March 2023

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No Review Was Granted or Denied During The Month Of March 2023

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 1, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. GLOBAL PUMICE, LLC	Docket No. WEST 2020-0254 A.C. No. 04-04783-511041

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On March 31, 2021, the Commission received from Global Pumice, LLC a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On November 23, 2020, the Chief Administrative Law Judge issued an Order to Show Cause in response to Global Pumice's perceived failure to answer the Secretary of Labor's May 18, 2020, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on December 24, 2020, when it appeared that the operator had not filed an answer within 30 days.

Global Pumice asserts that the answer to the Petition for Assessment of Civil Penalty was mailed to the Mine Safety and Health Administration ("MSHA") rather than the Commission, in the mistaken belief that it would be forwarded to the appropriate office. The operator further states that the Order to Show Cause was never received, because it was mailed to the incorrect address. The operator became aware of the default upon receiving a delinquency notification on March 23, 2020, and filed the motion to reopen shortly thereafter. The Secretary does not oppose the request to reopen but reminds Global Pumice to ensure that future contests are timely filed in accordance with MSHA's regulations and the Commission's procedural rules.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party

from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Global Pumice's request and the Secretary's response, we find that the operator's failure to properly file a response was the result of mistake. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 1, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. IRONSIDE STONE WORKS INC.	Docket No. WEST 2022-0216 A.C. No. 24-02209-545701

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On April 19, 2022, the Commission received from Ironside Stone Works, Inc. ("Ironside") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 31, 2022, and became a final order of the Commission on March 2, 2022. Ironside asserts that the assessment was delivered to the operator's mine site rather than the office, and was subsequently taken home by the mine operator while he was on compassionate leave. As a result, the assessment did not reach the office until February 21, 2022. The operator filed the contest paperwork in mid-March, approximately two weeks after the order became final. The Secretary does not oppose the request

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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March 9, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. OMYA, INC.	Docket No. WEST 2022-0119 A.C. No. 04-00167-529152

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

ORDER

BY: Jordan, Chair; Althen and Rajkovich, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 11, 2022, the Commission received from Omya, Inc. ("Omya") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that the proposed assessment was delivered to the operator on February 10, 2021. The assessment became a final order of the Commission on March 12, 2021.

Omya asserts that it had always intended to contest the penalties, which is evidenced by its Notices of Contest filed on November 8, 2020. Omya subsequently received a combined invoice, which contained an outstanding balance and new penalties. However, believing that the

notices of contest had preserved the operator's contest rights, Omya's Packaging Shipping Manager erroneously paid the penalties on March 19, 2021, in an effort to avoid a delinquency. The operator seeks reopening so that it may properly contest the penalties. Omya has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA's regulations at 30 C.F.R. § 100.7 and the Commission's procedural rules.

The Commission has granted requests to reopen where operators have mistakenly paid penalties and shown that they intended to contest the penalties or contested the underlying citations. See *Rockwell Mining, LLC*, 42 FMSHRC 793, 793-94 (Oct. 2020) (finding that operator sufficiently explained its failure to timely contest which was the result of excusable neglect); *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999); *Cyprus Emerald Resources Corp*., 21 FMSHRC 592, 592-93 (June 1999); *compare Sterling Sand & Gravel Co*., 22 FMSHRC 935, 936 (Aug. 2000) (motion to reopen denied where operator failed to show that it intended to contest the penalty that was paid). In *Kaiser Cement Corporation*, the operator's failure to contest a proposed assessment and its inadvertent payment of the penalties was determined to be the result of a processing error which the Commission reasonable found to qualify as "inadvertence" or "mistake." *Kaiser Cement Corp.*, 23 FMSHRC 374, 375 (Apr. 2001); *see also Cyprus*, 21 FMSHRC at 593-94.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

Commissioner Baker, dissenting:

Omya, Inc. received its proposed assessment in this matter on February 10, 2021 and that assessment became final on March 12, 2021. On or about March 19, 2021, Omya paid the outstanding amounts contained in the final assessment. On January 11, 2022, Omya filed the instant Motion to Reopen claiming both that it had mistakenly failed to contest the proposed assessment and had mistakenly paid the assessed penalty.

In the past, the Commission has held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *See e.g. Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010). Further, the Commission has also held that an operator accidentally paying a citation it intends to contest amounts to such an inadequate or unreliable internal processing system and cannot form the basis for reopening. *See e.g. Pinnacle Mining Company, LLC*, 30 FMSHRC 1061 (Dec. 2008); *Moose Lake Aggregates*, 34 FMSHRC 1 (Jan. 2012); *Kuhlman Construction*, 34 FMSHRC 2894 (Nov. 2012); *Noranda Aluminum, LLC*, 37 FMSHRC 2731 (Dec. 2015); and *Enviro Care, Inc.*, 39 FMSHRC 819 (2017). Similarly, the Commission has found that in situations where the operator had already paid the penalty in full, a motion to reopen is moot. *See e.g. Riverton Investment Corp.*, 31 FMSHRC 1067 (Oct. 2009); *Performance Coal Co.*, 32 FMSHRC 466 (June 2010); *Marfork Coal Company*, 32 FMSHRC 1185 (Oct. 2010); *see also Lee Mechanical Contractors, Inc.*, 38 FMSHRC 44 (Jan. 2016) (Jordan, concurring).

In fact, the case where the Commission first recognized its ability to reopen cases under Rule 60(b) concerns an alleged mistaken payment. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 789 (May 1993). In that case, the Commission concluded that administrative confusion caused by processing a large number of proposed penalty assessments does not excuse an operator from making deliberate litigation choices. *Id*. at 790. Further, the Commission noted that it is not a court of general equity and further that equity aids those who vigilantly pursue their own rights. *Id*.; *see also Pittsburg & Midway Coal Mining Company*, 15 FMSHRC 969 (Jun. 1993); *Monterey Coal Company*, 15 FMSHRC 997 (Jun. 1993); and *Mountain Coal Co.*, 15 FMSHRC 1012 (Jun. 1993).

In this case, Omya failed to timely contest a proposed penalty and then paid the amount owed. I do not believe it is accurate to characterize this action as a justifiable mistake or excusable neglect, as Omya took an affirmative step in making a payment. Instead, Omya's default and payment were the result of an inadequate or unreliable internal processing system. Omya's mistaken payment indicates that it has failed to vigilantly pursue its own rights.

Therefore, I would deny its motion to reopen.

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

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March 13, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LEHIGH CEMENT COMPANY LLC	Docket No. LAKE 2022-0204 A.C. No. 12-00063-552413

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 14, 2022, the Commission received from Lehigh Cement Company LLC ("Lehigh") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 4, 2022, and became a final order of the Commission on May 4, 2022. Lehigh asserts that on April 18, 2022, it mistakenly mailed its notice of contest to the incorrect address for the payment of penalties in St. Louis, MO, instead of correctly mailing it to MSHA's Civil Penalty Compliance Office in

Arlington, Virginia. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Lehigh's request and the Secretary's response, we find that the operator acted with excusable neglect by inadvertently mailing the notice of contest to the wrong address, despite doing so in a timely manner. The operator, however, should reassess its procedures to ensure that future contests are properly filed. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

/s/ Timothy J. Baker
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March 13, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PEABODY GATEWAY NORTH MINING, LLC	Docket No. LAKE 2022-0215 A.C. No. 11-03235-552654

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 19, 2022, the Commission received from Peabody Gateway North Mining, LLC ("Peabody") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 18, 2022, and became a final order of the Commission on May 18, 2022. Peabody asserts that its safety manager, who processes payments was on vacation and did not return until April 25, 2022. In his absence, the

mine controller was instructed to pay the penalties for all the citations except for the one in question. The operator further asserts that, upon the safety manager's return, he failed to file the contested citation due to staffing shortages, a reportable mine injury, and other duties he had to cover. He was made aware of his mistake in not filing when he received a delinquency notice on July 5, 2022 and promptly filed a motion to reopen with the Commission. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Peabody's request and the Secretary's response, we find that the safety manager acted in good faith with excusable neglect by inadvertently failing to file the notice of contest due to the staffing shortages and other intervening events occuring at the mine. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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March 13, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. SUN WEST ACQUISITION CORPORATION	Docket No. SE 2022-0100 A.C. No. 08-00729-532107

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On April 26, 2022, the Commission received from Sun West Acquisition Corporation ("Sun West") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 8, 2021, and became a final order of the Commission on May 10, 2021. Sun West asserts that due to "loss of . . . staff," it did not receive the penalty assessment until after the 30 days had passed. Sun West's Motion

at 1. Although the Secretary does not oppose the request to reopen, he notes that the unpaid penalty was referred to the U.S. Department of Treasury for collection on June 25, 2021.

