas grew concerned about a dangerous situation caused by a supervisor's potentially unsafe directions. (Tr. 26:8–16.) Pappas brought his concerns to mine management's attention, but management dismissed his concerns without fully addressing them. (Tr. 26:15–20.) Pappas later pointed out the problems to an MSHA inspector who investigated and, in turn, wrote the mine citations for safety violations and caused changes in Oro Grande safety policy. (Tr. 26:20–27:2.) Pappas's relationship with his managers and colleagues deteriorated sharply after MSHA issued the citations, and Martin Marietta eventually fired Pappas. (Tr. 27:3–8.)

On April 21, 2014, Pappas filed a section 105(c) discrimination complaint with MSHA against Martin Marietta. (Tr. 27:9–11; *see* Ex. C–1; Ex. C–2 at 1.) Following depositions in that discrimination case during December 2014, Martin Marietta and Pappas reached a court-approved settlement permanently reinstating Pappas at the Oro Grande mine; Pappas returned to work as a laborer at the cement plant in January 2015. (Tr. 27:12–25, 34:22–35:3; Ex. C–2.) Upon Pappas's return to work, however, Pappas's direct supervisor and his coworkers harassed Pappas about his discrimination case and prior safety complaints. (Tr. 29:8–14, 33:19–34:8.) Pappas asked the mine's upper management, including human resources manager Jamie Ambrose (née Rowe), to intervene and stop the harassing behavior. (Tr. 28:6–15, 29:14–23, 34:9–16.) Ambrose and the other mine officials did not address Pappas's repeated complaints about the harassment. (Tr. 30:1–8.)

Because of management's inaction, Pappas filed grievances with the United Steelworkers Union against three people in management: Ambrose; Terry Jacobs, production manager at Riverside Cement; and Kevin Grogan, the mine's plant manager. (Tr. 31:10–18, 35:10–15.) In June 2015, with his grievance complaints pending, Pappas switched to a new team – the labor team – that did not harass him. (Tr. 34:16–35:22.) Although the harassment of Pappas diminished following this transfer, members of Pappas's former team continued periodically to make disparaging comments to Pappas. (Tr. 35:16–22.) In August 2015, Pappas met with Tim Sheridan, a senior attorney for Martin Marietta, to discuss Pappas's grievances. (Tr. 31:14–32:11; 85:6–17.) During this grievance meeting, Sheridan brought up Pappas's prior discrimination complaint. (Tr. 32:18–22.) Pappas felt that Sheridan was belittling him rather than addressing his grievances regarding harassment. (Tr. 32:9–33:11.)

B. CalPortland Company's Purchase of the Oro Grande Quarry

Also in August 2015, officials from CalPortland Company began visiting the Oro Grande Quarry to determine whether CalPortland should purchase the cement plant and three related assets from Martin Marietta. (Tr. 30:9–24.) In a limited asset sale agreement, CalPortland agreed to purchase the Oro Grande Quarry, including the cement plant, two shipping terminals in National City and Stockton, California, and the remaining inventory stockpiled in Martin Marietta's storage facility in Crestmoore, California. (Tr. 83:15–84:6; Ex. R–2 at 12–15; Ex. R–10.) The asset sale agreement did not include the labor force at these facilities because CalPortland did not want to be bound by the collective bargaining agreement Martin Marietta and the United Steelworkers Union had negotiated at the facilities. (Ex. R–2 at 24–25, Ex. R–3; Tr. 110:8–111:25.) Accordingly, CalPortland was careful to structure the limited asset sale in line with the *Burns* successorship model that the Supreme Court first recognized in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). (Tr. 108:21–111:18; *see* Ex. R–1.) To follow this model and thus ensure CalPortland would be free to negotiate new employment terms, CalPortland and Martin Marietta agreed to "fire" all of the workers at these four locations at 12:00 midnight on September 30, 2015. (Tr. 119:1–20, 111:7–112:19, Tr. 63:19–25.) Immediately thereafter, on October 1, CalPortland would "rehire" the employees it wanted at the plant. (Tr. 86:21–87:25, 112:16–113:16, 135:2–136:6, 146:9–12.)

Because CalPortland wanted to take control of the Oro Grande Quarry cement operation without shutting down the plant's kiln, the company began the process of staffing the plant

early.[3] (Tr. 135:2–137:6.) In mid-August, CalPortland's vice president for human resources, Steve Antonoff, contacted Martin Marietta's human resources director, Ambrose, for advice on hiring decisions at the facilities. (Tr. 146:17–147:10.) In a statement to Investigator Jackson, Antonoff recalled comments Ambrose made to Antonoff about which workers "she would not hire."[4] (Tr. 149:15–150:8.) In late August, Antonoff offered Ambrose the human resources manager position at the Oro Grande mine following CalPortland's takeover. (Tr. 147:2–15.)

In September 2015, CalPortland informed all of the miners at the Martin Marietta facilities that they would need to reapply for positions at the mine. (Tr. 36:17–37:9; Ex. R–5; *see* Exs. R–6, R–7, R–8, R–9.) Nearly all of the miners from the four plants applied to work under CalPortland, including approximately 120 of the roughly 125 miners working at the Oro Grande cement plant. (Tr. 45:11–15, 112:10–113:10; 127:3–7.) According to Antonoff, CalPortland arranged interviews for all of the miners applying to work for them. (Tr. 112:10–113:10.) Each miner's interview was brief, with some lasting less than five minutes. (Tr. 38:2–17.) CalPortland's interviewers had a list of six questions for each miner regarding the miner's honesty and workplace relationships but not examining the miner's prior work performance. (Tr. 38:18–40:14, 53:17–54:20; *see* Exs. R–11, R–12, R–13.) CalPortland did not receive Martin Marietta's personnel files from the four facilities. (Tr. 118:3–20, 156:5–9.)

On September 26, 2015, CalPortland extended employment offers for the Oro Grande cement plant to approximately 115 miners. (Tr. 113:13–21; Exs. R–14, R–15; *see* Exs. R–18, R–19.) Two days later on September 28, 2015, CalPortland informed the remaining miners that they would not be brought back to the mine. (Tr. 41:1–42:15.) Pappas was among ten hourly workers who were told that day they did not receive an offer of employment from CalPortland and were thus terminated. (Tr. 41:17–42:15, Tr. 63:19–64:7.) Martin Marietta asked those miners to leave the mine immediately and not return for their shifts the following two days. (Tr. 41:14–25.) The miners were still paid through September 30, despite not coming to work. (Tr. 41:25–42:2.) As part of the asset purchase agreement, Martin Marietta and CalPortland arranged severance packages for Oro Grande miners whom CalPortland did not hire. (Tr. 89:18–90:12.)

Because CalPortland hired so many of Martin Marietta's miners, the company did not advertise the Oro Grande positions to the general public. (Tr. 146:9–12.) CalPortland renamed a

[3] Antonoff testified that "a key feature of a cement plant is the large kiln that is used to fire the materials. These kilns are 20 plus feet in diameter, 100 feet long, and operate at about 3,000 degrees Fahrenheit or so. Shutting one of these kilns down is cumbersome. And firing it back up again is cumbersome. So CalPortland had a strong desire to find a way to keep the kiln operating. Because they typically operate 24 hours a day to keep the kiln operating, which meant the entire production process needed to continue to operate." (Tr. 136:22–137:6.)

[4] Antonoff initially testified that his discussion with Ambrose regarding the Riverside Cement workforce was limited. (Tr. 146:20–24, 147:16–148:8.) On cross examination, however, Antonoff conceded that he had previously admitted discussing Ambrose's personnel preferences to MSHA Special Investigator Jackson in a signed statement. (Tr. 148:7–20, 149:9–22.) The scope of a temporary reinstatement proceeding is limited and is not appropriate for resolving conflicting evidence. *See Albu*, 21 FMSHRC at 719. Accordingly, I herein consider only Antonoff's earlier statements to Jackson.

few positions at the mine and changed or combined job responsibilities for some hourly positions. (Tr. 141:22–142:10.) Most of the job positions remained unaltered. (Tr. 143:7–145:18.) CalPortland also made modifications to the miners' hours and benefit packages in the new conditions of employment. (Tr. 138:13–139:3, 140:4–11; Exs. R–16, R–17, R–20.) Specifically, CalPortland eliminated the union grievance proceedings, removed the "just cause" firing protections for workers, eliminated the workers' seniority rankings, and altered the available medical insurance plan. (Tr. 140:4–141:4; Ex. R–4.) The mine now mostly produces the same cement product using the same equipment and the same processes as Martin Marietta. (Tr. 144:24–145:5, 171:18–172:18.) CalPortland continues to sell its cement to many of Martin Marietta's former customers with some changes in the customer base. (Tr. 168:2–12.)

IV. ANALYSIS AND CONCLUSIONS OF LAW

A. Pappas's Status as a Miner or Applicant

The Commission has held that temporary reinstatement is limited to "miners," as defined in section 3(g) of the Mine Act, 30 U.S.C. § 802(g). *Sec'y of Labor on behalf of Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 927, 930 (Sep. 1998). Accordingly, "applicants for employment" are not eligible for temporary reinstatement under section 105(c)(2). *Id.*; *Sec'y of Labor on behalf of Piper v. KenAmerican Res.*, 35 FMSHRC 1969, 1972 (July 2013). The Commission has considered the question of whether a complainant is a miner or an applicant as a threshold issue in temporary reinstatement proceedings. *See Young*, 20 FMSHRC at 932 n.5.

CalPortland's sole argument in this matter can be summed up simply: Pappas was an applicant, and thus cannot be entitled to temporary reinstatement under section 105(c)(2) of the Mine Act. (Tr. 177:20–179:9.) CalPortland emphasizes that its decision to fire all the workers was made in an arms-length transaction with Martin Marietta. (Tr. 178:7–179:24, 118:3–20.) In support, Respondent points to the law developed under the National Labor Relations Act, whereby a company may structure its purchase of assets in a manner that allows the purchaser to disregard its predecessor's collective bargaining agreement and negotiate new terms with the continuing workforce. (Tr. 178:8–179:24; Exs. R–1, R–21); *see NLRB v. Burns Int'l Sec. Servs.,* 406 U.S. at 272. Respondent asserts that under the Mine Act Pappas can only be viewed as an applicant for employment because CalPortland followed the *Burns* model of successorship and carefully limited its liability for the Oro Grande mine's workforce. (Tr. 180:5–22.) Pointing to the Commission's decisions in *Young v. Lone Mountain Processing* and *Piper v. KenAmerican Resources*, Respondent asserts that the case law clearly eliminates the availability of temporary reinstatement to applicants, including Pappas. (Tr. 15:12–20:5.)

In contrast, the Secretary argues that CalPortland's adherence to the *Burns* model of successorship is irrelevant to temporary reinstatement proceedings under the Mine Act. (Tr. 177:2–12.) The Secretary asserts that the termination of all Oro Grande miners and immediate hiring of most of those miners was an artificial scheme used to discriminatorily fire a worker –

Pappas – who had caused problems at the mine by filing a section 105(c) complaint.[5] (Tr. 175:2–8, 175:16–176:3, 177:2–7.) The Secretary, also pointing to *Piper v. KenAmerican Resources*, asserts that Pappas is a miner for purposes of this temporary reinstatement proceeding and CalPortland a successor-in-interest to Martin Marietta. (Tr. 176:8–178:12.)

In analyzing whether a complainant qualifies as a miner or an applicant, the Commission has focused on whether the complainant had a prior relationship with the mine operator and what that relationship was at the time of the alleged discriminatory act. *See Piper*, 35 FMSHRC at 1972–73. The Commission has found a complainant to be miner for the purposes of temporary reinstatement where the complainant was employed at the mine in the recent past and the protected activity related back to the complainant's employment at the mine. *Id.* at 1972.

Pappas worked at the Oro Grande concrete plant for 16 years prior to CalPortland's takeover of the mine. (Tr. 24:23–25:3.) Pappas was fired the instant CalPortland took control of the mine. (Tr. 63:19–25.) CalPortland hired back nearly all of the Oro Grande mine's workers immediately, but decided not to bring back Pappas. (Tr. 42:9–15, 113:8–21.) To ensure a smooth transfer, CalPortland made its staffing choices weeks earlier while Pappas was still working as a miner at the Oro Grande cement plant. (Tr. 36:17–38:17, 135:6–137:6.) Pappas's human resources director, Ambrose, helped CalPortland make its staffing decisions. (Tr. 146:17–147:10, 149:15–150:8.) Pappas's employer, Martin Marietta, coordinated with CalPortland to send home early those miners who would not stay on after the asset sale and to pre-arrange severance packages for those miners. (Tr. 89:18–90:12.)

[5] Respondent maintains that the question of whether a complainant is a miner or an applicant is a threshold issue to which the frivolously brought standard should not apply. (Tr. 22:24–23:15.) Respondent apparently wants me to apply a "preponderance of the evidence" standard. The scope of temporary reinstatement proceedings is unambiguously limited to determining whether the complaint is frivolously brought. Yet, in the temporary reinstatement context, the Commission permits limited inquiries to determine whether an obligation to reinstate a miner may be tolled due to other events, such as a layoff for economic reasons, and allows for a shifting standard. *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394, 396 (Feb. 2013); *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000 (May 2012). In such cases, an operator generally must affirmatively prove by a preponderance of the evidence that a layoff justifies tolling temporary reinstatement. *Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1055 (Oct. 2009). But, if the Secretary challenges the objectivity of the layoff during the temporary reinstatement proceeding, then the ALJ must apply the "not frivolously brought" standard to the question. *Ratliff*, 35 FMSHRC at 397. The Commission has not enunciated the evidentiary standard applicable to whether a complainant is a miner or an applicant. *See Piper*, 35 FMSHRC at 1972–73. By analogy, however, the Commission's justification for a shifting standard is similarly applicable to the question of whether a complainant is a miner or an applicant in the context of temporary reinstatements. Here, CalPortland has presented evidence on its process of hiring Martin Marietta employees at the Oro Grande mine in compliance with the *Burns* successorship model, and the Secretary has challenged Respondent's application process as a legal fiction created to discriminatorily dismiss a troublesome miner. (Tr. 177:2–12, 69:17–23.) Accordingly, I apply the "not frivolously brought" standard to the miner-versus-applicant question.

Pappas was no stranger off the street applying for a position at the Oro Grande cement plant but had an extensive employment history at the mine. Pappas's discrimination complaint relates back to decisions made while he was still employed at the mine.[6] Pappas is seeking reinstatement to the position he held until one minute prior to CalPortland's takeover of the Oro Grande plant. CalPortland's structured termination and application process for the Oro Grande workforce does not materially alter Pappas's status as a miner eligible for temporary reinstatement under section 105(c)(2) of the Mine Act.[7]

Moreover, CalPortland can be liable for Martin Marietta's discriminatory acts. The Commission has recognized that a successor-in-interest to a mine operator may be found liable for, and responsible for remedying, its predecessor's discriminatory conduct. *See Meek v. Essroc Corp.*, 15 FMSHRC 606, 609–10 (Apr. 1993). To make such a determination, the Commission has considered nine factors:

> (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operation, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same products.

Sec'y of Labor on behalf of Keene v. S&M Coal Co., 10 FMSHRC 1145, 1153 (Sep. 1988) (citing *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), *aff'd sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir 1983), *cert. denied*, 464 U.S. 851 (1983)). The key factor in this successorship analysis is whether there is substantial continuity of business operations. *Id.*

First, CalPortland is the named party here with direct knowledge of this proceeding, and CalPortland, through Ambrose, had full knowledge of Pappas's prior discrimination complaint and reinstatement. Second, CalPortland purchased nearly all of Martin Marietta's mining assets on the West Coast, leaving Martin Marietta with limited ability to provide relief to Pappas. (Tr. 90:13–91:1, 82:23–84:6.) Third, CalPortland has continued the production of cement at the Oro Grande cement plant (Tr. 144:24–145:5); indeed, it did not interrupt cement production at the mine during the transfer.[8] (Tr. 136:20–137:6.) Fourth, even though CalPortland shifted some of

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[6] Respondent relies on the Commission's opinion in *Young*, 20 FMSHRC at 930, as the legal basis that Pappas is a mere applicant. (Tr. 180:5–19.) Yet Respondent's reliance on *Young* is misplaced, as that case is distinguishable from the matter at hand. In *Young*, the worker had no prior relationship with the mine to which he was requesting temporary reinstatement. 20 FMSHRC at 927–28.

[7] Although I make my determination that Pappas is a miner using the "not frivolously brought" standard, I note that applying the "preponderance of the evidence" standard would lead me to the same conclusion: Pappas is a miner, not a mere applicant for employment.

[8] *See* footnote 3 *supra*.

the cement grinding process to the company's nearby facilities, production at the Oro Grande plant remains the same. (Tr. 169:22–171:11, 171:18–172:18.) Fifth, CalPortland employs approximately 105 of the 130 miners that previously worked at the Oro Grande cement plant. (Tr. 113:13–21) Although not all of the former Martin Marietta (Riverside Cement Company) miners at Oro Grande applied to work for CalPortland (Tr. 112:33–23), CalPortland did not advertise its Oro Grande positions outside of Martin Marietta. (Tr. 146:9–12.) Sixth, CalPortland employed at Oro Grande a number of former supervisors from Martin Marietta. (Tr. 65:5–20.) CalPortland replaced several top managers at the plant but left intact most of Martin Marietta's middle management. (Tr. 46:5–49:12, 72:3–8.) Seventh, although CalPortland altered some job titles and merged some job duties, most of the positions at the Oro Grande plant are the same as under Martin Marietta. (Tr. 141:22–142:10, 143:7–145:18.) Eighth, CalPortland uses the machinery it purchased at the Oro Grande plant in the same manner as Martin Marietta. (Tr. 144:24–145:1.) Ninth, CalPortland produces the same cement product as Martin Marietta. (Tr. 72:5–7.)

Given this evidence as it relates to the nine-factor test, I determine that the Secretary has presented sufficient evidence to establish at this stage of the proceedings that CalPortland is a successor-in-interest to Martin Marietta at the Oro Grande cement plant. As a successor-in-interest, CalPortland can thus be required to remedy Martin Marietta's past discriminatory acts.

Here, CalPortland and Martin Marietta carefully structured the sales purchase agreement for the Oro Grande Quarry to comport with the legal requirements of the *Burns* successorship model. (Tr. 108:21–111:18.) By adopting this legal framework, CalPortland was able to sidestep the miners' collective bargaining agreement and negotiate new labor terms more attractive to CalPortland. (Tr. 110:14–111:18.) Following this *Burns* successorship model does not, however, grant CalPortland carte blanche to disregard the statutory protections provided under the Mine Act. To the contrary, the Supreme Court expressly recognized in *Burns* that companies must still abide by other statutory protections provided to workers. 406 U.S. at 280–81 & n.5 ("However, an employer who declines to hire employees solely because they are members of a union commits a § 8(a)(3) unfair labor practice.").

As the Commission has recognized, "Congress intended that temporary reinstatement provide '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.'" *Piper*, 35 FMSHRC at 1973 (citing S. Rep. No. 181, 95th Cong., 1st Sess., at 37, *reprinted in* Subcomm. on Labor of the S. Comm. on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 625). Adopting Respondent's argument would create a legal loophole through which mine operators could sidestep the whistleblower protections of the Mine Act by using an artificial hiring process to cull "troublemakers" from their workforce. Such a threat of termination would have a grave chilling effect on the willingness of miners to raise safety issues. Respondent's claim must fail.

Considering all the evidence before me under the "not frivolously brought" standard, I determine that the Secretary has established that CalPortland Company is a successor-in-interest to Martin Marietta at the Oro Grande Quarry and cement plant, and that Pappas is a miner eligible for temporary reinstatement at the mine.

B. Whether Pappas's Discrimination Was Frivolously Brought

Section 105(c)(1) of the Mine Act prohibits discrimination against a miner in exercising his statutory rights.[9] 30 U.S.C. § 815(c)(1). A complainant alleging discrimination under the Mine Act establishes a prima facie case by presenting evidence sufficient to support a conclusion that: (1) the individual engaged in protected activity, (2) there was adverse action, and (3) the adverse action complained of was motivated in any part by that activity. *United Mine Workers of Am. on behalf of Franks v. Emerald Coal Res.*, 36 FMSHRC 2088, 2094 (Aug. 2014); *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). Thus, the Secretary must address each of these three elements to stablish a non-frivolous claim for temporary reinstatement.

1. Protected Activity

The Secretary has presented evidence that Pappas filed a discrimination complaint under section 105(c) of the Mine Act and received reinstatement to the Oro Grande cement plant under a settlement agreement approved by a Commission Administrative Law Judge. Respondent has not contested the Secretary's assertions.

The Mine Act expressly prohibits discrimination based on a miner having "instituted or caused to be instituted any proceeding under or related to this chapter . . . ." 30 U.S.C. § 815(c)(1). The Commission has recognized the importance of protecting miners who bring causes of action before the Commission, stating that "[a] miner who has allegedly been laid off for an impermissible reason must trust that he or she will not suffer adverse consequences later—including not being recalled—simply because he or she filed a discrimination complaint with MSHA." *Piper*, 35 FMSHRC at 1973.

Accordingly, I determine that the Secretary has presented sufficient evidence that Pappas engaged in protected activity.

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

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment . . . because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act filed or made a complaint under or related to this Act . . . .

30 U.S.C. § 815(c)(1).

2. Adverse Action

The Secretary asserts that CalPortland took adverse action against Pappas when it did not rehire him at the Oro Grande cement plant. (Appl. for Temp. Reinstatement at 2–3.) Respondent does not contend that Pappas's firing does not constitute an adverse action.

In addition, the Commission has recognized harassment and coercive interrogation as forms of adverse behavior prohibited under section 105(c)(1) of the Mine Act. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478–79 (Aug. 1982), *aff'd* 770 F.2d 168 (6th Cir. 1985) ("Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights."). The Commission has held that "an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 & n.2 (Aug. 1984) (recognizing that discrimination "may manifest itself in subtle or indirect forms of adverse action"). Whether an operator's questions or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act "must be determined by what is said and done, and by the circumstances surrounding the words and actions." *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005) (quoting *Moses*, 4 FMSHRC at 1479 n.8). Accordingly, a mine operator may not allow harassing behavior to proceed unchecked against a miner because that miner has exercised his rights under the Mine Act.

Here, the Secretary presented evidence that Martin Marietta's management tacitly allowed workers to insult and berate Pappas about his safety complaint and reinstatement at the Oro Grande cement plant in January 2015. (Tr. 30:1–8.) Only in June 2015, after Pappas filed a grievance with his union, did Martin Marietta take steps to address the behavior by moving Pappas to a new team. (Tr. 34:16–35:7.) Even then, Pappas states he was subjected to aggressive questioning and affronts at a grievance meeting in August 2015. (Tr. 32:9–33:11.)

Based on this, I determine that the Secretary has presented sufficient evidence to suggest Pappas suffered from two types of adverse action – first, months of unchecked harassment and, second, his firing from the Oro Grande cement plant in September 2015.

