

May 2022

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Review Was Denied In The Following Case During The Month Of May 2022

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 2, 2022

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

v.

RICHMOND MATERIAL COMPANY

Docket No. CENT 2022-0048
A.C. No. 41-04219-538889

BEFORE: Traynor, Chair; Althen and Rajkovich, 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 November 24, 2021, the Commission received from Richmond Material Company (“RMC”) 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 July 27, 2021, and became a final order of the Commission on August 26, 2021. RMC asserts that it never received the proposed assessment, only learning of the assessment due to a delinquency letter received on

November 17, 2021. The operator notes that the address listed on the assessment is checked daily for mail, and that assessments are routinely processed in a timely manner. 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 RMC's request and the Secretary's response, we find that RMC's failure to timely respond was due to inadvertent ignorance of the proposed assessment. We note that the motion to reopen was filed shortly after RMC learned of the 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/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 2, 2022

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

v.

SOUTHEASTERN PRIMARY
MINERALS LLC

Docket No. SE 2021-0006
A.C. No. 09-01195-521518

BEFORE: Traynor, Chair; Althen and Rajkovich, 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, 2021, the Commission received from Southeastern Primary Minerals LLC (“SPM”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On January 25, 2021, the Chief Administrative Law Judge issued an Order to Show Cause in response to SPM’s perceived failure to answer the Secretary of Labor’s November 24, 2020, Petition for Assessment of Civil Penalty. A second Order to Show Cause was issued on March 29, 2021. By its terms, the second Order to Show Cause was deemed a Default Order on April 28, 2021, when it appeared that the operator had not filed an answer within 30 days.

SPM asserts that a timely response to the Petition was mailed to the Mine Safety and Health Administration’s (“MSHA”) Birmingham office, and that after receiving the second Order to Show Cause, the operator contacted MSHA to explain that a response had already been submitted. SPM states that it now understands the responses to the Petition and Order should have been filed with the Commission. The Secretary does not oppose the request to reopen but reminds the operator to ensure all future responses are timely filed in accordance with MSHA’s regulations at 30 C.F.R. § 100.7 and the Commission’s procedural rules at 29 C.F.R. Part 2700.

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 SPM’s request and the Secretary’s response, we find that the operator’s failure to properly file a response was the result of mistake. We remind the operator to closely read the instructions in any future orders received from the Commission. However, 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/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 2, 2022

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

v.

WARRIOR MET COAL MINING LLC

Docket No. SE 2021-0076
A.C. No. 01-01401-528527

BEFORE: Traynor, Chair; Althen and Rajkovich, 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 August 12, 2021, the Commission received from Warrior Met Coal Mining LLC (“WMC”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On June 14, 2021, the Chief Administrative Law Judge issued an Order to Show Cause in response to WMC’s perceived failure to answer the Secretary of Labor’s April 12, 2021, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on July 14, 2021, when it appeared that the operator had not filed an answer within 30 days.

It appears that WMC attempted to timely file an answer to the Petition, but the filing was not accepted by the Commission’s e-filing system due to a typographical error in the caption. WMC asserts that it believed the answer had been accepted and was not aware of any problem with the filing.¹ WMC also states that it never received the Order to Show Cause, noting a typographical error in the distribution list, and asserts that it would have timely responded had it been aware of the Order. The Secretary does not oppose the request to reopen but reminds the operator to ensure all future responses are timely filed in accordance with MSHA’s regulations at 30 C.F.R. § 100.7 and the Commission’s procedural rules at 29 C.F.R. Part 2700.

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.

¹ WMC concedes that it received an automated notification from the Commission’s e-filing system stating that the filing had been rejected as duplicative, but assumed there would be further communication from the Commission if there was a problem.

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 WMC's request and the Secretary's response, we find that the lack of timely response was due to 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/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

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

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

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May 2, 2022

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

v.

STONY CREEK QUARRY
CORPORATION

Docket No. YORK 2022-0011
A.C. No. 06-00005-509944

BEFORE: Traynor, Chair; Althen and Rajkovich, 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 November 23, 2021, the Commission received from Stony Creek Quarry Corporation (“Stony Creek”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on March 10, 2020, and became a final order of the Commission on April 9, 2020. Stony Creek asserts that it left a message

regarding the assessment with MSHA’s Civil Penalty Compliance Office, but did not receive a return call, and assumed that MSHA’s operations had been disrupted by the pandemic. The Secretary opposes the request to reopen, noting that a delinquency notice was mailed to the operator on May 26, 2020, and the case was referred to the U.S. Department of Treasury for collection on July 23, 2020.

Based on representations by the Secretary, it appears Stony Creek attempted to file a notice of contest for the proposed assessment with MSHA (called a “request for a hearing” by the parties) on February 10, 2021. On February 25, 2021, MSHA sent a response denying the request as untimely and explaining that the case had become final in April 2020. Stony Creek states that, at some point, it received a call from MSHA and was advised to file a motion to reopen the assessment. A motion to reopen was ultimately filed in November 2021.

Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening. The Commission considers the entire range of factors relevant to determining mistake, inadvertence, excusable neglect, or other good faith reason for reopening. Further, Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

This motion to reopen was filed more than one year after becoming a final order. Therefore, under Rule 60(c), Stony Creek’s motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny Stony Creek’s motion.

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 9, 2022

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

v.

WESTFALL AGGREGATE &
MATERIALS, INC.

Docket No. LAKE 2019-0317-M
A.C. No. 33-04563-261088

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY: Althen and Rajkovich, Commissioners:

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 12, 2019, the Commission received from Westfall Aggregate & Materials, Inc. (“Westfall”) a request to reopen a penalty assessment 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. 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)(1) 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, or excusable neglect. *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).

The operator seeks to reopen a \$16,400 special assessment for a single violation allegedly documented in Citation No. 6559330. The operator received the assessment on July 20, 2011. The Secretary claims that the assessment became a final order on August 19, 2011, and that MSHA mailed a delinquency notification on October 6, 2011. The motion to reopen was filed in July 2019, seven years after the alleged final order. The current assessment, after interest, is \$33,559.46.

According to the proposed penalty assessment, Citation No. 6559330 was issued to the operator along with Order No. 6559329 on February 28, 2011. However, the operator “draws the Commission[’s] attention to the fact that Citation #6559330 as received by Petitioner and as set forth in MSHA files, did not consist of or include a ‘Mine Citation/Order.’” MTR at 1-2. Moreover, in contrast to the order, there is no Citation/Order Form for Citation No. 6559330 in the record.