We note that Sun West fails to allege specific facts to explain why it neglected to timely contest the proposed assessment. The operator merely states that it was "unable to contest the case in a timely manner due to loss of some of [their] . . . staff and didn't receive notice until the 30 days had passed." *Id*. However, Sun West fails to specify what it means by "loss of staff" or how this apparent "loss" was connected to the operator's failure to receive the proposed assessment or respond in a timely manner. This fails to adequately establish good cause for a failure to timely file. *See E. Associated Coal, LLC*, 30 FMSHRC 392, 394 & n. 2 (May 2008) (operators filing a motion to reopen must "provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment" and "disclose with specificity its grounds for relief."); *Olmos Contracting, LLC*, 39 FMSHRC 2015, 2017 (Nov. 2017) (same).

The operator's failure to allege sufficient facts is compounded by the fact that the motion was filed nearly one year after the proposed assessment became a final order of the Commission. Under Rule 60(c), a motion to reopen, regardless of its merit, is only granted if it is filed within a reasonable time. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a notification from MSHA and the operator's filing of its motion to reopen. *See, e.g., Highland Mining Co*., 31 FMSHRC 1313, 1316 (Nov. 2009). Once Sun West was made aware that it had failed to timely contest the proposed penalties, it did not take prompt action to try to rectify the situation. MSHA records show that the operator received the proposed assessment on April 8, 2021, and that it became a final order of the Commission on May 10, 2021. The present motion to reopen was filed on April 26, 2022—351 days later. *See, e.g., Olmos Contracting, LLC*, 39 FMSHRC at 2018 (denying a motion to reopen because the operator had filed the motion 49 days after the proposed assessment had became a final order).

Sun West has provided no explanation for this extreme delay. This alone is reason enough to deny the motion. *See Highland Mining Co*., 31 FMSHRC at 1316.

Accordingly, we deny Sun West's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

/s/ Timothy J. Baker
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March 13, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. GENESIS ALKALI, LLC	Docket No. WEST 2022-0223 A.C. No. 48-00152-549400

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On May 3, 2022, the Commission received from Genesis Alkali, LLC ("Genesis") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on February 14, 2022, and became a final order of the Commission on March 16, 2022. Genesis asserts that on March 7, 2022, it mistakenly mailed both the payment and its notice of contest to the incorrect address for the payment of penalties in St. Louis, MO, instead of correctly mailing it to MSHA's Civil Penalty Compliance Office in Arlington, Virginia. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Genesis's request and the Secretary's response, we find that the operator acted with excusable neglect by inadvertently mailing the notice of contest to the wrong address, despite doing so in a timely manner. The operator, however, should reassess its procedures to ensure that future contests are properly filed. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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March 13, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MAMMOTH COAL COMPANY	Docket No. WEVA 2022-0426 A.C. No. 46-09221-552354

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On June 27, 2022, the Commission received from Mammoth Coal Company ("Mammoth") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 11, 2022, and became a final order of the Commission on May 11, 2022. The operator asserts that the late filing of the notice of contest was due to a clerical error. Specifically, the executive assistant who received the proposed assessment entered it into the tracking system but inadvertently left it under "New" status instead of changing it to "Ready for Safety Review" status. This caused Mammoth to miss

the deadline to contest. Mammoth Coal asserts that its procedures are usually adequate and have worked well in the past, that it normally pays close attention to MSHA's Proposed Assessments. The operator promises that, in the future, the executive assistant will timely move all proposed assessments to "Ready for Review" status. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Mammoth's request and the Secretary's response, we find that the operator acted with excusable neglect due to the clerical error that occurred and promptly sought to reopen once the error was discovered. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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March 22, 2023

	Docket No. SE 2022-0204 A.C. No. 40-03530-525097
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. SE 2022-0205 A.C. No. 40-03530-528220
v.	Docket No. SE 2022-0206 A.C. No. 40-03530-540011
POTTER SOUTH EAST, LLC	Docket No. SE 2022-0207 A.C. No. 40-03530-541838
	Docket No. SE 2022-0208 A.C. No. 40-03530-543535

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act").[1] On September 1, 2022, Potter South East, LLC, filed a motion to reopen the five captioned cases which had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also

[1] The Commission hereby consolidates these captioned matters pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12.

observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Potter filed a *pro se* motion to reopen the proceedings which simply states: "[t]he amount of the assessment penalty was a total surprise to us, as we have implemented procedures to prevent and correct every situation that may have resulted in a citation." Mot. at 1.

The Secretary of Labor filed a motion in opposition, arguing that Potter's motion fails to fulfill its burden to explain why it did not timely contest the penalties and to explain its delay in seeking reopening after receiving delinquency notices.[2] In fact, the Secretary represents that Potter only filed the motion to reopen shortly after receiving the Secretary's scofflaw notice that it had an outstanding balance of $51,815.26 in unpaid penalties, interest and administrative costs. Sec'y Mot. at 7 (Attachment H, August 8, 2022).

The Commission requires that, at a minimum, a motion to reopen "must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure." *Noranda Alumina, LLC,* 39 FMSHRC 441, 443 (Mar. 2017) (citing *Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010).

Potter's terse motion is deficient as it neither alleges good cause for reopening under Rule 60(b) nor provides a factual accounting for Potter's failure to timely contest the penalties. *See,*

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[2] The Secretary of Labor represents that a total of 62 citations and penalties are at issue in the captioned cases. Proposed Assessment Number 000525097 (SE 2022-0204) concerns 11 citations and became a final order on December 18, 2020. On February 2, 2021, MSHA sent Potter a delinquency notice for the penalties. On June 23, 2021, MSHA received payment from Potter which it applied to the citations at issue.

Proposed Assessment Number 000528220 (SE 2022-0205) concerns nine citations and became a final order on February 18, 2021. MSHA sent Potter a delinquency notice on April 6, 2021.

Proposed Assessment Number 000540011 (SE 2022-0206) concerns two citations and became a final order on October 12, 2021. MSHA sent Potter a delinquency notice on November 30, 2021.

Proposed Assessment Number 000541838 (SE 2022-0207) concerns 23 citations and became a final order on November 9, 2021. MSHA sent Potter a delinquency notice on December 28, 2021.

Proposed Assessment Number 000543535 (SE 2022-0208) concerns 17 citations and became a final order of the Commission on December 7, 2021. MSHA sent Potter a delinquency notice on January 25, 2022.

e.g., *Copenhaver Constr., Inc*., 43 FMSHRC 113 (Mar. 2021) (denying a motion as "deficient on its face" because it did not assert a reason justifying relief pursuant to Rule 60(b)).[3]

Finally, with respect to the assessments associated with Docket Nos. SE 2022-0204 and SE 2022-0205, the motion to reopen was filed more than one year after the final order was entered. Under Rule 60(c)(1) of the Federal Rules of Civil Procedure, any motion for relief from a final order pursuant to Rule 60(b) must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. *See, e.g.*, *Carmeuse Lime & Stone*, 33 FMSHRC 1783, 1784 (Aug. 2011).

For all the aforementioned reasons, Potter's motion is DENIED with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

[3] Furthermore, it is well recognized that a movant's good faith or lack thereof is an important factor in determining whether good cause exists to reopen a final order. *See, e.g.*, *Stone Zone*, 41 FMSHRC 272, 274 (June 2019) (citations omitted). Some of the factors relevant to the good faith analysis are the number of delinquent penalties outstanding, the period of time the delinquent penalties accrued, and the seriousness of the citations underlying the aforementioned penalties. *Kentucky Fuel Corp*., 38 FMSHRC 632, 633 (Apr. 2016); *see also Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011).