3. Discriminatory Motive

The Commission recognizes discriminatory motive may be shown by indirect evidence establishing a nexus between the miner's protected activities and the adverse actions. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (citing *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission in *Chacon* identified that discriminatory intent can be established by circumstantial evidence of: (1) knowledge of the protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant. *Id.* at 2510. In reviewing the evidence I again cannot make credibility determinations but focus on whether sufficient evidence exists to conclude the discrimination complaint was not frivolously brought.

a. Knowledge of Pappas's Prior Discrimination Proceedings

At hearing, CalPortland presented evidence that it has not received Martin Marietta's personnel files. (Tr. 118:3–20, 156:5–9.) Thus, it is unclear whether CalPortland had direct knowledge of Pappas's prior section 105(c) complaint and his reinstatement to the mine. Nevertheless, a supervisor's knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner's employment. *See Turner*, 33 FMSHRC at 1067–68 (imputing knowledge and animus of miner's direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions"). The Secretary presented evidence that CalPortland's Antonoff consulted with Martin Marietta's Ambrose about whom Respondent should hire after taking over the Oro Grande cement plant. (Tr. 146:17–147:10, 149:15–150:8.) Ambrose was a central figure in Pappas's first discrimination complaint. (Tr. 28:1–16, 31: 3–18.) Therefore, I determine the Secretary has raised a non-frivolous issue as to whether CalPortland had imputed knowledge of Pappas's protected activities and has thus met the evidentiary burden.

b. Hostility or Animus toward Pappas's Reinstatement

The Secretary presented evidence that miners regularly harassed Pappas over his prior reinstatement at the Oro Grande cement plant and that Martin Marietta's managers were indifferent to Pappas's complaints over this harassment. (Tr. 30:1–8.) Animus may be shown by evidence suggesting supervisors were indifferent to or angered by a miner's protected activity. *See Turner*, 33 FMSHRC at 1069 (discussing supervisors' negative reactions to miner's safety complaints); *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC at 1085, 1089–90 (Oct. 2009). I determine sufficient evidence exists that management, in failing to address the regular harassment of Pappas, signaled a distinct animus toward his reinstatement at Oro Grande.

c. Temporal Relationship between Pappas's Discrimination Proceedings and the Adverse Actions

Pappas testified that his harassment at work began shortly after his reinstatement to the mine under a court-approved settlement. (Tr. 29:8–14, 33:19–34:8.) This harassment largely continued for most of the next nine months until Pappas was fired from the mine and not rehired alongside most of his coworkers. (Tr. 35:16–22.) Accordingly, I find the Secretary's evidence demonstrates a sufficient nexus in time between Pappas's protected activity, the section 105(c) proceeding and resulting reinstatement to the mine, and the adverse actions against Pappas.

d. Disparate Treatment of Pappas

At hearing, CalPortland's witnesses testified that the company developed an arms-length hiring process that treated each miner the same. (Tr. 118:3–25.) CalPortland's human resources officials held interviews with every applicant and were directed to ask each miner the same six questions. (Tr. 128:15–25; Ex. R–13.) The Secretary challenges the fairness of this hiring process. Pappas insisted that the interviewer asked only three of the six questions in the

application and his answers were not recorded properly but given a negative slant. (Tr. 54:13–20, 61:5–63:18.) Furthermore, Inspector Jackson testified that other miners who gave the same or substantively similar answers in their interviews were rehired, while Pappas was not. (Tr. 70:3–18.) The Secretary suggests that the application process was a façade and the real hiring decisions for CalPortland were made weeks earlier on the advice of Martin Marietta's Ambrose. (Tr. 70:14–25.) Indeed, CalPortland contacted Ambrose to discuss which miners to rehire at the Oro Grande mine the month before the hourly workers even applied for their positions. (Tr. 146:21–147:15.) I determine that the Secretary has presented sufficient evidence that Pappas was treated disparately from other miners in the application process.

C. Conclusions

The Secretary has shown that Pappas engaged in protected activity by filing a section 105(c) discrimination complaint. The Secretary has also shown that Pappas suffered adverse actions in the form of regular harassment at work and his eventual dismissal from the mine. The Secretary presented evidence directly linking the unchecked harassment of Pappas to his prior filing of a section 105(c) discrimination complaint against Martin Marietta. In addition, the Secretary showed that the mine's management, including the human resources official that advised CalPortland on its hiring decisions, was fully aware of Pappas's protected activity and consistently displayed animus toward that activity from the first day Pappas returned to the Oro Grande cement plant. Finally, the Secretary has presented evidence that CalPortland treated Pappas differently from other miners in the application process. In sum, sufficient evidence exists to conclude that this discrimination claim was not frivolously brought as it relates to knowledge, animus, coincidence in time, and disparate treatment. I therefore determine that the Secretary has established a nexus between Pappas's protected activity—i.e., his prior section 105(c) complaint and reinstatement to the mine—and Respondent's subsequent adverse action.

The Secretary has presented evidence on all three factors of a prima facie discrimination case under section 105(c) of the Mine Act. Therefore, I conclude that Pappas's current claim of discrimination against CalPortland was not frivolously brought.

V. ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is **GRANTED**. Accordingly, CalPortland Company is **ORDERED** to reinstate Jeffrey Pappas to his position as laborer with the same or equivalent job responsibilities and duties, at the same rate of pay for the same number of hours worked, and with the same benefits, as he would have received if rehired by CalPortland Company. Respondent CalPortland Company shall further provide economic reinstatement dating back to December 28, 2015, as stipulated by the parties.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4).

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution: (Via Electronic Mail & U.S. Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 14, 2016

THYSSENKRUPP ELEVATOR AMERICAS, Contestant	CONTEST PROCEEDINGS Docket No. WEST 2015-033-RM Citation No. 8830994; 09/09/2014
v.	Docket No. WEST 2015-034-RM Citation No. 8830997; 09/09/2014
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Lyons Cement Plant Mine ID 05-00344 A9233
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-234-M A.C. No. 05-00344-367349 A9233
v.	
THYSSENKRUPP ELEVATOR AMERICAS, Respondent	Lyons Cement Plant

DECISION

Appearances: Michelle Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary;
Paul Waters, Esq., Waters Law Group, Clearwater, Florida, for ThyssenKrupp Elevator Americas.

Before: Judge Manning

These cases are before me upon notices of contest filed by ThyssenKrupp Elevator Americas ("TKE") and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against TKE pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a hearing held in Denver, Colorado, and filed post-hearing briefs. Two section 104(a) citations were adjudicated at the hearing. TKE is an independent contractor that was performing work at the Lyons Cement Plant operated by Cemex, Inc. ("Cemex") in Boulder County, Colorado. For the reasons set forth below, I vacate both citations.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

On September 9, 2014, MSHA Inspector Kathleen Gearity[1] issued two citations under section 104(a) of the Mine Act as a result of conditions she observed at an elevator in Cemex's Lyons Cement Plant.

The first citation, Citation No. 8830994, alleges a violation of section 56.20011of the Secretary's safety standards, and asserts that TKE had disabled the elevator door interlock system in order to perform maintenance, left the mine property for the day, and failed to leave a sign or barricade in place to warn persons of the ongoing work on the elevator. The citation alleges that the elevator door opened easily, the cabinet lighting was on, and the bottom of the elevator car was about 21 inches from floor level of the landing. A piece of skirting had been installed by TKE to minimize fall exposure. The citation states that personnel in the area would have been unaware of the fall hazard and exposed to a dangerous and preventable situation.

Inspector Gearity determined that a fatal injury was reasonably likely to occur, that the violation was of a significant and substantial nature ("S&S"), that one person would be affected, and that TKE's negligence was moderate. Section 56.20011 states that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required." 30 C.F.R. § 56.20011. The Secretary proposed a penalty of $243.00 for this alleged violation.

The second citation, Citation No. 8830997, alleges a violation of section 56.14105 of the Secretary's safety standards, and asserts that TKE had disabled the elevator door interlock system in order to perform maintenance, left the mine property for the day, and not locked out the power or blocked the machinery against hazardous motion, which created a hazard to person unware of the ongoing maintenance. The citation alleges that the door opened easily, the cabinet lighting was on and, while TKE stated that it had three other systems in place, including the inspection switch, the bypass switch, and the elevator stop switch that should prevent unintended movement of the elevator car, the system was electrically energized and exposed personnel in the area to a hazard.

Inspector Gearity determined that an injury was unlikely to be sustained, but that any injury could reasonably be expected to result in lost workdays or restricted duty. Moreover, she found that the alleged violation was non-S&S, affected one person, and that TKE's negligence was moderate. Section 56.14105 states that "[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to

[1] Inspector Gearity has been an MSHA inspector since 2007. (Tr. 15). Prior to working with MSHA she was employed at a safety consulting company, which helped employers comply with the Occupational Safety and Health Act and the Mine Act. (Tr. 16).

the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion." 30 C.F.R. § 56.14105. The Secretary proposed a penalty of $100.00 for this alleged violation.

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. Although I have not included a summary of all the evidence presented at the hearing in this decision, I fully considered all the evidence.

B. Summary of Evidence

Cemex's Lyons Cement Plant is located along a river which flooded during the fall of 2013[2] and caused damage to the plant and, as relevant to this case, to all the elevators for the homogenizing silo at the plant. (Tr. 17). The elevator at issue was outside the silo. The elevator and its controls suffered damage while underwater and the elevator had been out of service since the flood, as had all the elevators for the silo. (Tr. 17, 44, 80, 131). In lieu of the elevator, Cemex employees had been using stairs and ladders to access the silo. (Tr. 104)

On September 9, 2014, William Trammell,[3] an elevator mechanic for TKE, and Joshua Miller[4], an apprentice mechanic for TKE, were at the plant working to repair the subject elevator. (Tr. 77). The two of them had been working on elevators at the plant for approximately one and a half to two weeks. (Tr. 77, 113, 132). None of the elevators on site had been working since the 2013 flood. (Tr. 103).

On September 9, Trammell and Miller installed a toe guard on the subject elevator. (Tr. 83-84). The toe guard is a piece of roughly 12 gauge sheet metal that extends downwards from the floor of the elevator car and acts as a safety device to fill the hole below the car when the floor of the car is above the floor of a landing. (Tr. 84). According to Trammell, the toe guard is supported by two braces behind the sheet metal, can hold 200 pounds of force, covers the entire the width of the opening, and is required to extend approximately 42 inches below the bottom of the elevator car. (Tr. 84, 115, 119-120; Sec'y Ex. 3 photo 2). Trammell explained that he is roughly 220 pounds and, after installing the guard, he tested it by pushing against it. (Tr. 116).

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[2] The flooding that occurred in Colorado during the fall of 2013 was an historic event and was a national news story. The town of Lyons was isolated as a result of the flooding and residents were evacuated by the National Guard. Jordan Steffen, *Colorado floods: Lyons residents rescued by National Guard,* DENVER POST (Sept. 13, 2013), http://www.denverpost.com/breakingnews/ci_24087700/colorado-floods-lyon-residents-rescued-by-national-guard. Many other Front Range communities in northern Colorado were severely flooded and major state highways and rail lines remained closed for months.

[3] Trammell has been a mechanic in the elevator industry for 34 years and with TKE for over five years. (Tr. 75). He repairs elevators when they break down, and modernizes elevators to bring them to code, or upgrades elevators based on what a customer wants. (Tr. 75-76).

[4] At the time of hearing Miller was a mechanic for TKE, but, at the time in question, Miller was in the fourth year of his apprenticeship to become an elevator mechanic. (Tr. 121).

After completing their work for the day, Trammell and Miller placed their tools in the elevator car and raised the car such that the floor of the elevator was above the floor of the first floor landing, leaving roughly a 12-14 inch gap between the bottom of the toe guard and the floor of the landing. (Tr. 85; Sec'y Ex. 3 photo 2). The floor of the elevator pit was approximately 5 feet below the opening. (Tr. 103). Both Trammell and Miller testified that, in raising the car and creating the gap, they made sure that they left the car low enough so that there would be no hazard. (Tr. 85, 88, 123-124). Trammell felt that falling though a vertical gap of 12 inches was not a reasonable possibility. (Tr. 103). Trammell explained that, when someone opened the elevator door, the first thing they would see would be the light on the platform, the support structure for the floor of the elevator car, and the toe guard right in front of them. (Tr. 88). He further explained that they also positioned the car this way to get their tools off of the landing and into an area that was out of the way and not accessible to individuals who may otherwise be inclined to take the tools, or mess with the electrical parts, including the newly installed control box in the car. (Tr. 84-85, 87, 111, 112). Trammell explained that another reason they positioned the car that way was because they were having problems with the interlock and door. (Tr. 92, 112). The interlock device on the first floor door of the elevator, which normally holds the hoistway door closed when the elevator is not at a floor, was not properly functioning and had been temporarily disabled by TKE.[5] (Tr. 78, 86, 92). Trammell testified that, had he not disabled the interlock, the elevator door would have locked since the car was not at ground level, and it would have required Miller or him to climb on top of the car roof, which would have been very difficult, to get the door open when they returned the following day. (Tr. 86-88, 92).

While Trammell and Miller did have barricades available and used them to block off the area when they were working, they did not leave them up when they left that day because the elevator door was closed, the position of the elevator car blocked access, and the barricades could have blown away given that the area was very windy. (Tr. 102, 113).

Trammell did not pull the elevator's electrical disconnect in the mechanical room before leaving. (Tr. 94). He explained that they had already put in place the new elevator controller, wired it up, begun the process of adjusting the car for automatic operation and, given all of the computer equipment involved during the adjusting procedure, there was the potential that cutting power would delete all of the important programming information, thereby requiring him to start over the adjusting procedure. (Tr. 78, 94-95). Part of the adjusting phase involves making sure the elevator car lines up with the door openings in the elevator shaft. According to Trammell, this volatile information was stored in the elevator's CPU and pulling the main disconnect could potentially delete the information. (Tr. 94). However, he did trip multiple switches in the controller in the mechanical room, including the run/stop switch, the inspection switch, and two door switches, as well as the hoistway access and car door bypass switches. (Tr. 95, 105). He explained that the run/stop switch in the controller opened the safety circuit and "shut off all things" and, as a result, the elevator would not have moved. (Tr. 96). The tripping of the run/stop switch activated the high tension jaws of the rope gripper, which physically clamped the rope and prevented the car from moving. (Tr. 91-92, 96). He further explained that the inspection switch in the controller, which he also tripped, disabled the buttons in the elevator car,

[5] The door to the elevator was not designed like the doors on elevators in office buildings. It was a door like that on the outside of a building that you open using a handle.

as well as the call buttons on the landing. The controller that contained all of these switches was in the locked mechanical room for which only Trammell had a key. (Tr. 97, 105).

Given the switches he tripped, Trammell opined that, in order for anyone to get the elevator to move, they would have had to break open the lock to the mechanical room, flip the hoistway access and car door bypass switches, flip the run/stop switch, then gone outside to the key switch in the push button panel where they would have to put in a special key to run the elevator down. (Tr. 105-106). According to Trammell, he had the only key to the padlock on the mechanical room door, and only "elevator people" have the kinds of keys used in the key switch at the call button. (Tr. 99-100, 105). At hearing, when questioned by the court, Trammell stated that, in order for the elevator to move under these conditions, "something catastrophic, like the ropes braking(sic)" would have to occur, and that it made no difference whether the power to the controller panel was on or off in that instance. (Tr. 108-109).

By the time Trammell and Miller left the plant at 2:30 p.m. on the September 9, the controls in the elevator had been replaced, the motor had been changed out, the toe guard had been completely installed, and all of the interlocks, with the exception of the interlock on the door on the first floor, had been replaced, tested, and were functioning. (Tr. 80, 82-83, 128). The elevator still required adjusting; TKE was in the process of putting the elevator into automatic operation. (Tr. 78, 83). However, the elevator could not be turned over to the mine until an elevator inspector checked it to make sure all of the safety features worked. (Tr. 83).

On September 9, 2014, MSHA Inspector Kathleen Gearity was conducting an inspection of Cemex's Lyons Cement Plant. (Tr. 16). Gearity traveled through the plant with a safety director from one of Cemex's facilities in Texas. (Tr. 23-34). During the course of her inspection she examined the subject elevator on the outside of the homogenizing silo at the plant. Gearity was aware that TKE was engaged in fixing multiple elevators at the plant, however, by the time she inspected this elevator, the TKE personnel had already gone home for the day and were not present. (Tr. 18-20, 25-26).

The elevator door on the first level was located on a landing at the top of a small flight of stairs. (Tr. 20). According to Gearity, it was not obvious to her that an elevator was at the top of the steps. (Tr. 21). Gearity climbed the steps and opened the door. (Tr. 22, 48). When the door opened she observed that the elevator car was not level with the floor of the landing but the car was in a raised position and a gap existed below the car. (Tr. 23; Sec'y Ex. 3 photo 2). The light was on inside the elevator car. (Tr. 59). Gearity testified that she did not measure the gap, but, when questioned by the court regarding the language in the citation body that the car "was about 21 inches from floor level," she stated that she probably used a tape measurer, but from a distance. (Tr. 52-53). Thereafter, she stated that she did not recall measuring it. (Tr. 54).

There was a sheet metal toe guard which extended down from the floor of the car. (Tr. 23). Gearity opined that the toe guard "would not withstand the fall of force of a human being[,]" but conceded that, at the time of the inspection, she did not know what the toe guard was made of, thought it might have been rubber, and did not push on it. (Tr. 23, 31, 48-49). Gearity observed that the toe guard did not extend all the way from the floor of the elevator car to the floor of the landing. As a result, an opening existed below the toe guard which, according

to Gearity, presented a hazard where a worker could step into the opening without realizing that the car was not where it was supposed to be, and go under the elevator car, and potentially into the elevator pit. (Tr. 28, 31-32). Gearity did not measure the depth of the pit, but estimated it at 6 to 8 feet. (Tr. 28, 56). Gearity took note of a contract laborer in the area who did not speak English and may not have been aware of the condition since there were no warning signs to prevent people from entering the area. (Tr. 27-28). She noted his "diminutive" size and how he could have fallen through the opening. (Tr. 27-29).

Gearity testified that the hazard was not obvious when the door was closed, but agreed that the hazard was immediately obvious once the door was opened. (Tr. 32). According to Gearity, there were no warning signs or barricades to stop a miner from opening the door and exposing themselves to the hazard behind the door. (Tr. 22). She testified that she was aware of a fatality at another Cemex mine where a contract employee had opened an elevator door where there was no elevator car and fallen to his death through the opening. (Tr. 26-27; Sec'y Ex. 7). She initially explained that the consequence of falling into this opening would be a broken leg, sprain, or fracture, and added that an individual would not have to fall all the way into the pit to sustain those types of injuries. (Tr. 28). Later in her testimony she explained that she determined that a fatal injury was likely to occur. (Tr. 28, 39).

Gearity recognized that people at the plant knew that the elevators were being worked on. However, she opined that personnel may not have known if the elevators were online or offline. (Tr. 30, 45). She also agreed that the safety director who worked for Cemex in Texas traveled with her and was aware that the elevators were being repaired. (Tr. 46). Based on her observations, Gearity issued Citation No. 8830994 to TKE for a violation of section 56.20011 for failing to have a sign or barricade in place to warn of a hazard. She determined that the condition was S&S. (Tr. 39).

Gearity also noticed that the light in the raised car was on. (Tr. 59, 72). According to Gearity, the 110 volt system for the light and the 480 volt system for the elevator motor were on. (Tr. 72). While work was not being done at the time, since the TKE personnel were gone, she believed that maintenance was ongoing. (Tr. 60). Gearity testified that when she first went to the mechanical room, there was a lock on it and no key was available. (Tr. 62). When she returned to the elevator the next day, Trammell had returned and unlocked the mechanical room. She discovered that the switch gear unit that drove the electric motor for the elevator was on and had not been de-energized. (Tr. 34-35; Sec'y Ex. 3 photo 4). Gearity testified that she was concerned that, while TKE personnel had moved the car so that it could not be accessed by anyone, they had failed to disable the power to the elevator and, as a result, there was a possibility of movement. (Tr. 37). Further, she stated that she had concerns about repairmen working on an energized elevator. (Tr. 38). Gearity didn't know what systems had been replaced in the elevator. (Tr. 37). Gearity testified that TKE told her they were in the testing phase. (Tr. 38). Gearity conceded that she was not sure how TKE could have effectively blocked the car against motion and that, normally, equipment comes with a "pin" or "block" that can be activated to prevent something from moving. (Tr. 72). She acknowledged that the switches may have worked perfectly fine to block the car, but that with power going to them, "if any of them did fail, there was potential that the car could move." (Tr. 73). Based on her observations, Gearity issued Citation No. 8830997 to TKE for a violation section 56.14105 for failing to de-

energize the elevator and block it against motion while performing maintenance. (Tr. 36, 66; Sec'y Ex. 4). Gearity designated the citation as non-S&S because it was unlikely that that the elevator would move because no one had access to the control room or switches besides the TKE personnel. (Tr. 39, 70-71). Gearity did not find any unguarded electrical hazard near the elevator that someone could have been exposed to. (Tr. 69).

When Trammell and Miller arrived at the mine the following day they measured the gap from the bottom of the toe guard to the floor of the landing as being 12.5 inches. (Tr. 86, 122-123). At hearing, Miller testified that, when he spoke with Gearity that day she described the hoistway as being "completely open" with the elevator car above her head. (Tr. 125). Miller was shocked by the inspector's comment since he had installed the toe guard the previous day. (Tr. 125). Miller opined that, because the inspector was wearing sunglasses at the time she examined the elevator the previous afternoon and given that it was late in the day and the toe guard was black, it was probably difficult for the inspector to see the guard. (Tr. 126). At hearing, Gearity testified that she may have been wearing glasses at the time, but they did not hinder her ability to perceive the condition of the elevator. (Tr. 148).

Roughly three weeks before the hearing in this matter, David Spence,[6] a branch manager for TKE, traveled to the plant to take various measurements of the subject area. (Tr. 130, 135, 142). Spence and a service technician from Cemex, using photographs taken by the inspector, attempted to position the elevator car in the hoistway as close to possible to where the car was on the day the citations were issued. (Tr. 133). Spence explained that, in order to do so, he looked at the photograph and saw that the elevator platform was in line with the bottom of the window on the door. (Sec'y Ex. 3 photo 2; Tr. 134). Relying on the picture as a reference point, he then positioned the car so that the elevator platform was as close as possible to the same location. (Tr. 134). After doing so, he measured the vertical height of the opening between the landing platform and the bottom of the toe guard as being 14 inches. (Tr. 136; TKE Ex. 8). Spence also measured the depth of the pit from the landing as being approximately 5 feet. (Tr. 139).