The Secretary opposes the operator’s request to reopen. The Secretary contends that the operator’s motion to reopen must be denied because it was filed more than a year after the final order.¹ In addition, the Secretary contends that the operator is not entitled to relief because its failure to timely contest the penalty was the result of an inadequate processing system, which resulted in the proposed assessment being placed into the wrong company file, and because the operator has an extensive delinquency history.²

The operator allegedly contacted the Secretary twice regarding the assessment. The operator claims that it made an inquiry regarding the \$16,400 assessment to Beau Ellis, an attorney for the Secretary, and that it made an inquiry in 2016 to Brian Yesko, a Conference Litigation Representative. The operator alleges that the Department of Labor did not provide any information in response to these queries. An MSHA inspector later contacted the operator in April 2019 regarding the unpaid balance for the assessment. Apparently, this was the first time MSHA, or anyone else, had contacted the operator about the assessment since it allegedly became a final order. The operator filed its request to reopen in July 2019, a few months after being contacted by MSHA.

Under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), MSHA must issue citations to operators in writing. Under section 105(a), MSHA can propose penalty assessments for citations issued pursuant to section 104. In *Dittrich Mechanical and Fabrication, Inc.*, 32 FMSHRC 1599, 1600 (Dec. 2010), the Commission cited these provisions to hold that if an operator claims not to have received a written citation, *i.e.*, the appropriate Citation/Order Form, the Secretary must provide evidence that such a citation had been issued. And if the Secretary fails to provide such evidence, the Commission “cannot find that the assessment was ever effective.” *Dittrich*, 32 FMSHRC at 1600.

¹ Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion must be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

² The operator does concede that it incorrectly placed the penalty assessment for violation No. 6559330 in its closed file for Order No. 6559329. The operator states that this occurred because the assessment paperwork received by the operator did not include an actual citation, therefore the matter was not flagged as an active citation requiring attention. The assessment provided as an exhibit by the operator includes the standard cover letter and narrative findings (which reference the citation), but not the citation form itself. Mot. at 2; Ex. A.

In *Dittrich*, the operator claimed not to have received a written citation, and the Secretary failed to provide evidence of a written citation. Although the Secretary provided “internal MSHA documentation” suggesting that a citation had been issued, the Commission held that this was not sufficient to infer the issuance of a written citation. *Id.* at n.1. Therefore, the Commission found that the assessment in *Dittrich* never became effective, and consequently never became a final order. However, the Commission did not foreclose MSHA from correcting its error by issuing a written citation in the future. *Id.*

Similar to *Dittrich*, the operator here claims not to have received a written citation for the assessment, and the Secretary failed to provide sufficient evidence of a citation. The only document in the record which might support the issuance of a written citation is an internal MSHA document, MSHA’s special assessment for violation No. 6559330. Although the special assessment contained information for violation No. 6559330 such as the alleged level of negligence, such internal MSHA documentation is insufficient to infer the issuance of a written citation. *See* MTR, Ex. A. at 5.

Under *Dittrich*, 32 FMSHRC at 1600, the proposed assessment for the violation in this case is not effective. Therefore, we cannot find that the assessment for violation No. 6559330 ever became a final Commission order.

Consequently, we conclude that there is no final order in this case, and we dismiss the operator’s request to reopen as moot.³ MSHA may issue another proposed penalty assessment once it has complied with the requirements of section 104(a).⁴

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

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

³ Similarly, the Commission has routinely found it appropriate to dismiss motions to reopen as moot where there was no final order because the operator did not receive the proposed assessment. *E.g.*, *Double Bonus Coal Co.*, 31 FMSHRC 358 (Mar. 2009); *Cumberland Coal Res.*, 38 FMSHRC 2502 (Oct. 2016); *Delhur Indus., Inc.*, 43 FMSHRC 396 (Aug. 2021).

⁴ We note that the alleged violation is more than a decade old. We express no opinion on how this long passage of time might affect a proceeding, if the Secretary chooses to wake the violation from its sleep.

Chair Traynor, dissenting,

Westfall Aggregate & Materials, Inc., filed its motion to reopen Citation No. 6559330 and the associated civil penalty almost *eight years* after it became a final order of the Commission. Rule 60(c) of the Federal Rules of Civil Procedure provides that a motion to reopen shall be filed not more than one year after the judgment was entered.¹ Westfall’s motion was filed well out of time and thus should be denied. *See, e.g., Wayne J. Sand & Gravel Inc.*, 43 FMSHRC 386, 387 (Aug. 2021) (denying a motion filed more than 16 months after the issuance of a default order as untimely filed). My colleagues tacitly acknowledge that the motion to reopen is time-barred, as they do not consider any of the operator’s arguments for relief pursuant to Rule 60(b), i.e., mistake, inadvertence or excusable neglect. Instead, my colleagues conduct an alternative analysis for relief *de novo*, from which I dissent.

The majority finds that the Mine Safety and Health Administration (“MSHA”) failed to issue Citation No. 6559330 in writing to Westfall as required by section 104(a) of the Mine Act, 30 U.S.C. § 814(a) (requiring that “each citation shall be in writing”). But this finding is very clearly wrong.

My colleagues’ analysis contains multiple errors. First and foremost, Westfall never argues in its motion that the Secretary failed to issue a citation as required by section 104(a) of the Mine Act. Second, my colleagues do not establish that the Commission has jurisdiction to consider such a claim, had it been presented. Finally, Westfall unambiguously concedes that it received a copy of Citation No. 6559330 in writing, *attaching it as an Exhibit to its pleadings*.

A. Westfall does not claim that MSHA failed to issue the citation in writing.

Westfall does not claim that MSHA failed to issue Citation No. 6559330 in writing and did not raise non-issuance in its motion.² Westfall’s actual argument as articulated in its motion is more nuanced. Westfall states that MSHA’s issuance of the written citation in an atypical form confused its staff and contributed to their failure to timely file contest of the penalty. Mot. at 4. Specifically, Westfall argues that MSHA’s decision to issue a specially assessed penalty rather than to regularly assess the civil penalty and the absence of a standard MSHA Citation/Order contributed to the confusion.³ *Id.* Westfall further avers that its inexperience with special assessments “resulted in inadvertent and mistaken interpretation and treatment” of

¹ “The Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure.” 29 C.F.R. § 2700.1(b).

² Accordingly, the Secretary did not have notice that the issue was before the Commission.

³ Westfall claims *inter alia* that the five-month gap in time between the issuance of the associated Order No. 6559329 and the specially assessed penalty for the subject citation also contributed to its confusion and mistake. Mot. at 4.

the citation, which would justify reopening the penalty pursuant to Rule 60(b).⁴ *Id.* at 5. My colleagues inappropriately transform this Rule 60(b) argument into a claim that MSHA failed to issue the citation “in writing” as required by section 104(a) of the Mine Act.

Again, Westfall does not argue that *the form of the citation* it received with the penalty assessment failed to comply with the requirements of section 104(a) of the Mine Act.