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ADMINISTRATIVE LAW JUDGE DECISIONS

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March 1, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. APPALACHIAN RESOURCE WV LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0555 A.C. No. 46-08930-560351 Mine: Grapevine South Mine

DECISION DENYING SECRETARY'S MOTION FOR APPROVAL OF SETTLEMENT

Before: Judge William Moran

This matter is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The non-attorney conference and litigation representative ("CLR") filed a Motion to Approve Settlement. Upon reviewing the motion, on January 24, 2023, the Court noted that two section 104(b) orders were missing from the record. Citing Exhibit A, from the petition for assessment of a civil penalty, the Court noted that the missing orders were part of the paper issued in connection with Citation Nos. 9567103, and 9567108 for this docket. The Court also noted that for Citation No. 9567108, the motion included a reduction in the regularly assessed penalty. Accordingly, the Court requested that these documents be provided promptly to it.

Subsequently, an attorney for the Secretary filed a notice of appearance and, in a motion filed at that time, in sum and substance, denied the Court's request for submittal of the orders.[1] Secretary's Response to the Court's Request for Documents. January 30, 2023.

It is noted that in prior litigation before this Court for which the Secretary refused to supply associated (b) orders, one of the asserted grounds was that as the matter was settled for the full amount assessed, that precluded the Commission from viewing such orders. The Court rejected that claimed basis for non-disclosure. Here, the Secretary takes it a step further, effectively claiming that even when a proposed penalty is reduced the Commission still has no business in viewing the entire record associated with violations.

[1] This decision denying the Secretary's motion for approval of settlement addresses only the Secretary's refusal to provide the full record with respect to the two citations for which (b) orders were issued. Three other citations involve reductions in the regularly assessed penalties while simultaneously standing by the issuing inspector's evaluation. Analysis of those modifications is deferred until the (b) orders absences are resolved.

Examining the two citations for which (b) orders were issued in connection with them, both are humdingers. Citation No. 9567103 cites a now-admitted violation of 30 C.F.R. §77.1606(c). That standard, titled "Loading and haulage equipment; inspection and maintenance," provides in subsection (c) that "Equipment defects affecting safety shall be corrected before the equipment is used." Involving a CAT loader, the issuing inspector cited nine (9) independent bases in support of the citation. Any one of the defects would support the violation of the standard cited. First issued on June 13, 2022, the citation informs that the loader was then removed from service. Regularly assessed at $626.00, effectively $69.56 per defect, the motion informs that the penalty remained as assessed.

It is fair to state that compliance with the cited standard, 30 C.F.R. §77.1606(c), at this mine has been poor, with some 68 (sixty-eight) citations being issued for such failures in the past two years. By June 21st, the conditions cited not yet corrected, the inspector allowed additional time to make the repairs – extending the time for abatement to June 24th. On June 27th, the repairs still not completed, the inspector extended the date for abatement a second time, to July 4, 2022. At that point the record goes dark, other than Exhibit A reflecting that a (b) order was issued. It is that order that the Secretary seeks to shield from the eyes of the Commission, miners and the public.

The other citation, No. 9567108, cites the same standard as being violated – 30 C.F.R. §77.1606(c). This one, issued two days after the loader citation just described, involved a CAT truck. Eclipsing the number of defects identified for the loader, by a factor of more than two, the inspector identified 19 (nineteen) independent defects on the truck. Though the issuing inspector informed that the truck is used on steep grades, elevated roadways, in congested areas and at times near foot traffic, neither those conditions nor the number of defects impeded the Secretary from dropping the penalty by 54% (fifty-four percent).

Offering that the Respondent would argue that there were no operational issues with the steering or brakes and contending that the tire was a 58-ply tire with only 2 plies damaged, the Secretary stuck by guns but only in terms of the inspector's evaluation. Monetarily, and inherently in conflict with being unwilling to change any part of the inspector's evaluation, the Secretary nonetheless dropped the penalty by more than half. That the 19 defects did not present operational issues is dubious. Those undisputed defects seriously belie that claim.

When first issued, on June 15, 2022, by June 21st the defects were still not abated, but the inspector then extended the time to correct the problems to June 24, 2022. On June 30th, the defects still were not corrected, and the inspector then extended the time for abatement yet again, this time to July 7, 2022. After that, as with the citation described above, the record goes dark except for the notation in Exhibit A that a (b) order was issued.

As the Court has explained in other matters assigned to it for which 104(b) orders were missing from the record, once a matter is before the Commission, as is the case for this docket, perforce the matter is before the Commission, not simply those aspects that the Secretary wishes to disclose.

The Secretary of Labor's role in mine safety and health matters is to protect the safety and health of our Nation's miners. Full stop. What purpose the Secretary serves by secreting the full enforcement record is a mystery. The Court cannot discern any benefit to the affected miners, nor to the public at large, nor to the Commission in fulfilling its statutory role under section 110(k) of the Mine Act. Acting this way, in the Court's opinion, is not a good look for the Secretary.

Accordingly, the motion and the request that it be approved is DENIED. As the issue in this matter is presently before the Commission, the Court will await that determination before acting further.

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

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March 16, 2023

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. POCAHONTAS COAL COMPANY LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2022-0489 AC No. 46-08878-557759 Mine: Affinity Mine

DECISION APPROVING SETTLEMENT

Before: Judge William Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed the Motion to Approve Settlement of the citations involved in this matter. The parties move to modify and reduce the assessed penalty of one citation, as stated below. The overall penalty will be reduced from original assessed amount of **$1,042.00** to **$272.00.**

Citation	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation
9556249	$133.00	$133.00	Violation of 30 C.F.R. § 75.512, forklift not maintained according to wiring schematic in service manual. Sustained as Issued. **Minimum Penalty Assessed**
9556250	$909.00	$139.00	Violation of 30 C.F.R. § 72.630(b), roof bolting machine's dust collection system not maintained. Modify to "low" negligence, "unlikely" likelihood of injury or illness, and non-S&S. **Penalty Reduction of 85%**
TOTAL	**$1,042.00**	**$272.00**	**Total penalty reduction of seventy-four percent (74%)**

Both citations in this docket were issued as 104(a) citations, regularly assessed, and received a 10% penalty reduction for good faith.

Citation No. 9556250

Citation No. 9556250 was issued on May 25, 2022, for a violation of 30 C.F.R. § 72.630(b). Titled "Drill dust control at underground areas of underground mines," the standard specifies that:

> (b) Dust collectors. Dust collectors shall be maintained in permissible and operating condition. Dust collectors approved under Part 33 - Dust Collectors for Use in Connection with Rock Drilling in Coal Mines of this title or under Bureau of Mines Schedule 25B are permissible dust collectors for the purpose of this section.
>
> 30 C.F.R. § 72.630(b).

The citation read:

> Standard 72.630(b) was cited 9 times in two years at mine 4608878 (9 to the operator, 0 to a contractor). Upon inspection of the #2 Section C/N# 71 roof bolting machine it was observed that the dust collection system was not being maintained in permissible and operating condition. When checked there was rock drill dust 1/16" inch deep on the off-side of the machine that had been allowed to accumulate behind the primary dust filters inside the duct work. Upon further examination rock drill dust in excess of 1/4" inch in depth was also present inside the secondary collection compartment and around the secondary filters on the off-side of the machine. This condition allowed rock drill dust to be visually suspended in the air space around the bolter both during the initial start and during operation. This violation if allowed to exist would result in miners exposure to the harmful elements present in rock drill dust and would result in permanently disabling injuries such as silicosis or coal miners pneumoconiosis.
>
> Pet. for a Civil Penalty at 18.

For gravity, likelihood of injury was found to be "reasonably likely," and injury could reasonably be expected to be "permanently disabling," affecting 2 people. *Id*. The violation was found to be significant and substantial. *Id*. Negligence was found to be "moderate." *Id*. The citation was terminated on May 26, 2022. As justification for the termination, the inspector wrote: "The dust collection system has been cleaned and is now functioning correctly." *Id* at 19.