C. Citation No. 8830994

I find that the Secretary did not establish a violation of section 56.20011. The cited standard requires that operators place barricades or post warning signs on all approaches to non-obvious hazards. 30 C.F.R. § 56.20011. There is no dispute that neither barricades nor warning signs were placed in the area of the elevator. However, the question remains whether the condition of the elevator presented a hazard and, if so, whether the hazard was obvious. For reasons that follow, I find that the Secretary did not establish that a hazard existed and that, even if the condition did present a hazard, I find that any hazard was immediately obvious.

I find that the Secretary has not met her burden of establishing that a hazard existed. The Secretary alleges that the raised elevator car created a hazard in the form of an opening below the toe guard that miners could fall into. While the inspector testified regarding the size of the opening, I decline to credit her measurements. At hearing, the court questioned the inspector as

[6] Spence has been in the elevator industry for eleven years, and worked as a branch manager for TKE for three and a half years. (Tr. 130).

to how she arrived at that measurement. (Tr. 53). While the inspector stated that she did not stand close to the opening, and opined that she probably measured it from a distance, she could not remember whether she took a measurement at all. Conversely, TKE's witnesses offered credible evidence regarding the size of the opening. Specifically, Miller testified that the day after the citation was issued, he measured the gap before the car was moved and determined that the opening was only 12.5 inches.[7] Moreover, Miller's measurement is bolstered by the later measurement taken by Spence who, using the Secretary's own photographs, repositioned the elevator car so as to attempt to replicate the location of the car at the time the citation was issued in order to take a number of measurements. Spence clearly articulated his methodology for why he repositioned the car where he did. After repositioning the car he measured the opening below the toe guard as being roughly 14 inches.

The 12-14 inch height of the opening does not present a hazard. The Secretary argues that little should be made of the "supposed awareness of the non-functioning elevators," that human behavior can be erratic and unpredictable, and that the Commission takes into account ordinary human carelessness in interpreting standards. Sec'y Br. 7. I frequently affirm citations based on the unpredictable nature of human conduct. In this case, however, I find that the Secretary is attempting to stretch this concept beyond reason. The plant and the surrounding area had been subjected to a major flood. The elevators for the silo had not been functional for about a year. There is nothing else at the top of the elevator landing other than the door to the elevator itself. As a consequence, nobody would be walking by the elevator door on their way to another working place. It is highly unlikely that anyone would walk up the stairs to the landing since it was common knowledge that the elevators had not worked since the catastrophic flood. If someone did walk up onto the landing and opened door, the condition did not present a hazard. All but the bottom 12-14 inches of the opening was blocked by the structure supporting the floor of the elevator car and the substantial toe guard. I credit the testimony of TKE's witnesses that the toe guard would hold back anyone who attempted to walk into it. The allegedly hazardous scenarios presented by the Secretary, i.e., the toe guard being unable to support an individual who fell against it and a "diminutive" individual falling through the opening, are simply too farfetched. I find that the inspector's reliance on the fatality at another Cemex plant was misplaced. In that instance, unlike here, nothing blocked the doorway or could have alerted the miner to the presence of the hazard. Given what was behind the door, nobody would attempt to take another step. If someone believed that the elevator had been fixed, he would quickly discover, upon pushing the call button outside the elevator door, that the elevator was not in operating condition. A hazard was not present because (1) nobody, including a fatigued or confused employee or contractor, would walk up the stairs to the elevator landing and open the door because it was common knowledge that the elevator was out of service, and (2) if someone were to do so, the conditions present would not have presented a hazard to that person.

[7] While the Secretary, citing page 123 of the transcript, argues that Miller repositioned the car after the citation was issued but before he measured the gap, I find that the Secretary has mischaracterized Miller's testimony. Sec'y Br. 7. Rather, I find that the cited testimony establishes that Miller was the one who positioned the car on September 9th before Trammell and he left the plant and the inspector issued the citation. Nothing in the testimony leads me to believe that he then repositioned the car before measuring the gap the following day.

Moreover, any hazard that was present was immediately obvious. Everyone knew that all the elevators at the silo were out of service and had been so for approximately a year. An employee would not open the door and then step into the 12-14 inch opening at the bottom because he or she would see that the elevator car was not in position. The inspector agreed that the hazard was obvious once the door was opened. (Tr. 32). The elevator buttons were not functioning. The conditions, as described above, were immediately obvious. The photographs admitted into evidence confirm the obviousness. (Sec'y Ex. 3 photo 2; TKE Ex. 1); *See Inland Steel Mining Co.*, 20 FMSHRC 760, 762-763 (July 1998) (ALJ) (Vacating a citation issued for an alleged violation of section 56.20011 based on photographic evidence of a hazard being "immediately obvious"). I find that the lack of warning signs or barricades did not create or contribute to a safety hazard.

Based on my findings above, Citation No. 8830994 is vacated.

D. Citation No. 8830997

I find that the Secretary did not establish a violation of section 56.14105. As both parties recognize, the pertinent requirements under the cited standard are threefold. First, the standard applies only when repairs or maintenance of machinery or equipment are being conducted. Second, the operator must ensure that the machinery or equipment is powered off. Third, the operator must ensure that the machinery or equipment is blocked against hazardous motion. In addition, the standard also provides an exception permitting machinery or equipment motion or activation to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion. 30 C.F.R. § 56.14105.

As evidenced by her testimony, the inspector was concerned with the conditions that existed after Trammell and Miller left the plant for the day on September 9. These are the conditions she observed at the time of her inspection. Inspector Gearity agreed that TKE had positioned the elevator car so that nobody could get into it. Specifically, she testified that "ThyssenKrupp had moved the car so that it could not be accessed by anyone, but by not disabling the power or de-energizing the equipment there [was] a possibility of movement." (Tr. 37). She was uncertain whether some of the water-damaged parts were still present and could potentially fail putting miners at risk.

I find that once Trammell tripped the run/stop switch in the control room, the elevator motor was effectively de-energized and the car was blocked against hazardous motion. The main power switch was not opened because of concerns that important data in the elevator's CPU would be lost if the entire system was de-energized. When Trammell tripped the run/stop switch before leaving for the day, he removed all power from the controls to the elevator and activated the high tension jaws of the rope gripper, which physically clamped the rope and prevented the car from moving. I find that these high tension jaws of the rope gripper blocked the elevator car and all other equipment against motion. In addition, Trammell tripped additional switches that made movement of the elevator even more unlikely. These switches were on the CPU's circuit board inside an electrical box in the padlocked mechanical room. (Ex. R-6). I note that, while the standard does not require that the power be locked out and tagged out, it effectively was. All

the switches that Trammell tripped were in the mechanical room which he padlocked, and he pocketed the only key.

Although the inspector expressed concern over the potential for a switch to fail, she acknowledged that she had never researched the topic. (Tr. 65). I must note that that the evidence makes clear that Inspector Gearity had little knowledge of the rather sophisticated workings of elevators or the maintenance and repair of elevators. The record established that all of the water-damaged parts had been replaced before her inspection. The only work that remained for the following day was to repair the interlock for the door and make critical adjustments so that the elevator functioned properly.

It is undisputed that a light in the elevator car was on when the inspector examined the elevator, but the inspector acknowledged that it ran on a separate circuit that was unrelated to the functioning or movement of the elevator. (Tr. 72). Trammell also admitted that energized wires were exposed in the control box located inside the elevator car. (Tr. 112). It is important to understand that the cited standard is not an electrical standard; it is intended to prevent a miner from being struck by machinery or equipment that is not de-energized or properly blocked against hazardous motion. Moreover, Inspector Gearity was not concerned that someone would be exposed to an electric shock hazard as a result of the conditions she observed. (Tr. 69). She was concerned that by not tripping the power at the main switch there was a possibility that the car could move and someone would be injured as a result. For the reasons set forth above, I find that the switches thrown by Trammell prevented all movement notwithstanding that the main power switch was not opened.

While TKE makes much of the fact that it was not engaged in repairs or maintenance at the actual time the citation was issued, it is clear that Trammell and Miller were working to repair the elevator on September 9. Trammell testified that TKE had been working on the elevators for about two weeks. It is not clear what work they performed on September 9. Trammell stated that they "finish[ed] the wiring [and] button[ed] up all the electrical boxes, closing them up." (Tr. 83). They also installed the toe guard and started the adjustment procedure. The parties presented little evidence concerning the conditions that existed when Trammell and Miller were working on the elevator earlier that day. The record does not reveal whether TKE was complying with the safety standard when Trammell and Miller were actively working to repair the elevator. It is not clear whether the power was off when the elevator motor was replaced, for example, or what precautions were taken when the toe guard was installed.

In addition, when Trammell was "adjusting" the elevator, the adjustment and testing exception would have applied. Equipment activation and motion is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided persons are effectively protected from hazardous motion. 30 C.F.R. § 56.14105. TKE was in the final stages of the repair and had begun the "adjustment" phase of their work. Trammell explained that the "adjustment" phase involves making sure that the elevator car "hits the floors right," making sure all the interlocks and limit switches work, and getting the elevator ready for the inspection required by the State of Colorado. (Tr. 83). Naturally, making sure the elevator car lines up correctly with the floors requires the activation of the elevator machinery and the movement of the elevator car. I credit the testimony of Trammell that, during the adjustment phase, there was

the risk that shutting off the power at the main disconnect would cause the loss of volatile data stored on the CPU. In the event the data was lost, TKE would need to start over the adjustment phase. No evidence was presented by the Secretary to contradict TKE's evidence on these issues and I find that when TKE was making these adjustments, the exception applied.

I find that the Secretary did not meet his burden of proof with respect to Citation No. 8830997. The evidence establishes that TKE was in compliance with the safety standard at the time Inspector Gearity examined the elevator. The Secretary presented insufficient evidence to establish whether TKE was in violation of the safety standard earlier in the day or on previous days when Trammell and Miller were actively working on the elevator. As a consequence, Citation No. 8830997 is vacated.

II. ORDER

For the reasons set for above, Citation Nos. 8830994 and 8830997 are **VACATED**, the Notices of Contest brought by TKE in WEST 2015-33-RM and WEST 2015-34-RM are **GRANTED**, and all three dockets are **DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 15, 2016

MARK L. LUJAN, Complainant, v. SIGNAL PEAK ENERGY, LLC, Respondent.	DISCRIMINATION PROCEEDING: Docket No. WEST 2015-252-D MSHA Case No. DENV-CD 2014-17 Mine: Bull Mountain Mine No. 1 Mine ID: 24-01950

DECISION

Appearances: Mark L. Lujan, P.O. Box 4733, Grand Junction, Colorado, 81502

Christopher G. Peterson, Esq., Benjamin J. Ross, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, Colorado 80202

Before: Judge Barbour

This case is before the court on a Complaint of Discrimination brought by Mark L. Lujan, on his own behalf, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended. 30 U.S.C. § 815(c) (the "Mine Act" or "Act"). On September 23, 2014, Lujan filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration ("MSHA"). On November 24, 2014, MSHA sent Lujan a letter informing him it did not find sufficient evidence to establish that a violation of section 105(c) occurred. On December 30, 2014, Lujan filed an "appeal" of MSHA's determination with the Commission. The appeal was docketed by the Commission as a section 105(c)(3) discrimination complaint, and the case was assigned by the Chief Judge to the court.[1]

Lujan alleges that he was first suspended illegally and then discharged illegally by his employer, Signal Peak Energy, LLC ("Signal Peak"), because he engaged in activity protected by the Mine Act. He seeks relief in the form of reinstatement to his former position as an underground coal miner with full benefits and medical accommodation as well as compensation for financial loss due to the alleged illegal discharge. Lujan charges that his discharge was a direct result of a medical condition, namely gout, about which Signal Peak allegedly knew when it hired him and which, prior to his discharge, caused him to miss several days of work. In particular, Lujan points to April 14, 2013, when he missed work due to a flare-up of gout. He states that he told his then supervisor, Ryan Stahl, that given his condition he was not coming to work as he would be a safety risk to himself and other miners, and that although Stahl told him to

[1] Section 105(c)(3) of the Mine Act provides that if the Secretary determines that a violation of section 105(c)(1) has not occurred, "the [C]omplainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3).

stay home, the company nonetheless suspended Lujan for "mismanagement of days" and discharged him two months later.

Lujan's employment ended on June 18, 2013, during or immediately following a confrontational meeting with management officials. P-Ex. 18 at 3-4. The company claims it believed that Lujan falsified his time cards to make it appear he worked overtime hours. Resp't Answer to Complaint at 3. It states when management officials asked Lujan about the discrepancies, the meeting turned acrimonious and Lujan quit. *Id*. Lujan maintains that the company's version of the meeting is false and that although his employment did indeed end on June 18, it was "not for the reasons given." Dec. 20, 2014, Letter to Commission at 4. Instead Lujan maintains that the company terminated him during that meeting due to his medical condition and the company's failure to reasonably accommodate him. *Id*.

PROCEDURAL BACKGROUND

In a March 4, 2015, Notice of Hearing and Prehearing Order, the court scheduled the case to be heard on June 30, 2015. The court also suspended discovery and the filing of pretrial motions and submissions until April 6, 2015, in order to provide Lujan time to obtain representation. Importantly, the court ordered the parties to exchange exhibits and lists of witnesses, with short summaries of the witnesses' testimony and to do so by May 30, 2015.

Lujan failed to find representation, and Signal Peak moved for summary dismissal on May 8. Lujan opposed the motion. Central to the motion was the company's assertion that Lujan had not engaged in protected activity, and that his complaint, having been filed 462 days after the end of his employment, was fatally untimely. The court expressed doubt about whether Lujan had in fact engaged in protected activity and whether his complaint was in fact timely, but the court ultimately concluded that fact finding was necessary with regard to both issues. June 12, 2015, Order Denying the Respondent's Motion for Summary Decision at 5.

On June 3, Lujan requested the court send him subpoenas he proposed to serve upon an MSHA investigator and on an MSHA inspector. The court complied with the request, despite the fact that Lujan had not provided the court or Signal Peak with a list of witnesses as required by the March 4 Prehearing Order. The court did not realize at the time that Lujan had neglected to copy opposing counsel on the e-mailed subpoena request.

Four days prior to the hearing, Lujan contacted the court by email and requested that two of his witnesses be allowed to testify via telephone, given that they lived a prohibitive distance from the hearing site. The court denied the request on the basis of credibility and cross-examination difficulties, but explained to Lujan that he could place witness affidavits into the record at hearing. Lujan failed to obtain a sworn affidavit from either witness by the time of the hearing.

Exactly one day prior to the hearing, the court received a telephone call from Jennifer Casey of the Denver Office of the Solicitor of Labor. Casey explained that she had just learned that subpoenas had been served on MSHA employees, and that she did not yet know what the Secretary's position would be regarding the witnesses appearing, but that even if the Secretary did not oppose the request, the subpoenaed officials could not appear at the hearing as both would be elsewhere on official business. Lujan asked Casey to relay to the court his request to

continue the hearing on this basis. The company opposed a continuance because it had only learned about the subpoenas one day prior to the hearing and because it had flown six witnesses to Denver for the hearing.

The hearing proceeded as scheduled in Denver, Colorado, from June 30 to July 1, 2015. At the hearing, Casey, appearing as an officer of the court, explained that it was her understanding that Lujan had only mailed the subpoenas on June 22, 2015, and that the Solicitor's office became aware of the subpoenas one day before hearing. Tr. 18-19. Additionally, she stated Lujan failed to comply with the Department of Labor's regulatory procedures for requesting testimony from Department of Labor employees in matters in which the Secretary is not a direct party. Tr. 20-21. On these bases, as well as on the basis of Lujan failing to comply with the March 4 Prehearing Order requirements regarding witnesses, the court denied the request for a continuance.

For the reasons that follow, the court concludes that Lujan has failed to meet his burden for proving a section 105(c) discrimination complaint.

THE LAW

To establish a prima facie violation of section 105(c)(1) of the Act, the Complainant must prove, by a preponderance of the evidence, (1) that he engaged in protected activity; (2) that he suffered an adverse action; and (3) that the adverse action taken against him by the mine operator was motivated in any part by the protected activity. The operator may rebut a prima facie case by showing that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980) (*rev'd on other grounds*); *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

If the operator is unable to rebut the miner's *prima facie* case, it may nevertheless defend itself affirmatively by proving (1) that it was also motivated by the miner's unprotected activity and (2) that it would have taken the adverse action in any event for the unprotected activity alone. Unlike with the *prima facie* case, the operator bears the burden of proof in establishing an affirmative defense. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982).

THE TESTIMONY

Testimony of Complainant Mark Lujan

Lujan was hired by Signal Peak in January of 2010 as an underground coal miner, primarily tasked with operating equipment. Tr. 37-38, 89. In a pre-employment physical examination on January 12, which he stated he was required to pass before being hired, and of which the company retained records, he informed the company that he had gout and was working with a doctor to address the issue. Tr. 39-40; P-Ex. 1. He testified that a human resources ("HR") employee at the company reassured him that flare-ups of his condition would not be an issue as long as he had a doctor's note. Tr. 44, 90. On cross-examination, Lujan stated that Signal Peak

subsequently changed this policy around 2012 so that "doctor's notes were no longer sufficient" because "miners were getting fake doctor's notes." Tr. 103-04.

In February, 2010, approximately one month after being hired, Lujan experienced his first flare-up of gout that prevented him from reporting to work. Tr. 37. Starting around March 11, 2011, Lujan began having numerous gout-flare-ups and missed "many scheduled days" of work. Tr. 90. Dale Musgrave had become the new mine manager around this time. Tr. 90. Lujan filed for Family Medical Leave Act ("FMLA") excused absences around May 2011, but the request was denied by Signal Peak. Tr. 41; P-Ex. 2, P-Ex. 3. Dr. Wagenaar, a physician that Lujan consulted as a part of his FMLA request, noted in a report dated June 9, 2011, that although Lujan's gout had not been well controlled, hopefully it would be better managed in the future with a change of medication. The doctor also stated that Lujan would "need to miss work in the future." Tr. 42; P-Ex. 2.

On July 13, 2011, Lujan received corrective counseling for missing work. Tr. 44; P-Ex. 4. Lujan contended that the counseling was for many days that were covered under the company's leave policy, including two weeks' worth of vacation days and four "dump days" that employees could use to call-in absent from work. Tr. 44-45. The corrective counseling form states that Lujan "reported off work 17 times" and that only four of the days were covered by "personal days" and four others were covered by vacation days. Tr. 100; P-Ex. 4. This left nine unexplained and unexcused absences. Lujan also testified that whenever he was absent for a day, he was given "less desirable" work upon returning, or work that was not a part of his normal duties. Tr. 90.

On April 14, 2013, Lujan called his foreman, Ryan Stahl, to inform him that he was experiencing a "major [gout] flare-up in both feet" and was unable to walk. Tr. 91. Stahl told him he needed to come to work, as he did not have any days of excused absences remaining. Tr. 91. Lujan then told Stahl that he was unable to operate some equipment due to his flare-up and the medication he was taking to treat it. Tr. 91, 104. The bottle for his prescription medicine contained a warning not to operate machinery, and his doctor had told him that he could not be in a mine during a flare-up. Tr. 93. Importantly, Lujan maintained that he would have been unable to leave the mine promptly in the event of an emergency. Tr. 93. Lujan recalled, "[Stahl] then decided there was no light duty for me and it would be too much of a safety risk to other miners and myself [to come into work], so he told me not to come in." Tr. 91. On April 19, Lujan was suspended without pay for missing work. Tr. 47, 91; P-Ex. 5. Lujan testified that Stahl was likewise suspended for allowing Lujan to miss work. Tr. 91. P-Ex. 5.

After his suspension, Lujan stated he was told he would be terminated from his employment if he missed any more work. Tr. 92. He claimed that he went to Brett Miller, the HR director at Signal Peak, and asked him multiple times for a written directive stating what he should do during a flare-up now that he did not have any remaining excused absences. Tr. 92. Lujan said he never received a response to his request. Tr. 92. Sometime between April and May, 2013, Lujan stated that his foreman Ryan Stahl was told to terminate Lujan for missing too many work days. Tr. 92.

On June 18, 2013, Lujan was called into a meeting with mine manager Dale Musgrave, continuous mining ("CM") coordinator Barry Schreckengost, and HR Director Brett Miller, with shift foreman Bryan Koppes participating by telephone. Tr. 92. During the meeting, Lujan stated

he was "confronted with allegations of falsifying time sheets on overtime days," but he maintained at hearing that he "did no such thing" and that "this was a made-up reason with no proof of such allegations." Tr. 92-93. Lujan explained that his son and brother were both employed by Signal Peak at the time of his firing, and that he "would never jeopardize being able to work with them." Tr. 93. The meeting ended with an angry confrontation and Lujan's departure, causing Signal Peak to contend that Lujan quit and Lujan to contend that he was fired. Tr. 93-94.

Lujan believed he was fired for "refusing to work due to being a safety risk to [himself] and others" which he characterized as a "protected activity" under the Mine Act. Tr. 93. Upon his termination, Lujan first pursued unemployment insurance benefits through the state of Montana. Tr. 94. After multiple rounds of appeals, the state ultimately awarded him all benefits and unemployment insurance on December 12, 2013. Tr. 95. He next pursued a claim with the Equal Employment Opportunity Commission, where he claimed he was first "informed of the potential to pursue a case through MSHA." Tr. 96. He stated he was previously unaware of his Mine Act rights. Tr. 96.

Testimony of Kalena Oschner

Kalena Oschner is a "business and distributing supervisor" at the mine where she processes biweekly payroll for all employees. Tr. 114-15. The company tracks employee time and attendance primarily through the use of "time clocks" that can scan employees in and out when they slide their hands through the devices.[2] Tr. 115. The company also keeps "backup handwritten time cards written by the supervisors for each crew" in case the "time clocks" fail to work. Tr. 115. Oschner is the only person at the mine with the ability to upload information from the time clocks directly to her computer. Tr. 115. As a third, additional backup system for tracking time and attendance, when there are discrepancies between the time clocks and handwritten time cards, she will call the company's dispatcher, who keeps records of whether employees have "tagged in and tagged out" during work days.[3] Tr. 118.

Oschner testified that Lujan continuously experienced problems with the hand tracking system, and that a couple of other employees at the mine also experienced problems, albeit not as frequently as Lujan. Tr. 125-26. She stated that when she encountered an apparent hand tracking system error with employees, she was able to verify that they had worked at the mine by checking with the dispatcher. Tr. 133. She stated that she was informed about a problem on June 5, when the system failed to recognize Lujan's hand. On that occasion, the dispatcher was able to verify that Lujan worked the shift in question and therefore he was paid for that date. Tr. 118-21.

[2] Respondent's counsel referred to these devices as "biometric hand scanners." Tr. 117.

[3] In its post-hearing brief, Respondent explains, "Before going underground, miners must flip a tag on the board at dispatch to show that they entered the mine. When miners return to the surface, they flip the tag to indicate that they have exited the mine. . . . The [d]ispatcher records which tags are flipped indicating whether a miner has entered the mine." Resp't Br. at 1.