B. The Commission does not have jurisdiction to issue the majority decision.

The majority asserts that it has jurisdiction to consider this matter pursuant to the Commission’s jurisdiction to reopen final orders. Slip op. at 1 (*citing* Federal Rule of Civil Procedure 60(b)); *see Monterey Coal Co.*, 15 FMSHRC 997 (June 1993) (“we hold that the Commission possesses jurisdiction to reopen final orders”). Yet, their conclusion that “there is no final order in this case” appears to contradict their initial assertion that the Commission possesses jurisdiction in this matter to consider a motion to reopen a final order. Slip op. at 3. My colleagues do not explain this apparent discrepancy.⁵

As an administrative agency created by statute, the Commission cannot exceed the jurisdictional authority granted to it by Congress. *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (Sept. 1988); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-73 (1977); *Civil Aeronautics Bd. v. Delta Airlines*, 367 U.S. 316, 322 (1961). Specific provisions of the Mine Act delineate the scope of the Commission’s jurisdiction and it does not possess plenary authority to review all enforcement actions. *Pocahontas Coal Co.*, 38 FMSHRC 176, 181 (Feb. 2016).

C. Westfall concedes that it received the citation in writing.

The majority ultimately concludes that because Westfall did not receive Citation No. 6559330 “in writing” as required by section 104(a) of the Mine Act, 30 U.S.C. § 814(a), it is not a final order of the Commission. The majority relies on *Dittrich Mechanical & Fabrication, Inc.*, 32 FMSHRC 1599, 1600 (Dec. 2010), in which the Commission held that absent evidence that the citations were ever issued to Dittrich, there was no final order.⁶

The case at hand is readily distinguishable from *Dittrich*. Westfall *concedes that it received a citation in writing from MSHA*, attaching a copy of the citation as Exhibit A to the instant Motion filed with the Commission. Mot. at 1 (“A copy of Citation No. 6559330 is attached hereto as Exhibit A”); Mot. at 3 (“Citation [No.] 6559330 was received approximately five (5) months after [Order No.] 6559329”). Additionally, the record also contains a copy of

⁴ MSHA’s regular and specially assessed penalty proposal regulations are available at 29 C.F.R. Part 100. According to 29 C.F.R. § 100.5, “MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment” and may issue a penalty in an alternative narrative form.

⁵ Furthermore, the motion to reopen was filed well beyond Rule 60(c)’s one year limit.

⁶ The Commission did not explain its jurisdictional authority in *Dittrich* either; however, the subject motion to reopen in that case was not filed out of time.

Order No. 6559329 which states that “Citation No. 6559330 is being issued in conjunction with this order.” Westfall Ex. B. The order and citation were issued after an MSHA inspector observed a crane operating at the mine without service brakes. *Id.*; Westfall Ex. A⁷.

Furthermore, this proceeding, unlike *Dittrich*, involves the issuance of a specially assessed penalty. Typically, the Secretary of Labor proposes civil penalties pursuant to his regulations at 30 C.F.R. § 100.3. If the Secretary determines that conditions warrant a specially assessed penalty, he may waive the regular assessment process. 30 C.F.R. § 100.5(b). For special assessments, “[a]ll findings shall be in narrative form.” 30 C.F.R. § 100.5(b). The Secretary’s narrative findings for the citation and special assessment received by Westfall in this proceeding contain all the information that MSHA is required to provide according to section 104(a), 30 U.S.C. 814(a), of the Mine Act (“Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.”). For example, the document alleges, in part, that: Westfall violated the mandatory safety standard at 30 C.F.R. 56.14101(a)(1), the Secretary believes that Westfall exhibited a moderate degree of negligence, and the gravity of the violation was serious. Thus, the record demonstrates that the Secretary’s section 104(a) obligations were fully satisfied.

In *Dittrich*, the only evidence that a citation had been issued was a print-out from MSHA’s website. 32 FMSHRC at 1601. The Commission found that “internal MSHA documentation regarding the violations” does not evidence that the citations were issued to the

⁷ Citation No. 6559330 attached to Westfall’s instant Motion as *Exhibit A* states in pertinent part:

On February 28, 2011, MSHA issued Section 104(a) Citation 6559330 at the Hill Road Pit. Westfall Aggregate & Materials, Incorporated, was cited for a violation of 30 CFR 56.14101(a)(1).

This citation was issued in conjunction with 107(a) Imminent Danger Withdrawal Order 6559229 dated February 28, 2011.

The gravity of the violation was considered serious.

The violation resulted from the operator’s moderate degree of negligence.

The number of previously assessed violations and inspection days at this mine, and the size of the mine and company appear on the attached Proposed Assessment.

Based on the six criteria set forth in 30 CFR 100.3(a) and the information available to the Office of Assessments, it is proposed that Westfall Aggregate & Materials, Incorporated, be assessed a civil penalty of \$16,400.

Westfall Ex. A (issued July 14, 2011).

operator. *Dittrich*, 32 FMSHRC at 1600, 1600 n.1. Here, of course, the operator concedes that it was issued the narrative findings for a specially assessed penalty. Westfall Ex. A at 5. My colleagues wrongly assert that the special assessment is “an internal MSHA document.” Slip op. at 3. The record reflects not only that the document was issued to Westfall as required by 30 C.F.R. § 100.5, but also that it was received and signed for by Westfall. Westfall Ex. A; Sec’y Ex. A.

Accordingly, the record establishes that a citation was validly issued pursuant to section 104(a) of the Mine Act, there is a final order, and the motion to reopen was filed out of time. Thus, I dissent.

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 28, 2021

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

v.

PEABODY MIDWEST MINING, LLC,
Respondent.

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

v.

MICHAEL BUTLER, employed by
PEABODY MIDWEST MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2019-0023
A.C. No. 12-02295-474164

Docket No. LAKE 2019-0122
A.C. No. 12-02295-478356

Docket No. LAKE 2019-0361
A.C. No. 12-02295-497867 A

Mine: Francisco Underground Pit

DECISION AND ORDER

Appearances: Barbara M. Villalobos, U.S. Department of Labor, Office of the Solicitor,
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R. Henry Moore, Fisher & Phillips, LLP, Six PPG Place, Suite 830,
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Before: Judge Simonton

I. INTRODUCTION

These cases are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d) and 820(c) (“the Act”).¹ In dispute are three section 104(d)(1)

¹ In this decision, the joint stipulations, transcript, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. S-#,” and “Ex. R-#,” respectively.

orders issued to Peabody Midwest Mining, LLC (“Peabody”) and two companion section 110(c) penalty assessments issued to Michael Butler (“Butler”), alleging his personal liability as an agent of Peabody.

The parties presented testimony and documentary evidence at a hearing held in Evansville, Indiana on March 3-4, 2020. The Secretary presented testimony from REI drill operator Robert Ferrin, MSHA inspector Keith Duncan, MSHA special investigator Phillip Stanley, and MSHA inspector Chris Persinger. Peabody presented testimony from hourly miner John Stevens, maintenance foremen Brad Cary, production supervisor James Ford, mine manager Michael Butler, general manager Brad Rigsby, maintenance manager Charles Lyons, and maintenance supervisor Michael Trueblood. The parties each filed post-hearing briefs.

