

January 2022

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 7, 2022

MARIA T. WALKER,
Petitioner,

v.

CAPURRO TRUCKING,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2021-0183
MSHA Case No. WE-MD-21-20

Mine ID: 26-01089 / F732
Mine: Goldstrike Mine

**DECISION ON RESPONDENT’S
MOTION FOR SUMMARY DECISION**

Before: Judge Sullivan

This discrimination proceeding is before the Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(3). Respondent Capurro Trucking (“Capurro”), pursuant to Commission Procedural Rule 67(a)-(c), 29 C.F.R. §2700.67(a)-(c), has filed a Motion for Summary Decision (“Resp’t Mot.”) on the pro se discrimination complaint brought against it by its former employee, Complainant Maria T. Walker. Complainant opposes the Motion for Summary Decision.

I. GENERAL FACTUAL AND PROCEDURAL BACKGROUND

Capurro, headquartered in Sparks, NV, provides trucking services as a contractor under the Mine Act from its Carlin, NV Mining Division facilities to nearby mines, including the Goldstrike Mine of Nevada Gold Mines LLC. Complainant started as a Capurro ore haul truck driver on November 25, 2019, with approximately three weeks of training.¹ She worked as a Capurro Mining Division driver until her termination on September 3, 2020.

According to the Exit Interview that Complainant attached to her Commission Complaint, (hereinafter “105(c)(3) Compl.”), Capurro informed the Complainant that she was being terminated for her “[f]ailure to take direction from supervisors without constant argument” and “[d]isruption of workforce.” The Exit Interview further stated that “all communications and

¹ Prior to her employment at Capurro, Complainant had six years of truck driving experience. Questionnaire at 2. Complainant’s husband, Mr. William Walker, was hired in the same position by Capurro at approximately the same time. Resp’t Mot. Ex. 1, ¶ 13.

directives given from any management or supervision is a debate or argument” and are “very disruptive and time consuming.” *Id.*²

Complainant, pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), subsequently filed a discrimination complaint against Capurro with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) (hereinafter “MSHA Compl.”).³ However, by letter dated March 19, 2021, MSHA notified Complainant that the Secretary of Labor would not be filing a discrimination complaint on her behalf with the Commission, because “[b]ased on a review of the information gathered during the investigation, MSHA does not believe that there is sufficient evidence to establish, by a preponderance of the evidence, that a violation of Section 105(c) occurred.”

Along the lines suggested in MSHA’s March 19th letter, and as discussed in further detail below, Complainant filed her own discrimination complaint with the Commission, dated April 13, 2021. Capurro timely filed its Answer, and on June 7, 2021, Chief Administrative Law Judge Glynn F. Voisin assigned me this matter.

On June 15, 2021, I conducted a conference call with the parties. Among the topics discussed was the scope of a Commission discrimination proceeding.⁴ I granted Complainant’s request that a hearing not be held in the near term, primarily in order to permit her to receive and review documents she had requested from MSHA through the Freedom of Information Act (“FOIA”).⁵ I explained to both parties that it was unrealistic to expect that any of the materials obtained from MSHA pursuant to a FOIA request would include MSHA’s view on the merits of

² The Exit Interview cited a specific example of disruption it attributed to the Complainant. According to Capurro, Complainant had recently, in a group text thread, objected to a Covid-19 temperature check protocol, which in turn caused “several others to fear temperature checks and park several pieces of equipment causing hardship to the employer and the employer[’]s inability to perform customer needs.”

³ The MSHA complaint includes (1) a completed MSHA Form 2000-123 titled, “Discrimination Complaint,” and (2) MSHA Form 2000-124 titled, “Discrimination Report,” a one-page narrative dated October 13, 2020, describing the basis for the complaint. While her MSHA Form 2000-123 stated that she would “possibly” seek temporary reinstatement, Complainant later informed MSHA that she was not interested in returning to work for Capurro.

⁴ The initial pleadings in this case, along with the initial conversation with the parties, indicated that not only the pro se Complainant, but also Capurro’s able counsel, viewed this Commission proceeding as an appeal of the Secretary’s decision not to pursue the case, rather than the de novo proceeding contemplated by section 105(c)(3). Such an erroneous impression may have resulted from the final instruction in the MSHA form letter concerning the filing of a section 105(c)(3) complaint, which refers to any subsequent Commission case as an “appeal file.”

⁵ MSHA had indicated that the agency would take approximately three months to fully answer the FOIA request. During this time Complainant was expecting to complete her planned relocation to a town in Idaho approximately 500 miles from Carlin.

the Complainant's discrimination allegations. However, given the circumstances and that the request was from a pro se Complainant, I viewed it as reasonable one and issued a Notice of Hearing and Prehearing Order for December 2021. *See Ribble v. T & M Dev. Co.*, 22 FMSHRC 593, 595 (May 2000) (holding that pro se complainant who met Commission's minimal section 105(c)(3) proceeding pleading requirements be afforded opportunity to prove discrimination allegations under the Commission's Procedural rules).⁶

After both parties conducted discovery, on November 15, 2021, Capurro filed its Motion for Summary Decision, along with a five-page Statement of Undisputed Facts, two affidavits, and approximately 600 additional pages of exhibits ("Resp't Ex.").

In response, Complainant filed a one-page opposition to Capurro's Motion, to which she appended a two-page "response" to Capurro's initial Answer. Complainant also submitted 356 pages of documents she characterized as exhibits ("Walker Ex."). Many of the documents were copies of repetitive instances of the same text conversation, and many documents included Complainant's undated annotations. Also accompanying the exhibits was a four-page "Exhibit Form" in which Complainant tersely summarized the documents and her view of their import. Because the Complainant is pro se, I have liberally construed Commission Rule 67(d), 29 C.F.R. § 2700.67(d), which governs the form of opposition to motions for summary decision.

With the prospect of a hearing that could only be held via Zoom video conferencing,⁷ I held a Zoom session with the parties on December 9, 2021. The purpose of the session was to explore their respective abilities to conduct a full video conference hearing, as well as to discuss the issues in the case, including those raised by a voluminous summary decision record.

At that time, Complainant requested a continuance to the hearing so that she could continue with what she represented were ongoing conversations with experienced Mine Act counsel regarding his serving as her attorney in the case. I granted the continuance request, indicating that I had not yet decided how I would rule on the Motion for Summary Decision, but would do so in a written order or decision before ordering further proceedings in the case, if any. I also suggested that Complainant respond in good faith to Capurro's outstanding offer to discuss

⁶ In the interim, Commission staff attempted to cure the absence in her section 105(c)(3) Complaint of the relief that Complainant was seeking. *See* Commission Procedural Rule 42, 29 C.F.R. § 2700.42 ("A discrimination complaint shall include . . . a statement of the relief requested."). By e-mail dated September 20, 2021, Complainant responded she was seeking \$5,000,000. She also indicated her desire that the case result in Capurro firing or otherwise disciplining various members of its Mining Division management.

Complainant was thereupon informed that such requests far exceeded any remedy conceivably permitted by section 105(c). *See Sec'y on behalf of Rieke v. Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1257-60 (July 1997) (discussing that goal of Mine Act is to make discriminatees whole). In the absence of a serious response from Complainant, I am assuming that her statement to MSHA during its investigation that she was seeking backpay, but not reinstatement, extends to her case before the Commission.

⁷ The Commission was not holding in-person hearings through 2021 due to the changing circumstances regarding Covid-19.

potential settlement, informing the parties, as I had before, that the Commission could assist these discussions by appointing settlement counsel in the case.

A month later, Complainant has yet to provide a definitive answer on whether she will be retaining the counsel she referenced at the conference (or any other), and recent indications are she is not interested in participating in settlement discussions. Consequently, due process and fairness considerations require that I rule upon Capurro's Motion for Summary Decision now.

II. SUMMARY OF APPLICABLE LAW

A. Establishing Discrimination Under the Mine Act

The pertinent provision of the Mine Act, section 105(c)(1), provides that "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner, . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine." 30 U.S.C. § 815(c)(1). In cases such as this one, that are potentially reviewable by the United States Court of Appeals for the Ninth Circuit under section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), the key term in section 105(c)(1) is "*because*." A discrimination complainant must show that (1) she engaged in what is known as "protected activity" (i.e., "the exercise of statutory rights"); and (2) that the adverse action complained (here the Complainant's termination) was "*because*" of that protected activity. In other words, at least in cases ultimately subject to Ninth Circuit review, a Complainant must show that her employer would not have taken the adverse action against her "but for" the protected activity she engaged in. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1210 (9th Cir. 2021) (remanding 105(c)(3) case for Commission to apply "but-for standard"); Docket No. WEST 2018-0402 (Dec. 2, 2020), at 11 (ALJ) (decision on remand applying but-for standard), pet. for rev. filed Dec. 29, 2021; *see also Sec'y on behalf of Alvaro v. Grimes Rock, Inc.*, 43 FMSHRC 299, 302-03 (June 2021).

The question of whether an employer would not have taken an adverse action "but for" a complainant's protected activity is one of motivation. Motivation can be established either directly or indirectly, through circumstantial evidence. Relevant considerations in determining motivation are the employer's knowledge of the protected activity, its hostility towards the protected activity, the coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *See Sec'y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 954 (D.C. Cir. 1983).

B. Summary Decision Standard

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law."