While examining payroll records for June, Oschner noticed that the time clock system had not registered multiple days during that payroll period that the backup time cards reported Lujan as having worked. Tr. 117. Consequently, she called the company's dispatcher. Tr. 118. This time, the dispatcher was unable to verify that Lujan was at the mine on the days for which the tracking systems showed discrepancies, and as a result Lujan was not paid for the following dates: June 7, 13, 14, and 15. Tr. 118, 122. She also admitted that she had noted a discrepancy in one additional date, June 6, but that after the company spoke with Lujan, management instructed her to pay him for that date.[4] Tr. 131.

Oschner maintained that she checked the June dates in the course of her normal payroll duties, and that no one prompted her to specifically check Lujan's records. Tr. 119. She believed that dispatch contacted Lujan's shift foreman, Bryan Koppes, about the June discrepancies only after she inquired about them. Koppes did not bring the June discrepancies to her attention. She also maintained that when she checked on the discrepancies, she was unaware of Lujan's medical condition. Tr. 124.

On cross-examination, Oschner stated that it is her job to inform management about time discrepancies and to investigate the problem. In the case of Lujan, she did not have an opportunity to talk to anyone in management before dispatch informed Koppes about the problem. Tr. 129. She also admitted that when she had a chance to talk to management she only asked about two days, June 6 and 7, not June 13, 14, and 15. Tr. 131.

Lujan also questioned Oschner about the practice of employees initialing their own names on their time cards and recording their hours worked if their foremen forgot to do so. Tr. 127. Oschner stated that although she had seen the practice, she did not know whether it was allowed by management. Tr. 127. Additionally, she testified that when she came across an instance of the practice, she checked to verify that the employee actually worked the shift that he or she initialed, and in instances other than Lujan's the times were successfully verified. Tr. 132.

Testimony of Bryan Koppes

Bryan Koppes is a "shift coordinator" at Signal Peak. He oversees all miners working on his shift. Tr. 136. While Koppes was initially Lujan's direct supervisor, by 2013 he mostly oversaw Lujan's work during over-time shifts and did not directly supervise Lujan. Tr. 150, 154. Koppes is also responsible for ensuring that the information on time cards for miners working on his shift is accurate and for signing the cards on the last day of the period that each card covers. Tr. 138. Koppes believes that he can "[p]retty accurate[ly]" identify who works on a shift for him on any given day. Tr. 137. At the hearing, approximately two years after the end of Lujan's employment, Koppes testified that he could not remember the dates of the shifts Koppes believed Lujan fraudulently claimed he worked. Tr. 160.

[4] Testimony from subsequent witnesses revealed that Lujan was paid for June 6 because he was able to satisfactorily explain to management officials the work that he performed on that date. Tr. 213-214; Tr. II 23-24. This means that although Lujan's hand scanner did not register his presence in the mine for three consecutive days between June 5th and 7th, he was paid for two of those days because of dispatcher verification on the 5th and Lujan's explanation about the 6th.

According to Koppes, he became aware of an issue with Lujan's overtime hours in June 2013 when he was contacted by a dispatcher about discrepancies on Lujan's time cards. Tr. 137. The time cards consist of a grid with crew member names in the first column, hours worked on individual days in a different column, and information about those hours worked (such as the shift in which they were completed and whether or not they were regular or overtime hours) in adjacent columns. R-Ex. 1. The court observes that the names of crew members are printed in the first column, but some names are handwritten into the column below the printed names. R-Ex. 1. All of the data in the remaining columns is handwritten. R-Ex. 1. At the bottom of each time card is the dated signature of the pertinent shift foreman. R-Ex. 1.

On the time card for the first full week of June, Lujan's name is handwritten at the bottom of the first column containing the names of crew members. The card lists Lujan as having worked 12 overtime hours on both June 6 and June 7. R-Ex. 1 at 2. While Koppes' signature is at the bottom of the card, Koppes claims that he did not write Lujan's name or hours worked on the card, as the handwriting is not his. Tr. 138-39. On the time card for the second full week of June, Lujan's name is again handwritten at the bottom of the first column, and the card lists Lujan as having worked overtime hours on June 13, 14, and 15. R-Ex. 1 at 4. Koppes' signature is once again at the bottom of the card. Koppes testified he was "pretty sure" that Lujan did not work on those days and "pretty sure" that Lujan's hours were not recorded on the time card when he signed it.[5] Tr. 141.

When Koppes signed the time cards for the first week of June, he stored them in what he referred to as his "cubby space . . . in the corner of [his] office," where they would have remained "all night" for approximately 12 hours. Tr. 142-43. Koppes agreed that miners could easily reach the cards and that there is no security for the cards. Tr. 142.

Koppes described the tag-in/tag-out procedure at the mine. Under the procedure, miners are required to tag-in to enter underground and to tag-out to exit so that management knows when a miner is underground. Tr. 143-46. He explained that the exhibit marked R-Ex. 3 documented employees' tag-in and tag-out records, and that on this document Lujan is not registered as having tagged in or out on June 7, 13, 14, and 15. Tr. 143-45. While he agreed that a miner's absence in the tag-in/tag-out document could reflect a miner's forgetting to tag-in, he explained that usually if a miner forgot to tag-in, dispatchers would alert Koppes, and management would "call them out from underground and make them flip their tag," before returning underground. Tr. 146, 164-65. Koppes also testified that there were at least four independent, non-redundant systems in place to track miners, so that if one of them failed it would not affect the others.[6] Tr. 170.

Koppes described the meeting on June 18, 2013, which marked the end of Lujan's employment. Tr. 147. Koppes was not physically present at the meeting. Rather, he participated

[5] However on cross-examination, Koppes admitted he sometimes let employees complete and verify their timecards before he signed them. Tr. 158-59, 163.

[6] In addition to the biometric hand scanners, time cards, and tag-in/tag-out system, Signal Peak also tracked miners' locations using the Strata wireless trackers that miners were required to carry with them in the mine. Tr. 149, 153, 183-84.

"[v]ia phone call" for 10 to 15 minutes. Tr. 147, 161. The purpose of the meeting, according to Koppes, was "[t]o find out why there was time documented when [Koppes] had no recall of [Lujan] . . . working" on those shifts. Tr. 147. He stated that "[t]here was no plan or discussion to terminate him." Tr. 147-48. Koppes testified that the company tried to verify whether Lujan worked the shifts in question by "asking him what jobs or tasks . . . he had performed during those shifts." Tr. 148. When Lujan failed to provide answers to the company's satisfaction, an individual in the room, Barry Shreckengost, left to check the tag-in/tag-out documents and the Strata system (which can track miners' location to within 200 feet) to verify if Lujan was present in the mine. Tr. 149, 153. After a period of silence, Koppes heard Lujan say, "I quit." Tr. 149. He then heard Dale Musgrave, the mine manager, respond, "I accept [your] resignation." Tr. 150. This was the last thing Koppes heard. Tr. 153.

Koppes testified that on June 18 he was unaware of any medical conditions or other attendance-related issues that Lujan had with the company.[7] Tr. 150. Koppes maintained that at the June 18 meeting neither Lujan's medical condition nor his prior absenteeism was discussed. Tr. 152. He stated that he did not expect the meeting to end with Lujan's resignation or termination. Tr. 150. Rather, he expected to learn that there had been some misunderstanding about the hours Lujan worked. Tr. 151. If there had been a mix-up of dates and times, he expressed his belief that management would have handled the situation through a "verbal warning" or "correction letter." Tr. 151.

On cross-examination, Koppes was asked about Lujan's allegation that Lujan was the subject of retaliatory job assignments. Koppes denied that "being a third man on a bolter or cleaning up rags in a return" were less desirable jobs for a miner of Lujan's position and further denied that he had ever "assigned these duties to somebody that [was] in trouble." Tr. 161. He claimed that everyone does these kinds of jobs, himself included. Tr. 161.

Testimony of Dale Musgrave

Dale Musgrave was the mine manager at all times relevant to this matter. As such, his responsibilities included directing and supervising the underground work force, hiring and firing employees, and recommending disciplinary action. Tr. 176-77. His testimony largely concerns the June 18 meeting which ended Lujan's employment at the company. Musgrave became involved when discrepancies on Lujan's time cards and his tag-in/tag-out records were brought to Musgrave's attention, and Musgrave sought to determine whether Lujan actually worked the times he claimed. To find out if Lujan's time cards were accurate, Musgrave contacted three management officials: continuous mining ("CM") coordinator Barry Schreckengost, shift foreman Bryan Koppes, and human resources ("HR") director Brett Miller. Tr. 179. After consultations with the officials failed to produce a satisfactory explanation for the discrepancies, Musgrave directed Schreckengost to call Lujan out from underground and into a meeting so that management officials could ascertain more information. Tr. 179. The meeting took place in Musgrave's office and consisted of Lujan, Musgrave, Schreckengost, Miller, and Koppes, the latter via telephone. Tr. 179-80.

[7] Koppes agreed that if Lujan had given him a doctor's note when he was absent from work due to a gout flare-up, Koppes would have known about the condition, but Lujan never gave him a doctor's note. Tr. 155-56.

Musgrave first explained the discrepancies to Lujan and asked "if he could explain . . . what he did on those days that he had signed[8] and who he worked for." Tr. 180. Musgrave stated that Lujan was unable to answer the questions. Tr. 180. According to Musgrave, management then looked at dispatch tag-in/tag-out records and tracking system information and asked Koppes if Lujan worked on the disputed dates. Tr. 182. When Koppes did not recall Lujan working on the June dates, Musgrave asked Schreckengost to verify Lujan's whereabouts through the Strata wireless tracking system. Tr. 183-84. Musgrave stated that Schreckengost left the room to check the system and, within a minute of Schreckengost leaving, Lujan got aggravated and voluntarily quit. According to Musgrave, Lujan's exact words were, "You're not going to believe me. You don't believe me . . . I quit." Tr. 186. In response, Musgrave stated that he accepted Lujan's resignation. Tr. 186.

Musgrave speculated on how management would have dealt with Lujan's situation had he not resigned. He stated, "If [Lujan] had continued to not show any proof or explanation, . . . he would have been terminated for falsifying his time cards." Tr. 189-90. When asked how this process would have worked, Musgrave replied that he "would have asked Lujan to leave the room" so that management could discuss the appropriate disciplinary action. Tr. 190. Then he would have given him one more chance to explain himself. If Lujan did not have a satisfactory explanation, Musgrave would have announced to Lujan the disciplinary action management would take as a result of Lujan "falsifying time cards" and "[s]tealing time." Tr. 190.

Musgrave stated he never had an employee falsify time cards before, but he had confronted two employees about potentially falsifying time cards in the past. Tr. 191. In the first situation, the company was able to verify that the employee was seen on the property on the day in question, and therefore Musgrave only gave him an oral warning. Tr. 191. In the second situation, where an employee's time card listed two more hours than the employee actually worked, Musgrave claimed that the employee explained that "he was in a hurry" to leave, that "he was [not] trying to steal time," and that "he would make it up to [the company], which he actually did." Tr. 192. As a result, Musgrave testified he gave the employee a second chance. Tr. 192. He differentiated that case from Lujan's by stating that Lujan "had no explanation for the time he clocked in on those shifts." Tr. 192. Further, Musgrave appeared unwilling to entertain the possibility that Lujan's time cards reflected a mistake, stating, "You don't make a mistake three days in a row. That's not a mistake." Tr. 193.

Musgrave denied that the intent of the June 18 meeting was to fire Lujan. He also denied any discussion of Lujan's medical condition at the meeting. Tr. 193. He was aware of attendance issues with Lujan, issues he characterized as "abusive." Tr. 193. However, he claimed that Lujan could have been terminated at any time for those attendance issues, and therefore he would not have needed to use his alleged falsification of time cards as an excuse to terminate him. Tr. 194.

On cross examination, Musgrave agreed that gout "could pose a safety hazard to certain individuals" and that "not being able to push a brake pedal or escape in the mine in [an] emergency" would be a safety hazard. However he also stated that he had never seen Lujan at work with a medical condition that affected him. Tr. 197.

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[8] According to Musgrave, Lujan verified that it was his handwriting on the time cards. Tr. 180.

Testimony of Brett Miller

Brett Miller is the HR director at Signal Peak. Tr. 206. He is one of the individuals who was in the room with Lujan during the June 18 meeting. Tr. 208. Miller characterized the meeting as "a typical disciplinary meeting" and explained that his role at the meeting was "to make sure that the company was maintaining policies and treating the employee fairly." Tr. 208. He also was there "to help question the employee." Tr. 208. He stated he first learned about the issue with Lujan's timecards from Dale Musgrave on the morning of June 18. Tr. 209. According to Miller, the company investigated whether Lujan was in the mine on the days in question using multiple means of verification prior to the meeting, however no one checked the tracking system until the meeting itself. Tr. II 12.

Miller took notes during the meeting. He also filled out and signed an "employee exit checklist." Tr. 210-11. The items were admitted into evidence as R-Ex. 8. The checklist states that Lujan "voluntarily resigned," that he was "suspected of claiming time that he did not work," and that "he did not have any justification and resigned" when confronted. R-Ex. 8 at 1; Tr. 211. Miller stated that it is common practice to generate a record of such meetings. Tr. 212. He testified that the meeting consisted of Lujan, Miller, Musgrave, Schreckengost, and Koppes, and that Koppes participated via phone and stayed on the line during the entire time the meeting lasted. Tr. 212-13. Miller knew this because he and Musgrave were the two individuals present for the entire meeting. Tr. 213.

According to Miller's notes and testimony, management was examining five dates during the meeting: June 6, 7, 13, 14, and 15. Tr. 213; R-Ex. 8 at 2. Lujan was asked who he worked for and what he did on those days. Tr. 213. Miller stated that although Lujan was able to remember what he did at the mine on June 6, he could not remember what he did during the other dates. Tr. 214. Miller remembered Musgrave telling Lujan, "You can have the 6th. Let's talk about the [other four dates]." Tr. 214. Miller testified he asked Kalena Oschner to pay Lujan for June 6. Tr. 216. He explained that Lujan "was paid for that day because . . . he correctly explained what was going on that day in the mine." Tr. II 19. Miller stated that if Lujan had provided similar information for the other dates in question, he would have been paid for those days as well and sent back to work. Tr. II 19-20.

As for June 7, 13, 14, and 15, Miller testified that Lujan named tasks that Koppes maintained were performed at the mine a week prior, rather than on the disputed dates. Tr. 214. According to Miller, Koppes did not have any recollection of Lujan working for him on those days. Tr. 217. Miller stated that, at this point, Schreckengost asked Lujan whether he used his own "marker number" or somebody else's, so that management could determine whether he showed up on the tracking system data for those dates. Tr. 214. Miller speculated that "the tracking system could have cleared this up," however Miller maintained data from the system did not reveal Lujan's presence at the mine on the dates at issue. Tr. II 13. According to Miller's notes and testimony, Lujan finally stated, "I will just quit," and Musgrave responded "I accept your resignation." Tr. 217; R-Ex. 8 at 5. Miller described the meeting as following a "pretty standard form," except that management usually asks the employee to leave the room and then

brings him or her back in after a disciplinary decision is reached, but in this instance, Lujan "quit and stormed out of the room before [it] got to that point."[9] Tr. II 5.

Miller denied that any issues with Lujan's gout, attendance, or safety concerns were discussed during the June 18 meeting, although he had been aware of Lujan's claims that gout flare-ups caused his work absences. Tr. 218-19; Tr. II 8. Rather, the meeting concerned Lujan's potential violation of the company's policies on falsification of time records and/or theft of hours. Tr. 223. Miller had no doubt that Lujan was aware of these policies. All new employees undergo a "thorough" three-hour orientation on Signal Peak's attendance, punctuality, and dependability policy handbook and are then given a form to sign that they acknowledge receiving the handbook. Tr. 219-20, Tr. II. 15. Lujan signed a form to that effect in 2008, and again in 2011 for an updated handbook.[10] Tr. 220; R-Ex. 7. The time reporting policy section of the handbook states, "Reporting hours for another employee or falsifying a time keeping record is not permitted and is cause for disciplinary action up to and including discharge." R-Ex. 5. The section on Signal Peak's discipline policy contains a similar warning. R-Ex. 6. Miller stated that had Lujan not first quit and had he come up with a "reasonable explanation" for the time discrepancies, he likely would not have been discharged, as the company "tend[s] to err on the side of the miner." Tr. 224.

Although Miller stated that the June 18 meeting was unrelated to Lujan's pre-June 2013 attendance issues, at the hearing, he was asked about and testified extensively regarding those issues. Tr. 224-37. Miller was presented with a number of records of corrective counseling, some of which predated his time as HR director, but he was able to provide testimony on them due to his familiarity with such documents in the course of his job. Tr. 225-26. The records show that Lujan received a "Verbal Warning" on January 30, 2010, for calling off work when he did not have any personal days to use. Tr. 225; R-Ex. 9 at 1. As a step up from a verbal warning, he then received a "Written Notice" on February 22, 2010, for a similar reason. Tr. 225-26. On May 18, 2011, he received a "Written Notice" detailing his 15 absences since the beginning of the year, only five of which the company considered to be excused. Tr. 226; R-Ex. 9 at 3. On July 13, 2011, he received the "Written Notice" detailing 17 absences since the beginning of the year, only eight of which were excused by the company. Tr. 228; R-Ex. 9 at 9. On February 27, 2012, he received another "Written Notice" for attendance issues informing him that he had already exhausted his personal sick leave for the year, and that he had missed a shift on February 26 after he had been informed by management that his request for leave on that date was not approved. Tr. 228-29; R-Ex. 9 at 12.

Lujan was suspended on April 19, 2013, for not following proper call off procedure and for habitually abusing Signal Peak's attendance policy. R-Ex. 9 at 14. The suspension followed

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[9] An opinion from the Montana Board of Industry and Appeals ("MBIA") stated, "All parties agree that discrepancies for three shifts [were] resolved to all parties satisfaction" at the meeting. P-Ex. 32 at 1. However, Miller claimed the statement was not correct. Tr. II 6. Instead, he maintained that Signal Peak never conceded that three of the shifts had been resolved. Tr. II 6. Indeed, the transcript of a subsequent MBIA hearing is devoid of any discussion of this topic from either party, so it is unclear from where the agency derived its conclusion. P-Ex. 26.

[10] Miller was not aware of any changes to the attendance, disciplinary, or time reporting policy between the 2008 edition and 2011 update. Tr. 237.

the gout-related work absence that Lujan primarily cites to as his protected activity in this matter. Related to this suspension, Miller felt that there were "a lot of inconsistencies with Mr. Lujan's supervisor, Ryan Stahl" and that "Stahl seemed to be covering for Mr. Lujan a lot of times on these shifts that he was missing." Tr. 233. As a result, both Lujan and Stahl received simultaneous suspensions. Tr. 233. Specifically, the company had directed Stahl to discipline Lujan for an unexcused absence, and Stahl had refused, which led to Stahl's suspension. Tr. II 27-28; R-Ex. 11.

While Stahl excused some of Lujan's absences, Miller stated he did not believe that an employee could always rely on a foreman's approval if such approval conflicted with the company's attendance policy guidelines. Tr. II 14. Miller stated that both the employee and supervisor are expected to have a general knowledge of the number of days the employee is allowed to take off and that company policy supersedes a supervisor's permission. Both the employee and the supervisor can be disciplined for violation of the policy.[11] Tr. II 14. Stahl was eventually terminated by Signal Peak on October 4, 2013, for inadequate management of employees' time, "specifically regarding Mark Lujan's absences" and Stahl's "consistently excused absences for Mr. Lujan when he did not have time off available . . . in violation of Signal Peak's attendance policy." Tr. II 23-24; R-Ex. 11 at 4. Miller also maintained that Stahl's termination was related to issues regarding inadequate safety training of the miners working under him. Tr. II 24-25; R-Ex. 11.

According to Miller, employees at Signal Peak are given four personal days per year, which they can use for any reason, including sick days. Tr. 230. They typically cannot use their vacation days as sick days since the company's policy book requires "that an employee give[] 30 days notice for a vacation day." Tr. 230. However, the company's miners "typically work half the year" on a "four on/three off schedule." Tr. 229. With 80 hours of vacation available to miners such as Lujan, Miller felt that Signal Peak's miners are "scheduled a lot of time off." Tr. 229. Thus, according to Miller, it is very "unlikely for somebody to have [as] many attendance issues [as Lujan]." Tr. 229.

Miller testified that during the time Lujan was employed at Signal Peak, from 2010 to June 18 of 2013, he missed 52 days of work. Tr. 231. Only 26 of those days were excused. Tr. 231. Miller stated there were seven doctor's notes in Lujan's file for those days, five of which pertained to gout. Tr. 231. If Lujan had given him additional doctor's notes, the unexcused absences would have become excused absences. Tr. 236. Although Lujan had testified to seeking guidance from Miller on how to manage his attendance issues and gout-flare ups, Miller maintained that he did not recall any such inquiry. Tr. 236; Tr. II 8-9.

Miller believed that Lujan could have been terminated for attendance issues alone, and that the company did not need to invent a pretext to fire him. Tr. 234. Signal Peak has a three-step discipline policy for attendance violations, with escalating consequences such that the "fourth occurrence, in a lot of cases, could be termination." Tr. 232. Miller stated, "There have been quite a few employees terminated for attendance issues" and far from being "singled out," Lujan "was treated very favorably." Tr. 235.

[11] In response to a question about whether Lujan would have been relying on Stahl's approval if he entered incorrect information into his timecards, Miller stated that he had no knowledge of any such approval. Tr. II 25.

Regarding Lujan's gout, Miller believed that Signal Peak had reasonably accommodated Lujan's medical condition by sending him home when his condition was bad. Tr. II 9. He was not aware that Lujan refused to work on April 14 because of his gout, as he did not remember Stahl telling him that. Tr. II 10. In fact, he was unaware of *any* instances where Lujan refused to work, but he was aware of instances where Lujan was sent home because he was feeling ill, and, in accordance with the company's disciplinary process, he was not written up for this. Tr. II 18-19. Nevertheless, Miller was certain that none of these attendance issues were involved during the June 18 meeting that immediately preceded the end of Lujan's employment. Tr. II 29.

Testimony of Barry Schreckengost

Schreckengost is the continuous mining section ("CM") coordinator for Signal Peak. As such, Schreckengost is "in charge of the continuous mining sections and all of the development work that takes place for the long wall mine." Tr. II 30. Schreckengost stated he considered Lujan to be a "fair" worker. Tr. II 31. He testified that Signal Peak would address any safety complaints Lujan brought up, and the company did not force Lujan to work through an illness. Rather, it allowed him to go home when needed. Tr. II 31. In regard to whether Lujan was handed less desirable work after taking time off work for medical reasons, Schreckengost also denied that "picking up rags in the return is a less desirable job duty for a miner of [Lujan's] status." Tr. II 44. Schreckengost stated he does the same duty. Tr. II 44.