The Secretary moves to modify the citation, changing the likelihood of injury or illness to "unlikely," removing the S&S designation, reducing the negligence to "low," and reducing the penalty to $139.00, offering the following in support:

> Order No. 9556250 shall be modified from Reasonably Likely to Unlikely, S&S to Non S&S and from Moderate Negligence to Low. The Respondent would have argued at the hearing that this citation was issued on the midnight shift when the bolting machine was not in operation and that the curtain side roof bolter operator wore a Personal Dust Monitor on the previous shift and that the whole shift

> exposure was just 0.152 mg/cubic meter, an incredibly low and compliant result. Therefore, the condition did not cause exposure to hazardous respirable dust. Respondent would further argue that the condition was not obvious and had come into existence following the weekly examination 6 days prior.
>
> Taking into account the Respondent's arguments, the facts and circumstances surrounding the violation, the available evidence, the Secretary has decided to modify the citation from Reasonably Likely to Unlikely, S&S to Non S&S and from Moderate Negligence to Low and to reduce the Penalty to $139.00 for settlement purposes. Respondent has agreed to accept the citation as modified and pay the agreed-upon penalty. No other modifications are made.
>
> Mot. to Approve Settlement at 3.

Analysis

The Court considers the settlement for Citation No. 9556250 with antipathy. Pneumoconiosis, "Black Lung" is an insidious disease. Speaking in the past tense about the condition he found, the inspector noted:

> [t]his condition ***allowed*** rock drill dust to be visually suspended in the air space around the bolter both during the initial start and during operation. This violation if allowed to exist would result in miners exposure to the harmful elements present in rock drill dust and would result in permanently disabling injuries such as silicosis or coal miners pneumoconiosis.

Petition at 18.

Each instance of potential exposure to the lung-crippling coal dust contributes to developing this respiration smothering disease. It is the cumulative effect that impairs, not a single instance. By endorsing the "unlikely" designation, MSHA does no favors to the miners it is charged with protecting. Here, the inspector found that the dust collection system on a roof bolting machine was not being maintained in permissible and operating condition and he identified two locations on the machine with this issue.

MSHA compounds this mistake of calling the injury as 'unlikely,' by accepting the idea that the curtain side roof bolter operator wore a Personal Dust Monitor on the previous shift[1] and that the whole shift exposure was just 0.152 mg/cubic meter, an incredibly low and compliant result. Even if true, such putative claims are not to be considered in evaluating likelihood and the significant and substantial designation. The federal courts of appeals have rejected the 'alternative safety measures' argument raised by respondents when analyzing the significant and

[1] The operator's statement is also an implicit admission that the condition existed on the prior shift and it couples this with the misguided notion that wearing a dust monitor lessens the hazard.

substantial designation. Redundant safety measures are not to be considered in evaluating a hazard. For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

> "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' Cumberland Coal, 717 F.3d at 1029; see also Buck Creek, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Further regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

> interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"— that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id.* at 1028–1029.

Id. at 118-119

Nor is the mine operator ignorant of the cited requirement, having been cited for violating it **nine (9) times** in the past two years.

In the Court's opinion, reducing this now-admitted violation by **85%,** from a regularly assessed amount of $909.00 down to $139.00, virtually a minimum penalty, MSHA does a disservice to the miners it is charged with protecting. Such results raise the risk that operators may decide that a minimal fine is the better option than compliance.

In spite of the concerns expressed above, the Court finds that the motion meets the test for approval because under the Commission's interpretation of section 110(k) of the Mine Act, Congress only intended that the three elements as laid out in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) must be shown.

In that light only, the Court has considered the motion and finds that justification for the reduction in the penalty has been presented. Accordingly, the motion to approve settlement is

GRANTED. Respondent Pocahontas Coal Company LLC is **ORDERED** to pay the Secretary of Labor the sum of **$272.00** within 30 days of this decision.[2]

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N
WASHINGTON, D.C. 20004

March 23, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0009 A.C. No. 36-07230-543018 Mine: Bailey Mine

DECISION

Appearances: Erik Unger, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, and Kenneth J. Polka, Conference & Litigation Representative, U.S. Department of Labor, MSHA, Mt. Pleasant, Pennsylvania, for Petitioner; James P. McHugh, Esq., Hardy Pence PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Paez

This docket is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. In dispute is a single section 104(a) citation issued to CONSOL Pennsylvania Coal Company, LLC ("CONSOL" or "Respondent").[1]

To prevail, the Secretary must prove any cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom.*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

[1] In this decision, the hearing transcript and the Secretary's, Respondent's, and Joint exhibits are abbreviated as "Tr.," "Ex. P–#," "Ex. R–#," and "Jt. Ex. #," respectively. The parties' post-hearing briefs and reply briefs are abbreviated as "Br." and "Reply," respectively.

I. STATEMENT OF THE CASE

Citation No. 9075606 alleges CONSOL violated 30 C.F.R. § 77.400(a)[2] by failing to guard moving machine parts, consisting of a spinning metal shaft on an industrial water pump. The Secretary proposed a penalty of $355.00, which CONSOL timely contested.[3] I held an in-person hearing on July 7, 2022, in Pittsburgh, Pennsylvania, where counsel for the Secretary appeared remotely via Zoom for Government due to elevated levels of COVID-19 infections.

At the hearing, the Secretary presented testimony from MSHA Inspector Craig Mikulsky. CONSOL presented testimony from two witnesses: Matthew Criado, CONSOL's Refuse Coordinator who accompanied the inspector, and Tyler McMillan, the Contract Technician for Hollowood Heating, Inc., assigned to grease the fittings on the cited water pump. In addition to the parties' submissions of documentary and photographic evidence, the Secretary submitted three short videos taken by Inspector Mikulsky at the time of his inspection of the cited water pump. During the hearing I granted counsel for CONSOL permission to review MSHA's history of violations for the Bailey Mine and raise any discrepancies in his post-hearing brief, but he reported no issues. Due to a delay in receiving the transcript, the parties requested and were permitted to submit their post-hearing briefs and reply briefs several months later.

II. ISSUES

Based on Citation No. 9075606 the Secretary asserts that CONSOL violated section 77.400(a) by failing to guard the spinning metal shaft of the booster pump that pressurizes water flowing to the Bailey Prep Plant. (Exs. P–1-1, P–5-1; Tr. 26:18–19, 99:4–9, 130:5–11.) The citation characterizes the likelihood of injury to be reasonably likely to result in lost workdays or restricted duty of one miner, designates the citation as significant and substantial ("S&S"),[4] and marks CONSOL's degree of negligence as low. The Secretary argues the violation should be upheld as written and the proposed penalty affirmed. (Sec'y Br. at 3; Exs. P–1-1, P–2-2.) CONSOL originally contested the fact of the violation, the S&S designation, and the amount of the penalty. (Resp't Am. Prehr'g Report at 2.) However, in its post hearing brief, CONSOL no longer argues against the fact of a violation but asserts the citation should be modified to drop the S&S designation along with a penalty reduction based on the penalty charts under 30 C.F.R. part 100.3. (Resp't Br. at 2, 8, 21.)

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[2] Section 77.400(a) provides: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." 30 C.F.R. § 77.400(a).

[3] This docket originally contained three section 104(a) citations. The parties settled two of the three violations prior to the hearing, and only Citation No. 9075606 remains.

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

Accordingly, I determine the following issues are before me: (1) whether CONSOL violated the guarding provisions of 30 C.F.R. § 77.400(a) as alleged in Citation No. 9075606; (2) whether the citation was properly designated as S&S; and (3) whether the proposed penalty is appropriate for any such violation.

For the reasons set forth below, Citation No. 9075606 is **AFFIRMED** as written.

III. FINDINGS OF FACT

A. Parties' Stipulations

At the hearing the parties stipulated in a joint exhibit to the following items, verbatim:

1. The Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 802(d), at the mine at which the citations at issue in this proceeding were issued.
2. At all times relevant to these proceedings, Bailey Mine (ID 36-07230) is a "mine" as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. Operations of the Respondent at the mine at which the citations were issued are subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
5. Bailey Mine is owned by the Respondent.
6. Payment of the total proposed penalty in this matter will not affect the Respondent's ability to continue in business.
7. The individual whose name appears in Block 22 of the citations in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
8. True copies of each of the citations that are at issue in this proceeding were served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated in the citations, as required by the Act.
9. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 202[2]-00[0]9 contains authentic copies of the citations at issue in this matter with all modifications or abatements, if any.