29 C.F.R. § 2700.67(b). The Commission analogizes summary decision to Rule 56 of the Federal Rules of Civil Procedure governing summary judgment. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, determined that summary judgment is only appropriate “upon proper showings of the lack of a genuine, triable issue of material fact.” *Id.* at 2987-88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

The Supreme Court has also held that both the record and “inferences drawn from the underlying facts” must be viewed in the light most favorable to the party opposing the motion. *Id.* at 2988 (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)). However, only such inferences that are “reasonable” may be drawn. *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 150 (2000); *Tolan v. Cotton*, 572 U.S. 650, 660 (2014). Consequently, in ruling upon motions for summary judgment, courts have refused to indulge inferences from non-movants that are “farfetched or fantastic” (*Int’l Ass’n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr.*, 103 F.3d 196, 206 (1st Cir. 1996)), that do not follow rationally from facts presented to the judge (*Iglesias v. Mutual Life Ins. Co. of New York*, 156 F.3d 237, 240 (1st Cir. 1998)), or that require the court to “accept . . . sheer speculation as fact.” *Robbins v. Becker*, 794 F.3d 988, 997 (8th Cir. 2015). In short, a non-moving party “cannot rely on conclusory allegations, improbable inferences, acrimonious invective, or rank speculation.” *Thompson v. Gold Medal Bakery, Inc.*, 989 F.3d 135, 141 (1st Cir. 2021).

III. DISCUSSION AND ANALYSIS

In its Motion for Summary Decision, Capurro argues that Complainant has not alleged, much less provided any evidence, that she engaged in activity protected by the Mine Act. Resp’t Mot. at 11-13. Capurro maintains that the scope of any discrimination complaint before the Commission is strictly circumscribed by matters raised in the initial complaint to MSHA, because only those matters could have been investigated by that agency. *Id.* at 16. Capurro further argues that the evidence it submitted establishes beyond any doubt that Complainant was terminated for cause, and thus, under the “but for” section 105(c) test for discrimination, its Motion should be granted. *Id.* at 13-15.

In opposing the motion, Complainant argues that Capurro still fails to sufficiently document why it terminated her. She further contends that Capurro did not address her section 105(c) complaints and that the “constant absences” of Capurro Mining Division General Manager David Peck “left unknowledgeable and untrained . . . managers/supervisors in his stead.”

A. The Permissible Scope of a Section 105(c)(3) Complaint

I first address Capurro’s arguments on the scope of the section 105(c)(3) complaint that the Commission can entertain in this case. In *Hatfield v. Colquest Energy, Inc.*, the Commission held that the scope of a section 105(c)(3) proceeding is not defined solely by the original complaint to MSHA but can also include additional matters that were “reported to” MSHA for investigation. 13 FMSHRC 544, 546 (Apr. 1991). A section 105(c) proceeding is not strictly circumscribed by the original complaint to MSHA if, during MSHA’s subsequent investigation, additional information relevant to the question of whether discrimination occurred is uncovered.

Hopkins Cty. Coal, LLC, 38 FMSHRC 1317, 1322-26 (June 2016) (detailing MSHA investigatory process in discrimination cases).

The MSHA investigatory process can hardly be described as transparent when the Secretary declines to file a discrimination complaint with the Commission. Hence why it is difficult for a section 105(c)(3) complainant, especially a pro se one, to establish the actual extent of matters that MSHA investigated. Here, however, there is no question regarding what matters Complainant “reported to” MSHA during its investigation, and thus provided the agency the opportunity to investigate.

That is because Complainant appended to her Commission Complaint not only the required original discrimination complaint to MSHA and the Capurro Exit Interview previously discussed, but also copies of two other documents detailing the information she provided to MSHA in support of her initial complaint. The first is a six-page document containing answers the Complainant appears to have provided to various MSHA questions on October 29, 2020 (hereinafter “Questionnaire”). The second is a more formal document, the signed “Statement of Maria Walker” that Complainant gave to MSHA Special Investigator Kyle E. Jackson on November 17, 2020 (hereinafter “Complainant Statement”).

Consequently, in ruling upon the Motion for Summary Decision, I will review the allegations in the Complaint to the Commission to the extent that they were reported to MSHA in the Complaint to MSHA, the Questionnaire, or the Complainant Statement. I will not address the additional allegations Complainant made to MSHA in the latter two documents that she did not include in either of her complaints. *See Carmichael v. Jim Walters Res., Inc.*, 20 FMSHRC 479, 484 n.9 (May 1998) (“Whatever its value as evidence, the [section 105(c)(3)] complaint to the Commission, much like a complaint in a court proceeding, is a basic pleading that serves to frame the issues to be tried.”). Such review will be conducted in accordance with the standard for summary decision.

B. Whether the Section 105(c)(3) Complaint Includes Allegations of Protected Activity Raised in the Complaint to MSHA or the Subsequent Investigation

Much of the Complaint to the Commission is a compendium of accusations against Capurro, many of which are quite serious. For instance, as she had to MSHA, Complainant alleges criminal conduct on the part of Capurro and its agents. Included are allegations of “fraud” carried out by Capurro’s agents, “payoffs of mine employees,” and theft from the company. While Complainant identifies those she accuses by name, most of those names will not be repeated here, given the Complainant’s tendency to cavalierly allege criminal conduct, not only by individuals within Capurro’s Mining Division management but outside of it as well.⁸ With the exception of one serious accusation, none of the claims will be addressed in this decision because, even if true (which the record indicates there is much reason to doubt), they have

⁸ In responding to the Motion for Summary Decision, Complainant included a copy of her letter to the superior of a Nevada Highway Patrol Commercial Enforcement Officer, in which she accused the officer of having accepted a bribe from Capurro. Dated October 19, 2021, the letter appears to have been prompted by information Complainant would have then recently learned through the discovery process in this case. *See Walker Ex. WV-1(a) & (b)*.

nothing to do with workplace safety. Rather they only concern how Capurro carried out other aspects of its business operations.⁹

The Complainant maintains that the reason she was terminated was not related to how she carried out her job duties, but rather because she knew “too much” regarding the criminal conduct at Capurro. 105(c)(3) Compl. at 1. According to the Complainant, she posed a risk to the company’s management personnel, in that she could inform Capurro’s owner in Reno “of all the going-on’s” at the Carlin location. The Complainant further alleges that because she knew “too much,” she was treated differently from other drivers by management with respect to enforcement of company rules. Her ultimate request is that, before the Commission, she be permitted to “challenge Capurro, in which to produce true and correct documentation against their falsified and sparse history” of her employment there. *Id.* at 2.

At bottom, Complainant’s case revolves around allegations of disparate treatment of her by management. Of course, a Mine Act discrimination case based on disparate treatment must contain some plausible allegation that a miner had engaged in protected activity and was subsequently treated differently than employees who had not engaged in protected activity. *See, e.g., Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1364-67 (Dec. 2000).

Keeping in mind that Complainant is pro se, I have thoroughly reviewed her Complaint to the Commission, as supported by her original Complaint to MSHA and the additional MSHA investigation documents she included, to discern any recognizable allegation of protected activity under the Mine Act that may have motivated Capurro to terminate Complainant’s employment. My conclusions are as follows:

1. “Stop work” Incident

The closest mention of protected activity in the Complaint to the Commission is what led to what Complainant refers as the “stop work” incident. 105(c)(3) Compl. at 2. Capurro described the incident as a “disruption of [the] work force” and included it as a reason for Complainant’s termination.

According to the information Complainant provided to MSHA, on August 3, 2020, she and other drivers on her shift learned that due to a mine’s Covid-19 concerns, driver compliance with masking and temperature checks were now conditions of truck entry through the mine’s gate. MSHA Compl. at 2; *see also* Walker Ex. WI-6 (L). It is undisputed that the new

⁹ The section 105(c)(3) Complaint also included absurdly false information. It stated that “[m]y Exit interview did not even specify what I was being fired for.” As discussed, the Capurro Exit Interview sheet clearly and succinctly provided the reasons Capurro gave Complainant for her termination, doing so under the heading “Reason for Termination.” Complainant not only attached this to her Complaint to the Commission, but her very first exhibit submitted is a copy of the Exit Interview (which also indicates that she refused to sign it). Walker Ex. WI-1.

requirements were the subject of a driver group text involving the Complainant, and she and several other drivers subsequently parked their trucks.¹⁰

While the Mine Act grants miners the right to complain of a safety, health, or danger violation, it does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, both the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger. *See Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 177 (Feb. 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)). To be considered “protected,” work refusals must be based upon a “good faith, reasonable belief in a hazardous condition.” *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 812 (Apr. 1981); *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). Consistent with the requirement that the complainant establish a good faith, reasonable belief in a hazard, “a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue.” *Sec’y of Labor on behalf of Dunmire v. N. Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982).

In this instance, Complainant has not alleged that the work stoppage arose from concerns regarding potential adverse health or safety impacts associated with the new mine site requirements. Rather, she stated that the basis for her and other drivers’ objections was that the policy was understood to have been newly instituted during that shift, and that it was contrary to the policy that previously applied to drivers who would not be exiting their trucks while at the mine. In bringing her complaint to MSHA regarding this incident, Complainant never alleged that concern with health or safety impacts prompted her involvement in it. Rather, her concern was solely regarding how the issue was handled internally by Capurro. *See* MSHA Compl. at 2 (“As it turns out, [Capurro’s] acting supervisor was wrong [about the new mine policy] and the whole incident was a waste of time, energy and emotion by her lack of due diligence. . . [O]ur Supervisor then got involved when the issue became too big for our acting supervisor”)¹¹

In responding to Capurro’s Motion, Complainant provides contemporaneous evidence, in the form of copies of her own texts with General Manager of Mining Division Peck. The texts further establish that she was not objecting to compliance with the mine’s new masking and temperature check requirement on safety or health grounds. *See* Walker Ex. WI-6 (c) (“I’m trying to work within the rules but don’t [think?] that that was cool to spring [on] us. Was there not a meeting?”); Walker Ex. WI-6 (h) (“Did you guys have a meeting on this with the mine? Feels really weird we were informed on the road like that[.]”).