II. FINDINGS OF FACT

Peabody operates the Francisco Underground Mine (“Francisco”), a coal mine located in Gibson County, Indiana. Jt. Stip. 2. In July 2018, Peabody employed a contractor, REI Drilling, to conduct horizontal longhole drilling in the “0” return entry for Unit 3. Jt. Stip. 19. The drilling was performed in order to identify old works in close proximity that might be intersected when the continuous miner on Unit 3 advanced. *Id.* This exploratory drilling is safer to do ahead of mining activity so that a barrier may be established, and the operator can be confident that abandoned workings are not too close to new ones. Tr. 398. Prior to July 2018, horizontal drilling had taken place three times before at Francisco, and in each of those instances, drilling was conducted without encountering old works. Jt. Stips. 21, 22. On July 23, 2018, however, the drill intersected old works, causing methane gas to leak into the mine. Jt. Stip. 26; Tr. 36, 261. This incident led to the issuance of the violations at issue in these matters.

A. The Drill Encounters Old Mine Works

At about 9:00 p.m. on July 22, 2018, REI drill operator Robert Ferrin and his assigned helper, Peabody employee John Stevens, arrived at the drill site in the 0 entry between crosscuts 65 and 66. Jt. Stip. 25; Tr. 248. As they worked, Ferrin operated the drill and Stevens worked at Ferrin’s direction, loading the drill rods. Tr. 33, 249. After drilling for several hours, the drill hit a void at approximately 1:49 a.m. on July 23, 2018. Jt. Stip. 26. The drill rods jumped forward much faster than normal, and air began to exit the borehole at significant pressure. Tr. 34-35, 250; Jt. Stip. 26. The sound of the air escaping was very loud. Tr. 53, 290.

Stevens immediately went to the phone to call the tracker, and asked the tracker to contact mine manager Michael Butler and inform him that he was needed at the drill site. Tr. 254. He provided no other information to the tracker. Tr. 254. Stevens’ spotter—the methane detector on his person—showed elevated methane levels “just moments” after the drill encountered the void, and the level went up to “over range,” which indicates greater than 5% methane concentration. Tr. 253, 261. He could not recall whether his spotter went off before or after calling the tracker. Tr. 254. Butler received the call to go to the drill site at approximately 1:50 a.m. Tr. 376.

Stevens returned to the drill, and Ferrin, having realized that they had “punched into the old works,” told Stevens to engage the blowout preventer (“BOP”). Tr. 50, 252. The BOP is a

device that seals the hole and contains the methane behind the wall to stop it from entering the drill site. Tr. 50, 60. In Ferrin's experience in other methane inundation incidents, the BOP has successfully contained the escaping gas. Tr. 63. In this instance, however, the pressure buildup was so great that the gas began to come out the rib itself, so Ferrin told Stevens to stop engaging the BOP. Tr. 61, 65, 252. Ferrin did this because he did not want to blow out the drill casing, which would have caused him to lose all control over the escaping gas. Tr. 61-63.

Ferrin then directed Stevens to begin pulling out drill rods so that they could install a plug. Tr. 35, 51, 253. This was no small task, as the rods are approximately 10 feet each in length, and the drill had drilled in about 900 feet. Tr. 50. The drill rods needed to be removed in order for the hole to be plugged, so that a "packer" could be pushed into the hole and form a plug. Tr. 51, 73. Stevens' spotter continued to alarm throughout the time that they were pulling rods. Tr. 262. Ferrin's spotter went over range during the methane inundation as well. Tr. 43.

The methane detector on the drill causes the drill to shut down when methane reaches a concentration level of two percent. Tr. 43-44, 70, 364. During this incident, the methane level at the drill site fluctuated. Tr. 43-44, 70, 119-120, 264. Therefore, after each time the drill kicked power off due to elevated methane levels, the methane level diminished to a point where Ferrin was able to restart the drill and continue working. Tr. 44. Both Ferrin and Stevens agreed that the drill shut down and was restarted a total of two or three times during this inundation before the drill was de-energized and the mine evacuated. Tr. 44, 100, 349.

B. Mine Manager Michael Butler Arrives at the Drill Site

Minutes after Stevens called the tracker, at approximately 1:53 or 1:55 a.m., Butler arrived at the drill site. Tr. 101, 335-36, 376-77. He brought maintenance foreman Brad Cary with him, since at that point he thought there might be a problem with the drill. Tr. 276, 335; Jt. Stip. 27. Cary stayed back, near the drill tender approximately 10 feet from the drill, and Butler continued walking down toward the drill. Tr. 286. Butler met up with Stevens just in by the drill tender, and Stevens informed him that they had drilled into old works and that Steven's spotter was reading over range. Tr. 336-337, 368-69. Butler then walked up to the drill to speak with Ferrin. Tr. 337. Butler leaned in to ask Ferrin a few questions, and as he leaned over the drill, Butler's own spotter went off. Tr. 338. He looked at it and saw that it was over range. Tr. 338. At hearing, Cary could not recall whether his spotter ever alarmed near the drill tender. Tr. 277, 294.

Ferrin told Butler that they had breached old works, and Butler asked him what the procedure was because Butler knew "nothing about that drill." Tr. 38, 339. Ferrin told him that they had to pull out the drill rods and plug the hole. Tr. 339. Butler thought that sounded like a wise thing to do, and figured that if something was "off," they would have already had an explosion by the time he arrived at the drill site. Tr. 345-46. Ferrin had made the decision to pull rods prior to Butler's arrival, but testified that the decision to continue pulling the rods and attempt to plug the hole was "kind of discussed between everybody," including Butler, once Butler had arrived at the drill site. Tr. 44-45.

Butler then went to the phone and called the tracker. Tr. 340. He told the tracker what was going on and informed him that he needed to "make some phone calls and get some people out of

bed.” Tr. 340. After calling the tracker, Butler told Cary to return to Unit 3, kill power on the Unit 3 equipment, and evacuate the miners on the unit. Tr. 290, 340, 347. Unit 3 was in by the drill site in close proximity, and, according to Butler, evacuating the miners on the unit was a “no-brainer.” Tr. 340, 383.

Once back at Unit 3, Cary found production supervisor James Ford, and told Ford that the drill had hit a void and that they needed to evacuate. Tr. 278, 317. They ensured that the equipment was backed out and power was killed, and then conducted a head count and sent the miners outside. Tr. 278, 317. Once everyone on the unit had evacuated, Ford went over to the drill site. Tr. 317. Cary stayed at Unit 3 and killed power on the back of the power center, which shut down power to everything on the unit. Tr. 279, 291-92. Butler had specifically told Cary not to kill power to the power center that provided power to the drill, so he only shut off power to the unit. Tr. 292. He then also went back to the drill site. Tr. 279.