(Jt. Ex. 1.)[5]

B. Operations of Bailey Mine 960 Booster Pump Area

CONSOL operates the Bailey Prep Plant for coal processing at the surface of the Bailey Mine in Greene County, Pennsylvania. (Tr. 37:1–6.) The Bailey Prep Plant uses water for various tasks and employs large industrial pumps to transport it through water lines around the

[5] The parties incorrectly listed the docket number for this case in their last stipulation (Item 9) which I have corrected.

4,000-acre mine site. (Tr. 27:2–4, 96:9–11, 130:5.) Two such industrial water booster pumps sit in a semi-circular metal Quanset hut (Tr. 35:4–7) in an isolated area of the mine called Coal Refuse Disposal Area No. 5, located approximately two miles from the prep plant. (Tr. 36:25–37:4, 130:23–25, 140:6–9.) These 960 Booster Pumps fill a water tank supplying makeup water to the prep plant. (Tr. 36:25–38:14, 46:4–46:22; *see* Ex. P–3.) The booster pumps exert 110 pounds per square inch (PSI) of pressure that forces water through two-foot diameter water lines. (Tr. 37:19–22, 38:17–21, 57:25–58:5; Ex. P–3-13.) Each "large" booster pump motor exerts 500 horsepower (Tr. 35:12–36:23, 65:18–20, 195:21–22) which in turn rotates a shaft that completes between 300–900 rotations per minute. (Tr. 34:23–35:17–18, 65:18–20.)

For maintenance, the 960 Booster Pumps have grease fittings. (Tr. 39:1–2, 73:3–6, 74:3–10, 112:1–10, 166:23–25; Exs. P–2-1, P–3-24, R–3-A.) One of the grease fittings on the 960 Booster Pump sits five inches from its spinning metal shaft. (Tr. 34:12–17, 122:19–21, 123:10–124:6.) Miners known as "greasers" visit Coal Refuse Disposal Area No. 5 approximately monthly to add grease to this grease fitting to lubricate the booster pump motor. (Tr. 38:9–13, 50:19–20, 85:23–86:3, 141:13–21, 152:21–22, 160:10–18.) The greaser walks down the 43-inch-wide walkway through the pumps to approach this fitting. (Tr. 40:21–42:15, 145:2–6; Ex. P–2-1.) Because this grease fitting sits approximately 60 inches, or five feet, above the floor, the greaser must climb the pump to grease the fitting. (Tr. 39:1–2, 73:3–6, 74:3–10, 112:1–10, 166:23–25; Exs. P–2-1, P–3-24, R–3-A.) To reach the fitting, the miner pulls himself closer to the pump with both hands, reaches out 24 inches, and hovers over the spinning shaft. (Tr. 36:21–23, 38:21–24, 51:21–23.)

The contract miner, Tyler McMillan, assigned to service the grease fitting of the 960 Booster Pump in Citation No. 9075606 provided a detailed description on how to perform the greasing task. McMillan greases the fitting from the side, with the motor on his left and the pump on his right. (Tr. 159:13–22; Ex. R–3-A.) While holding the grease gun in his left hand, he steps his left foot in front of the yellow leg on the flat surface with metal tread, grabs the nut and bolt with his right hand, and pulls up. (Tr. 148:21–151:25, 152:19–24, 157:2–20; Ex. R–3.) Then, he places his right foot on the ledge next to the metal frame, leans his thigh against the structure of the motor, and leans his waist against the cast iron ledge while reaching out over the grease fitting. (Tr. 148:25–150:16, 167:2–10; Ex. R–3.) The miner then pushes down on the rigid handle of the 20-inch-long grease gun to lock on the fittings at the end of the grease gun. (Tr. 154:2–9; Ex. R–2f.) If the grease gun does not snugly fit the bearing, grease leaks out from the sides. (Tr. 163:13–16.) Prior to greasing, the miner may clean the fitting with a rag, his gloves, or his hands. (Tr. 66:22–67:1, 155:24–156:19; Ex. P–2-1.) Water sprays in the area of the pump and gets onto the miner's protective glasses. (Tr. 168:24–169:8.)

C. Mikulsky's Inspection of Booster Pump Area

MSHA Inspector Craig Mikulsky arrived at the Bailey Mine on August 18, 2021, for a routine EO1 inspection. (Tr. 22:2–19, 26:5–10, 118:11–14.) Matthew Criado, CONSOL's Refuse Coordinator, accompanied Inspector Mikulsky for part of the inspection (Tr. 27:13–28:2, 196:1–6), whereby Mikulsky traveled to the Coal Refuse Disposal Area No. 5. (Tr. 28:3–28:20, 34:23–35:3, 141:2–12, 140:6–9, 188:3–11; Exs. P–1, P–3-23.) Upon entering the Quonset hut containing the 960 Booster Pumps, Mikulsky heard the "very loud" machinery and observed

water spraying around the hut and dripping from the ceiling. (Tr. 35:19–23, 39:20–23, 47:6–7, 59:15–16, 62:15–21, 72:7–9, 79:5–15, 82:8–9; Ex. P–3-1, R–4 (video 3).) The flooring around the pumps sloped downward to allow water to drain from the building. (Tr. 99:25–100:5.) While standing in the doorway of the hut, Inspector Mikulsky noticed one pump to his left and another pump to his right with a wash down hose draped between them. (Tr. 39:11–25, 43:17–20.)

As Inspector Mikulsky walked past the 960 Booster Pump (the pump that appears on the right side of the photo in Exhibit P–3-1), he glanced over and observed a 3-to-4.5-inch opening exposing the spinning shaft's "teeth." (Tr. 34:8–11, 64:1–7, 104:13–16, 132:25–133:1; Exs. P–1, P–2-1, P–3-1, P–3-9, P–3-10, P–3-17, P–3-24.) These teeth consisted of keyed, or protruding and jagged, bits of rusty metal sticking out from the rotating shaft. (Tr. 34:12–13, 123:5–8, 132:25–133:1.) To Mikulsky the opening was large enough where "a miner can easily, if his hand slips [sic] down, his hand could easily get into this spinning shaft." (Tr. 38:16–19.) A semi-circular, yellow guard covered some of the shaft, and a hose draped over the guard and through the handle. (Tr. 41:20–24, 47:9–12, 132:2–8; Exs. P–3-3, P–3-5.) Mikulsky wrote in his notes that a portion of the hose was directly above the exposed spinning shaft. (Ex. P–2-1.) Metal legs, which extended from the floor, propped up the guard. (Exs. R–3a, P–3-15.) Upon being notified of the condition, Criado observed that the guard "was lifted up on one side of the pedestal." (Tr. 175:8–10.) A grease fitting for the 960 Booster Pump sits in between the yellow leg of the pump's steel frame and the blue rusted metal to the left of the picture in Exhibit P–3-15. (Ex. P–3-15; Tr. 61:22–62:4, 134:20–4.) Inspector Mikulsky observed the cutout in the recessed guard (where the miner's grease gun fits into the grease fitting) hangs almost directly above the shaft, so a greaser would work almost directly above the spinning shaft. (Tr. 37:17–22, 39:11–13, 43:8–9, 53:23–54:13.)

D. Issuance of Citation No. 9075606 and its Abatement

In Citation No. 9075606 (Ex. P–1-1), Inspector Mikulsky wrote:

> A portion of the spinning shaft on the motor output side of the 960 Booster Pump was not guarded to prevent miners from contacting the high speed moving shaft parts. The unguarded opening of the spinning shaft ranged from approximately 3 to 4.5 inches wide around the top portion of the shaft. The spinning shaft is rusted, with protruding and keyed metal sections. The exposed spinning shaft is approximately 4ft to 5ft above the floor and within approximately 5 [sic] inches from a grease fitting. In addition, the entire guard/cage system covering other sections of the motor output side of the spinning shaft was not secure. The entire guard/cage system moved when bumped.