¹⁰ Contrary to the section 105(c)(3) Complaint, the Exit Interview does not state that the Complainant initiated the work stoppage by being the first to park her truck. Rather, the Exit Interview merely states that after the Complainant stated in the group text her refusal to comply with the temperature check, several other drivers also parked their equipment.

¹¹ The MSHA Complaint goes on to allude to Complainant having, on more than one occasion, “issues with ‘Fill-in’ supervisors, as my boss was gone on many personal trips.” There is no mention of protected activity having prompted any of the “issues.”

Thus, there is no claim by Complainant that any disparate treatment of her with respect to the August 3rd incident is connected to any activity protected by the Mine Act in which she alleges to have engaged. Instead, this incident is more in line with what appears to be her myriad other general complaints regarding how Capurro Mining Division management carried out day-to-day operations.¹²

Complainant's issues with masks extend beyond requirements imposed by the mine, to also include how Capurro carried out its own masking policy. Again, however, Complainant's issue was not that wearing masks posed any sort of health or safety hazard, either in general or while carrying out her duties. Rather, her objection was that the policy was inconsistently enforced. Walker Ex. WI-6 (x); (a-1). Complainant pointed to when she was asked to wear a mask by management while indoors, and although she proceeded to go outside instead of putting a mask on, management still requested that she put one on. MSHA Compl. at 2 ("made to put on a mas[k]outside just so my safety director could see me, 'Wear one for a few seconds'"); Walker Ex. WI-6 (t). When describing this incident, the Complainant provided no indication that this request impacted her medically, but rather just that she was asked to do so – again, aligning more with a general grievance.

Moreover, Complainant's issues with masks appear to stem from her personal views, as she states in texts with management, that she is an employee who is against masks. Ex. WI-6 (o). While Complainant indicated in texts with management that she could wear a mask while working, she also communicated during the same text exchange that she and her husband will "stand true to beliefs" and "will not bow to our generation of sheeple[s]" if they are asked to wear a mask in a situation that can be "worked around." Walker Ex. WI-6 (R).

2. Speeding Infractions

Complainant also alleges that Capurro treated her differently than other drivers, including her own husband, with respect to discipline for violating Capurro's speeding policies. 105(c)(3) Compl. at 2. As background, in her Complaint to MSHA, Complainant stated that she "spent many days off for speeding and held accountable as I accepted my responsibility for my actions.

¹² Other documents submitted by the Complainant in response to Capurro's Motion indicate that at one time she feared an adverse impact from the use of the specific temperature check device being used by the mine. Complainant's fear, however, had to do with whether she would be able to subsequently continue with her side avocation as a "light worker," not as a driver for Capurro. Walker Ex. WI-6 (C), WII-3(k),(l)). Complainant's documents describe a "light worker" as someone who facilitates "quantum healing hypnosis." Walker Ex. WV-2 (a)-(h). Even then, as her own documents show, Capurro Trucking management sent her pictures and additional information regarding the type of thermometer used for temperature checks and allowed the Complainant to take a day off, at her request, while management "figures out particulars." Walker Ex. WI-6 (g)-(j). This appears to have alleviated Complainant's concern, and she did not subsequently raise with MSHA her concern that the temperature check device would adversely impact her "light worker" capabilities or that the prospect for its use on her prompted her to park her truck.

It was later after checking that others also had speeding infractions but were not given days off and batches were even thrown in the garbage with no time off.” MSHA Compl. at 2.

Again, Complainant fails to suggest in either complaint that there was any protected activity in which she engaged that may have prompted this alleged disparate treatment. At most, during the MSHA investigation Complainant attributed some of the speeding infractions she incurred to the lack of a working speedometer in the first truck she was assigned, Truck 29, and claims that she had earlier alerted Capurro to that fact. Complainant Statement at 2; Questionnaire at 3, 4. Capurro, in its Motion, disputes that Complainant had previously notified it as to the condition of the speedometer. Resp’t Mot. at 12-13. This conflict need not be resolved, however, because Capurro provided documentary evidence indicating that Complainant was assigned Truck 29 only during her first month and was soon assigned other trucks to drive for the remaining *eight or so months* while she drove for Capurro. Resp’t Mot., Ex. 10 (timecards) & 12 (truck assignments). Complainant does not dispute this, nor has she alleged speedometer problems with those other trucks led to her additional speeding infractions. *Cf. Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1825-26 (Aug. 2012) (finding termination of complainant two to three weeks after his safety-related complaints indicated employer’s discriminatory motivation); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 983, 992-93 (June 1982) (concluding that termination of complainant the same day he had engaged in a protected work refusal was indicia of employer’s discriminatory motivation).

Capurro cited Complainant 21 more times for speeding instances during that period. While Complainant took issue with the basis for a few of the later infractions during the MSHA investigation (Complainant Statement at 4-5), consistent with her earlier admission that she accepted responsibility for her speeding infraction record, she does not dispute that she incurred many additional speeding infractions that she did not challenge at the time.¹³

¹³ Absent an allegation of protected activity that prompted the Capurro’s alleged disparate treatment of the Complainant with respect to speeding infractions, any further conflicts between the parties’ accounts on this issue need not be resolved. I note, however, that in its Motion Capurro documented that Complainant was not the only driver suspended for speeding infractions over the course of her employment. *See* Resp’t Mot. at 4 & Ex. 5 (showing documentation of six other drivers suspended). Complainant herself also provided documentation of other drivers receiving suspensions after speeding, contradicting her own complaints. Walker Ex. WI-7 (A)-(B), WI-7 (J), (O), (P), and WI-7 (a) 24, 26 (featuring records of various other drivers who received one-day and three-day suspensions for speeding). Capurro’s documents further contradict Complainant’s claim to MSHA that “[e]very time I was written up for speeding, I was given 3 days off.” Questionnaire at 3. Of the 22 times Capurro cited the Complainant for speeding, the company’s records show that only six times was she disciplined, only twice was she suspended, and only once was she suspended for three days. Resp’t Mot. at 6-7 & Resp’t Ex. 5. Thus, there is evidence in the case that Complainant also benefitted from any tendency on the part of Capurro to not strictly enforce its disciplinary policies with respect to speeding infractions.

3. Repair Incident

In her complaint to MSHA, the Complainant obliquely referred to another incident that occurred on March 2, 2020—again relatively early in her tenure at Capurro. She described it as her as having been required to wait for truck repairs at a mine site. MSHA Compl. at 2. In her statement to MSHA, the Complainant alleged that she “one time red tagged the truck and they cut it off and put it back in service.” She subsequently explained, however, that, at that point, the truck had already been repaired at the mine, which permitted her to return to the Capurro truck shop. It was there that she proceeded to red tag the repaired truck out of an admitted fit of pique, stating “I was tired and upset that I was getting told two different things. So that is when I red tagged the truck and told them they can figure it out.” Complainant Statement at 3.

When the MSHA Investigator asked Complainant how her reporting of safety issues led to her termination, she responded not with specifics but instead simply claimed that she had become a “pain” on reporting to Capurro issues with trucks and safety procedures not being followed. *Id.* at 4. However, text messages between Complainant and Capurro management, provided by the Complainant herself, include positive management feedback to Complainant’s safety suggestions. Walker Ex. WI-6 (p), (w).

4. Down Time for Necessary Truck Washing

Complainant also alleges disparate treatment regarding the discipline she received following instances in which she admitted to taking more time than routinely allotted to wash her assigned truck. While her Complaint can certainly be read to involve a safety matter (“when it is wet and the mag on the mine dries in your sensors, it is like concrete, therefore setting off the ABS”), her claim is not that the discipline she received was for taking too long to clean her truck to fix the problem. Rather, the discipline was for her not obtaining the required prior approval before taking additional time. *See* MSHA Compl. at 2. Complainant does not dispute that Capurro contemplated as a matter of policy that additional truck washing time could be necessary. *See* Resp’t Ex. 8 at MSD0110 (noting the Plan for Improvement states “Be in contact with immediate supervisor to inform them of any washing of trucks going longer than 30 mins.”). Complainant again raises the issue as one in which allegedly similarly-situated drivers were not disciplined, but also again without alleging that Capurro’s disparate treatment towards her was due to her exercise of protected activity. As with the speeding infractions, Capurro documented the imposition of progressive discipline for not obtaining the required prior approval, starting with coaching from her supervisor. *Id.*, Ex. 10 at MSD0551, MSD0574, MSD0533.

5. Falsification of Documents

The final allegation contained in the Complaint to the Commission that bears any resemblance to a claim that the Complainant engaged in an exercise of protected activity is her contention that she could prove that Capurro had “falsified MSHA documents.” Specifically, she stated “[p]lease also be aware that I will also be filing [an] MSHA Hazard complaint that will contain actual mine safety documents of falsification by” Capurro’s Mine Division management. 105(c)(3) Compl. at 1.

Complainant did not include this falsification allegation in either her Complaint to MSHA or in her formal November 17, 2020 statement to MSHA Special Investigator Jackson. However, because it is a serious allegation, I have endeavored to discern from the documents provided what the Complainant is referring to, in the context of her relationship with Capurro, during the period of her employment and afterwards.

The Complainant's only mention of "falsification" involving mine safety documents is in her October 29, 2020 answers to questions from MSHA when she stated she was not seeking reinstatement because her "safety information had also been altered and signature forged" by Capurro. Questionnaire at 2. Complainant clearly did not provide to MSHA during its investigation any support for this claim, thus her statement to the Commission almost six months later that she "will be filing" an MSHA Hazard Complaint regarding falsification of mine safety documents.

Just as importantly, if not more so, the Complaint to the Commission does not come close to alleging that Complainant held this belief regarding falsification, in good faith or otherwise, prior to her termination, and that Capurro had any knowledge that Complainant held this view. *Cf. Pero*, 22 FMSHRC at 1364-65 (finding that complainant had engaged in protected activity prior to her discharge when she had informed superiors that she believed company was falsifying lost-day information on MSHA 7000-1 forms). Absent any claim by Complainant that such was the case, her prolonged and mere promise to provide evidence of falsification, now that she no longer works for the company, does not qualify as protected activity that could have motivated the company to terminate her.