Ford initially approached the drill site by coming up crosscut 65, outby the drill, but his spotter alarmed and went over range. Tr. 326. He then retraced his steps and approached the site by traveling up crosscut 66, in by the drill. Tr. 326-27. When Ford arrived at the drill site, Butler told him to go get some curtains to ventilate toward the drill. Tr. 318. He went back to the unit to retrieve the curtains, and then hung two curtains in order to provide more air flow to the drill site. Tr. 318-21; Ex. R-A-2. He also opened a man door for additional ventilation. Tr. 321.

When Cary returned to the drill site after shutting down the power to Unit 3, he was accompanied by mechanic Jesse Mitchell. Tr. 292. At this point, only Ferrin, Stevens, Butler, Cary, Ford and Mitchell remained underground. Tr. 293; Ex. S-10B. When Cary approached the drill site, he saw that Butler was on the phone. Tr. 282.

C. General Manager Brad Rigsby Orders the Miners to Stop Work and Evacuate

Above ground, by this point, Francisco’s general manager Brad Rigsby had been contacted. The tracker called Rigsby at his home and informed him that the drill had intersected an old mine and that gas was coming out of the hole. Tr. 400. Rigsby did not have any information about methane levels, but he had “enough” information to instruct the tracker that they needed to cease operations on Unit 3 right away and get ready to pull out. Tr. 400-01. Rigsby then left his home and headed to the mine. Tr. 401. On his way in, Rigsby made calls to mine personnel and to MSHA district manager Ron Burns. Tr. 401-02. Rigsby told Burns what the tracking office had told him, and Burns told Rigsby that they needed to evacuate. Tr. 402. Rigsby interpreted Burns’ instruction in their initial conversation as a directive to evacuate the “affected area,” which Rigsby believed was “the split going into Unit 3.” On a later call between Rigsby and Burns, Burns clarified that they were to evacuate the entire mine, not only Unit 3. Tr. 402.

When he arrived at the mine, Rigsby called Butler, who was still at the drill site. Tr. 403-04, 414. Butler did not relay any methane levels, but he did inform Rigsby that they were getting ready to insert the packer in the hole. Tr. 404-05, 415. The drill rods had all been removed, the plug had been inserted in the casing, and they had just started to push it into the hole. Tr. 350. Prior to this conversation with Butler, Rigsby was not aware that any work was occurring at the drill

site. Tr. 417-18. As soon as he learned of that activity, and still without knowing any methane levels, Rigsby told Butler to stop, just let the hole “bleed,” and come out of the mine. Tr. 415.

After Butler got off the phone with Rigsby, he briefly spoke with Cary and told him to go kill power to the drill. Tr. 298-99, 347. Cary and Mitchell went together to de-energize the drill. Tr. 280-81. They went to the roadway and killed power at the vacuum breaker and put a lock on it. Tr. 280. Then, they went back to the drill and Butler informed them that they were going to evacuate. Tr. 282. When Ford finished hanging the curtains, the others were evacuating. Tr. 321-22.

When the miners finally evacuated, there was still air coming out of the hole. Tr. 363. The six miners left in the mine evacuated at the same time. Tr. 293. On their way out of the mine, Cary killed power at another vacuum breaker and then, once out of the mine, he put a lock on the substation which “killed all power on the rim.” Tr. 282. Ford and Butler were the last people to exit the mine. Tr. 324. Ford’s notes indicate that he evacuated at 3:00 a.m. Ex. R-H. Tracking records indicate that both Butler and Ford left the drill site at 3:11 a.m. and arrived at the surface at 4:28 a.m. Ex. S-8; Tr. 106-107.

D. The Hole is Plugged on July 24, 2018

The hole was plugged the next day, on the evening of July 24, 2018. Jt. Stip. 28. Ferrin again operated the drill. Tr. 54, 72. Also present were state mine inspector Steve Riley and MSHA inspector Chris Persinger. Tr. 356, 379. Even then, air was still loudly rushing out of the hole. Tr. 72, 379-80, 469. Butler testified that he also went to the drill site that night, and he heard someone’s spotter beeping. Tr. 355. However, Persinger took seven methane readings while he was at the drill site, both inby and outby the drill, and all were less than one percent. Tr. 465-68, 470. None of the readings were taken standing next to the drill. Tr. 471. Persinger testified that he never heard anyone’s spotter alarm, and if he had, he would have “shut everything off.” Tr. 468, 474.

The plug was placed approximately 400 or 500 feet inside the hole. Tr. 64. More than 600 feet of cementitious grout was applied, and the hole “was dead at that point.” Tr. 411. The abatement was completed by the morning of July 25, 2018. Tr. 420.

E. The Permissibility Exam

The July 2018 drilling project at Francisco began on July 11, almost two weeks before the methane inundation incident. Jt. Stip. 24. On that date, before the drill was put into service, Peabody conducted a permissibility examination of the drill. Tr. 129-130. The purpose of a permissibility exam is to examine the electrical components of the equipment to ensure that the equipment is safe and does not present an ignition hazard. Tr. 435. Though the drill belongs to the contractor, REI Drilling, Peabody is responsible for conducting permissibility exams, and they are supposed to be conducted on a weekly basis. Tr. 134, 426, 454. During the July 11 exam, Peabody discovered that the “sniffer head,” or methane sensor, on the drill was in need of replacement. Tr. 129-30; Ex. S-7, p. 2. It was replaced and the drill went into service. Tr. 130.

No additional permissibility exams were reported for the drill equipment between July 11 and the July 23 incident. Tr. 429; Ex. S-7. An exam was conducted on July 24 following the breach into old works on July 23. Ex. S-7, p. 7. During that exam, Francisco maintenance supervisor Michael Trueblood and foreman Robert Ewers identified six issues with the drill. Tr. 446-52; Ex. S-7, p. 7. They corrected all the issues, and Trueblood testified at hearing that none of the issues they identified were of serious concern in terms of their potential for causing an explosion. Tr. 455-56.

F. Violations

MSHA inspector Keith Duncan conducted an investigation of the July 23, 2018 incident. On August 16, 2018, he issued Order Nos. 9106663, 9106664, and 9106665 to Peabody. Jt. Stips. 9, 10, 11. Following a special investigation, MSHA also proposed penalties against Butler, requesting that the Commission hold him personally liable under section 110(c) of the Mine Act for his role in the violations alleged in Order Nos. 9106663 and 9106664. Jt. Stip. 18, Pet. for Assessment of Civ. Penalty at 2 (Sept. 13, 2019).

III. DISPOSITION

A. Order No. 9106663

1. The Violation

In any enforcement action, the Secretary bears the burden of proving an alleged violation by a preponderance of the evidence. *RAG Cumberland Resource Corp.*, 22 FMSHRC 1066, 1070 (Sep. 2000). The Secretary may sometimes establish a violation by inference, but only when the inference is inherently reasonable and there is a rational connection between the evidentiary facts and the conclusion inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138 (May 1984).

In Order No. 9106663, the Secretary alleges that Peabody violated section 75.323(c)(2)(ii) of MSHA's health and safety regulations, which mandates that

[w]hen 1.5 percent or more methane is present in a return air split between the last working place on a working section and where the split of air meets another split of air, or the location where the split is used to ventilate seals or worked-out areas—

....