> Standard 77.400(a) was cited 5 times in two years at mine 3607230 (5 to the operator, 0 to a contractor).

(Ex. P–1-1; Tr. 28:6–24, 34:5–21.)

Inspector Mikulsky issued Citation No. 9075606 at 8:30 a.m. for a failure to guard the spinning shaft on the 960 Booster Pump per section 77.400(a). (Tr. 28:5–30:16, 182:17–20.) He designated the citation as low negligence and as S&S, inasmuch as he determined the failure to guard this portion of the shaft was reasonably likely to lead to an injury resulting in lost workdays or restricted duty. (Tr. 81:15–82:11, 84:13–85:1–10; Exs. P–1-1, P–2-2.) He determined the hazard in question could affect one person, likely the greaser. (Tr. 80:1–3.) Mikulsky stated that guarding should fit "tightly" to prevent injury (Tr. 38:14–15), yet here Mikulsky observed the guarding slid away from the spinning shaft because the bolts had rusted. (Tr. 59:10–12, 77:17–21.)

Inspector Mikulsky notified Criado of the condition, and Criado arrived in the area, though management did not previously know about this gap in the guarding. (Tr. 85:69, 118:7–10, Tr. 119:2–18; Ex. P–2-2.) While Inspector Mikulsky examined the condition, filmed video, and took photographs, Criado attempted to slide the guarding to its previous position; but when Criado bumped the guarding, its legs wobbled, the entire guarding frame moved, and the gap exposing the moving shaft lengthened. (Exs. P–1, P–2-1, P–3-3, R–4; Tr. 58:22–60:6, 67:21–22, 68:21–24, 78:3–78:8, 112:19–113:6, 132:25–133:3, 135:515, 148:21–152:16, 191:2–5.) In his contemporaneous notes, Inspector Mikulsky wrote that the "footing of the cage [guarding frame] was off and could [be] moved around easily." (Ex. P–2-1.) Inspector Mikulsky determined CONSOL needed to weld the unstable legs of the guarding frame. (Tr. 113:5–6.)

To abate the citation, Criado initially shut off the pump. (Tr. 64:11–21.) CONSOL required additional time to establish an adequate guard. (Ex. P–1-2.) Therefore, Inspector Mikulsky extended the citation, and CONSOL restricted access to the unguarded area to allow the pumps to continue operating. (Tr. 73:8–13; Ex. P–1-2.) MSHA terminated the citation on August 24, 2021, when CONSOL stabilized and adequately adjusted the guard to prevent injuries to miners by bolting the guard and welding the legs. (Exs. P–1-2, P–1-3, P–3-27; Tr. 59:19–24, 72:12–16, 75:11–12.)

IV. ADDITIONAL FINDINGS OF FACT, PRINCIPLES OF LAW, ANALYSIS, AND CONCLUSIONS OF LAW

A. Violation of 30 C.F.R. § 77.400(a) – Failure to Adequately Guard Spinning Shaft on 960 Booster Pump

The Secretary alleges that CONSOL violated section 77.400(a) requiring "[s]hafts . . . which may be contacted by persons, and which may cause injury to persons shall be guarded." 30 C.F.R. § 77.400(a). The Commission has held a "minimal" likelihood of contact to be sufficient to uphold a violation of this standard. *Thompson Bros. Coal*, 6 FMSHRC 2094, 2096–97 (Sept. 1984) (concluding "section 77.400(a) contemplates guarding of machine parts subject to the standard where there is a *reasonable possibility* of contact and injury" and upholding the

ALJ's finding of a "minimal" likelihood of contact to be sufficient for "reasonable possibility of contact") (emphasis added). CONSOL points to the "reasonable possibility" test in *Thompson Brothers*, which takes into consideration the possibility of "contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness," but emphasizes *Thompson Brothers* did not involve any S&S determination. (Resp't Br. at 9–10.) CONSOL also argues that Mikulsky's photos distort the measurements he made. (Resp't Br. 3–4.)

Here, Inspector Mikulsky observed a 3-to-4.5-inch gap in the guarding that exposed the rusted, keyed spinning shaft on the 960 Booster Pump. (Tr. 34:8–11, 64:1–7, 104:13–16, 132:25–133:1; Exs. P–1, P–2-1, P–3-1, P–3-9, P–3-10, P–3-17, P–3-24.) This shaft contains metal fins, or "teeth", that could reasonably snag clothing, straps, or limbs. (Exs. P–1, P–2, P–3, P–4; Tr. 36:12–36:24, 37:23–38:24, 133:25–134:1.)

CONSOL generally questions the accuracy of Mikulsky's measurements and takes issue with some of the photographic evidence. Mikulsky is an experienced inspector who has worked for MSHA for the last nineteen years, including work as an accident investigator; he received a Bachelor of Science in geology from the University of Pittsburgh, as well as a degree in mine safety from Marshall University. (Tr. 22:15–19, 24:4, 25:15–24.) In response to CONSOL questioning his measurements, Mikulsky explained the difficulty of photos showing accurate depth in a two-dimensional photograph, which I credit. (Tr. 42:17–43:1, 53:13–18, 55:8–10, 62:10–14, 104:7–20, 106:11–12, 107:8–10, 110:2–7.) I also credit Inspector Mikulsky's testimony that while greasing the fitting, "[t]he greaser is exposed, and his hand could easily, if it slips, it could easily get down into that guard." (Tr. 79:25–80:3.) Because the pump's jagged, rusty, 20-inch diameter shaft spins at a rate of 300-900 rotations per minute, and a miner greasing the fitting works five inches from the shaft, contact would reasonably cause injury.[6] (Tr. 34:12–35:18, 65:18–20, 123:5–8, 132:25–133:1; Ex. P–2-1.) Indeed, Inspector Mikulsky who has experience as a greaser stated, "if [a miner's] hand slips in there, a serious injury is going to happen, and it could possibly be permanently disabling" or even something "catastrophic" such as cutting off the miner's hand. (Tr. 50:3–4, 83:2–7.)

Based on the record, I determine that CONSOL failed to adequately guard the shaft of the 960 Booster Pump while in operation, and the gap from the missing guarding exposed miners to a spinning, keyed shaft due to its proximity to the grease fitting miners serviced. Therefore, I conclude that the Secretary has met his burden of proving CONSOL violated section 77.400(a).

B. Significant and Substantial Determination

A violation is S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a

[6] Unlike in *Mach Mining* where the Commission Judge determined the lack of guarding caused no reasonable likelihood of contact since the miner could get no closer than four feet from the moving part, in this case the greaser must work within five inches of the moving machine part. (Ex. P–2-1); *Mach Mining, LLC*, 33 FMSHRC 763, 776 (Mar. 2011) (ALJ) (vacating guarding violation "where a miner could get no closer than four feet from the missing cover" and therefore contact with the moving part would be "completely impossible").

reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, 42 FMSHRC 379, 383 (June 2020) (citing *Newtown Energy*, 38 FMSHRC 2033, 2037–38 (Aug. 2016)); *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming the application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* test).

I now analyze these elements of the *Mathies* test to determine if the violation is S&S.

1. Underlying Violation of a Mandatory Safety Standard

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. I determined CONSOL violated section 77.400(a) because it failed to guard the entire shaft of the 960 Booster Pump causing a reasonable possibility of contact and injury. *See* discussion *supra* Part IV.A. Thus, the Secretary has satisfied the first element of the *Mathies* test.

2. Likelihood of Causing the Occurrence of the Discrete Safety Hazard Against Which the Standard Is Directed

For the second *Mathies* element, the Secretary must establish that "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC 2033, 2038 (Aug. 2016). Here, the hazard is the possibility of miners contacting the exposed spinning shaft (Tr. 36:18–21), because Inspector Mikulsky observed a 3-to-4.5-inch "opening in the guard where a miner can easily, if his hand slips down, his hand could get into this spinning shaft with these protruding fins . . . ." (Tr. 38:16–21, 80:1–3); *see Pittsburg & Midway Coal Mining Co.*, 15 FMSHRC 2243, 2244 (Nov. 1993) (noting section 77.400(a) aims to prevent persons from contacting moving parts).