Accordingly, I grant Capurro's Motion on the ground that there remains no genuine issue of material fact as to whether Complainant engaged in protected activity as alleged in her Complaint to the Commission. I thus do not reach Capurro's alternative ground for summary decision, which is that it has established as a matter of law that any protected activity on the part of Complainant was not the "but for" cause of her termination.

CONCLUSION

For the foregoing reasons Respondent's Motion for Summary Decision in this proceeding is **GRANTED** and Complainant's section 105(c)(3) proceeding is **DISMISSED**.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 14, 2020

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JAMES MCGAUGHRAN,
Complainant,

v.

LEHIGH CEMENT COMPANY, LLC,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. PENN 2020-0015-DM

Mine: Nazareth Plant I
Mine ID: 36-00190

ORDER DENYING MOTION TO ENFORCE ORDER

Before: Judge Rae

This matter comes before the Court upon the Secretary of Labor's ("Secretary") Motion to Enforce Order ("Motion"). For the reasons set forth below, the Secretary's Motion is denied.

I. BACKGROUND

On August 20, 2019, I issued an Order Granting Temporary Economic Reinstatement ("Order") ordering Lehigh Cement Company, LLC ("Respondent") to economically reinstate James McGaughran in accordance with all terms set forth in the parties' Joint Motion to Approve Settlement Regarding Temporary Reinstatement. I issued the Order in the temporary reinstatement proceeding, Docket No. PENN 2019-0144. Subsequently, I was assigned this discrimination proceeding—Docket No. PENN 2020-0015—which concerns the merits of McGaughran's discrimination complaint. I set a hearing date of June 2-4, 2020 for the discrimination proceeding. Subsequently, I postponed the hearing until October 27-30, 2020 due to COVID-19.

On May 11, 2020, Respondent filed a Motion for Tolling of Economic Temporary Reinstatement. On May 22, 2020, I issued the Order Tolling Temporary Reinstatement under the temporary reinstatement docket, Docket No. PENN 2019-0144. The Secretary filed a Petition for Discretionary Review of my Order Tolling Temporary Reinstatement, which the Commission granted on July 1, 2020. The matter is currently pending before the Commission.

II. DISCUSSION

The Secretary's Motion alleges that Respondent is not honoring the Order. Specifically, the Secretary alleges that Respondent failed to pay McGaughran the entire amount he is owed under Respondent's Annual Incentive Plan ("Incentive Plan"). The Incentive Plan provides Respondent's eligible employees with "an incentive compensation opportunity for improving

operating performance within their areas of responsibility during the ‘plan year.’” Mot. to Enforce Order Ex. 1, at 1. The Secretary seeks an order requiring Respondent to pay McGaughran \$12,000.00, which the Secretary claims represents the remainder of the Incentive Plan payment that Respondent has withheld from McGaughran.¹

Conversely, Respondent claims it is in full compliance with the Order. Respondent argues that payments under the Incentive Plan are a discretionary “bonus,” not a “benefit” that McGaughran is entitled to under the Order. Resp’t’s Opp’n to Mot. to Enforce Order, at 3-5. Although Respondent made a partial Incentive Plan payment to McGaughran, Respondent now maintains that the Order does not require Respondent to make *any* Incentive Plan payment to McGaughran. *Id.* at 6-7. For that reason, Respondent seeks an order requiring McGaughran to return the partial Incentive Plan payment to Respondent.

Ultimately, I cannot resolve the issues raised by the Secretary’s Motion at the present time because the Motion is not properly before me and because I lack jurisdiction over the temporary reinstatement proceeding. The Secretary filed the instant Motion under the incorrect docket. The instant discrimination proceeding solely concerns *the merits* of McGaughran’s discrimination claim, not issues addressing compliance with the Order. Rather, the matter of enforcing compliance with the Order would be properly filed under Docket No. PENN 2019-0144, the temporary reinstatement proceeding.

However, this Court would lack jurisdiction to address the substance of the Secretary’s Motion even if it were filed under the temporary reinstatement docket. Per Commission Rule 45(e), “[a] Judge’s order temporarily reinstating a miner is not a final decision within the meaning of [Section] 2700.69, and[,] *except during appellate review of such order by the Commission or courts*, the Judge shall retain jurisdiction over the temporary reinstatement proceeding.” 29 C.F.R. §2700.45(e)(4) (emphasis added); *see also BR&D Enters., Inc.*, 23 FMSHRC 386, 389 (Apr. 2001). During the Commission’s review of the Order, the Court does not retain jurisdiction over the temporary reinstatement proceeding.² 29 C.F.R. § 2700.45(e)(4).

¹ From 2016 through 2019, Respondent paid McGaughran an incentive payment that ranged from 15% to 17% of his annual salary. McGaughran Decl. ¶ 5. The Incentive Payment Respondent paid McGaughran in April 2020 represented approximately 7% of his annual salary. *Id.* ¶¶ 6, 7.

² Even if I had jurisdiction, I would find that payments under the Incentive Plan are not a “benefit” that McGaughran is entitled to under the Order. Payments under the Incentive Plan are solely at the discretion of Respondent to award. Further, Section VI.D of the Incentive Plan states that “incentive payments . . . shall not be deemed a part of a participant’s regular, recurring compensation for purposes of calculating payments or benefits from any Company benefit plan or severance program.” Mot. to Enforce Order Ex. 1, at 7.

Therefore, I deny the Secretary's Motion to Enforce Order because the Motion is not properly before me and because I lack jurisdiction over the temporary reinstatement proceeding pending review by the Commission.

ORDER

The Secretary's Motion to Enforce Order is **DENIED**.

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

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July 25, 2020

SECRETARY OF LABOR, U.S.
DEPARTMENT OF LABOR on behalf of
WILLIAM R. WHITMORE,
Complainant

v.

YAGER MATERIALS CORP.,
Respondent

TEMPORARY REINSTATEMENT

Docket No. KENT 2020-0116-DM
Mine: Riverside Stone Mine
Mine ID: 15-00081

Docket No. KENT 2020-0117-DM
Mine: Riverside Stone Mine
Mine ID: 15-18549

**ORDER ON RESPONDENT'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS**

Respondent, Yager Materials Corp., through Counsel, filed, on July 21, 2020, a Motion to Compel Production of Documents. ("Motion"). The Court held a conference call with the parties on July 23, 2020 to discuss the Motion. During that call the also Court issued its rulings on the subjects identified in the Motion. This Order memorializes the Court's rulings.

The Motion requested the following documents: Copies of the statement or memorandum of interview of any interview of Mr. Whitmore; Copies of the statements or memoranda of interviews of any management witness; Copies of all exhibits the Secretary intends to introduce at hearing on the Secretary's Application for Temporary Reinstatement in this matter; Copies of any documents Mr. Fugate relied upon in preparing his Declaration. Motion at 2-3.

The Secretary responded to the Motion via an email, objecting to it on the basis that it ran afoul of several of the Commission's Procedural Rules, including claims that the response to the Motion would not be due until the day of the temporary reinstatement hearing or later and that discovery was not expressly contemplated for a hearing on a temporary reinstatement application. The full text of the Secretary's email response is footnoted here.¹

¹ The Secretary's Attorney stated in his email that he "request[ed] oral argument on this matter [asking that the Court] [p]lease permit [him] a brief, if unorthodox, rejoinder: As the parties are aware, by Rule, a response to the Respondent's Motion is not due for eight days from service, which would be July 29, 2020, the day of the hearing. 29 C.F.R. 2700.10(d). Any discovery served under the Rules would not be due for 25 days from service. 29 C.F.R. 2700.57(c). If we call what [Respondent's Attorney] served on July 17, 2020 "Document Requests," the responses from the Secretary would not be due until August 11, 2020. The Rules also clearly state that discovery must be completed at least 20 days before a hearing. 29 C.F.R. 2700.56(e). We are within 20 days of hearing and were when the requests were served. Even [the Respondent's attorney's] arbitrary deadline of this Friday [July 24, 2020] (after he conceded his initial arbitrary deadline of tomorrow) has not passed for the Secretary's responses. So, to have any discussion of what the Rules permit, we must ignore the plain language of the foregoing rules, and the deadline that the Respondent, itself, set. The Respondent and the Secretary agree on one thing: the Commission Rules do not expressly contemplate discovery commencing after a request for a hearing on an Application for Temporary Reinstatement: (d) Initiation of discovery. Discovery may be initiated after an answer to a notice of contest, an answer to a petition for assessment of penalty, or an answer to a complaint under section 105(c) or 111 of the Act has been filed. 30 U.S.C. 815(c) and 821. 29 C.F.R. 2700.56(d). Absent from this list is the request for a Temporary Reinstatement hearing. This absence is intentional in light of the unique scope of such a hearing and the speed at which it must be completed. If the rules contemplated discovery prior to a Temporary Reinstatement hearing, they would necessarily have set forth things like the scope of such discovery in light of the limited scope of the hearing, alternate time frames for service of requests and responses, and a blanket exemption from Rule 2700.56(e). Initial disclosures, rather than discovery, would be more appropriate given the tight deadlines between the request for a hearing and the hearing itself, but the Rules contain no such provisions. As I explained to [the Respondent's Attorney]: he wants discovery, the complainant (I am sure) wants discovery, and the Secretary wants discovery. Why does the Respondent get discovery and not the Secretary or the Complainant? The time frame for a Temporary Reinstatement hearing does not allow the parties the opportunity to serve discovery and to lodge good-faith objections to such requests. As we have here, we are essentially preparing for the hearing at the same time we are having a discovery dispute. If all of the parties, as the Respondent argues, are allow[ed] to serve discovery, the week before the hearing will be filled with constant expedited discovery battles for which the Rules set forth no time frames. This current issue only came to a head because the Secretary's counsel affirmatively stated that discovery was not permitted. Had the undersigned waited until this Friday to do so, the issue would not be before the Tribunal until three days before the hearing. Had the Secretary served discovery responses with objections, the same problem would have arisen. Finally, since the Rules set forth no limit on discovery for [a]Temporary Reinstatement proceeding, who is to decide the scope of what is permissible for such requests and how many requests can be served? There is simply no guidance available on

(continued...)