While Schreckengost acknowledged that an "inability to press the brake pedals on mobile equipment or escape from a mining emergency" could be a hazard to a miner, he did not know whether gout itself would present such a safety hazard since he had no personal experience with the condition. Tr. II 44. Additionally, he did not consider Lujan's request to stay home on April 14 to be a protected work refusal because he "did not provide evidence of a medical condition to [Signal Peak] at that time," such as a "doctor's note . . . stating the reason why [Lujan] had a medical condition on that day." Tr. II 51. While he was aware that Lujan had gout, he had no verification that his absence on April 14 was gout related. Tr. II 53.

Schreckengost testified he attended the June 18 meeting. Tr. II 32. The subject of the meeting was the problem presented by Lujan's time cards. Tr. II 32. Schreckengost stated his "intent was to resolve the issue and have Mr. Lujan go back to work." Tr. II 32. However, the issue was not resolved because, according to Schreckengost, Lujan could not tell the people in that room "anything" about the four days and 40 hours of work he said he performed.[12] Tr. II 33.

When Lujan's claims he worked on the disputed days could not be verified, Schreckengost contacted Ryan Beesley regarding the Mine's tracking system's record of employee attendance and location. Tr. II 33-34. Schreckengost stated that the tracking system is in place in compliance with a requirement "to keep track of all [the company's] employees in case of [an] emergency underground so [that Signal Peak] can evacuate the mine and know

[12] On cross-examination, he stated that he personally was not satisfied that Lujan had even worked on June 6 although he was paid for the date. Tr. II 39-40.

where [its employees] are."[13] Tr. II 34. Beesley is responsible for the operation of all underground electrical equipment, which includes the tracking system. Tr. II 34. Schreckengost stated that Beesley told him Lujan was not at the mine on the days in question. Tr. II 52.

Schreckengost testified that Lujan left the meeting before Schreckengost returned from his visit to Beesley. Tr. II 35. Schreckengost passed Lujan on the stairway leading back to the meeting room and met Dave Musgrave at the top of the steps. Tr. II 35. Musgrave told Schreckengost that Lujan had resigned. Tr. II 35.

After Schreckengost testified about the events of June 18, he was asked to describe how the company makes its miners aware of their Mine Act rights. Schreckengost described the 8-10 hour refresher training that Signal Peak holds annually, per MSHA requirements. Tr. II 38. The training session covers, among other topics, miners' rights, which includes protection from discrimination under the Act. Tr. II 38-39. Signal Peak provides the training through a "Power Point" presentation on a screen to a class room of 40-50 people.[14] Tr. II 42-43. He agreed it is possible for an individual to miss the presentation by being out of the room, but he was skeptical that Lujan could have missed the presentation every time it was given. Tr. II 43-44. Signal Peak also introduced into evidence a certificate of training, signed by Lujan on January 17, 2013, acknowledging that he had received the referenced training on that date. Tr. II 48-49; R-Ex. 12 at 4.

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[13] The requirement comes from the MINER Act of 2006, which specifies, in pertinent part:

> Consistent with commercially available technology and with the physical constraints, if any, of the mine, the [mandatory accident response] plan [developed and adopted by each underground coal mine] shall provide for above ground personnel to determine the current, or immediately pre-accident, location of all underground personnel. Any system so utilized shall be functional, reliable, and calculated to remain serviceable in a post-accident setting."
>
> * * *
>
> "[A] plan shall . . . provide for post accident communication between underground and surface personnel via a wireless two-way medium, and provide for an electronic tracking system permitting surface personnel to determine the location of any persons trapped underground."

30 U.S.C. § 876 (b)(2)(E)(ii)-(F)(ii)

[14] One of the Power Point slides explains in pertinent part, "Miners cannot be fired, harassed, refused employment or transferred to a lower paying job because they exercise their rights under the Act, such as . . . refusing to work (or [being] withdrawn) because proper safety and health training was not received." R-Ex. 12 at 3.

Testimony of Ryan Beesley

Ryan Beesley is the electrical manager at Signal Peak, a position he held for a little over three years at the time of the hearing. Tr. II 54. Beesley testified he has been employed at Signal Peak for six years, five of which he has spent working with electrical systems in the mine. Tr. II 54-55. Although he was initially in charge of installing and maintaining the personnel tacking system at the mine, he now has a crew of electricians that handle the maintenance duties for him. Tr. II 55-56.

Beesley explained that "the [personnel tracking] system consists of a wireless node network," with "battery nodes at varying distances" throughout the mine that "operate on a wireless system." Tr. II 56. This wireless "system . . . pick[s] up a tracker the miner[s] . . . carry and . . . measures the distance they are from the node," thereby tracking the underground presence of miners throughout the mine. Tr. II 56. The system generates records of each miner's location, which the company retains for two weeks. Tr. II 56. MSHA only requires the company to retain records for two weeks, which Beesley claims is partly because "so much information is processed and kept and stored on the server, [that retaining the records for longer than two weeks will] actually cause an overage on the system." Tr. II 57. MSHA has also "stipulated that any operator or mine that has a tracking system is not allowed access to modify, clear or change the tracking system in any way, other than nodes in the mine" so that "it is impossible for [Beesley] to get in" the system to change the data. Tr. II 64.

Beesley described how the system works. Miners entering the mine pick up their trackers, which have been charging since they were last used. The trackers display a message reading "Checking in," followed by a message asking whether it is clear to enter the mine. Tr. II 58-59. It is the miners' responsibility to verify that the trackers are operational and fully charged, and to check themselves into the system. Tr. II. 60. Internal signals in the devices ensure that miners appear on the tracking system immediately after they pull their trackers out of the charger. Tr. II 60. Even if a tracker were to cease functioning immediately after a miner checked in, there would still be a record in the system that a miner had removed the tracker and checked in. Tr. II 61. The device does not track miners in areas where they do not regularly work and travel. Tr. II 61. But, the system will still register a miner as having picked up his or her tracker and will record his or her last tracked location, with a time recorded for that location. Tr. II. 61, 63.

Beesley testified that during the June 18 meeting regarding Lujan's time cards, Schreckengost asked if Beesley could show him records of everyone in the continuous mining section of the mine on June 13, 14, and 15. Tr. II 67. He responded that the system could not identify and track a group of miners, but that it could track the locations of specific individuals. Tr. II 68. Schreckengost narrowed his request to Lujan, and Beesley responded that "he was not shown underground anywhere" on those three dates. Tr. II 69.

Beesley then checked with dispatch records to see if Lujan had been given an alternate tracker for those days, or if his tracker had been dead or nonoperational. [15] Tr. II 69. He could not find anything to support those possibilities. Tr. II 69. He also showed Schreckengost screenshots

[15] Beesley explained that if a tracker was sufficiently low in battery power, the tracking system would send an alert out to the dispatcher to make him or her aware of the problem. Tr. II 63-64.

of several other miners' progress in the section on those dates in order to demonstrate that the system was operational and tracking at the time. Tr. II 70. Beesley thought that it would be impossible for a miner working underground to not be on the tracking system or tag-in/tag-out sheets for three consecutive days. Tr. II 70. He had never known it to happen. Tr. II 70. He testified that he had been asked to locate miners on the tracking system before, and that as far as he could recall, he had always been able to do so. Tr. II 72. Beesley thought the data conclusively showed Lujan was not underground on the days in question. Tr. II 71.

Beesley acknowledged the tracking data from June 13, 14, and 15 no longer existed. The data had been overwritten, which was the usual practice at the mine. Beesley explained that if he had known the data would be needed, he could have retained copies, but after Lujan's employment ended, retention of the data seemed to Beesley a "nonissue." Tr. II 71.

The remainder of Beesley's testimony on both direct and cross examination focused on an interview he had given to MSHA employees investigating Lujan's discrimination complaint. An MSHA statement summarizing the interview reads, "Beesley stated he was requested by Barry Schreckengost . . . to check tracking for Mark Lujan, and Beesley determined Lujan had been tracking." P-Ex. 11 at 2. The report continued, "Beesley stated Lujan did not show up on the battery default list." P-Ex. 11 at 2. Finally, the report noted, "Beesley stated he checked the tracking of Lujan on June 7, 13, 14, 15, 2013, and determined Lujan was in the continuous mining section. . . . SPE Attorney, Peterson, clarified Lujan was not in the section." P-Ex. 11 at 2. Beesley testified, "[T]he [MSHA investigators were] misunderstanding what I was saying." Tr. II 73. He stated that he "never told [the investigators] that [Lujan] was in the mine on those dates." Tr. II 83. He also clarified that his statement that Lujan did not show up on the default list meant that his "battery had not shown up as dying at any point." Tr. II 78. Beesley attributed the misunderstanding to the investigators not understanding how the tracking system worked. Tr. II 80. According to him, the MSHA representatives "were confused by the layout and the structure of the system." Tr. II 80. He also added that for one of the MSHA representatives in the interview, Mark Albright, "it appeared that this was his first time doing this." Tr. II 80. The other MSHA representative, Lois Duwenhoegger, was an MSHA Special Investigator, and presumably had more experience in these matters. Tr. II 77-78. When asked whether he was threatened by Dale Musgrave or anyone else in management to change the testimony that he provided to MSHA investigators, Beesley replied that he has never been threatened by any individual in management. Tr. II 79.

Rebuttal Testimony of Mark Lujan

Lujan reiterated his contention that he would have been a safety risk to himself and others if he had entered the mine on April 14. Tr. II 86. He would not have been able to push the brake pedal on the machinery he was operating, and would not have been able to leave the mine in the event of an emergency. Tr. II 86. And once again, he testified he suffered adverse actions for refusing to work by being given less desirable duties after missing work, and then by being suspended and fired. Tr. II 86.

Lujan was asked on cross-examination whether he ever supplied information from his doctor to Signal Peak verifying his medical condition on April 14, the date on which he claims he made a protected work refusal. Tr. II 88. Lujan replied that he supplied that information to his

foreman, Ryan Stahl, but that he did not have a copy of that letter anywhere that he could present to the court. Tr. II 88. Lujan did not have any document from his doctor that specifically addressed April 14. Tr. II 90.

LEGAL ANALYSIS

I. Timeliness of Lujan's Complaint

Signal Peak argues that "Lujan's Discrimination complaint should be dismissed because it was untimely filed and [he] failed to prove that justifiable circumstances caused that late filing." Resp't Br. at 5. Lujan did not address this argument in his post-hearing brief. However, his complaint and testimony indicate that he would ask the court to excuse his untimely filing on the basis that he was unaware of his 105(c) rights. *See* P-Ex. 7 at 5; Tr. 96.

Under section 105(c)(2) of the Mine Act, Lujan was required to file his complaint with the Secretary "within 60 days" of being discharged or otherwise discriminated against in violation of the Act. 30 U.S.C. § 815(c)(2). Lujan filed his complaint on September 23, 2014, which was 402 days late. However, according to Commission case law, this 60-day period is not jurisdictional. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem*, 750 F.2d 1093 (D.C. Cir. 1984). A judge is required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation," in order to determine whether a miner's late filing should be excused. *Id.*

The Commission has held that "a miner's genuine ignorance of applicable time limits" as well as "mistake, inadvertence, and excusable neglect" "may excuse a late filed discrimination complaint." *Schulte V. Lizza Indus., Inc*., 6 FMSHRC 8, 13 (Jan. 1984); *Perry v. Phelps Dodge Morenci, Inc*. 18 FMSHRC 1918, 1921-22 (Nov. 1996); *Farmer v. Island Creek Coal Co*., 13 FMSHRC 1226, 1230-31 (Aug. 1991). A primary consideration in cases involving late filing is whether there was evidence of material prejudice to the operator. *See Sec'y of Labor on behalf of Hale v. 4-A Coal Co*., 8 FMSHRC 905, 908-09 (June 1986); *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1387 (Dec. 1999); *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enters*., 16 FMSHRC 2208, 2213-14 (Nov. 1994). Other factors that the Commission has considered in excusing untimely filing include the complainant's proceeding without the benefit of counsel and the complainant's pursuit of related complaints, which can indicate that he was not "sleeping on his rights." *Morgan*, 21 FMSHRC at 1387.

Lujan claims that he was unaware of his 105(c) rights before he contacted the EEOC to file a separate discrimination complaint with that agency. [16] Tr. 96. The court does not find the

[16] Lujan did not testify as to when this happened, so the court cannot determine whether he filed his complaint with MSHA within 60 days of allegedly becoming aware of his rights. The record is confusing on this point as well. In his December 30, 2014, Letter to the Commission at 3, Lujan stated that the EEOC claim was filed on February 13, 2013, but that he was made aware of his 105(c) rights on September 23, 2014, the date that he filed his complaint with MSHA. Given the order of events in the timeline, the court concludes that Lujan meant February 13, 2014. In its Answer to Lujan's Complaint, the company states that Lujan filed a complaint with the EEOC on or about April 10, 2014.

claim credible. A mine operator has a duty to provide training on Mine Act rights, so that a miner can be assumed to be reasonably competent to exercise those rights once trained. The record establishes that Signal Peak provided Lujan with annual refresher training on his rights as a miner, which included an explanation of discrimination and protected activity under the Act. Tr. II 38-39; R-Ex. 12. Lujan provided no evidence or testimony that he was absent for these explanations, and indeed Lujan signed a statement acknowledging that he received this training. R-Ex. 12 at 4. In such circumstances, the court is unwilling to accept post hoc claims of ignorance. Nor is there any evidence that Lujan's untimely filing was the result of a mistake or inadvertence. Rather, the court can reasonably infer from Lujan's 464-day delay that he chose not to exercise the right to which he knew he was entitled.

All of that said, Signal Peak has not demonstrated material prejudice from Signal Peak's late filing. Indeed, the company has not addressed the issue. Additionally, Lujan's pursuit of "related claims" through the EEOC and state unemployment board could suggest that he was not "sleeping on his rights,"[17] while his failure to obtain counsel could weigh in his favor on this specific issue. In any event, given that the Commission has found material prejudice to be a primary factor in cases involving untimely filing, the court must conclude that Lujan's late filing is excusable.[18]

II. No Protected Activity

Lujan claims that he "engaged in a protected activity by refusing work due to safety concerns for himself and other miners" during flare-ups of gout, most notably on the morning of April 14, 2013, when he refused to come into work. Pet. Br. at 6-7. The company responds that "Lujan did not establish that he engaged in protected activity by failing to report to scheduled shifts due to a medical condition," because the "Commission has held that an inability to work due to a medical condition does not constitute protected activity for purposes of [section] 105(c)." Resp't Br. at 7.

Section 105(c) of the Mine Act protects miners from discrimination motivated by their protected activity, which includes exercising any statutory right afforded by the Act. 30 U.S.C. § 815(c)(2). While the Act does not expressly state that miners have the right to refuse work under conditions involving health or safety dangers, "the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger." *Dykhoff Jr. v U.S. Borax, Inc.*, 22 FMSHRC 1194, 1198 (Oct. 2000) (citing *Price v. Monterey Coal Co.,* 12 FMSHRC 1505, 1514 (Aug. 1990); *Sec'y of Labor on behalf of Cooley v. Ottawa Silica Co.,* 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.,* 780 F.2d 1022 (6th Cir. 1985)). Lujan is effectively asserting that

[17] According to the December 30, 2014, Letter to the Commission at 3, Lujan filed his claim for Unemployment Insurance on June 20, 2013, two days after the end of his employment, and his appeal process ended on December 12, 2013. As previously mentioned, there is some confusion as to when Lujan filed his EEOC claim, but this event appears to have occurred between February and April of 2014.

[18] The court observes, in its view the Commission's leniency in excusing late filing all but writes timeliness out of the Act and potentially undermines the effectiveness of the requirement that operators train miners in their rights.

he engaged in a protected work refusal under section 105(c) of the Mine Act by staying home on April 14, 2013, because his gout flare ups would have made working conditions unsafe.

The court noted in its June 12, 2015, Order Denying the Respondent's Motion for Summary Decision that Commission case law "strongly suggest[s] that medical-related absences cannot form the basis of a protected activity claim," but that "the issue remains unsettled as a matter of law." This is in part because the Commission has held in *Bjes v Consolidation Coal Co.*, 6 FMSHRC 1411, 1417-18 (Jun. 1984) that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations." While Commission members have signaled, in subsequent concurrences and plurality opinions, that extending that holding to protect medically related absences might be a bridge too far, none of the language to that effect is binding precedent. See *Dykhoff, Jr. v U.S. Borax, Inc.*, 22 FMSHRC 1194, 1198 (Oct. 2000) (Riley and Verheggen plurality opinion); *Price v. Monterey Coal*, 12 FMSHRC 1505, 1518-20 (Aug. 1990) (Doyle concurrence).

The court, however, is convinced by the considerable persuasive authority in the *Dykhoff* and *Price* opinions and by the decisions of those Commission Administrative Law Judges (listed below) who have examined the issue in depth and found that the type of activity cited to by Lujan is not protected under the Act. In particular, the court finds persuasive the reasoning of a plurality of Commissioners in *Dykhoff* in refusing to treat a miner's medically related absence as a protected work refusal on the grounds that doing so would "stretch[] the work refusal doctrine far beyond its contours as heretofore recognized by the Commission" and risk turning every work absence due to an illness into a protected work refusal. *Dykhoff*, 22 FMSHRC at 1200, 1200 n.9. The plurality noted that this expansion "would make enforcement of otherwise valid attendance policies difficult if not impossible," conflict with Commission precedent "recogniz[ing] that operators may discipline employees who violate non-discriminatory time and attendance policies," and "trivialize the concept of protected activity." *Id*.

In *Sheperd v. Black Hills Bentonite*, 25 FMSHRC 129, 134 (Mar. 2003) (ALJ), a case in which a miner told his employer he could not perform heavy duty work due to a back sprain, Judge Manning noted that "[s]ection 105(c) does not grant a miner the right to refuse his assigned duties because he is no longer capable of performing them as a result of an injury." Under a similar set of facts in *Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1126 (July 1995) (ALJ), Judge Melick explained that the Mine Act was not designed to "provide continuing compensation or disability benefits for individuals who, because of certain physical impairments or injuries, would find working most jobs in the mining industry impossible." Rather, "worker's compensation, social security disability and other similar laws [are available] to provide loss of income protection under these circumstances." *Id.*

In accordance with this reasoning, the court finds Lujan did not establish he engaged in protected activity. It is important to note that, in contrast to the facts of *Bjes*, 6 FMSHRC at 1417, Lujan was not refusing an at work order to perform a specific task or set of tasks. He was calling into work sick because of a flare-up of gout, after an extensive history of absences that had resulted in corrective counseling. Tr. 91, 44. The *Dykhoff* plurality's concern that treating medically-related absences as protected work refusals "would make enforcement of otherwise valid attendance policies difficult if not impossible" is especially on-point here. Signal Peak's

reasonable policy was to pay miners for a number of unexcused and unplanned work absences, but to impose discipline after the number was exceeded. Tr. 44-45, 229-30. To deem an unexcused sick call-in to be protected activity would put Signal Peak in the impossible position of being unable to impose otherwise legitimate discipline without running afoul of section 105(c), a situation outside the boundaries of the Act.

Moreover, there is no evidence that Signal Peak forced Lujan to work when he demonstrated to the company that he was ill. A work refusal in the face of such behavior could potentially be protected under the Act. However the evidence conclusively establishes the opposite. When Lujan came to work and complained of feeling ill, he was allowed to go home. Tr. 106, Tr. II 9, Tr. II 31. Miller also testified credibly that Lujan's absences could have been excused with a doctor's note justifying the specific date in question. Tr. 236. However, Lujan failed to provide any evidence that he had offered the company a note from his doctor confirming that his absence on April 14, 2013, was in fact gout-related. Tr. II 88-90. For these reasons, the court fully agrees with Signal Peak that under the circumstances of this case, "Lujan's inability to work because of his medical condition does not constitute protected activity." Resp't Br. at 8.

III. No Adverse Actions Motivated by Protected Activity

Lujan claims that he suffered adverse actions in the form of suspension and then termination of his employment on June 18, 2014, as a result of the protected activity alleged above.[19] Even if the court were to assume that Lujan engaged in protected activity, it would still find that Lujan failed to establish a prima facie case of discrimination, because the record supports the conclusion that the actions of which he complains either did not qualify as adverse actions or were not motivated by his supposed protected activity.

Generally, an adverse action is an act or omission by the operator that subjects the affected miner to a detriment in his employment relationship or to discipline. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). Adverse actions include discharge, suspension, demotion, coercive interrogation and harassment over the exercise of protected rights. *Moses v. Whitley Dev. Corp.,* 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd,* 770 F.2d 168 (6th Cir. 1985). In order to prove that an adverse action was motivated by

[19] Lujan also claims that he was harassed and assigned to "less desirable jobs" outside of his normal responsibilities, including picking up rags in the return, as punishment for missing work. Tr. 90. However he failed to provide dates for these events and failed to specify whether those alternative duties were assigned to him specifically after a gout-related work refusal. Tr. 90.

Lujan also failed to provide any evidence of disparate treatment through which discriminatory motivation could be inferred. Koppes and Schreckengost credibly testified that every miner, including themselves, performs the duties that Lujan points to as less desirable jobs. Tr. 161, Tr. II 44. Lujan did not offer any testimony to rebut those claims, nor did he establish that those duties were outside of his job description. Therefore, the court finds that Lujan experienced no adverse action in the form of alternative work assignments.

protected activity, a complainant will often have to rely on circumstantial evidence, since "direct evidence of motivation is rarely encountered." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.,* 709 F.2d 86 (D.C. Cir. 1983). The Commission has clarified that circumstantial evidence may include: (1) knowledge of protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the protected activity and the adverse actions and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510.

1. Complainant Was Not Terminated or Constructively Discharged

Lujan's claim that he was terminated because of Signal Peak's failure to reasonably accommodate his medical condition requires the court to first address whether Signal Peak actually terminated him. The record supports the finding that he was not terminated, and instead quit. The consistent testimony of Koppes, Musgrave, and Miller, as well as Miller's contemporaneous notes, establish that during the course of the meeting in which his work attendance was questioned, Lujan stated that he quit, and his resignation was accepted. Tr. 149, 186, 217; R-Ex. 8 at 5. Further, Miller and Musgrave provided consistent descriptions of the company's normal procedure for disciplining an employee, which was to ask the employee to leave the room while management discussed the appropriate disciplinary action, and then calling that employee back into the room to render a decision. Tr. 190; Tr. II 5. The court accepts that if the company had terminated Lujan, it would have done so in accordance with this procedure, as opposed to abruptly firing him when Schreckengost was out of the room and still attempting to verify Lujan's story with Beesley using the wireless tracking system.

The court could construe Lujan's decision to leave his job voluntarily as a constructive discharge if the evidence supported finding that Signal Peak's management engineered the meeting so as to force Lujan to quit. But the evidence does not support that conclusion. Rather, the testimony supports finding that the meeting involved legitimate concerns on management's part that Lujan was reporting that he worked, and requesting to be paid, for hours when he was not present at the mine. The court accepts that Oschner identified time and attendance discrepancies in the course of her normal payroll duties, without prompting from management, and that the company's concerns originated there. Tr. 119. Management justifiably investigated the discrepancies Oschner identified, and several other discrepancies that they independently identified at that point.[20] Tr. 178-79, 131.