The parties disagree whether a finger, hand, or loose clothing would reasonably contact the quickly moving shaft based on the proximity of the grease fitting to the shaft, the size of the gap exposing the shaft, and the ergonomics of how a miner accesses the grease fitting while the shaft spins. To reach the grease fitting, the greaser ascends the pump frame, and climbs on it in a

highly specific manner, as described by CONSOL's contract greaser McMillan.[7] (Tr. 39:1–2, 73:3–6, 74:3–10, 112:1–10, 166:23–25, 167:2–10; Exs. P–2-1, P–3-24, R–3-A.) Grease covers the frame because the guns leak grease from the sides.[8] (Tr. 50:4–10, 66:15–16, 69:25–70:2, 163:13–16.) Indeed, Mikulsky noted that grease guns, especially older models, often do not fit the bearings well causing grease to leak (Tr. 50:4–10), and, therefore, "it's common to have grease around in the conditions." (Tr. 66:15–16, 69:25–70:2.) In the area of the 960 Booster Pump, water sprays onto the metal frame and drips from the ceiling as noted by McMillan, as well as evidenced by the photographs and videos showing spraying water around the 960 Booster Pump. (Tr. 169:6–8; Exs. P–2-1, P–3-24, R–4 (video 3).)

In these wet conditions the greaser, McMillan, explained how he climbs onto the pump and contorts his body to balance on the ledge of the pump. (Tr. 148:21–152:24.) This description comports with Mikulsky's description that a miner will not work with his arms fully stretched out, but instead will pull himself closer to the pump to work with bent elbows in a more comfortable position; the "miner works really close to [the] moving part," as miners usually pull themselves closer to the unguarded area so they can work with bent elbows and enhanced dexterity. (Tr. 52:3–9, 82:3–5.) A miner would lean and perhaps reach with both hands out beyond the frame over at least 20 inches. (Tr. 51:7–52:9.) Meanwhile, water would spray on the miner's safety glasses, potentially obstructing his view of the fitting or location of his hands. (Tr. 47:12–14, 82:6–9; Ex. P–2-1.) The miner may get even closer to the fitting to clean the fitting with his hands or guide the head of the grease gun onto the fitting. (Tr. 49:10–12, 50:8–10, 66:15–67:1, 125:25–126:14; Ex. R–2f.) With the jagged "teeth" of the spinning shaft merely five inches below the miner's arms and torso, Inspector Mikulsky noted "how easy [miner's clothing or a rag] can get caught in that opening." (Tr. 34:12–17, 49:8–13, 83:16–18, 122:19–21, 123:10–124:6; Ex. P–2-1.)

Further, given the noisy environment, the wetness, and the awkward position a miner uses to access the grease fitting, it is reasonably likely that a miner could become distracted, slip, or lose his balance. Because a miner holds the grease gun in one hand or both, it is conceivable that a miner would struggle to properly catch himself if he slipped or lost his balance. *See Pittsburg & Midway Coal Mining Co.*, 15 FMSHRC 2243, 2245 (Nov. 1993) (remanding to the ALJ for failing to properly address all the evidence in S&S analysis, including consideration of the hazard of carrying an object which would have made catching oneself from a fall difficult).

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[7] Though CONSOL notes that the Quanset flooring slopes (Tr. 99:25–100:5) and has braille to prevent slipping (Tr. 157:2–9, 186:2–187:5), these facts are irrelevant to the analysis because CONSOL's McMillan testified he stands on the pump frame when greasing the fitting.

[8] The Commission considers the surrounding conditions when determining whether the occurrence of the hazard is reasonably likely. For example, in *Mathies*, the Commission considered the "damp conditions in the mine, the wet track, and the fact that the mantrip's route traversed curves and grades" in determining that the violation was S&S. *Cumberland Coal,* 33 FMSHRC 2357, n.10 (Oct. 2011) (*citing Mathies Coal Co.*, 6 FMSHRC 1, 2, 4 (considering the wet conditions of the mine in affirming the ALJ's conclusion that the violation was S&S)); *see Pittsburg & Midway Coal Mining Co.*, 15 FMSHRC 2243, 2245 (Nov. 1993) (remanding to the ALJ for failure to properly address all the evidence in his S&S analysis which should have included consideration of the pathway's wet and dusty nature).

Despite the proximity of the grease fitting to the unguarded part of the shaft, CONSOL asserts a hand could not fit though the 3-to-4.5-inch gap exposing the spinning shaft. (Resp't Br. at 3–4, Resp't Reply at 6–7; Exs. P–1, P–3-9, P–3-10, P–3-16, P–3-18, P–3-24.) Yet, Inspector Mikulsky testified a hand could fit through the gap. (Tr. 50:3–4, 57:6–8, 83:2–7.) Specifically, Inspector Mikulsky observes, "[I]f your hand's on the edge of something, it doesn't fall rigid. It bends." (Tr. 57:6–8.) Therefore, the gap need not be large enough for a miner's splayed hand to fit through. Rather, consistent with Mikulsky's testimony, if you rotate that splayed hand ninety degrees with the thumb pointed to the sky, it is quite reasonable that hand could slip through a 3-to-4.5-inch gap in the guarding. CONSOL's witnesses never refuted Inspector Mikulsky's testimony that a hand could fit through this gap. Moreover, Mikulsky observed the instability of the guarding frame and the likelihood it would be bumped by a miner, whereby "that opening is going to get, you know, could easily get larger." (Tr. 59:19–24.) Therefore, I determine a miner's rag, clothing, hand, fingers, or portion of the arm could reasonably fit through the gap in the guarding and contact the spinning shaft, creating the reasonable likelihood of the occurrence of a hazard which section 77.400(a) is designed to prevent.

CONSOL makes several additional arguments challenging the S&S determination. First, CONSOL argues that even if a miner's hand, arm, or clothing could fall through the gap in the guarding, no miner could contact the moving machine part because no miners regularly enter the area. (Resp't Br. at 8.) While Inspector Mikulsky admitted he observed no miners in the immediate vicinity at the time of his inspection (Tr. 99:2–3), the record demonstrates greasers come to the area approximately once monthly to grease the fittings of this 960 Booster Pump. (Tr. 38:9–13, 50:19–20, 85:23–87:12, 128:1–129:17, 160:10–18.) Matthew Criado, the refuse coordinator at the time of the inspection, worked at CONSOL from 2014 until November 2021.[9] (Tr. 171:19–172:20, 188:24–189:17.) Criado acknowledged that "a plethora of different people," including electricians, and the contractor who laid the hose over the pump, regularly work in the booster pump area. (Tr. 39:4–42:1, 43:2–42:16, 83:10–12, 114:19–117:22, 193:8–193:25, 197:11–20; Exs. P–2-1, R–3a.) Although CONSOL emphasizes that Mikulsky saw no miners in the immediate vicinity at the time he issued the citation (Tr. 99:2–3), this is not legally relevant because S&S determinations are made in the context of normal, continuous mining operations. *See, e.g.*, *Knox Creek Coal Corp*., 36 FMSHRC 1128, 1132 (May 2014), *aff'd*, 811 F.3d 148 (4th Cir. 2016) (indicating that the ALJ erred when he took a "'snapshot' approach" to the S&S analysis). Thus, I find under normal mining operations that miners in addition to the greasers visit the area of the 960 Booster Pump.