[o]ther than intrinsically safe AMS, equipment in the affected area shall be deenergized, electric power shall be disconnected at the power source, and other mechanized equipment shall be shut off.

30 C.F.R. § 75.323(c)(2)(ii). In Order No. 9106663, Inspector Duncan reported that the drill at Francisco remained energized for 35 minutes in the midst of a methane inundation on July 23, 2018, that resulted in methane concentrations ranging from 1.5% to over 5% in the area. Ex. S-2.

Given the risk of combustion, Duncan found that the violation created a reasonable likelihood that a fatal injury would occur, and that this risk affected 10 miners. *Id.*

It is clear the drill remained energized despite methane levels exceeding 1.5 percent. The overwhelming weight of the evidence presented at hearing supports this conclusion. The drill, which is designed to shut down when methane concentration reaches two percent, shut itself off two or three times, indicating that it had indeed been operating in violation of the standard when methane levels were between 1.5% and 2%. Tr. 70, 264. Ferrin also admitted that his spotter detected methane levels that were over range (greater than 5 percent) at some point during the inundation, and yet he continued to use the drill to plug the hole. Tr. 43. Ferrin's helper, Stevens, who was tasked with pulling rods at the drill site, also testified that his spotter alarmed and went over range. Tr. 262. He reset it several times and yet the readings went over range again within a minute throughout the time that the miners unloaded drill rods out of the bore hole. Tr. 262.

Butler arrived at the drill site around 1:55 a.m. and oversaw the drill's continued operation. Tr. 107-08, 376. He immediately learned from Stevens that the drill had encountered old mine works. Tr. 336. When speaking with Stevens, Butler learned that Stevens' spotter had a reading of over range. Tr. 370-71. Butler then leaned over the drill to talk to Ferrin, and Butler's own spotter went off, registering yet another methane reading that exceeded the device's detection range. Tr. 370-71. The data presented by the Secretary shows that the methane readings on Butler's spotter were consistently over range. Ex. S-9A. Butler was therefore almost immediately on notice that methane levels near the drill were unacceptably high. As mine manager, Butler had the authority to shut down the drill that night. Tr. 366. He failed to do so, even after seeing several indications that methane concentrations in the mine were in excess of 1.5%. In sum, Peabody continued to work with energized electrical equipment when methane levels exceeded 1.5%, and thus the fact of violation is proven.

The inspector's gravity findings were reasonable, given the risk presented by the methane inundation. Inspector Duncan testified that a fatal injury could be expected because methane levels at various times exceeded five percent and therefore presented a major combustion risk. Tr. 122. This is supported by methane spotter logs and other information in the record. *See* Exs. S-9A, S-9B, and S-9C. Methane combustion could have easily caused a mine explosion, and history counsels that such explosions are often deadly. Tr. 123. According to Duncan's experience, the presence of oxygen, high levels of methane, and an ignition source (the energized drill) made the risk of combustion reasonably likely. Tr. 122. Finally, Duncan testified that the explosion risk affected at least 10 miners who were underground at the time, which is supported by the record. Tr. 167-68, 315-16, 333, 353.

Accordingly, I find that the Secretary has satisfied his burden in proving the fact of violation and the gravity determination for Order No. 9106663.

2. Significant and Substantial

The Secretary also alleges that this violation is significant and substantial. A violation is significant and substantial (S&S) "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a

reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The test associated with S&S violations has undergone a decades-long process of refinement. *See, e.g., id.; Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Under the Commission’s most recent articulation of this test, in order to establish that a violation of a mandatory safety standard is S&S, the Secretary of Labor 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, LLC*, 42 FMSHRC 379, 383 (June 2020).

The *Peabody Midwest* test—which imposes a greater burden on the Secretary than previous versions of the S&S standard—did not exist at the time that this case was heard. The Secretary argued vigorously in his brief that a more lenient standard ought to be applied. *See* Sec’y Br. at 17-21. Notwithstanding the Secretary’s argument, I must apply the *Peabody Midwest* test as the most current, controlling precedent regarding the S&S threshold. I have not asked for supplemental briefing because I find that the Secretary has satisfied his burden of proving S&S even under the stricter *Peabody Midwest* standard.

The Secretary has clearly proven the underlying violation of 30 C.F.R. § 75.323(c)(2)(ii). This section of the MSHA regulation aims to avoid mine explosions caused by the ignition of subsurface methane. When issuing this regulation, MSHA recognized:

Methane is the most dangerous gas encountered by miners working underground. When the level of methane reaches 5.0 percent it is explosive. Section 75.323 generally establishes action levels below this lower explosive limit to permit appropriate actions to be taken by mine operators in order to prevent an explosion.

Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9777 (Mar. 11, 1996) (to be codified at 30 C.F.R. pt. 75). I find the first prong of the *Peabody Midwest* test has been met by the Secretary.

In order to satisfy prong 2 of the test for S&S, the Secretary must prove that the violation was reasonably likely to cause an explosion. The Secretary has met this burden. He has offered uncontroverted proof that, at times, the concentration of methane at the drill site exceeded five percent. Tr. 43, 255, 370-71; Exs. S-9A, S-9B, S-9C. This is the level of methane accumulation that the regulation sought to avoid. A methane concentration of five percent is combustible and, in the presence of an ignition source like an energized drill, is reasonably likely to cause the sort of explosion that the ventilation rule is directed against. Prongs 3 and 4 of the test are also satisfied, given the serious injury that is reasonably likely in the event of a mine explosion. Accordingly, the Secretary has successfully shown that the violation described in Order No. 9106663 was significant and substantial.

3. Negligence and Unwarrantable Failure

Based on his observations, the inspector designated the violation as high negligence and as an unwarrantable failure to comply with the mandatory standard. An operator is negligent when it violates its duty of care to avoid violations of mandatory safety standards. *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). To determine whether the operator has met its duty of care, the Commission considers “what actions a reasonably prudent person who is familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have taken under the same circumstances.” *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016). A judge is not required to apply or even consider the definitions of negligence found in 30 C.F.R. § 100.3. *Id.*; *Mach Mining LLC v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

The term “unwarrantable failure” arises in section 104(d) of the Mine Act, describing serious misconduct that triggers the issuance of a citation under that section. 30 U.S.C. § 814(d). The Commission has defined unwarrantable failure as “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corporation*, 9 FMSHRC 1997, 2001 (Dec. 1987). The conduct that qualifies as unwarrantable failure is often characterized as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Martin County Coal Corp.*, 28 FMSHRC 247 (May 2006) (citing *Emery*, 9 FMSHRC at 2001).

While these descriptors are helpful guideposts, the inquiry of whether conduct is “aggravated” is ultimately a holistic analysis of both aggravating and mitigating circumstances. Such circumstances include (1) the extent of the violative condition, (2) the length of time it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

a. Extent of the Violative Condition

The first factor to consider is the extent of the violative condition. The extensiveness of a violation is determined by examining “the extent of the affected area as it existed at the time” and “the number of persons affected by the violation.” *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014).