Although Lujan argues that the company "did not verify all avenues of determining Complainant's attendance before the meeting on June 18, 2013" and "did not exhaust all means of determining the truth before the Complainant was confronted with all the allegations," the court concludes that the investigation was thorough enough to justify calling Lujan into a meeting for additional information. Pet. Br. at 6. The court credits Koppes' testimony that there was no plan or discussion at or prior to the meeting to terminate Lujan (Tr. 147-48), and it credits

[20] Cross-examination revealed that Oschner only informed the company about the June 6 and 7 discrepancy, but not the 13th, 14th, and 15th. Tr. 131. Lujan implies that this fact adds credibility to his complaint. Pet. Br. at 5-6. The court however does not find it unusual that the company investigated additional discrepancies after learning about the first two apparent discrepancies from Oschner.

Schreckengost's testimony that the intent of the meeting "was to resolve the issue and have Mr. Lujan go back to work." Tr. II 33. Once the meeting was underway, Lujan's inability to adequately describe the work he did at the disputed times, according to the consistent testimony of Koppes, Miller, and Schreckengost (Tr. 148, 214; Tr. II 33), made it reasonable for company officials to press Lujan for an explanation.

Therefore, the court finds that Lujan experienced no adverse action in the form of termination. Rather, and as found above, he quit on June 18.

2. Suspension Was Not Motivated By Protected Activity

While the court has found that Lujan suffered no adverse actions in the form of termination or the assignment of less desirable jobs, there is no dispute that Lujan was suspended without pay on April 19, 2013, and that suspension would normally qualify as an adverse action. Tr. 47, 91. The question is whether the suspension was motivated by Lujan's alleged protected activity. This court finds that it was not. His suspension was the culmination of a pattern of absences that violated non-discriminatory company policy.

All of the testimony and evidence indicates that Lujan had considerable attendance issues during his time at the mine. The court finds, consistent with Miller's testimony, that during Lujan's roughly three years at Signal Peak, he missed 52 days of work, only 26 of which were excused under company policy, and only five of which were excused by a doctor's note pertaining to gout. Tr. 231. Lujan believed that some of his absences should have been covered by the four "dump days" and two weeks of vacation days he was allowed to use each year. Tr. 44-45. However, Lujan's records of corrective counseling clearly indicate that vacation days had to be planned in advance so that the company could make arrangements for the employee's absence and that Lujan did not do this. P-Ex. 4. (Lujan did not indicate at hearing whether or not he tried to comply with this policy.)

On top of the 52 absences, Lujan was excused from work and permitted to leave when he reported a gout flare-up at work, and he was not written up for the incidents. Tr. II 18-19. At the hearing, he did not deny that the company made these accommodations for him. The court finds that the company's behavior does not indicate any animus or hostility toward Lujan's medical condition.

Lujan was unable to prove that he provided a doctor's note for more than 5 of his 52 absences, or even that he had provided a doctor's note to excuse the one work refusal he claims triggered his suspension. Tr. II 88-90. While management officials in the company were generally aware of Lujan's condition, they also understood, as per the explanation provided by Lujan's own physician, that gout flare-ups are sporadic and unpredictable. P-Ex. 2 at 4. Without a doctor's note, management officials would not have had knowledge that Lujan was legitimately refusing to work because of the safety hazard his condition posed on most of the specific dates that led to his suspension, including on April 14.

Additionally, Lujan was not able to identify any disparate treatment in the manner in which the company dealt with his attendance issues. Indeed, Miller testified that "[t]here have been quite a few employees terminated for attendance issues" and that far from being "singled out," Lujan "was treated very favorably in comparison." Tr. 235. The court finds this testimony believable, as Signal Peak has a three-step discipline policy for attendance violations, with a

fourth violation potentially leading to termination, and Lujan had received corrective counseling for attendance violations at least five times prior to his suspension. R-Ex. 9.

In light of these findings, Lujan has not met his burden to establish that his suspension was motivated by his protected activity.

IV. Affirmative Defense:

Even if the court assumes that Lujan did not voluntarily resign his job but rather was fired or constructively discharged in part for his protected activity, the record supports finding that he would have been fired in any event for a legitimate business reason, and that Signal Peak would have been motivated in part by this reason. The court finds that Signal Peak genuinely and reasonably arrived at the conclusion that Lujan was stealing time from the company, and this legitimate business reason would have provided the company with an affirmative defense to Lujan's discrimination claim.

The company discovered, in the normal course of business, discrepancies between Lujan's time cards and hand scanning records, which it then investigated in good faith. Tr. 119. It consulted with Koppes, who had been Lujan's foreman during the disputed shifts, and additionally checked to see if Lujan had tagged in or tagged out during those dates. Tr. 137. Other than the time card itself, all of these methods indicated that Lujan did not work the hours that were listed. Tr. 179, 209.

Lujan raised the possibilities, both in his MSHA interview and during cross-examination, that his biometric hand scanner may have failed to work properly on some of the dates in question (Tr. 125-26; P-Ex. 7 at 3), that he may have forgotten to tag himself in or out (Tr. 164-65), and that his foreman may not have remembered that Lujan was working. Tr. 173-74; P-Ex. 7 at 3. However, the chances of all of these things happening at once are so unlikely that the company would have been entirely justified in calling the meeting and pressing Lujan for more information.

At the meeting, company officials asked Lujan what he had done on the days in question. He was able to provide satisfactory answers for one date (June 6) and was paid for that date as a result, but he was not able to satisfactorily answer questions pertaining to the other dates. Tr. 214-16; Tr. II 19-20. Schreckengost then left the room to check with Beesley to see if the wireless tracking system at the mine could confirm Lujan's presence on the disputed dates. Tr. II 33-34. Beesley said that it could not, but Lujan's employment ended before Schreckengost returned with that answer. Tr. II 35, 52.

Even if it assumed that Lujan was terminated, the fact that he was paid for one date in question when he was able to adequately answer management's questions suggests that he would still be employed by Signal Peak had he demonstrated to management that he had worked at the mine on all or most of the dates in question.

The court has found that Lujan quit. However, if the court assumes Lujan did not quit, it concludes that he would have been terminated. The company's investigation prior to the meeting, Lujan's inability to provide satisfactory answers to management's valid questions at the meeting,

and Beesley's answer to Schreckengost's wireless tracking inquiries would have provided the company with a legitimate business reason for terminating him.[21]

That Signal Peak would have been at least in part motivated by this reason is bolstered by the lack of evidence of disparate treatment in the company's handling of similar incidents. Musgrave stated that he had never had an employee falsify time cards before and adequately distinguished this case from two prior accusations that did not result in termination. Tr. 191-92. In prior situations employees suspected of falsifying time cards were able to verify their presence or credibly explain their absence as a misunderstanding, but given the number of dates with discrepancies in this situation and Lujan's failure to provide satisfactory answers during the meeting, Signal Peak would have been justified in treating Lujan's case differently. Tr. 192-93.

CONCLUSION

Having concluded that Lujan has not established that he was unlawfully discriminated against, the court hereby **DISMISSES** the complaint and this proceeding.[22]

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution:

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[21] The court recognizes that a conflict exists between Beesley's testimony and the summary of his interview by MSHA investigators. Tr. II 77-80; P-Ex. 11 at 2. However, Beesley's credible testimony that he did not tell Schreckengost or MSHA special investigators that Lujan was at the mine on the dates in question, and his reasonable explanation for why the investigators may have been confused about the technical details of the tracking system, have been given more weight by the court than the far less detailed hearsay briefly summarized in the investigation report. Tr. II 77-80; P-Ex. 11.

[22] After the hearing, both parties moved to reopen the record, and each party opposed the other party's motion. The company moved to introduce an affidavit describing comments their witnesses allegedly overheard Lujan make after the hearing. Lujan moved to introduce a signed statement from Ryan Stahl, which he had been unable to produce at the hearing, and also moved to introduce testimony and interviews from the MSHA employees that he had attempted to subpoena for the hearing, provided that the Secretary agreed to his request. The court denied both motions. July 23, 2015, Order Denying Motion to Reopen; August 6, 2015, Order Denying Motion to Reopen; July 23, 2015, Order Denying Motion to Reopen.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 5, 2016

DANIEL B. LOWE, Complainant, v. VERIS GOLD USA, INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-614-DM WE-MD 14-04 Mine: Jerritt Canyon Mill Mine ID: 26-01621

ORDER REGARDING SECRETARY'S MOTION FOR RECONSIDERATION

Before: Judge Moran

The Secretary of Labor has filed a "Motion for Reconsideration" in this matter. The reconsideration sought through the Motion seeks to have the Court vacate its October 15, 2015, decision in which it found that the Complainant, Daniel B. Lowe, was discriminated against by Veris Gold, USA, Inc. ("Veris"). For the reasons which follow, the Court DENIES the Secretary's motion.

The problems with the Secretary's motion are many, beginning with his premise that the Court "effectively made the Secretary a party by ordering him to file a penalty petition." Motion at 1. No authority is cited for the contention that the Court's decision "effectively made the Secretary a party." The Secretary plainly decided not to become a party, a decision which compelled Mr. Lowe to move forward on his own, once the Secretary declined to be involved with his claim of discrimination. Lowe's invocation of his right to go forward without the Secretary's help was part of Congress' design in such matters by the Mine Act's provision, under section 105(c)(3), which provides that "the complainant shall have the right, within 30 days notice of the Secretary's determination [that the provisions of section 105(c) have not been violated] to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph [(c)](1)." Thereafter, the Secretary steered clear of the Lowe section 105(c)(3) proceeding, never seeking to intervene.

The civil penalty proceeding is an entirely separate matter, though the Secretary now would like to conflate it with the prior section 105(c)(3) action. The same provision goes on to provide:

> Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the

> Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 816 of this title. *Violations by any person of paragraph (1) shall be subject to the provisions of section*[] . . . *820(a) of this title*.

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

The Commission's procedural rules specifically address this matter and make clear that, in the wake of a section 105(c)(3) decision finding for the complainant, the Secretary is to promptly file a petition for the assessment of a civil penalty:

> Petition for assessment of penalty in discrimination cases. . . . (b) Petition for assessment of penalty after sustaining of complaint by miner, representative of miners, or applicant for employment. Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of receipt of such notice.

29 C.F.R. § 2700.44(b); *see also Maggard v. Chaney Creek Coal,* 8 FMSHRC 966 (June 1986) (ALJ); *Pendley v Highland Mining*, 37 FMSHRC 2436 (Oct. 2015) (ALJ). Such civil penalty proceedings are assigned their own docket numbers when the civil penalty action is launched.

Having found that the Secretary has not been "effectively made" a party of the section 105(c)(3) action, the premise of the Motion collapses and becomes more confusing by the Secretary's assertion that he has "standing to file this motion as a 'party adversely affected' by the ALJ's decision." Motion at 1 (citing Procedural Rule 10(d), 29 C.F.R § 2700.10(d)). Remembering that the motion at hand was brought *by the Secretary*, the procedural rule provision cited refers to *a statement in opposition* to a written motion. If accepted, the Secretary would apparently be opposing his own motion, a crazy-quilt result.

The Secretary does get some things right in his motion. As noted, it is accurate that the Secretary did decline to file a section 105(c)(2) action on behalf of Mr. Lowe, and that decision prompted Complainant to file his own action, under section 105(c)(3), per Congress' design. However, in a distressing fashion, the Secretary neglects to mention several salient points, such as that Mr. Lowe filed his complaint with MSHA on November 22, 2013, and that he filed his section 105(c)(3) complaint twenty days after MSHA declined to represent him, on April 24, 2014. By May 5, 2014, Veris had acknowledged that the Complaint had been filed and by June 3, 2014, Veris' retained law firm, and specifically Attorney David M. Stanton, was responding to Lowe's 105(c)(3) complaint, denying the allegations of discrimination. The Secretary notes that Veris began its quest for bankruptcy protection in June 2014, that is to say, at a point in time *after* Lowe's Complaint had been filed. Lowe's conundrum was that he could not make a claim for damages until after first prevailing in the administrative proceeding before this Court. Lowe did so prevail upon the Court's issuance of its decision on October 15, 2015, finding that Veris had discriminated against him in violation of the Mine Act. The record does not reveal if the United States Bankruptcy Court was informed of Lowe's Complaint, nor does it disclose any

notice to Mr. Lowe about such bankruptcy proceeding being launched, or his rights in that matter, although Lowe apparently received from Attorney Stanton a notice of an Order from the United States Bankruptcy Court, District of Nevada, dated September 17, 2014.

The Secretary's motion states that, on December 17, 2014, this Court rejected Veris' claim that the bankruptcy court's order enjoining the commencement or continuation of any proceedings against Veris Gold applied to Lowe's complaint.[1] That much is true. However, as the Secretary tells the chronology of events, immediately after his motion recounts that the Court rejected the claim by Veris that the bankruptcy court's order applied to Lowe's complaint, the motion *next* states that:

> Veris Gold's attorney later informed the ALJ that he was withdrawing from representation, that Veris Gold would be unrepresented at the hearing, and that Veris Gold was aware of these facts. No representative for Veris Gold appeared at the hearing.

Motion at 3.

In the Court's assessment, the Secretary engaged in a technically accurate, but quite misleading, telling of the events since it implied nearness in time between the Court's order and Veris' attorney's informing the Court that he was withdrawing from representation of Veris. In point of fact, more than six months elapsed following the Court's ruling that Lowe's complaint could proceed. Veris' attorney first announced his intention to withdraw from the *Lowe v. Veris* discrimination litigation less than a week before that hearing began. During that half-year interval between the Court's ruling and the start of the hearing, Veris prepared, through Attorney Stanton, for Lowe's hearing. A companion Veris discrimination case, another section 105(c)(3) hearing, with this Court presiding, had concluded in the week just prior to the start of Lowe's hearing. *Varady v. Veris Gold USA, Inc*., WEST 2014-307-DM. Attorney Stanton appeared and represented Veris throughout that entire hearing involving Mr. Varady's claim. The Varady hearing did not go well for Veris. The credible testimony revealed to all at the hearing the merits of Mr. Varady's claim and at the same time the lack of a credible defense by Veris. Attorney Stanton could not have been oblivious to the testimonial developments and the devastating impact that had on Veris' defense claims. The weakness of Respondent's defense was subsequently memorialized in the Court's September 2, 2015, decision in the Varady matter, but it was plain to all who participated at the Varady hearing that the complainant would prevail.[2]

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[1] The Secretary's motion is not paginated and therefore the Court can only approximate the page associated with a particular quoted passage.

[2] The Court noted in its decision in the *Lowe v. Veris Gold* matter:

> At the outset of the hearing, Attorney David Stanton, privately retained legal counsel for Veris Gold, appeared. The Court noted that Attorney Stanton filed a motion for his withdrawal as the Respondent's representative. Tr. 6. The Court had previously received word of Attorney Stanton's motion to withdraw at the conclusion of the prior week, one day

(continued…)

Immediately after the Varady hearing concluded, through emails to the Court from Veris' attorney, Respondent began to take actions to staunch the bleeding. This culminated the following week when, on the first day of the Lowe hearing, Attorney Stanton appeared for the purpose of withdrawing from representation of Veris. Thus, the Secretary's recounting of the events, jumping from the Court's December 17, 2014, decision to allow the continuation of Lowe's action against Veris, to a time some six months later when Attorney Stanton sought to back out of the case, is misleading. It is fair to presume that Attorney Stanton's firm was being paid or at least was billing Veris for its defense of the Lowe and Varady discrimination complaints up until the conclusion of the Varady hearing on June 10, 2015, and through the first day of Lowe's hearing on June 18th.

The Secretary's Motion, after noting that the successor to Veris Gold USA, Inc., Jerritt Canyon Gold, LLC, was not a party to the Lowe hearing, contends that this Court lacked jurisdiction to adjudicate Lowe's 105(c)(3) complaint. To arrive at this contention, the Secretary first acknowledges that

> [t]he Commission has held that [11 U.S.C. §] 362(b)(4) permits the Commission to adjudicate proceedings brought by the Secretary alleging violations of the Mine Act and mandatory health and safety standards and regulations promulgated thereunder. *Hidden Splendor Res., Inc*., 35 FMSHRC 1548, 1550 (2013). Additionally, the Commission has held that Section 362(b)(4) exempts Section 105(c)(2) actions filed by the Secretary on behalf of a complainant. *Jim Walter Res., Inc.* 12 FMSHRC 1521, 1528-30 (1990).

Motion at 4.

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[2] (…continued)

> after another section 105(c)(3) hearing against Veris, *Matthew Varady v. Veris Gold USA, Inc.*, WEST 2014-307-DM, had concluded. This Court presided in the *Varady* discrimination case. That case involved the *pro se* discrimination claim brought Matthew Varady against Veris Gold, and a decision finding for Mr. Varady was issued on September 2, 2015. Attorney Stanton represented Veris in the Varady discrimination matter for the entirety of the hearing. As stated, *infra*, the Varady hearing did not go well, evidentiary-wise, from Respondent's perspective, and it was obvious that Attorney Stanton correctly gauged the adverse evidentiary consequences of the proceeding, owing to the poor credibility of Respondent's various witnesses. Therefore, it was not a surprise to the Court that the attorney moved to withdraw from representation. As the Varady and Lowe matters are closely linked, it followed that withdrawal would be sought in the Lowe matter as well.

Lowe v. Veris Gold USA, Inc., 37 FMSHRC 2337, 2338 (Oct. 2015) (ALJ).

However, the Secretary, siding with mine operator *Veris*, not miner *Lowe*, asserts that the Court erred by

> holding that Section 362(b)(4) exempts Section 105(c)(3) actions brought by miners themselves. [The Secretary argues that] [m]iners do not meet the definition of 'governmental unit' for purposes of the Section 362(b)(4) exemption. *See id*. (noting that the Bankruptcy Code defines 'governmental unit' as the 'United States;…department, agency, or instrumentality of the United States.' 11 U.S.C. § 101(27)).

Motion at 4.

The Motion continues by referencing other examples where private individuals, as opposed to a governmental unit, are out of luck when it comes to stays. *Id.* at 5. Accordingly, on the basis that a section 105(c)(3) claim is inherently infirm *vis-à-vis a* bankruptcy court's stay, the Secretary maintains that he:

> cannot comply with the ALJ's order to commence a penalty proceeding against Veris Gold or its successor. Any such penalty would be for discriminatory action that occurred prior to Veris Gold's bankruptcy filing. Consequently, the Secretary's only remedy against Veris Gold was to file a proof of claim in the bankruptcy proceeding. Moreover, commencing a civil penalty proceeding would be futile, insomuch as Veris Gold has been liquidated in bankruptcy and the proceeding has closed. Docs. 320, 356 in Docket No. 14-51015 (Bankr. D. Nev.). Nor may the Secretary seek to impose a penalty on Veris Gold's successor. When, as here, the successor purchases the predecessor in bankruptcy, the Bankruptcy Code renders such sales "free and clear," 11 U.S.C. § 363(f) – even of employment discrimination claims. *In re Trans World Airlines, Inc*., 322 F.3d 283, 290-92 (3rd Cir. 2003); see also *In re Leckie Smokeless Coal Co*., 99 F.3d 573, 585-87 (4th Cir. 1996) (successors of coal mine operators sold in bankruptcy were not liable for financial obligations to employees' benefit plan and fund). In suggesting otherwise, the ALJ relied on Commission case law imposing successor liability[3] for Section 105(c) discrimination cases that did not involve sales in bankruptcy. ALJD at 12.

Motion at 5-6.

[3] While the Court recognizes that it is entirely premature to rule on successorship liability, if newspaper accounts turn out to be correct, it would appear quite likely that Jerritt Canyon Gold, LLC, squarely meets most, if not all, of the nine-factors applied in determining whether an entity is a successor. These include notice of this proceeding, substantial continuity of the mining operations, no significant hiatus in that continuity, employment of substantially the same workforce, essentially the same job functions and working conditions, the same machinery, and selling the same mined material, gold. *See Sec'y of Labor on behalf of Zambonino v. Colonial Mining Materials,* 36 FMSHRC 1239 (May 2014) (ALJ) (citing *Munsey v. Smitty Baker Coal Co.,* 2 FMSHRC 3463, 3465-66 (Dec. 1980), *aff'd in relevant part sub nom.*, *Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983)).

Mr. Lowe, who is not an attorney and has proceeded *pro se* throughout this proceeding, filed a response to the Secretary's motion.[4] In arguing against the Secretary's motion, Lowe contends that the Secretary could have moved to intervene in the 105(c)(3) case, but did not, and that it is now too late to be considered a party to this proceeding. Lowe Motion, Arguments I and II. The Court agrees that the Secretary is not now, by the Court's action, effectively, a party, as discussed, *supra.*[5] Lowe also contends that the Secretary is duty-bound by 29 C.F.R.§ 2700.44(b) to petition for the assessment of a penalty after a complaint of discrimination has been sustained by the judge. Lowe next notes that in the companion discrimination case of *Varady v. Veris Gold*, this Court, having found that Varady was discriminated, similarly ordered that the Secretary file a civil penalty and that the Secretary did file such a petition. Lowe Response at 7.[6]

The Court's reaction to the Secretary's contention is multi-faceted. While the Secretary states, as noted above, that he "cannot comply with the ALJ's order to commence a penalty proceeding against Veris Gold or its successor [because] [a]ny such penalty would be for discriminatory action that occurred *prior* to Veris Gold's bankruptcy filing," that seems to be an acknowledgment in favor of Lowe. Motion at 5. Lowe's initial complaint to MSHA, relating to alleged discriminatory activity, and later, his subsequent 105(c)(3) complaint, all occurred before the commencement of the Veris bankruptcy proceeding. As noted, Lowe filed his initial complaint with MSHA on November 22, 2013 and, thereafter, on April 24, 2014, filed his section 105(c)(3) complaint. Veris filed for relief from creditors on June 9, 2014. Thus, Veris Gold, through its retained counsel, had notice of the claim. Neither Lowe, nor anyone else, including the Secretary of Labor, could file a proof of claim until after prevailing in the discrimination case. It would seem that Veris, and the law firm representing it, being fully aware

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[4] Lowe accurately notes that, while the Secretary opted not to pursue his discrimination complaint and thereby necessitate that he file a 105(c)(3) claim in order to continue his complaint, MSHA Special Investigator Kyle E. Jackson, investigated Lowe's discrimination claim, found that Lowe engaged in protected activity, and that his employment was terminated, at least in part, because of that protected activity. Declaration of Kyle E. Jackson, attached as Exhibit 1 to Complainant's Motion to Deny the Secretary's Motion for Reconsideration. Unfortunately, the Secretary declined to follow the recommendation of its special investigator. The Court cannot usurp, nor look behind, the Secretary's decision to decline a section 105(c)(2) complaint; the Court can only proceed when a miner elects to pursue a discrimination claim filed under section 105(c)(3), as occurred here.

[5] The Court has reviewed each of Lowe's contentions in his motion, which is more in the nature of a response to the Secretary's motion. Not every observation made by Lowe, such as the Secretary's mistake in listing the certificate of service date as "December XX, 2015," will be commented upon.