CONSOL also seems to posit that fewer miners working in proximity to this guarding violation negates an S&S determination. However, the Commission stated that "'reasonable

[9] Criado operated heavy equipment before going to college then earned a master's degree in mechanical engineering, and at the time of the hearing was a Ph.D. candidate in mechanical engineering. (Tr. 171:19–172:20.) I note that Criado's approach to examinations of the 960 Booster Pump area did not inspire much confidence in his ability to identify potential safety issues. At the hearing, Criado said his safety examinations of the Quanset hut housing the 960 Booster Pump consisted of opening the door, sticking his head in, and making sure there was no smoke, no big leaks, or no weird noises, and he would very rarely if at all venture more than ten feet in the door. (Tr. 184:14–19, 191:13–19.)

likelihood' is not an exact standard" when it wrote that "a Judge cannot calculate the degree of risk of the occurrence of a hazard or a reasonably serious injury in precise percentage terms. Rather, the 'reasonable likelihood' standard is a 'matter of degree' evaluation with particular focus on the facts and circumstances presented regarding these risks." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2039 (Aug. 2016) (reversing the ALJ's decision dropping the S&S designation and instead finding that failure to lock out a shuttle car during electrical repairs was S&S). Indeed, I am persuaded by Commission and ALJ cases finding violations to be S&S when a miner is in the cited area infrequently. *See, e.g.*, *Eagle Nest Inc.*, 14 FMSHRC 1119 (July 1992) (vacating and remanding the ALJ's non-S&S determination where mine examiner was exposed to water accumulations in entry during weekly examinations), *on remand* 14 FMSHRC 1800 (Nov. 1992) (ALJ) (holding on remand that violation was S&S where one miner examined area weekly); *Original Sixteen to One Mine, Inc*., 36 FMSHRC 2224, 2227–28 (Aug. 2014) (ALJ) (affirming S&S designation where only one miner visited area of mine with violation once monthly). Thus, I am not persuaded by CONSOL's arguments that a violation where a miner visits the cited area monthly to grease the 960 Booster Pump cannot be S&S.

Second, CONSOL argues that the hazard would not reasonably occur because of its employees' knowledge, experience, safety training, and prudence. Specifically, CONSOL argues that its contract greasers do not wear loose clothing or use loose rags to wipe up grease spills (Tr. 98:5–7, 126:21–127:20, 146:2–10, 156:2–13; Resp't Br. at 8, 19), would know to power down the machine before greasing the pump (Tr. 115:8–19; Resp't Br. at 4), and would not grease the fitting with a loose or dislodged guard. (Tr. 158:24–159:8.) McMillan, a contract greaser, said he has never observed the guard "pulled back" when he greased the fitting. (Tr. 161:6–8.) And CONSOL points to McMillan's testimony that he normally tucks in his clothing when he greases the fitting. (Tr. 146:4–9.) However, the Commission has held a miner's knowledge, experience, and prudence, or mine operator's redundant safety measures are irrelevant to the S&S analysis, as "[t]he Court cannot assume that S&S miners would exercise caution." *CONSOL Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (affirming ALJ's S&S finding and noting that a miner's caution when traversing near and under unsupported roof is irrelevant in S&S analysis of missing reflector).

In interpreting section 77.400(a), the Commission further notes "the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Bros. Coal*, 6 FMSHRC at 2097 (emphasizing the importance of considering "the vagaries of human conduct" in standards involving miner's behavior in affirming the ALJ's finding of a violation of 30 C.F.R. 77.400(a) for failure to guard fan blades where the inspector observed contact could stem from "sudden movement, stumbling, or momentary distraction or inattention."); *Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 116, 118 (D.C. Cir. 2018) (holding that safety measures, including company policy not to access area of unsupported roof, are irrelevant to S&S analysis); *Sec'y of Labor v. Ohio Valley Coal Co.*, 359 F.3d 531 (D.C. Cir. 2004) (noting miner's failure to turn off machine when assessing for maintenance led to severing of his arm and subsequent fatality).

Given the record as a whole, including the credible testimony of Inspector Mikulsky as well as the photographic and video evidence of the cited area, I determine it is reasonably likely that a miner could come in contact with the spinning shaft of the 960 Booster Pump. *See Mathies*, 6 FMSHRC at 5 (noting "an inspector's judgment is an important element" in an S&S determination) (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that the ALJ did not abuse his discretion in crediting opinion of experienced inspector). Thus, I determine the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed, and, therefore, the Secretary has satisfied the second element of the *Mathies* test.

3. Likelihood the Occurrence of the Hazard Would Cause Injury

Regarding the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood that the occurrence of the hazard would result in an injury. Inspector Mikulsky testified the raised, keyed fins on the spinning shaft "can easily cut or grab a miner if he slips down into this." (Tr. 65:12–16; Ex. P–3-17.) Mikulsky stated that in his experience jagged fins on spinning shafts "historically [] can and ha[ve] caused injuries." (Tr. 65:21–66:1.)

Additionally, in his post-violation notes, Inspector Mikulsky writes "[i]f [the miner] contacted [the shaft], lacerations, blunt force trauma, sprains, strains, [or] broken bones could reasonably occur." (Ex. P–2-2.) Mikulsky, who previously worked as a greaser, stated "if [a miner's] hand slips in there, a serious injury is going to happen, and it could possibly be permanently disabling" or even something "catastrophic" such as cutting off the miner's hand. (Tr. 50:3–4, 83:2–7.) Mikulsky has experience as an accident investigator (Tr. 24:3–9), and based on a miner's exposure to the hazard of the unguarded spinning shaft, Mikulsky "believe[s] that if a miner's hand contacted this, if a miner – if a miner was pulled into this by a loose piece of clothing or even holding a rag, that it would reasonably likely cause severe injury . . ." (Tr. 81:23–84:7.)

Consequently, I determine that the hazard of contacting the spinning shaft—either through the direct contact of the hand, fingers, or arm or by being pulled into the shaft due to loose clothing or rags—is reasonably likely to cause injury, thus satisfying the third element of the *Mathies* test.

4. Likelihood Resulting Injury Would Be of Reasonably Serious Nature

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood the resulting injury would be of a reasonably serious nature. An injury of a "reasonably serious nature" does not require a specific type of injury, and a mere sprain or finger or wrist fracture may be "reasonably serious. *S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013) (holding the ALJ erred in requiring the Secretary to demonstrate an injury would result in hospitalization, surgery, or a long period of recuperation to satisfy the fourth *Mathies* element). The Commission found a finger or wrist fracture to be a reasonably serious injury. *Buffalo Crushed Stone, Inc.,* 19 FMSHRC 231, 238 n.9 (Feb. 1997) (reversing the ALJ's finding of non-S&S and noting that a finger or a wrist fracture are reasonably serious to fulfill the fourth *Mathies* element). The spinning shaft is large enough, spanning 20 inches in diameter (Ex. P–2-

1), and fast enough at 300-900 rotations per minute that if an incident occurred, "something serious would happen" and the "500 horsepower moving shaft would definitely cause some serious injury" according to Inspector Mikulsky, who previously worked as a greaser. (Tr. 80:4–5, 82:24–25.)

CONSOL's witnesses did not dispute Inspector Mikulsky's testimony that such injuries could include cutting off the miner's hand. (Tr. 50:3–4, 83:2–7.) A severed hand is more serious than a finger or wrist fracture, which the Commission previously determined were "reasonably serious." *Buffalo Crushed Stone, Inc.* 19 FMSHRC at 238. I determine that the injuries expected to result from contacting the spinning shaft are reasonably likely to be of a reasonably serious nature, thus satisfying the fourth *Mathies* element. For the same reasons, I affirm the Inspector's gravity determination as reasonably likely to result in lost workdays or restricted duty.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9075606 is appropriately designated as S&S.

C. Penalty

The Secretary has proposed a penalty of $355.00. The Commission is not bound by the Secretary's proposal and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

CONSOL is a large operator with a low to moderate violation history. In the two years preceding the issuance of this citation, MSHA issued to CONSOL's Bailey Mine three violations of section 77.400(a) that became final orders of the Commission. (Ex. P–6-18.) The Secretary determined CONSOL's negligence to be low, and the operator does not contest that decision. CONSOL has not alleged that the proposed penalties would adversely affect its ability to continue in business. I determined the gravity of the violation to be S&S with the number of persons affected to be one, the likelihood of injury as reasonably likely, and the expected severity as lost workdays or restricted duty. Finally, CONSOL demonstrated good faith in attempting to achieve rapid compliance when its employees used tape to "danger[] off" the area around the pump and then bolted the guard and welded the guarding frame's legs to stabilize them. (Ex. P–1-2; Tr. 59:19–24, 72:7–16, 75:11–12.) In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $355.00.

V. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 9075606 is **AFFIRMED** as written.

Respondent CONSOL Pennsylvania Coal Company, LLC is hereby **ORDERED** to **PAY** a penalty of $355.00 within 40 days of this decision.[10]

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

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