Here, the Secretary has proven that dangerous methane levels existed at the drill site, but there is very little indication of elevated methane levels in other parts of the mine. Inspector Duncan testified that he believed James Ford’s spotter went over range upwind of the tender, but Special Investigator Stanley testified as to his belief that Ford’s spotter exceeded its range when he was only slightly outby the drill. Tr. 113, 225. The remaining spotter data tends to indicate that the unlawful methane conditions were concentrated around the drill. The Secretary has therefore only proven by a preponderance of the evidence that a limited physical area (the area near the drill) was affected by the methane accumulation.

I also must take into account the number of persons affected by the violation. Initially, up to 60 underground miners were exposed to the potential for a calamitous mine explosion. Tr. 123.

However, Michael Butler gave orders to evacuate most of those miners very quickly after the old works were breached. Tr. 340. After the evacuation of Unit 3, the number of miners affected by the violation was drastically lower. The Secretary never conclusively proved how many people remained in the mine post-evacuation outside of Butler, Cary, Ford, Stevens, Ferrin and Mitchell.

I take the initial risk to 60 miners very seriously. However, as soon as Butler became aware of the methane inundation and initial over range methane levels, he did order the evacuation of Unit 3 where most of the miners were located. The fact remains though that no less than six miners were allowed to remain in the drill area where the methane levels were known to be at or above combustible levels for a period of time while the drill remained energized. While the Secretary proved only a limited physical extent of the methane accumulation, the violation was still extensive insofar as it affected initially dozens of nearby miners and for a longer period of time no less than six miners in the drill area where methane concentrations were unacceptably high, at or above combustible levels. All told the extensiveness factor weighs in favor of a finding of unwarrantable failure.

b. Duration of the Violative Condition

The Commission has highlighted the duration of the violative condition as a “necessary element” of the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1352 (Dec. 2009). A duration of seconds or minutes often mitigates the severity of the violation. *See, e.g., Dawes Rigging*, 36 FMSHRC at 3080. However, when a hazardous condition is “readily distinguishable from other types of danger due to [its] high degree of danger [and] its obvious nature,” the brief duration of the hazard will not militate against a finding of unwarrantable failure. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361 (Sep. 2016) (quoting *Midwest Material Co.*, 19 FMSHRC 30, 36 (Jan. 1997)) (internal quotations omitted).

In the present case, the duration of the violative condition is contested. Butler arrived at the drill site around 1:55 a.m. Tr. 101. He claimed that he was present at the drill site for about half an hour before ordering the drill to be deenergized. Tr. 377. The driller, Ferrin, testified that he did not recall how long the drill remained energized, but he told the special investigator in October 2018 that approximately thirty minutes elapsed between the first time the drill “kicked” and Butler’s directive to exit the mine. Tr. 47; Ex. S-13. Testimony and contemporaneous notes from James Ford, however, indicate that Ford and Butler did not exit the drill site until 3:00 a.m., which is about an hour after the inundation. Tr. 328; Ex. R-H. Similarly, tracking data for Michael Butler and John Stevens shows that they passed through the second west main roadway around 3:10 a.m., suggesting that they exited the drill site just minutes before. Ex. S-8; Tr. 105-06, 267-69. With all of this in mind, I find that the drill remained energized for 30-60 minutes after methane inundation.

However, it is unclear whether the methane level was consistently over 1.5% for the entire time that the drill remained energized. The methane levels did in fact fluctuate. *See, e.g., Ex. S-9A*. In addition, the nature of the methane spotters makes it difficult to discern the actual methane level over time, because once a spotter goes over range, it must be reset to resume its active methane measurements. Tr. 108, 262.

The duration of the violation remains a relevant consideration in this analysis even when the record does not permit a conclusive finding regarding the duration of the hazardous condition. *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010). The Secretary in the present case has proven that the drill was energized for 30-60 minutes after Butler became aware of the elevated methane levels. What has not been proven is the duration of specific methane levels. However, Butler continued to allow the drill to be energized despite his knowledge that methane levels were not only above 1.5% but reached combustible levels numerous times during the 30-60 minute time frame. The duration factor therefore supports a finding of unwarrantable failure.

c. Degree of Danger

The Commission has found that a high degree of danger presented by a violation constitutes an aggravating factor in support of a finding of unwarrantable failure. *IO Coal*, 31 FMSHRC at 1355-56. In this case, the degree of danger was high. The drill remained energized even while methane levels nearby exceeded five percent, creating the conditions that could have led to combustion and a major accident. As Inspector Duncan said, “we’re very lucky that we did not have a mine explosion that night.” Tr. 126. The degree of danger unequivocally points toward a finding of unwarrantable failure.

d. Obviousness of the Hazard

The obviousness of a violation can be an aggravating factor in the unwarrantable failure analysis. In some ways, methane—as an invisible and odorless gas—is a nonobvious hazard. However, the risk of methane accumulation became obvious when it set off at least three methane spotters and tripped the emergency shut-off feature on the drill no less than two or three times. Tr. 43, 370-71, 378. The methane accumulation was an obvious hazard, and this militates toward a finding of unwarrantable failure.

e. Operator’s Knowledge of the Violation

The operator’s knowledge of the existence of the violative condition is also relevant. The knowledge of a corporate agent may fairly be imputed to the mine operator. *See Va. Crews Coal Co.*, 15 FMSHRC 2103, 2106 (Oct. 1993) (citing *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-98 (Feb. 1991)). In this case, various members of Peabody management possessed different levels of knowledge regarding the violative condition. The mine’s general manager, Brad Rigsby, testified that he did not know about the elevated methane levels until after he had already directed that the mine be evacuated. Tr. 404-05. Michael Butler, on the other hand, knew of multiple methane spotters going over range. Tr. 370-71. He also knew that the drill’s emergency shut-off had been triggered. Tr. 378. Nevertheless, Butler allowed the drill to remain energized and went so far as to direct that the power to the drill be maintained when other power was being shut off in light of the hazard. I therefore find that Butler did have knowledge of the violative condition and that, as mine manager, his knowledge may be imputed to the operator.² *See Va.*

² See *infra*, Section C, for additional discussion about Michael Butler’s knowledge of the violation.

Crews Coal Co., 15 FMSHRC at 2106. Accordingly, the operator's knowledge is an aggravating factor that supports a finding of unwarrantable failure.

f. Abatement Efforts

Another relevant factor is whether the operator took action to abate the violative condition before the issuance of the citation or order. When an operator has been put on notice of a problem, "the level of priority that the operator places on addressing the problem is a factor properly considered in the unwarrantable failure analysis." *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 487 (Mar. 1997).