[6] Following the Court's determination that Matthew Varady had been discriminated against by Veris, on September 11, 2015, an Associate Regional Solicitor filed a petition for assessment of penalty in the Varady matter seeking a civil penalty of $20,000.00. The matter was then docketed on September 15, 2015, as WEST 2015-909-M. On December 23, 2015, the Secretary moved to dismiss the civil penalty petition essentially on the same arguments presented and addressed here in the Lowe matter. No order has yet been issued on the Secretary's motion to dismiss in the Varady matter.

of the bankruptcy filing and Lowe's discrimination complaint, had a duty to inform Lowe of that bankruptcy action, any notification rights he might have before the bankruptcy court, and to advise the bankruptcy court of this potential liability. Instead, Veris, through its legal counsel, pressed forward with discovery and defense of Lowe's complaint. Indeed, as noted earlier, by June 3, 2014, Veris' law firm and Attorney David M. Stanton were responding to Lowe's 105(c)(3) complaint.

The Secretary adds, as also noted above, that:

> commencing a civil penalty proceeding would be futile, insomuch as Veris Gold has been liquidated in bankruptcy and the proceeding has closed[, and] . . . [e]ven if he had, . . . it appears that general unsecured creditors, such as the Secretary would have been, did not receive any payment from the bankruptcy estate of the debtor.

Motion at 5 & n. 2.

The Court's reaction to these contentions has two aspects. First, the Secretary has confused Mine Act proceedings with proceedings in which businesses seek the refuge of bankruptcy protection. Lowe's right to pursue his 105(c)(3) action before the Federal Mine Safety and Health Review Commission exists apart from bankruptcy court issuances. Although it is possible that Veris, and the successor entity Jerritt Canyon Gold, LLC, may escape financial responsibility for discriminating against Mr. Lowe, such maneuvers do not erase Lowe's right to bring his Mine Act claim in the first instance. At a minimum, Lowe would have for all the world to see the decision that Veris engaged in discrimination in violation of that Act, behavior that Congress intended to protect miners from, and for which it expressed that compensation and such other relief as the Commission deems appropriate was to be provided. That Veris and Jerritt Canyon may be able to legally walk away from compensating a victim of discrimination through the process of bankruptcy law is, in this Court's view, a stain on those entities.

Second, it should be for the bankruptcy court, with its expertise in such matters, to rule upon such claims, and not for the Secretary of Labor to peremptorily cede that obtaining payments would be hopeless. It may be, as with the Federal Mine Safety and Health Review Commission, that bankruptcy law permits such courts to reopen matters in the interest of justice.[7] *See, e.g.*, *Tolbert v. Chaney Creek Coal,* 12 FMSHRC 615 (Apr. 1990); *Sec'y of Labor v. Deck*, 37 FMSHRC ___, No. SE 2014-322-M (Dec. 18 2015).

[7] While not claiming any expertise in bankruptcy law, the Court notes that under 11 U.S.C. section 105(a) of the Bankruptcy Code, a bankruptcy court can issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title and that "the overriding consideration in bankruptcy … is that equitable principles govern." *In re NWFX, Inc.*, 864 F.2d 588, 590 (8th Cir. 1988). Even the Supreme Court considers *in forma pauperis* petitions, and so it may also be that if Lowe makes a claim before the bankruptcy court, it could decide to consider Lowe's claim. Given that changes in bankruptcy law, which went into effect in October 2005, made it more difficult for individuals, as opposed to corporations, to escape obligations they could afford to pay, it would be ironic if, in discrimination cases, corporations, employing other bankruptcy chapters, remain freer than individuals to clear away debts.

Similarly, regarding the Secretary's contention that it may not impose a penalty on Veris Gold's successor "[w]hen, as here, [a] successor purchases the predecessor in bankruptcy, [because] the Bankruptcy Code renders such sales "free and clear," 11 U.S.C. § 363(f) – even of employment discrimination claims," the Court believes that should be up to the Commission, and, if the Commission agrees with this Court, ultimately the bankruptcy court to make such a ruling. After all, the Mine Act is a remedial statute. As the Commission has observed:

> The Federal Mine Safety and Health Act of 1977 is a remedial statute, the "primary objective [of which] is to assure the maximum safety and health of miners." U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 634 (1978). *Cf. Freeman Coal Mining Company v. IBMOA*, 504 F.2d 741, 744 (7th Cir. 1974). The Senate Committee emphasized the remedial nature of the Act's compensation provision. The Committee stated:
>
> > This provision . . . is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations. . . . It is therefore a remedial provision which also furnishes added incentive for the operator to comply with the law. This provision will also remove any possible inhibition on the inspector in the issuance of closure orders. Legislative History, supra, at 634-635. In interpreting remedial safety and health legislation, "[i]t is so obvious as to be beyond dispute that . . . narrow or limited construction is to be eschewed . . . [L]iberal construction in light of the prime purpose of the legislation is to be employed."
>
> *St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines*, 262 F.2d 378, 381 (3rd Cir. 1959); *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). We believe that a liberal construction of the 30-day filing period for compensation claims requires a conclusion that the period may be extended in appropriate circumstances.

Local 5429, UMWA v. Consolidation Coal Co., 1 FMSHRC 1300, 1302 (Sept. 1979).

In sum, unless the Commission directs otherwise, the Court intends to review Lowe's submission of his damages and to issue a decision regarding an appropriate award.[8] Accordingly, the Secretary's Motion for Reconsideration is DENIED.

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

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[8] While an extra-judicial observation, the Court would note that there is nothing prohibiting Jerritt Canyon Gold from stepping up and doing what the Court considers to be the right thing by settling the Lowe (and Varady) matters. Settlements regarding damages in discrimination matters routinely occur and it may be that the new gold mine owners may decide it best, in good conscience, to put these matters, remnants of the troubled former operation under Veris Gold USA, Inc., behind them.

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January 12, 2016

MICHAEL WILSON, Complainant, v. JARROD FARRIS, DAVID TAYLOR, & ROSS GLAZER, Respondents.	DISCRIMINATION PROCEEDING Docket No. KENT 2015-672-D MSHA Case No. MADI-CD-2015-13 Mine: Parkway Mine Mine ID: 15-19358

ORDER DENYING MOTION FOR LEAVE TO TAKE DISCOVERY

Before: Judge Moran

This case is before the Court upon a complaint of discrimination under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). Complainant ("Wilson") has filed a Motion for Leave to Take Discovery ("Motion"), which Respondents opposed. For the reasons that follow, the motion is DENIED.

As outlined more fully below, the essence of this discrimination complaint rests on a simple set of facts: Respondents Farris, Taylor and Glazer, ram car drivers at the Parkway mine, allegedly asked an MSHA inspector how they could get Michael Wilson, a non-employee representative of miners the Parkway Mine, removed as a miners' representative and keep him off mine property. Complaint Ex. B. Complainant argues that without taking depositions of the three respondents and the inspectors, this case is not ripe for summary decision because it will rest on speculative facts.

Complainant argues that "[t]he Commission's procedural rules impliedly grant parties the right to take discovery before a motion for summary decision is filed with the presiding ALJ." Motion at 1. In support, Complainant first notes that discovery is generally allowed, and that Procedural Rule 67(b) states that "[a] motion for summary decision shall be granted only [upon consideration of] the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits." *Id.* at 1-2 (quoting 29 C.F.R. § 2700.67(b)). Because the parties have not engaged in discovery, Complainant argues, there "has been no development of the record on which the Court can reasonably consider a motion for summary decision." *Id.* at 2.

Respondents' opposition contends that Procedural Rule 67(b) merely provides examples of what may "typically be in a record ripe for summary decision, but those are not required if . . . the Court cognizes legal grounds from which to independently resolve the matter." Response at 1. They note that discovery may not be used as an "ever-expansive fishing expedition" and, a related concern, Respondents assert that allowing depositions under these circumstances would put them to inordinate expense. *Id.* at 2. Finally, Respondents makes the point that "a

complainant who initiates his own proceeding before the Commission is confined to the four corners of his complaint as it was presented to and investigated by MSHA." *Id.* (citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991)).

Discussion

The subject of summary decision is set forth in Commission Procedural Rule 67(b), which provides:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

Although that provision speaks to summary decision, it does not grant to parties an unequivocal right to take discovery prior to the Court ruling on a motion for summary decision. Instead, the ruling on discovery is connected to the nature of the complaint. In section 105(c)(3) discrimination complaints in particular, per the Commission's decision in *Hatfield*, such matters are confined to the miner's complaint to MSHA.

Wilson's Complaint, dated June 18, 2015, states in its entirety:

> I am a non-employee "representative of miners" at Armstrong Coal Company's Parkway underground mine. I worked for Armstrong at the Parkway mine from August 2009 until May 6, 2015. Since my employment with Armstrong Coal ended, I have continued to act as a "representative of miners" at the mine.
>
> On or about May 12, 2015, I traveled underground with a MSHA inspector. That same day, three ram car drivers from the unit approached MSHA Inspector Jeremy Walker and asked Walker how they could get rid of me as a miners' rep and keep me off of mine property.
>
> These actions constitute interference with my rights as a "representative of miners" under the Mine Act, and violate section 105(c) of the Act.
>
> I will provide MSHA with the names of the ram car drivers on the unit and ask that the MSHA Special Investigator interview each of them. When it is determined which miners asked the MSHA inspector how to remove me as a miners' rep, I will amend my discrimination complaint to include their names.
>
> I want each of these miners to be fined for violating section 105(c) of the Mine Act, and I want each of them to be required to take training – taught by MSHA personnel – in miners' rights under the Act, including the rights of

> "representatives of miners." I also want each of the miners to be ordered to cease and desist from interfering with my rights as a "representative of miners."
>
> I am not filing this complaint against Armstrong Coal. I am filing it against the three ram car drivers individually.

Complaint Ex. A at 2.

On July 16, 2015, Wilson amended his complaint, by adding Farris, Taylor, and Glazer, thereby identifying the names of the ram car drivers. In both his June 18th and July 16th discrimination complaint filings, Wilson checked "no" in the box, inquiring if the alleged discriminatory action resulted in his being suspended, laid off, or discharged.

Accordingly, the full content of Wilson's complaint and its amendment, the latter adding only the names of the three ram car drivers, represents the four corners of his discrimination claim. Depositions of the three ram car drivers and the inspector, which is the discovery requested by Complainant, would not provide any possible issue of material fact that would prevent the Court from ruling on the motion for summary decision. This is also true for answers to interrogatories, admissions, and affidavits. Given that state of affairs, no amount of legerdemain, through the vehicle of discovery or otherwise, can conjure up genuine issues as to any material fact, nor could they disprove that the moving party may be entitled to summary decision as a matter of law. In short, when the Court subsequently rules upon the motion for summary judgment, it will be working from the proposition that each of Wilson's allegations in his complaint is taken to be true.

Under Complainant's reading of the summary decision provision of the Commission's procedural rules, depositions, answers to interrogatories, admissions, and affidavits would all be required prior to the filing of a motion for summary decision, even in those cases in which some or all of those documents are unnecessary and unhelpful to the motion for summary decision. Rule 67(b) does not mandate that depositions be allowed in all instances. Further, Commission Procedural Rule 56(c) infers the result taken in this Order by providing that a judge may limit discovery to prevent undue delay or to protect a party from oppression or undue burden or expense. *See* 29 C.F.R. § 2700.56(c). That is to say, where such discovery will not alter the core facts nor materially change the basis of the discrimination claim, and therefore, to put it plainly, would not only be an undue expense on the party burdened by it, but also a waste of time, it should be denied.

The Court finds that these circumstances exist here. Further, in its order on the motion for summary decision, the Court will resolve all of the claims made by Wilson as true.[1]

[1] That Order will be issued once the Complainant has had an opportunity to respond to the motion for summary decision and after the Court has considered it. However, it is noted that in the Respondents' Memorandum of Law in Support of its Motion for Summary Decision, they have conceded, for the purposes of the motion, that "each and every fact asserted in the complaint is true." Mem. Supp. Summ. Decision 1.

As Respondents are not disputing the allegations of the Complaint, and for the reasons set forth above, at least for the purposes of Complainant's motion for leave to take discovery, allowing depositions of the three respondent miners and the inspector would needlessly delay the resolution of this proceeding, and it would force them to endure unnecessary and undue expense. Furthermore, given the concession by Respondents, there is no genuine issue as to any material fact, and this leaves the Court only with the question of whether, as a matter of law, Complainant has alleged a cognizable claim of discrimination under section 105(c) of the Mine Act.

Accordingly, Complainant's motion is **DENIED**. As previously agreed, Complainant is directed to file his response to Respondents' motion for summary decision within two weeks of the date of this Order.

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

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January 12, 2016

CHRISTIAN LANDERS, Complainant, v. PEABODY POWDER RIVER MINING, LLC, and JOY GLOBAL SURFACE MINING, INC., Respondents.	DISCRIMINATION PROCEEDING Docket No. WEST 2015-732-D DENV-CD 2015-10 Mine: North Antelope Rochelle Mine Mine ID: 48-01353

ORDER ON COMPLAINANT'S MOTION TO ADD PARTY

Complainant, Christian Landers, has filed a motion to amend his complaint brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2012) ("Mine Act") to add a party. The Motion seeks to add Joy Global Surface Mining, Inc. ("Joy") as a Respondent in Landers' discrimination proceeding under section 105(c)(3) of the Mine Act. In support of his motion, Complainant first points out that in Landers' statement to MSHA, dated April 24, 2015, he named *both* Joy and the North Antelope Rochelle Mine (Peabody Powder River Mining, LLC) ("Peabody") as his employers. Complainant's Ex. 1. The Motion asserts that Complainant, in his statement to MSHA, complained of cold weather issues to an agent of Peabody and that both Peabody and Joy discriminated against him. Motion at 2. The Motion concedes that MSHA's notice to Landers, declining to take up his case, named only Peabody. However, the key point from Complainant's perspective is not the names that appeared on MSHA's notice but the substance of Mr. Landers' complaint, as set forth in the statement he gave to MSHA investigator Lois Duwenhoegger. That substance identifies *both* Joy and Peabody as the entities that discriminated against him. *Id.* at 2.

Landers correctly notes that the Commission's procedural rules (29 C.F.R. § 2700) do not speak to the issue of adding parties to an action and that, in such circumstances, those rules provide that "the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil . . . and Appellate Procedure." 29 C.F.R. § 2700.1(b). Applying that, Complainant looks to Federal Rules of Civil Procedure, Rule 19 — Required Joinder of Parties — and contends that adding Joy Global meets that Rule because joining that entity as a party will not deprive the court of subject-matter jurisdiction and, in that person's absence, the court cannot afford full relief among existing parties. *Id.* at 3. Complainant also asserts that Joy Global is an "operator" within the meaning of the Act as it "was, and remains, a contractor performing

services at a mine, in this case, Peabody's North Antelope Rochelle Mine." *Id.* Further, Landers' complaint of discrimination, brought under 30 U.S.C. § 815(c), broadly prohibits discrimination of the type alleged and it applies to operators such as Joy Global. *Id.*

The Motion continues, contending that, as "Landers was directly employed by Joy Global and provided services at Peabody's North Antelope Rochelle Mine," Complainant cannot be afforded full relief without the joinder of Joy Global. *Id.* 3-4. With Landers seeking both reinstatement and backpay with interest, the former relief cannot be granted if Joy Global is not joined as a party. *Id.* at 4.

Peabody Powder River filed a short response to the Motion. Citing *Pontiki Coal Corp*., 19 FMSHRC 1009, 1017 (June 1997), for the proposition that "it is the scope of the Secretary's investigation, rather than the initiating complaint, that governs the permissible ambit of the Commission's jurisdiction," it contends that the Complainant will need to show that the Secretary's investigation included an investigation of Joy [Global]." Peabody Response at 1.

Joy Global's Response acknowledges that it hired the complainant, Landers, on February 13, 2012, and, at the time of Landers' termination on January 15, 2015, he was employed as a field service technician for Joy. However, Joy points to Landers' complaint naming Peabody as the entity that committed discrimination and only a Peabody employee, Mike Hatfield, is identified as the person for the discriminatory action. It also points to the flip side of that observation, that "Complainant did not name JGSM as an organization Committing Discrimination nor did Complainant identify any [Joy] employee as a person responsible." Joy Response at 2. Joy adds that it was not "served with an administrative complaint nor investigated for alleged discriminatory conduct by the Secretary . . . [and, on May 21, 2015,] the Secretary issued a finding to Peabody Powder River Mining LLC." *Id.*

Joy argues that "[i]t is the scope of the Secretary's investigation, rather than the initiating complaint, that governs the permissible ambit of the Commission's jurisdiction." Joy Response at 3 (quoting *Pontiki*, 19 FMSHRC at 1017. Joy also quotes from a decision issued by this Court wherein, upon citing the Review Commission's decision in *Hatfield v. Colquest Energy,*13 FMSHRC 544 (1991), the Court, quoting from *Hatfield* at 546, noted: "[I]f the Secretary's determination was based upon an investigation that did not include consideration of the matters contained in the *amended* complaint, the statutory perquisites for a complaint pursuant to §105(c)(3) have not been met." *Lowe v. Veris Gold USA, Inc. 37 FMSHRC 1130, *1131* (May 22, 2015).

The Court does not view these cases as supportive of Joy's position. The context of the Commission's decision in *Pontiki*, a section 105(c)(2) action, addressed the *scope of the Secretary's investigation*, but in speaking to that investigation, it was expanding the ambit of the complaint, not curtailing it. The Commission also referenced its decision in *Hatfield*, and while Joy correctly quotes from that decision, there are important distinctions. In *Hatfield*, the context was a section 105(c)(3) complaint, with the issue being whether "the miner's complaint differed substantially from the complaint he initially filed with MSHA." *Pontiki*, 19 FMSHRC at 1017. Although the Secretary's investigation was addressed, again it was in the context of whether that investigation included matters identified in the *amended* complaint. *Id.* at 1017-18.

The matter presented here is quite different. Landers, as Joy admits, named "Joy Global/North Antelope Rochelle Mine" in his April 13, 2015, Statement to MSHA before that agency's investigator. While it is true that a complainant has to identify those who are alleged to have engaged in discrimination, as long as that occurred, as it did here, a complainant is not barred from proceeding against all employers named. A complainant has no ability to direct the scope of the Secretary's investigation. Further, no small observation, only Joy, as the Complainant's employer, could, and did, fire the Mr. Landers.

Also instructive, in this Court's view, is the Commission's decision in *Sandra G. McDonald v. TMK Enterprise Security*, No. WEVA 2014-387-D, 2015 WL 6588249 (FMSHRC Oct. 23, 2015).[1] As with this matter, that case was also a section 105(c)(3) proceeding. McDonald had been employed as a security guard by a security services contractor at a mine site operated by Frasure Creek Mining. In its *sua sponte* review of that judge's determination, the Commission pointed out that "*[i]n her complaint to MSHA*, *McDonald also listed her employer's contractor ID* as "5GI" which, according to the Mine Data Retrieval System, corresponds to the company 'TMK Enterprise Security.'" *McDonald*, 2015 WL 6588249, at *4 n.3 (emphasis added). Thus, the Commission looked to the entities named by the complainant in her MSHA Complaint.

Landers filed a motion seeking leave to file a reply to Joy's Response in opposition to its motion to add Joy. This was granted. The Motion notes that Joy argues that, because MSHA made no determination about Joy Global, Landers cannot now add Joy, as the section 105(c)(3) jurisdictional prerequisite is missing. The essence of Landers' Reply is that Joy "overstates the rigidity of the jurisdictional prerequisites set forth in Section 105(c) and [that such a] result [would operate to] punish[] Landers for incomplete administrative processing, a process over which Landers had no control." Landers' Reply at 2. The Court agrees. Landers did the only thing over which he had control: he named Joy Global as his employer in the discrimination complaint. As noted, Joy admits to being Landers' employer. Having done that, naming Joy in his Complaint, Landers can hardly be put in a position of being penalized because MSHA focused on Peabody Powder River, and compounded this by listing only Peabody Powder River Mining LLC in its letter declining to pursue the complaint on his behalf, believing that it lacked sufficient evidence to prevail under the preponderance of the evidence standard.[2]

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[1] In what the Court construes as a research error on Joy's part, it cites to an earlier decision by an administrative law judge in *McDonald* in which that judge denied that complainant's attempt to add a new respondent. However, as noted, *supra,* the Commission, *sua sponte,* examined that judge's decision, reversing and remanding it. The judge then issued an order on that remand, granting Complainant McDonald's right to amend her complaint, adding certain other parties "as well as any other relevant parties." *McDonald*, No. 2014-387-D, 2015 WL 7074631, at *2 (FMSHRC Nov. 3, 2015) (ALJ). Landers' Reply makes the same point, noting that Joy's analysis missed the ultimate outcome: the judge was reversed and was directed by the Commission to *add* the new respondent.

[2] One should not confuse MSHA's determination as tantamount to concluding that Landers' claim was without merit. Rather, as noted, it only came to the conclusion that there was insufficient evidence to meet the preponderance standard. Instead, MSHA noted, per Congress' (continued…)

Landers has an assessment of the Commission's decision in *Pontiki Coal Corp*. which is in line with the view of this Court. Although Landers agrees that, as a general proposition, the Commission looks to the scope of the Secretary's investigation of discrimination complaints, it notes that the interpretation of 105(c) complaints must be consistent with its determination "that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act." Landers' Reply at 2 (citing *Pontiki*, 19 FMSHRC at 1017). Joy contends that it is clear that the Secretary's investigation included Joy, but that "Landers was not able to control the *quality and nature* of MSHA's investigation, *i.e.*, how vigorously MSHA investigated Joy Global, [as] that was out of Landers' control." Landers' Reply at 3.

Accordingly, for the reasons set forth above, and as now reflected in the revised caption, Joy Global Surface Mining is hereby added as a party to this proceeding. This matter remains, as scheduled, for the hearing to commence in Gillette, Wyoming, on April 5, 2016. The parties should prepare accordingly, as the hearing date will not be moved back.

SO ORDERED.

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

[2] (…continued)
design, that Landers had the right to file a discrimination case on his own behalf. Landers did that, and it was only the administrative process that continued to, incorrectly, only list Peabody Powder River Mining, LLC, as the sole respondent.

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January 15, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. STATE OF ALASKA, DEPT. OF TRANSPORTATION, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2008-1490-M A.C. No. 50-01729-159523 Docket No. WEST 2011-1549-M A.C. No. 50-01729-266809 Mine: SAG Screener Docket No. WEST 2012-109-M A.C. No. 50-01893-269505 Mine: Cordova Screener

DISMISSAL ORDER ON REMAND

Before: Judge Feldman

At issue is whether the State of Alaska Department of Transportation's ("Alaska") use of front-end loaders in conjunction with mobile screeners is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 *et seq.* (2006) ("Mine Act"). The subject front-end loaders are used to maintain the Dalton Highway, a 420-mile unpaved haul road in northern Alaska. The Dalton Highway is traveled by vehicles servicing the Alaska Pipeline.