At the outset of the July 23, 2020 conference call with the parties to discuss the Motion, the Court informed that it considered the Secretary's Counsel's procedural objections to have been waived by virtue of his email response.

The Court's rulings on the Motion were also informed by the Commission's procedural rules on the subject of Temporary reinstatement Proceedings at 29 CFR 2700.45. It is noted that subsection (d) of that section provides that "[t]he scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. **In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant.** The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought." *Id.* (emphasis added). In that regard, the Court notes that there is no reference to the MSHA investigator's declaration. Rather, the focus is upon the testimony of the complainant and that the Secretary's presentation can rely solely upon that.²

1. The Respondent's request for copies of the statement or memorandum of interview of any interview of Mr. Whitmore

Apart from the Court's ruling that the Secretary had waived issues regarding the due date for a response to the motion, the Court informed the parties that it did not view the Respondent's request for copies of the statement or memorandum of interview of any interview of Mr. Whitmore to be properly denominated as "discovery," at least in the classic sense of that term. The Court explained its reasoning for this determination, noting that all the Respondent had, and all that the Court had as well, was the Complainant's signed, but *unfairly uninformative* May 18, 2020, "Discrimination Report." That document contained a typed "Summary of Discriminatory Action," which stated *in its entirety* the following:

I was suspended on April 23, 2020, then discharged on April 29, 2020, from my job as the Maintenance Manager at Riverside Stone underground and surface mines because of numerous protected safety activities that I engaged in.

Discrimination Report, May 18, 2020.

¹ (...continued)

what the permissible scope of discovery is in light of the 'not frivolously brought' standard. It is inconsistent that a party would be burdened with a broader scope of discovery than its burden of proof at an expedited hearing. The Rules contain no guidance on these issues because discovery was not completed, and was specifically excluded, for Temporary Reinstatement hearings." July 21, 2020 email from the Secretary to the Court.

² As explained *infra* with regard to the Respondent's request for copies of the statement or memorandum of interview of any interview of Mr. Whitmore, the Court considered the Respondent's discovery request to actually be a request for a complete statement of the Complaint from the Complainant Whitmore.

The “Discrimination Complaint” document itself was no more enlightening. At its heart, it informed of the Complainant’s name, rate of pay, job title and the address of the Respondent’s mine and the names of four individuals employed by the Respondent alleged to be responsible for the discriminatory action.³ Discrimination Complaint, May 19, 2020.

Importantly, the Discrimination Complaint added nothing, that is to say it provided no additional information whatsoever regarding any particulars about the alleged protective activity.

It was *only* through the vehicle of the Secretary’s “Declaration of Freddie Fugate,” identified as a “senior special investigator” employed by MSHA, that some particulars about the nature of the Complainant’s discrimination complaint were first revealed. Of course, Mr. Fugate has no more first-hand knowledge about the Complainant’s allegations than the Court.

Accordingly, the Fugate Declaration serves as a mere conduit, recounting the allegations made by the Complainant and nothing more than that. Thus, the Court does not consider it far-fetched to analogize the Fugate Declaration as akin to an individual relating a story over a fence to a neighbor. And it is that serious shortcoming that formed the basis of the Court’s problem with the inadequacy of the declaration. The story may be an accurate retelling, or it may not, but for purposes of defending a discrimination complaint under due process, a respondent has a right to more. The Respondent is entitled to the Complainant’s first-hand accounting of the basis for his discrimination complaint. Fundamental fairness demands this. *See, e.g., Sec. v. Cumberland Coal Resources*, 32 FMSHRC 442 (May 2010), wherein the Commission stated that the “concepts of fundamental fairness [] require that every litigant receive adequate notice of charges made against it.” *Id.* at 449.

Accordingly, during the conference call, the Court ordered that copies of the statement or memorandum of interview of any interview of Mr. Whitmore be provided.

2. Copies of the statements or memoranda of interviews of any management witness

The Court ruled during the conference call that this request was denied. The basis for that ruling was that such statements, if they exist, are not necessary in the context of the Secretary’s burden in an application for temporary reinstatement. If the Secretary did intend to introduce such documents, the Court’s order for the parties’ prehearing exchange would cover those.⁴ As an aside, the Court opined that it would be highly unusual for any management witness to have made a statement without receiving a copy of it.

³ Four individuals are named in Complaint itself as those responsible for the discriminatory action: Bryan Ory, Rick Voyles, Tammy Wimsatt, and Lisa Weldman, but *there is no information tying those individuals to Whitmore’s Discrimination Report.*

⁴ The Court had previously ordered that the parties conduct their prehearing exchange by Friday, July 24, 2020. The parties submitted those exchanges pursuant to that order.

3. Copies of all exhibits the Secretary intends to introduce at hearing on the Secretary's Application for Temporary Reinstatement in this matter

This request, as alluded to above, was covered by the Court's prehearing exchange order.

4. Copies of any documents Mr. Fugate relied upon in preparing his Declaration.

As the Court ruled that Mr. Fugate's declaration could not serve as a substitute for copies of the statement or memorandum of interview of any interview of Mr. Whitmore, this request was denied. The Court considered that such other documents, if they exist, would more appropriately be the subject for possible discovery in a full hearing on the merits in the complainant's discrimination complaint, but not in the context of a temporary reinstatement application. It is noted that such a request could run afoul of attorney-client or deliberative process claims.

Accordingly, having ruled on the four aspects of the Respondent's Motion, this matter has been disposed of and will now proceed to the hearing on the application for temporary reinstatement set to commence on Wednesday, July 29, 2020 at 9:00 a.m. EDT.

SO ORDERED.

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

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January 21, 2022

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

v.

KNIGHT HAWK COAL, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2021-0160
A.C. No. 11-03147-536309

Mine: Prairie Eagle-Underground

ORDER CERTIFYING CASE FOR INTERLOCUTORY REVIEW

Before: Judge Young

This matter is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary filed a Motion to Approve Settlement setting forth the factual bases for the proposed modifications. When I disapproved the settlement, the Secretary filed amended motions, which I disapproved based on my concerns with the removal of a “Significant and Substantial” (“S&S”) designation.

The Secretary now seeks interlocutory review of this proceeding, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76. I agree with the Secretary that this interlocutory ruling involves a controlling question of law, and that immediate review will materially advance the final disposition of this proceeding. I certify for review this question: whether the Secretary has unreviewable discretion to remove a “Significant and Substantial” (“S&S”) designation from a contested citation without the Commission’s approval.

This case was assigned to me on August 18, 2021. This docket includes three citations issued pursuant to Section 104(a) of the Mine Act. The Secretary submitted a motion to approve settlement on August 24, 2021, in which the Secretary proposed removing S&S designations from two citations: Citation Nos. 9198165 and 9198038. The third citation remained unaltered. Additionally, the motion requested a penalty reduction from \$7,960.00 to \$4,590.00. After review and careful consideration, I denied approval of this settlement via email—specifying that for Citation Nos. 9198165 and 9198038, I needed clarification of the operator’s arguments in support of why the facts and circumstances surrounding the conditions were not reasonably likely to contribute to an event with the potential to cause significant injuries. The email provided possible resolution—a detailed explanation—rather than Commission review.

The Secretary chose to submit subsequent motions to approve settlement on September 3, September 13, and September 14, 2021. Although I determined that the amended explanation for the removal of the S&S designation from Citation No. 9198165 was satisfactory, I was not provided with sufficient factual support to approve such removal from Citation No. 9198038.¹ As such, my approval of the settlement would unfairly compromise the public interest by conceding an important issue without reasonable justification for doing so. Therefore, I issued an order on September 30, 2021, denying the motion to approve settlement (“Denial Order”).² In order to resolve the question of law before us, the Secretary submitted a motion for certification on November 24, 2021.

I. The Standard for Approval of Proposed Settlements

The Secretary relies on the Commission’s decisions in *Mechanicsville Concrete, Inc.* and *American Aggregates of Michigan, Inc.* as support for his contention that he need only depend on his discretion when vacating S&S designations. S. Mot. ¶ 6(C)(2); *Am. Aggregates of Mich., Inc.*, 42 FMSHRC 570, 576–79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879–89 (June 1996)). However, *Mechanicsville* and *American Aggregates* do not confer sole discretion upon the Secretary or limit the evaluation of the Commission under section 110(k) of the Mine Act. The Secretary made a S&S designation and now intends to modify it. He cannot rely solely on discretion, but must provide sufficient factual support. *See* 29 C.F.R. § 2700.31(b)(1) (requiring “facts in support of the penalty agreed to by the parties”); *see also Am. Coal Co.*, 38 FMSHRC 1972, 1981 (Aug. 2016) (“*AmCoal I*”); *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1856 (Aug. 2012).

The unreviewable discretion asserted by the Secretary is contrary to the Mine Act’s requirement that the Commission approve all settlements. *See* 29 C.F.R. § 2700.31(g) (“Any order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record.”). While the Secretary retains prosecutorial discretion at the citation and petition stage, Commission Judges have the authority to review proposed compromises. 30 C.F.R. § 2700.31(b) (“A motion to approve a penalty settlement shall include *for each violation* . . . facts in support of the penalty agreed to by the parties.”) (emphasis added). Rule 31 enables Judges to review proposed penalties under section 110(k) of the Mine Act, which provides, “No 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.” 30 U.S.C. § 820(k).