The loaders are used to transfer to a mobile screener natural deposits of rock, gravel, and sandy material that have been extracted from a series of pits along the highway. The screened material is ultimately used to fill potholes, as necessitated by road deterioration caused by the spring thaw. The Federal Aid to Highways Act authorizes Alaska to use these federal lands adjacent to the Dalton Highway for the purposes of construction and maintenance of the highway. 23 U.S.C. § 317 (2012); 34 FMSHRC 179, 181 (Jan. 2012) (ALJ).

The initial decision, issued on January 10, 2012, determined that the subject operations constitute borrow pits that are exempt from Mine Act jurisdiction. 34 FMSHRC 179 (Jan. 2012) (ALJ). However, on appeal, the Commission held that there is "unquestioned [Mine Safety and Health Administration ("MSHA")] authority under the Mine Act" to regulate "operations involving the '[o]pen pit mining' of '[s]and and [g]ravel.'" 36 FMSHRC 2642, 2645 (Oct. 2014) (citing *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. at 22,829 (Apr. 17, 1979, *amended by* 48 Fed. Reg. 7521 (Feb. 22, 1983)). Having determined that there is Mine Act jurisdiction, the Commission remanded this matter for further proceedings which now concern a total of five

citations for Dalton Highway vehicle maintenance defects, all designated as non-significant and substantial.[1]

The disposition of this remand matter was delayed to give the Secretary and Alaska the opportunity to resolve conflicts of jurisdiction between MSHA and the Alaska Occupational Safety and Health Administration. On November 18, 2015, the Secretary moved to vacate the five citations at issue, Citation Nos. 6444323, 6444324, 8605302, 8605303, and 8601014.

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 6444323 and 6444324 in Docket No. WEST 2008-1490-M, Citation Nos. 8605302 and 8605303 in Docket No. WEST 2011-1549-M, and Citation No. 8601014 in Docket No. WEST 2012-109-M, **ARE VACATED** with prejudice. **WHEREFORE**, the above captioned civil penalty matters **ARE DISMISSED**.[2]

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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/acp

[1] Docket No. WEST 2008-1490-M was the only captioned docket dealt with in the January 10, 2012, initial decision, and the Commission's October 16, 2014, remand. Given the Commission's finding of Mine Act jurisdiction, Docket Nos. WEST 2011-1549-M and WEST 2012-109-M, which also concern defects on Dalton Highway maintenance equipment, were consolidated with Docket No. WEST 2008-1490-M following the Commission's remand by order dated March 26, 2015.

[2] During the course of several telephone conferences, counsel for Alaska expressed regret that the Secretary's vacatur deprived Alaska of further litigating the subject jurisdictional question. I trust that the parties have resolved this issue through mutual agreement.

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January 21, 2016

SECRETARY OF LABOR, MSHA, on behalf of ADAM WHITON, Complainant v. WHARF RESOURCES (USA), INC., Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. CENT 2016-0136-DM MSHA Case No. RM-MD 16-04 Mine: The Wharf Mine Mine ID: 39-01282

ORDER GRANTING TEMPORARY, ECONOMIC REINSTATEMENT

Before: Judge McCarthy

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor (Secretary) on behalf of complainant, Adam Whiton, against Respondent, Wharf Resources (USA), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On January 15, 2016, the Secretary, on behalf of complainant Whiton, and Respondent, filed a Joint Motion to Approve Terms of Economic Reinstatement. On January 8, 2016, the Respondent timely requested a hearing on the Application. Thereafter, the parties negotiated a settlement of the issues raised by the Application.

Pursuant to the terms of the Joint Motion, the parties move for a temporary order that would economically reinstate Whiton, consistent with the terms and conditions of his former position as Pad Operator II at the Wharf Mine during the pendency and litigation of Whiton's October 27, 2015 complaint of discrimination. Specifically, the parties agree that Whiton's temporary reinstatement shall be subject to the following terms and conditions:

1. Respondent shall economically reinstate Whiton, rather than returning him to work. Accordingly, Respondent shall pay Whiton the rate of pay, including company-provided 401(k) contributions for which he qualifies. The parties have calculated the rate of pay and agree that Whiton's monthly gross pay during the period of temporary, economic reinstatement shall be an agreed amount. All applicable tax withholdings and other payroll deductions including, but not limited to, employee 401(k) contributions, deductions for payment of employee medical premiums, voluntary life, and other insurance previously taken from Whiton's gross pay will be withheld from his pay for each pay period. During the term of the temporary economic reinstatement, Respondent shall also provide

Whiton with the same health insurance that he was previously afforded. Whiton agrees that he is not entitled to request or to collect any unemployment benefits during the economic reinstatement period.

2. Respondent agrees to provide Whiton with a specified amount equally two months of back pay, less taxes and applicable deductions described in Paragraph 1.

3. Whiton will not report for duty with Respondent during the pendency of the temporary, economic reinstatement.

4. Whiton's temporary, economic reinstatement shall be effective beginning January 19, 2016. The first payment to Whiton under this agreement will be made on January 29, 2016. Subsequent payments to Whiton will be made on Respondent's normal payroll schedule.

5. The Secretary represents that the terms of the Joint Motion were conveyed to Respondent, who has agreed to the terms of the temporary, economic reinstatement, as set forth above.

6. Each party agrees that the undersigned Administrative Law Judge shall continue to have jurisdiction over all aspects of the economic reinstatement while it is in effect. At the conclusion of MSHA's investigation into Whiton's October 27, 2015 complaint, if MSHA determines that Respondent did not violate Section 105(c) of the Mine Act, Whiton will no longer be entitled to economic reinstatement payments as of the date that MSHA finalizes that determination.

7. The agreement may not be relied upon by either party for any reason other than to enforce its terms during the pendency of the Temporary Economic Reinstatement Order.

I have reviewed the Joint Motion and determined that it reflects a clear meeting of the minds on the issue of temporary, economic reinstatement, as required by Commission precedent. I have further determined that the parties' settlement agreement is consistent with the purposes of the Act and Section 110(i) of the Act. Upon consideration of the foregoing, the Joint Motion to Approve Terms of Economic Reinstatement is **GRANTED**.

Accordingly, pursuant to the terms of the parties' agreement, Respondent is **ORDERED to economically reinstate** Adam Whiton, as specified in the Joint Motion, as approved herein. The parties are **FURTHER ORDERED** to comply with all of the provisions of the Joint Motion to Approve Terms of Economic Reinstatement.

As set forth in the parties' Joint Motion, this Order Granting Temporary, Economic Reinstatement is not open-ended. If MSHA determines that there is insufficient evidence to proceed on Whiton's discrimination complaint, this order will terminate on the date of MSHA's determination. *See N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744-46 (6th Cir. 2012); *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 309 (7th Cir. 2012). Otherwise, it will end upon final order on the underlying discrimination complaint. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act and so advise the Respondent and this tribunal.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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January 27, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KENTUCKY FUEL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2015-504 A.C. No. 15-19475-379792 Mine: Beech Creek Surface Mine

ORDER DENYING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement. The Secretary originally proposed penalties totaling $69,400 for the two violations alleged and the motion seeks to settle them for penalties totaling $45,000, a 35% reduction. For the reasons which follow, the Secretary's Motion must be DENIED.

Citation No. 8300623

The Motion first addresses Citation Number 8300623, a section 104(a) citation, citing standard 30 C.F.R. § 77.404(a), and its provision that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The Secretary presents that the "Basis of compromise [is the] Fact of the Violation."[1] However, the fact of violation appears to be acknowledged in the motion. Instead, the Secretary offers the following[2] justification:

[1] Before presenting any information to justify the reductions, the Secretary habitually reasserts his view that "the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the parties' settlement under section 110(k) of the Mine Act, 30 U.S.C. § 820(k)." Motion at 2. The motion's reference to "the above summary" consists, in full, of the Secretary informing the Commission that he "*has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above*." *Id.* (emphasis added). Along with that summary, the Secretary adds that, when considered with "the pleadings in this case," the Commission has "an adequate

(continued…)

At hearing, Respondent would present evidence that the required pre-operational check under 30 C.F.R. § 77.1606(a) is conducted by an hourly miner, not a certified person. Respondent contends that the defects listed in this citation were not reported to mine management nor to the company maintenance staff. Many of the defects were cosmetic in nature, such as loose step, hood latch, and accumulations. None of the accumulations and the leaks was in proximity to a substantive ignition source. The operator admits that the remaining defects were

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[1] (…continued)
basis for exercising its authority to review and approve the parties' settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k)." *Id.* As the Secretary surely knows, "[t]he statements of fact in a party's pleadings are merely his contentions and are not evidence for himself unless admitted by his opponent." *Pullman Co. v. Bullard*, 44 F.2d 347, 348 (5th Cir. 1930). "The pleadings serve only as a rough guide to the nature of the case." *Minyard Enterprises, Inc. v. Southeastern Chemical & Solvent Co.*, 184 F.3d 373, 386 (4th Cir. 1999) (citing *Robinson v. Lorillard Corp*., 444 F.2d 791, 803 (4th Cir. 1971)). Given that the pleadings are only contentions, under the Secretary's approach the Commission is left only with the Secretary's statement that *he* has evaluated the matter and that is that, there being no need to offer more than his conclusion that the settlement is appropriate. Therefore, while the Secretary acknowledges that the Commission has the "authority to review and approve the parties' settlement under Section 110(k) of the Mine Act," the Secretary's position is that such authority to review is to be made without facts, resting on the Secretary's mere assertion that the settlement is appropriate. *Id.* In other words, by the Secretary's interpretation of section 110(k), Congress intended by its words that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission," to mean that the Commission's approval role is purely perfunctory. The words of Section 110(k) instruct otherwise. For an excellent review of settlements under the Mine Act and the legislative history regarding that section, the reader is referred to Ellen Smith, "*History 101: Settlements Under the Mine Act.*" Mine Safety and Health News, May 14, 2014, http://www.minesafety.com/history-101-settlements-under-the-mine-act/.

[2] After protesting that he need not provide anything of substance to the Commission in settlement motions, the Secretary, ever reluctant to genuinely meet his obligation to provide sufficient information to justify penalty reductions, then proceeds to offer, in the alternative, his justification. An indication that his intention remains to provide as little information as possible, the Secretary's justification begins by noting that the Respondent refers to another standard than the one cited, 30 C.F.R. § 77.1606(a), which requires that "[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation [and that] [e]quipment defects affecting safety shall be recorded and reported to the mine operator." The Court notes that the standard cited for Citation No. 8300623 addresses *maintaining* equipment in safe operating condition, and that even the standard cited as a justification for a reduction requires inspection by a "competent person." The Respondent offers that the inspection was done by an "hourly miner, not a certified person." Motion at 3. This does not strike the Court as a mitigating factor. If anything, it suggests that § 77.1606(a) may have been violated as well.

> reasonably likely to result in a lost workday/restricted duty injury. However, they were not readily apparent and would not have been noted without the input from the miner conducting pre-operational check. Further, Respondent argues about this citation being specially assessed. Nonetheless, in the interest of compromise, Respondent is willing to resolve this contest with a reduction to the penalty amount.
>
> Although the Secretary does not concede the issue, he recognizes a legitimate legal and factual dispute and believes settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act. The Secretary agrees to accept a reduced penalty.

Motion at 3-4. Based on those representations, the parties propose a 39% reduction from the proposed (special) assessment of $27,900 to $17,000.

The section 104(a) citation and the four continuation sheets which followed its issuance present a far different picture. Those documents, all part of Citation No. 8300623, issued December 1, 2014, assert:

> The red auto car grease truck, unit #7175, is not being maintained in safe operating condition. Several safety hazards, mechanical defects, and over worn components that directly affect the ability to safely operate this vehicle exist.
>
> A list of these issues follows:
>
> The operator's foot pedals, located inside the cab of this truck are worn, making them slick. This condition also adds to the difficulty and inability of the operator to bring this truck to a stop. Accumulations of the combustible material in the form of diesel fuel are present on the engine's diesel fuel injector pump, the diesel fuel transfer pump that is used to fill equipment, as well as a diesel fuel supply line coming from the left side diesel fuel tank supplying fuel to the motor of this truck. Additional leaks on of combustible materials, in the form of power steering fluid, are coming from the steering box's input shaft seal and the hose supplying oil to the power steering box.
>
> Extraneous material are present on the inside of the cab of this truck in the form of soda bottles, cans, oil and fuel filters, spare equipment light housings, hand cleaner, and a wooden plank.
>
> Safe means of access to the cab and rear service deck of this truck is not being provided. Both the mounting straps located on the fuel tank on the operator's side are broken. These are the mounting straps that the steps to board this truck are attached.
>
> The offside lower step is very loose and has one of the two present mounting bolts missing.

Tripping hazards on the service deck are present from miscellaneous hydraulic hoses lying scattered out over the service deck. Gross amounts of oil and grease are present on the service deck of the truck and has been allowed to obviously accumulate in this area over and [sic] extended period of time. The accumulations of slick lubricants and extraneous material present in this area creates a tripping hazard situation for employees that access this area to obtain use of the filling nozzles and refill the oil tanks and grease drum.

The front hood latches on both sides were broken and inoperative. The hood is the type that opens forward toward the front of the truck. Without the latches in place the hood could open forward and block the visibility of the operator.

The pitman arm on the output shaft of the steering box is loose. Total loss of control of the direction the vehicle is traveling, would occur when this comes loose.

The right side rear tandem outside tires has a 2 and ½ inch x 9 inch x ¼ inch deep section of rubber missing from the tire's sidewall area.

The left side rear tandem outside tire has a groove worn the entire diameter of the tire 3/8 of an inch wide x 1/8 of an inch deep.

A braking system air leak is present at the rear tandem splitter valve. The suspension's rear tandem left side front leaf spring is damaged and bent due to excessive stress. This condition is allowing the truck's frame to sit in a lower position than normal and the frame is coming in contact with the tires. This condition will cause the tires to explode and blow out due to the wear caused by friction of the tires rubbing the frame when moving. The two rear tandem axle wheels have lug nuts loose on three out of four wheels. Due to the excessive heavy loads this truck carries, this condition will cause the wheels to come off of the truck and the truck to overturn. Work practices of allowing equipment to operate with this many hazardous conditions constitutes extremely high negligence. This truck is used to service all equipment on this surface mine two times a day and seven days a week.

By December 22, 2014, the continuation report, (8300623-01), advised: "The affected truck remains out of service and at the mine site. A decision hasn't been made on the future of this truck due to the mine economy." On January 9, 2015, a subsequent continuation report, (8300623-02), advised: "The affected truck remains out of service and at the mine site. Additional time is needed for the truck to be moved and made inoperative." The January 19, 2015 continuation report (8300623-03) noted: "The affected truck has been towed off mine property. Additional time is needed to determine what's going to be done with truck."

The recounting ends with the continuation report dated January 20, 2015, (8300623-04), which advised:

> The red auto car grease/lube unit #7175 was removed from the mine site and being towed to Blue Ridge Farm Center in Buchanan, Va. The violation is terminated due to removal from the mine site and transport off mining property. Prior to its removal the cited conditions had not been repaired by the operator. The mine operator was notified that prior to resuming mining activities at this or any other mine site, he is required to comply with the cited standard and notify MSHA.

The Court's problems with the settlement motion are severalfold. First, depending on how one subdivides the various safety hazards identified in the detailed three (3) page citation, by the Court's count, there were at least 9 (nine) separate hazards identified. The Court does not understand the basis for claiming that "[m]any of the defects were cosmetic." Motion at 3. In fact, reading the citation, none appear to be cosmetic. The Court also does not understand the claim that the hazards were "not readily apparent" as the text of the citation implies that they quite obvious. The narrative for the Special Assessment asserts the "numerous hazards had existed for an extended period of time."

Another issue is that the Secretary "does not concede" any of the Respondent's claims. Yet, without any elaboration, he offers only 8 (eight) words in support of it: "[The Secretary] recognizes a legitimate legal and factual dispute." Motion at 4. Such claimed justification does not meet the requirements of section 110(k). The Secretary will need to weigh in, with particularity, regarding the nine hazards identified in the citation and explain the factual disputes and which, if any of the named conditions, the Secretary believes may be argued as "cosmetic in nature." As noted, the standard cited speaks to maintaining equipment in safe operating condition and does not turn upon nor envision mitigation based on a claim that it was examined by an hourly employee. When equipment is not maintained in such condition, the standard requires that it be removed from service immediately. The importance of the cited standard, as the Narrative Findings for the Special Assessment informs, is also one of the Agency's "Rules to Live By."[3]

[3] MSHA's "'Rules to Live By' is an initiative to prevent fatalities in mining [which was spawned by the fact that] [t]oo many miners still lose their lives in preventable accidents." MSHA, "Fatality Prevention – Rules to Live By," http://www.msha.gov/focuson/rulestoliveby.asp.

Citation No. 8296781

Similar deficiencies exist for the section 104(d)(1) Order, No. 8296781,[4] issued December 10, 2014, which alleges a violation of 30 C.F.R. § 77.1713(a). That standard provides:

> Daily inspection of surface coal mine; certified person; reports of inspection. (a) At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

For this alleged violation, the "Basis of Compromise" is listed as "Gravity." The motion asserts:

> At hearing, Respondent would present evidence that it was unlikely that a fatal injury would have occurred from the underlying cited condition. Respondent contends that the condition cited was the result of bad blasting practice engaged by the blasting contractor. The resulting materials had been identified by mine management. Respondent contends that all miners were alerted to the safety hazards in the areas, and appropriate steps were in process to remove these safety hazards. Respondent argues that even though the conditions had not yet been recorded in the book, the operator had notified MSHA of the problems and had submitted a proposed addendum to the ground control plan outlining the steps to be taken to correct the issue. The addendum was subsequently approved by MSHA shortly after this enforcement action was issued. Further, Respondent argues about this citation being specially assessed. Nonetheless, in the interest of compromise, Respondent is willing to resolve this contest with a reduction to the penalty amount.
>
> Although the Secretary does not concede the issue, he recognizes a legitimate legal and factual dispute and believes settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act. The Secretary agrees to accept a reduced penalty.
>
> Amount of the penalty proposed by the Office of Assessments: $41,500.
>
> Amount of the penalty proposed by the parties: $28,000.

Motion at 4.

[4] In the Secretary's Motion, initially he correctly identifies this matter as No. 8296781, but then later mislabels it, in describing the offered basis for the reduction as pertaining to No. 8300623, which actually relates to the 104(a) citation discussed above. Motion at 4.

Thus, the Secretary advances the same 8 (eight) words, and nothing more, in support of his motion for this alleged violation, that "he recognizes a legitimate legal and factual dispute." Motion at 4.

In contrast, the (d)(1) order asserts:

> Adequate on shift exams are not being conducted at this mine site in that they are not reflective of the actual conditions found. On this date, hazards were observed in the pits, on the dumps, on the drill benches, and on the safety catch bench areas and none of them were recorded in the exam book (see citation No. 8296765[5]). The foreman were [sic] aware of the conditions, as they were obvious and extensive, and failed to record them in the exam book or to take corrective actions. This is an unwarrantable failure to comply with a mandatory standard in that the foreman has engaged in aggravated conduct by failing to detect and correct the hazardous conditions exposing numerous miners to the hazards for several shifts. This is the third time this standard has been cited in 9 months at this mine.

Order No. 8296781.

Of note, the Order applied to the entire mine and, adding detail that the party cited in the prior instances was the operator, not a contractor, it also advised that "Standard 77.1713 (a) was cited 2 times in two years at mine 1519475 (2 to the operator, 0 to a contractor) and the inspector deemed it be "an unwarrantable failure to comply with a mandatory standard."

The Order was terminated:

> on the basis that the foreman has received additional training on the requirements of the ground control plan, hazard recognition, and on conducting better on shifts exams. An exam was conducted by the 2nd shift foreman, of active work areas, and the location of the exam, hazards observed, and corrective actions were recorded in the on shift book.

Order 8296781-01, initialed on December 12, 2014.

The Secretary again has offered nothing in terms of identifying the "legitimate legal and factual" dispute that he "recognizes." Thus, although the basis for the reduced penalty is framed as if it is different from the Secretary's original stance that he not provide any information to the Commission because the pleadings and his summary are sufficient and because the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The fact is the Secretary has not provided more information to the Commission, presenting instead only the Respondent's version, coupled with the remark that none of that version is conceded by him.

[5] The inspector intended to reference Citation No. 8296780, not Citation No. 8296765. The Secretary filed a motion to amend the 104(d)(1) order, which the Court granted. *See* Order, October 16, 2015.

Of concern and not addressed is the inspector's statement in the section 104(d)(1) order that the failure to conduct the on shift exams was mine-wide, with hazards observed in the pits, on the dumps, on drill benches, and on safety catch bench areas, and with none of the hazards recorded in the exam book. As also noted, the Order asserts that "the foreman [was] aware of the conditions [which were] obvious and extensive." The inspector deemed the foreman's failure to be aggravated conduct by his failing both to detect and correct the many hazards, which miners were exposed to "for several shifts." Order 8296781. The Order makes no mention that "the *condition* cited" was attributable to a blasting contractor, describes *multiple conditions*, not one, and that the foreman was aware of the obvious and extensive hazards, yet failed to record them in the exam book and also failed to take corrective actions. The settlement does not advise if there was a blasting contractor, nor if there was, whether that contractor was also cited. For his part, the Secretary addresses none of these matters in the Motion.

Another problem with the Secretary's offering is that the motion, as with all of the Secretary's settlement motions encountered by this Court, fails to inform whether the Secretary has consulted with the issuing inspector about the claims made by the mine operator. One would anticipate that the Secretary would want to reach out to the issuing inspector as part of the process of evaluating conflicting factual claims. A failure to engage in such practice seriously undercuts the diligent efforts of MSHA's dedicated inspectors and can only be expected to dampen those efforts if the problems identified are disposed of without such consultations and with as few as eight empty words.

If the parties cannot supply sufficient additional explanations/justifications for the motion, the Court will set the matter for hearing.

Conclusion

It seems more than unlikely that Congress would have taken the time to create a specific subsection within the topic of penalties for Mine Act violations to create only a paper, and purely ministerial, role for the Commission. That provision arrived in the context of a historical progression, as each iteration of Congressional legislation addressing mine safety and health recognized the prior legislation's shortcomings and from those lessons sought to strengthen the protection for miners.

Based on the foregoing reasons, the motion is DENIED. It is important that the parties understand that this decision does not suggest that a settlement motion can never be approved. Rather, it is a statement that the Secretary has failed to do his job and by that failure has prevented the Court from performing its job — carrying out Congress' will, per section 110(k).

Only when armed with sufficient information, can the Court, acting in the first instance for the Commission, make sure that compromises, mitigations, and settlements are substantially justified. Such adequate information may result in the approval of the settlement amount as originally presented or, as the facts may warrant when fully presented, a lesser or greater civil penalty.

So Ordered.

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

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