The Secretary argued in *AmCoal I* that enforcement agencies are generally presumed to have unreviewable discretion to settle enforcement actions, and that section 110(k) does not provide meaningful or substantive standards sufficient to limit the Secretary’s prosecutorial discretion as applied to settlement agreements. 38 FMSHRC at 1974–75 (citing as support the “Heckler Test” established in *Heckler v. Chaney*, 470 U.S. 821, 834 (1985)). The Commission

¹ This is a controlling question of law because there is no other defect with the settlement. If I am found to be in error, I will approve on remand the motion as submitted to me. Otherwise, the case will still be before me subject to further action by the Secretary and Respondent.

² I incorporate that order here by reference.

has expressly rejected, and the text and structure of the Mine Act refutes, this argument. *Id.* at 1979–81. As the Commission held in *AmCoal I*, Congress charged the Commission with the administration of section 110(k), which explicitly grants the Commission the authority to approve settlements and limits the Secretary’s authority to reduce contested penalties. As the Commission noted, the assessment of civil penalties under the Mine Act has not been committed to the Secretary by law, but was instead expressly and clearly delegated to the Commission. *Id.* The Commission has employed a meaningful abuse of discretion standard—discussed in detail below—under which the Secretary is required to provide facts in support of settlement. This requirement may only be deemed inappropriate if it is unreasonable or inconsistent with the Mine Act—and it is not.

A. The Secretary's cited authority does not confer the discretion asserted.

The Secretary’s reliance on *Mechanicsville* is misplaced. *Mechanicsville* is irrelevant to this proceeding because it relies upon the Commission’s decision in *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993), which in turn relied upon the U.S. Supreme Court’s decision in *Cuyahoga Valley Railway Co. v. United Transportation Union*, 474 U.S. 3, 6–7 (1985). In contrast to the case at hand, *RBK Construction* did not involve a settlement, and the Court in *Cuyahoga Valley* grounded its decision on the statutory scheme of the Occupational Safety and Health Act, which—unlike section 110(k) of the Mine Act—does not require the Occupational Safety and Health Review Commission to approve settlements.

Even if the cited authority was relevant to a case which has been contested before the Commission under section 105(a), an important distinction between this proceeding and *Mechanicsville* renders it inapplicable. The present case involves a proposal to *eliminate* an S&S designation, while the Commission in *Mechanicsville* held that an ALJ may not *add* an S&S designation on his or her own initiative. *Mechanicsville Concrete, Inc.*, 18 FMSHRC at 880, 882. These important distinctions between this case and *Mechanicsville* render this authority irrelevant to this case.

The Secretary’s reliance on *American Aggregates* is also misplaced. In this case, the Commission vacated a Judge’s decision to deny a settlement motion because the Judge ignored information that was relevant to the reasonableness of the settlement under the *AmCoal* criteria. 42 FMSHRC at 577, 581. This information included several facts that were relevant to, and plausibly supported, a decrease in gravity and negligence, and the removal of the S&S designation. The Commission only reversed the Judge’s denial of the settlement, and the included removal of the S&S designation, because of the Judge’s failure to consider the significant factual support provided.

B. The Secretary must provide substantive, relevant facts in support of modifying violations in a motion to approve settlement.

The Commission has consistently required its judges to consider facts that are both substantive and relevant to proposed modifications before a motion to approve settlement may be granted. The facts provided must enable a plausible inference that the violation at issue can be justly compromised. In the case at hand, the facts provided must permit an inference that facts

might be established at hearing that could result in the violation in question not being affirmed as S&S.³

1. *The Commission has consistently required Judges to consider substantive, relevant facts in support of settlement.*

No definition of the term “relevant” has been provided by the Commission to date. However, Black’s Law Dictionary defines the term “relevant” as “[l]ogically connected and tending to prove or disprove a matter in issue; having appreciable probative value — that is, rationally tending to persuade people of the probability or possibility of some alleged fact.” *See Relevant*, BLACK’S LAW DICTIONARY (10th ed. 2014). The Federal Rules of Evidence defines “relevant” as a contention that “has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.” Fed. R. Evid. § 401.

In *Solar Sources Mining, LLC*, the Commission approved a denied settlement based on a Judge’s failure to consider the facts submitted in support of settlement. 41 FMSHRC 594, 605, 606 (Sept. 2019). The Commission held that the Judge erred in concluding that the parties presented no facts to support settlement, when the parties “actually presented relevant facts,” including the non-applicability of the standard. *See* 41 FMSHRC at 601.⁴

In addition to relevant facts, the Commission has consistently recognized that Judges must consider substantive evidence, defined as “[e]vidence offered to help establish a fact at issue,” in order to approve or deny settlement motions. *Substantive Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014). In *AmCoal I*, the Commission rejected the Secretary’s “boilerplate referencing” of “professional judgment” and enforcement value “in lieu of the substantive factual support traditionally provided to justify a penalty reduction.” *AmCoal I*, 38 FMSHRC at 1973–74. Another *Am. Coal Co.* case was denied settlement by a split Commission because of a lack of facts, and was approved by the disapproving Commissioners only upon submission of additional facts. *See* 40 FMSHRC 765, 766 n.1 (June 2018); Am. Joint Mot. Approve Settlement Agreement, Docket No. LAKE 2009-0035, at 8–10 (May 18, 2018).

The Commission discussed the proper substantive evidence requirement for modifying individual citations in *Hopedale Mining*, 42 FMSHRC 589 (Aug. 2020). In *Hopedale*, the Commission held that a Judge’s denial of a settlement constitutes an abuse of discretion when the agreed-upon facts supplied by the parties satisfy the standard for approval established in *AmCoal I*. Although judges need not engage in fact-finding, weighing conflicting evidence, or making credibility determinations, the majority stressed that this holding does not restrict judges by limiting their ability to “probe gaps or inconsistencies in the explanation offered in support of

³ I note that I have not found, and do not find, that the violation must be affirmed as S&S. Nor have I required the Secretary to establish that it is not. I merely note that the limited facts the parties have chosen to provide would preclude a non-S&S finding for this violation.

⁴ Commissioners Jordan and Traynor dissented, arguing that the parties failed to meet the *AmCoal* standards because the motion contained insufficient factual support. *See Id.* at 607 (Jordan, Traynor, dissenting).

a settlement motion.” *Id.* at 595; *see also Solar Sources Mining LLC*, 41 FMSHRC at 602 (stating that Judges are “expected to . . . determine whether the facts support the penalty agreed to by the parties”).

The Commission determined that the provided facts in *Hopedale* supported the penalty reduction agreed to in the settlement, and that “[t]he rejection in this case was contrary to stipulated facts, mischaracterized the operator’s compliance history, and failed to give weight to the considerable non-monetary value preserved by the settlement.” *Id.* at 602. For citations where the Secretary proposed a reduction in negligence, he provided respondent contentions demonstrating that the “violative conditions were not obvious or readily known to the operator.” *Id.* at 598. For other violations challenging gravity, the Secretary provided contentions showing possible compliance (i.e., no violation) or the reduced likelihood of hazard because the equipment was found to be functioning better than noted. *Id.* at 597–98. These facts were all *substantive* because they were offered to dispute a fact at issue. These substantive facts, as described, were also *relevant* to the individual modifications proposed, a principle that should also apply to the removal of S&S designations. This case thus differs from *Hopedale Mining*, in that it does not involve the rejection of substantive, relevant facts. Rather, the parties have not provided me with sufficient facts to serve as the basis for an evaluation under *AmCoal I*.⁵

2. *The Secretary misreads the cited authorities.*

- a. Although the Secretary cites *Am. Coal Co.*, this case requires the submission of relevant facts.

The Secretary states in the Motion to Approve Settlement that he “has considered the deterrent value of the penalty and obtaining a final resolution to this matter.” As support for this statement, the Secretary cites the following excerpt:

The Amended [motion] provides substantive explanations supporting the Secretary’s decision to compromise the issues of one violation at issue In

⁵ Though the Commission found that the facts provided in *Hopedale Mining* were substantive and relevant to either gravity or negligence modifications, two Commissioners thought even these facts were insufficient to support the modifications. *See* 42 FMSHRC at 608–09 (Commissioners Jordan and Traynor, arguing in dissent that settlements must provide substantive explanations). The dissenting Commissioners asserted that “[t]he Congressional transparency mandate has always meant that the Judge’s decision must include a substantive explanation as to how the penalty reduction submitted for approval is (or is not) warranted by the facts and legal contentions the parties claim as support for their motion.” *Id.* (citing *Co-Op Mining Co.*, 2 FMSHRC 3475, 3475, 3476 (Dec. 1980) (vacating a settlement with finding of violation where the stipulations demonstrate that a violation did not actually occur)). My decision is consistent with both the majority and the dissent in *Hopedale* and the decision in *Co-Op Mining*. All of the opinions rely on the same legal principles requiring settlement decisions to be consistent with the facts provided, but the dissent in *Hopedale* disagreed that the required quantum of substantive evidence had been met.

addition, the Secretary has set forth reasons why it would not be in the public interest to litigate certain legal issues in the context of this case. Moreover, the amended motion explains that the operator's mines have closed since the citations issued, reducing the deterrent value of the penalty. Commissioners Jordan and Cohen note that *these justifications were absent in the initial settlement motion*. Upon review of the *amended motion*, Commissioners Jordan and Cohen agree to grant the motion and approve the settlement.

Am. Coal Co., 40 FMSHRC at 766 n.1 (emphasis added).

The Secretary asserts that it is sufficient for him to “consider the deterrent value” of the penalty. This assertion is based on only a partial understanding of the cited authority. In citing this footnote as support, the Secretary ignores the facts of the case. Importantly, the settlement at issue was only granted following the submission of additional facts. *Id.* at 766. After AmCoal appealed a remanded decision, the parties submitted a motion to approve settlement that was denied by the Commission in a 2-2 split.

As support for their denial, Commissioners Jordan and Cohen set forth reasons why approval would not be in the public interest, including their concerns that (1) it was unclear what AmCoal had agreed to give in exchange for settlement, (2) the Commission did not remand for a gravity reduction where the trier of fact already made a gravity determination, and (3) the settlement was one-sided and did not help with enforcement of the Mine Act. *Am. Coal Co.*, 40 FMSHRC 330, 337–39 (Mar. 2018).

Commissioners Jordan and Cohen joined in approving settlement after the parties submitted an amended motion that included additional factual support. Amended Joint Motion to Approve Settlement Agreement, Docket No. LAKE 2009-0035, at 8 (May 18, 2018).

The amended motion included at least three additional substantive facts that were directly relevant to the proposed modification, including acknowledgement that the operator's mines had since closed. *Am. Coal Co.*, 40 FMSHRC at 766 n.1. This decision, and the footnote cited by the Secretary, do not support the contention that the Secretary need only consider the deterrent value of a penalty in obtaining a final resolution. The outcome of this case clearly depended on the submission of substantive, relevant facts. This is the standard I have followed in rejecting the settlement.

b. *AmCoal II* also requires the submission of substantive facts.

The Secretary states that he has evaluated enforcement values and maximized his prosecutorial impact, citing page 989 of *AmCoal II*. The cited authority requires that the facts provided “reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process.” *Am. Coal Co.*, 40 FMSHRC 983, 991 (Aug. 2018) (“*AmCoal IP*”). The Secretary uses this language to make the overbroad assertion that he need only state that the parties are in agreement without submitting adequate support. However, the Commission has consistently required that the Secretary provide substantive facts, relevant to the proposed modifications.

The standard for Commission evaluation is whether the proposed settlement is “fair, reasonable, appropriate under the facts, and protects the public interest.” *AmCoal II*, 40 FMSHRC at 987.⁶ The Commission found that in order to effectively apply this standard, Commission Judges must be provided with “sufficient information” upon which to base their evaluation. *Id.* (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)). Specifically, the Commission found that the Judge required substantive facts to support proposed penalty reductions. *Id.* at 989 (“[T]he Judge appropriately determined that the submission of additional substantive facts to support the proposed penalty reductions was necessary”) (emphasis added).

Similar to the *AmCoal* case noted above, *see supra* Section I.B.2.a., the settlement motion approved by the Commission depended on the submission of new facts that were substantial and relevant to the modifications—primarily that the mine ceased production two years prior, and that the respondent’s other mine also ceased production, facts that proved a reduced enforcement value. *Am. Coal Co.*, 40 FMSHRC 1380, 1388 (Sept. 2018) (ALJ); Joint Mot. Approve Settlement & Dismiss Proc., Docket No. LAKE 2011-0013, at 2 (Sept. 7, 2018).

In this case, the Secretary denies that he must provide substantive, relevant facts in support of settlement. *AmCoal II* does not support this claim. The Commission requires sufficient facts—including nonmonetary assessments regarding enforcement value—upon which Judges can make an appropriate finding. *AmCoal II*, 40 FMSHRC at 991 (“[F]acts required by Rule 31 may include a description of an issue on which the parties have agreed to disagree.”). In the present case, the Secretary has failed to provide any detailed explanation of how the enforcement value of the violation will be maintained.

II. The facts provided by the Secretary do not justify removal of the S&S designation.

A. The Commission utilizes an abuse of discretion standard to evaluate the Secretary’s enforcement decisions.

Rule 31 requires that a settlement motion include facts in support of the penalty agreed to for “each violation,” and that a Judge’s order set forth reasons for approval and be supported by the record. 29 C.F.R. § 2700.31(b), (g). The abuse of discretion standard requires the Secretary to provide relevant facts from which a Commission Judge may understand the reasonable conclusions drawn in support of his decision. *See Prairie State Generating Co.*, 792 F.3d 82, 92 (D.C. Cir. 2015); *Knight Hawk Coal, LLC*, 42 FMSHRC 435, 445–46 (July 2020).

The Commission has established that denial or reversal is justified in cases where there is no evidence to support the Secretary’s decision. *See Solar Sources Mining, LLC*, 41 FMSHRC at 599 (citing *Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014) (“An abuse of discretion may be found where there is no evidence to support the Judge’s decision or if the

⁶ While this is a “four factor” analysis, as a practical matter, there is often considerable overlap between the factors. Thus, a proposed settlement may not be “fair” because it is insufficiently protective of the public interest, or it may not be “reasonable” because it is inappropriate to the facts provided in support of the settlement.

decision is based on an improper understanding of the law”)); *see also Twentymile Coal Co.*, 27 FMSHRC 260, 278 (Mar. 2005) (Jordan, dissenting) (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249–50 n.5 (Feb. 1997), *aff’d*, 133 F.3d 916 (4th Cir. 1998)).

On review, the D.C. Circuit Court of Appeals has noted that the Commission’s ALJs determine, in the first instance, whether the Secretary has been arbitrary and capricious, abusing his discretion in his decision, and that the Commission’s standard of review is whether substantial evidence supports the Judge’s determination. *See Sec’y of Lab. v. Knight Hawk Coal, LLC*, 991 F.3d 1297, 1308 (D.C. Cir. 2021) (citing 30 U.S.C. § 823(d)(2)). Under the arbitrary and capricious standard, the Secretary must “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* at 1307 (quoting *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

This standard is deferential to the Secretary, but its grace is not unlimited. In particular, the law—statutory law, Court and Commission precedents, and the Commission’s procedural rules—clearly establishes a requirement that the Secretary’s decisions be consistent with the reasoning and assumed facts provided with a motion to approve settlement.

Congressional intent, as well as Commission and court precedent, compels a meaningful review of all settlements submitted for approval. Section 110(k) of the Mine Act serves to maintain the deterrent effect of violations and penalties, in part by preventing the Secretary from abusing his authority to settle such violations without appropriate justification. *See AmCoal I*, 38 FMSHRC at 1976 (citing S. Rep. No. 95-181, at 44, *reprinted in* Senate Subcommittee on Labor, Committee on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632–33 (1978)) (“Congress explained that ‘[b]y imposing [the] requirements’ of section 110(k), it ‘intend[ed] to assure that the *abuses* involved in the unwarranted lowering of penalties as a result of the off-the-record negotiations *are avoided*.”).

The Commission has acknowledged the importance of section 110(k) in preventing abuse, and it possesses the authority to deny the Secretary’s decisions when appropriate. This includes when the Secretary declines to provide an explanation for a settlement decision, or when the facts provided by the Secretary do not reasonably support a settlement decision. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012) (authorizing the Commission to approve the settlement of contested penalties in section 110(k) “[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.”)

Thus, under the governing law, I—as well as the Secretary—must make a rational decision governed by the operative facts and the law as it has been interpreted. I would abuse my discretion if I approved a settlement that is inconsistent with the facts provided. I have declined to do so.

- B. Judges must have sufficient facts from which to plausibly infer that the violation would not meet S&S requirements.

The abuse of discretion standard requires judges to consider sufficient facts, taken as true, from which they may plausibly infer that proposed modifications are reasonable. Although the term “plausible” has not yet been defined by the Commission (and has in fact caused confusion amongst judges and scholars alike), the plausibility standard is evident in Commission precedent. The Commission has consistently required consideration of facts relevant to proposed modifications. *See Knight Hawk Coal, LLC*, 42 FMSHRC at 446 n.22 (requiring “some plausible—i.e., not speculative or preconceived—factual basis.”).

In *Knight Hawk Coal, LLC*, the Commission affirmed a Judge’s decision to vacate the Secretary’s rejection of a ventilation plan because substantial evidence existed in support of the Judge’s conclusion that the plan was acceptable. 42 FMSHRC at 452. The Commission applied a plausibility standard, agreeing that the Secretary had failed to articulate reasons, “rationally supported by the facts,” that the ventilation approach did not protect miners. *Id.* The Commission could not condone rejection of a long-used plan based upon an “implausible belief” that harmful conditions might arise from the plan. *Id.* at 446 n.22 (describing such “implausible belief” as an “irrational belief not grounded on the record evidence”).

The Commission articulated that the minimum standard requires “some plausible—i.e., not speculative or preconceived—factual basis for rejecting an operator’s claim.” *Id.* (“Requiring the Secretary to show his work in this regard is hardly a ‘new’ requirement. Rather, it reflects his fundamental duty under the Act to defend his choices as ‘reasonable,’ at a minimum.”). This should be no different from requiring the Secretary to provide facts in support of a proposed settlement—i.e., “show[ing] his work”—to support a Judge’s 110(k) review.

This standard is also supported by the Commission’s requirement to be guided, when practicable, by the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) (“[T]he Commission and its Judges shall be guided so far as practicable by the [FRCP].”); *see also Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). Specifically, the Secretary’s case can be likened to a pleading to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6).

Black’s Law Dictionary equates the term “Plausibility Test” to the “Twombly Test,” which requires the following in a pleading to survive a 12(b)(6) motion: “(1) state facts that, taken as true, make a plausible (rather than conceivable) claim, and (2) not rely solely on conclusions of law, which are not entitled to the same assumption of truth as factual allegations.” *Twombly Test*, BLACK’S. The Court in *Bell Atlantic Corp v. Twombly* required a FRCP 8 pleading to “possess enough heft to ‘sho[w] that the pleader is entitled to relief.’” 550 U.S. 544, 557 (2007).

The Court noted that “[a]sking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Id.* at 556. Requiring substantive, relevant facts in a settlement motion only requires sufficient facts to “raise a reasonable expectation” that there was no violation, or that the violation did not meet the level of gravity or negligence cited.

In *Ashcroft v. Iqbal*, the Supreme Court provided a description of the plausibility requirement, stating that in order to survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The Court described facial plausibility as “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). In relation to a settlement motion, the factual content provided should allow a Commission Judge to draw the reasonable inference that there is no violation, or that the violation does not meet the level of gravity or negligence cited.

The standard of plausibility exists in Commission review of decisions on the merits of a violation. Upon a *prima facie* showing of a violation by the Secretary, a respondent operator must demonstrate a “plausible theory based upon any facts in the record to support a reasonable inference” that the violation did not occur. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 988, 989–90 (Dec. 2006) (affirming the Judge’s decision to uphold a S&S designation because there was substantial evidence to support the conclusion that the respondent did not show “any plausible theory” rebutting the Secretary’s case).

The need to make a plausible demonstration refuting the existence of a violation could and should be applied to facts required in a settlement motion. Such a requirement is not contradictory to the Commission’s directives in *AmCoal II*. See 40 FMSHRC at 991 (ruling that judges must not assign probative value to some facts). It merely requires that the submitted facts, if taken as true, plausibly demonstrate that there was no violation, or that the violation did not reach the level of gravity or negligence assigned.

C. The facts provided by the Secretary cannot support the removal of the S&S designation.

An S&S designation is appropriate if, “based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard [danger to safety or health] contributed to will result in an injury or illness of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). An S&S determination must be based on the continuation of normal mining operations. See *Consol PA Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) (“A determination of ‘significant and substantial’ must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.”).

The four elements supporting an S&S designation provided in *Mathies* have been refined and expressed as follows: (1) an underlying violation of a mandatory safety standard; (2) a reasonable likelihood the violation will cause the occurrence of the discrete safety hazard against which the standard is directed; (3) a reasonable likelihood that the hazard would cause an injury; and (4) a reasonable likelihood that the injury would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*).

1. *The relevant facts provided demonstrate a prima facie showing of a S&S violation.*

The Mine Act and the Commission's precedents interpreting it compel me to determine whether the settlement tendered is appropriate to the facts provided to me. Citation No. 9198038 arises from an alleged violation of the operator's roof control plan, which appears to have been discovered after a roof fall occurred. *See* 30 C.F.R. § 75.220(a)(1) (requiring operators to develop and follow approved roof control plans); *see also* 30 C.F.R. § 75.202(a) (requiring roof support to protect miners from hazards related to roof falls). Under the terms of the plan, entry widths are limited to 19 feet. The operator asserts that a variance permits it to inadvertently mine widths up to 21½ feet wide. In that case, the variance requires the operator to use *additional* bolts that are one foot longer in between the rows to support the roof in the wider area.

Both the second and third amended motions state, "Because the area had never been deemed to be wider than the plan allowed, the additional bolts had not been installed." This explanation does not provide a sufficient evidentiary basis to support removal of an S&S designation. The explanation notes that the condition was not obvious, had not been noted on prior inspections, and did not present visible signs that a roof fall was imminent.

While these facts would support a reduction in negligence, they would not support a reduction of the likelihood of injury in an area where a roof fall occurred. Additionally, the operator's belief that a confluence of factors did not exist has no value to an assessment of the likelihood of injury from the hazard.

The limited facts provided in the motion included an acknowledgment that at least one miner, the examiner, would work or travel in the area where the fall occurred—an area where the Secretary has alleged the roof support was deficient—and a roof fall in fact occurred. During that time, the area was examined at least once every shift by an examiner. The motion provided no facts from which one might infer that this miner was not exposed to a possible hazard of serious injury from a roof fall.

A finding of S&S for a violation of an approved roof control plan is supported by Commission precedent. *See, e.g., Consol Pa. Coal Co.*, 43 FMSHRC 145, 149 (Apr. 2021) (affirming Judge's determination that roof control plan violation was S&S); *Halfway, Inc.*, 8 FMSHRC 8, 12–13 (Jan. 1986) (affirming S&S for failing to comply with roof control plan when miners could have worked or traveled in areas with inadequately supported roof). Importantly, I do not find that the cited violation is or must be held to be S&S. I have been provided with limited facts, and neither party has waived its right to contest this issue by providing additional facts or legal authority at hearing. I am thus not substituting my enforcement judgment for that of the Secretary; I am merely noting that his conclusion that this violation might not be found to be S&S is entirely inconsistent with the evidence the Secretary himself has chosen to provide.

2. *The Secretary has provided no facts plausibly supporting the inference that the violation does not meet any one of the Mathies elements.*

Mathies Step 1 requires that the Secretary establish a violation of a mandatory safety standard. The Respondent's roof control plan is the functional equivalent of a mandatory safety standard and specifies the means of compliance with the ground support requirement for underground mines: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). A failure to comply with the provisions of a roof control plan would satisfy Step 1 of the Commission's S&S analysis. The Secretary has provided no facts plausibly supporting an inference that Respondent was in compliance with the allowed variance.⁷

Mathies Step 2 requires a reasonable likelihood that the violation will cause the occurrence of a discrete safety hazard against which the standard is directed. The fact that a roof fall actually occurred here is dispositive as to the second S&S factor, because unintended roof falls in areas where miners work or travel is the focal point of Section 75.202(a) and the plan developed to ensure the protection of miners from such falls. *See Jim Walter Resources, Inc.*, 37 FMSHRC 493, 495–96 (2015) (noting that the Mine Act strictly requires protection of miners from roof falls in areas where miners work or travel). I find that an event that has occurred is performe reasonably likely to have occurred.

Unlike the second factor, the remaining two S&S factors are not conclusively established. However, the settlement motion must provide at least a plausible basis for concluding that a hearing might result in a finding that there was no S&S violation, either because one of the remaining factors might not be proved or depends on questionable evidence, or because there may not have been a violation.

Mathies Step 3 requires a reasonable likelihood that the hazard would cause an injury. It is accepted that roof falls may cause injury as miners have died from roof falls. *See, e.g., Doe Run Co.*, 42 FMSHRC 521, 521 (Aug. 2020); *Jim Walter Res., Inc.*, 37 FMSHRC at 493. To support removal of a S&S designation, the facts must allow the plausible inference that occurrence of the hazard would not cause an injury. The Secretary has provided that only the examiner travels the area and that exposure to the hazard would only last for a "split second of time," but these facts are insufficient for me to plausibly infer than an injury was unlikely.

Respondent acknowledged that an examiner traveled the area for the entire duration the violative condition existed. The fact that a roof fall did not occur while the examiner was traveling there does not negate the likelihood of an injury. Nor does the fact that the examiner was only exposed once per shift. *See Consol Pa. Coal Co.*, 43 FMSHRC at 149 (finding it sufficient for Step 3 that the inspector determined that miners and an examiner would be exposed to the hazard twice per shift). Additionally, an unplanned roof fall is an "instantaneous event," so the Secretary's mention of only a split-second exposure fails to negate the likelihood of injury.

⁷ The facts provided would establish a violation of the plan. The motion does not provide even a contention by the operator that the entries did not exceed the plan's limits or that the additional longer bolts permitted by the variance had been employed in the areas cited by the inspector. As noted in the Denial Order, my decision does not prejudice Respondent's ability to argue or prove facts contrary to those provided in the settlement motions.

Mathies Step 4 requires a reasonable likelihood that the injury would be of a reasonably serious nature. An inspector's conclusion that a possible injury is of a reasonably serious nature has been held sufficient for Step 4. *Consol Pa. Coal Co.*, 43 FMSHRC at 149 (finding it sufficient that the inspector characterized the potential injury as "serious"). Therefore, to support removal of a S&S designation, the facts provided to challenge Step 4 must allow the plausible inference that an injury would not be of a reasonably serious nature.

The inspector characterized the likely injury as "fatal" at the time of citation and petitioned for civil penalty on that finding. Roof and rib falls are subject to an extensive regulatory regime precisely because of the great danger of serious injury or death posed by unplanned ground movements in underground mines. No facts contended by the Secretary allow a plausible inference to the contrary—that the injury from a roof fall might not be of a reasonably serious nature.

D. Application of the abuse of discretion standard leaves me no choice but to deny the Secretary's motion to approve settlement.

Having made a S&S designation, the Secretary must provide substantial and relevant evidence as support for its removal. My denial of the Secretary's motion to approve settlement was specifically based on a lack of sufficient factual support available for me to properly consider the settlement under the *AmCoal* factors.

The Secretary must provide me with a plausible basis for the proposed modification of Citation No. 9198038. The Commission should not condone the removal of a cited and petitioned designation based on the implausible conclusion that the violation did not meet the requirements of an S&S designation. The conclusion to which the Secretary comes—that the proposed modification is justified by the respondent's contentions—must be rationally supported by the facts. It is not. The facts provided by the Secretary do not allow me to plausibly infer that the violation did not meet the *Mathies* requirements for a S&S designation. If anything, they support the existence of a S&S violation.

III. Certification

A settlement would finally resolve this matter without a hearing. I have invited the parties to submit additional facts that might permit approval, and they are apparently unable to agree on such facts. Following *Hopedale*, it would not be appropriate for me to proceed to a hearing with this legal question unresolved. Therefore, under Commission Procedural Rule 76, 29 C.F.R. § 2700.76, I certify that this interlocutory ruling involves a controlling question of law—whether the Secretary has unreviewable discretion to remove an S&S designation from a contested

citation without the Commission's approval—and that immediate review will materially advance the final disposition of the proceeding.

This interlocutory ruling is hereby **CERTIFIED**.

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

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