I find that Respondent's abatement efforts weigh heavily against a finding of unwarrantable failure. Peabody kept the drill energized for one reason: to stanch the stream of methane infiltrating the mine. The evidence presented at hearing by both parties demonstrates that Respondent acted in good faith to address the hazard that was created when the drill hit the old works. There is no indication in the record that Respondent ignored the dangerous condition; rather, its miners worked diligently in an attempt to fill the borehole and eliminate the hazard.

Respondent took additional measures to abate the dangerous conditions when it organized an effort to increase ventilation at the drill site. Michael Butler instructed James Ford to hang curtains that would increase the flow of oxygenated air towards the drill, and Ford obliged by hanging curtains at the No. 1 entries to crosscuts 66 and 67. Tr. 233; 318-20. Ford also opened a man door at crosscut 67 to increase the airflow to the drill. Tr. 321. Further, John Stevens testified that he also installed curtains to help ventilate the area and reduce the methane concentration at the drill site. Tr. 255. These efforts were intended to abate the hazardous methane levels and to keep miners safe in the wake of the inundation. Given this response by the operator and its miners, I find that the abatement efforts constitute a major mitigating factor that weighs in favor of Respondent and against a finding of unwarrantable failure.

g. Notice to the Operator that Greater Efforts Were Necessary

Finally, when an operator has previously committed similar violations, those violations are relevant to an unwarrantable failure determination to the extent that they give the operator notice that greater efforts are necessary for compliance with a safety standard. *Brody Mining*, 37 FMSHRC at 1691. The Secretary has not presented any evidence of previous violations, and therefore this factor does not affect the unwarrantable failure analysis.

h. Conclusion

I find that the preponderance of the evidence supports a finding of high negligence for Order No. 9106663. By showing that the operator knew or should have known that the methane concentration exceeded 1.5%, the Secretary has successfully proven that the operator's lack of care rises above the level of ordinary negligence. Peabody might have acted in good faith to address the source of the methane, but no prudent operator would have believed that it was reasonable to continue powering the drill in a persistently high-methane environment in light of MSHA's safety standards.

Similarly, after careful consideration of the aggravating and mitigating factors, I find that the violation clearly and persuasively constitutes an unwarrantable failure. Peabody ignored an extensive, obvious, and extremely dangerous hazard despite having knowledge of the violation. The mine manager knew about methane accumulations that exceeded five percent and that, therefore, put 60 underground miners at risk of a mine explosion. He should have immediately deenergized the drill as required by law, and his failure to do so was unwarrantable. I recognize that Peabody acted in good faith to address the source of the hazard—as its miners are trained to do in other contexts—and that this selfless conduct may be seen as laudable. However, “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource[,] the miner,” 30 U.S.C. § 801(a), and keeping the drill energized in the high-methane environment constituted an unacceptable risk to miner safety. Accordingly, I affirm the Secretary’s finding of unwarrantable failure for Order No. 9106663.

B. Order No. 9106664

1. The Violation

In Order No. 9106664, the Secretary alleges that Peabody violated section 75.323(c)(2)(iii) of MSHA’s mine safety and health regulations. In pertinent part, section 75.323(c) states:

(1) When 1.0 percent or more methane is present in a return air split between the last working place on a working section and where that split of air meets another split of air, or the location at which the split is used to ventilate seals or worked-out areas changes or adjustments shall be made at once to the ventilation system to reduce the concentration of methane in the return air to less than 1.0 percent.

(2) When 1.5 percent or more methane is present in a return air split between the last working place on a working section and where that split of air meets another split of air, or the location where the split is used to ventilate seals or worked-out areas

....

(iii) *No other work shall be permitted in the affected area until the methane concentration in the return air is less than 1.0 percent.*

30 C.F.R. § 75.323(c) (emphasis added). The inspector reported that mine management “knowingly and willfully allowed work other than ventilation corrections to be performed for approximately 15 minutes” even though methane detectors sensed concentrations of greater than five percent methane. Ex. S-3. Inspector Duncan again found that the violation created a reasonable likelihood that a fatal injury would occur, and that this risk affected 10 miners.

I have made my findings regarding the elevated methane levels above. *See* Section A, *supra*. Mine management was consistently aware of methane levels that exceeded five percent, well above the level that triggers mandatory work stoppage under this regulation. Methane levels between 5% and 15% are explosive. Tr. 101. Nonetheless, mine management permitted miners to

continue pulling rods and attempting to plug the borehole for approximately half an hour, if not longer. Tr. 377.

Respondent argues that its response to the mine inundation did not violate section 75.323(c)(2)(iii) because management did not permit the type of “other work” that is contemplated in the regulation. Peabody interprets the regulation to allow work to “change or adjust the ventilation system”—even if the methane concentration exceeds 1.5%—and to forbid any “other work” from continuing. Resp. Br. at 19. Based on this interpretation, Peabody argues that the efforts to plug the borehole constituted ventilation control and therefore were not forbidden by the regulation.

But the miners were not merely conducting ventilation control. By attempting to plug the borehole, the miners engaged in remedial actions that sought to address the source of the methane. These actions, while perhaps admirable, constitute the sort of “other work” forbidden by section 75.323(c)(2)(iii). MSHA has made clear that efforts to investigate and address the source of the methane accumulation must be secondary to the critical actions that are immediately necessary to protect miner safety in the face of a mine inundation:

Other commenters thought that the standard, as proposed, would cause hasty, ill-advised changes to be made and would prohibit an investigation into the cause or source of the methane problem which could result in phased-in corrections. MSHA agrees that operators should seek long term solutions and should fully investigate the cause or source of methane accumulations. Investigation and long term corrections are not prohibited by the rule. However, *the final rule does require that certain actions be undertaken at once to correct the short term or acute safety hazards resulting from accumulations of methane.*

Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9778 (Mar. 11, 1996) (to be codified at 30 C.F.R. pt. 75) (emphasis added). Miners should have been evacuated “at once” when management saw consistent methane readings over 1.5%. *Id.* Getting miners to safety must be the priority, and then the operator can determine the best way to address the methane source.

With regard to gravity, the Secretary has proven that there was a high risk of methane combustion and miner fatality given the mix of high methane levels, oxygen, and ignition source, and given the continued presence of miners underground due to Respondent’s inaction. I therefore find that the Secretary has satisfied his burden in proving the fact of violation and the gravity determination for Order No. 9106664.

2. Significant and Substantial

The mine inspector designated this violation as S&S, and I find that this designation is proper. First, the Secretary has proven the fact of violation. Second, the mine operator’s decision to permit work to continue in the mine was reasonably likely to cause the safety hazard that the regulation was designed to address. Section 75.323(c)(2)(iii) aims to reduce the risk that miners will be harmed or killed by a mine explosion. The presence of the miners underground and their continued work drilling and pulling rods amid a methane inundation made it reasonably likely that

those miners would face a mine explosion. Third, a mine explosion is reasonably likely to cause injury. Finally, injuries following a mine explosion are reasonably likely to be serious in nature, if not deadly. Therefore, the Secretary has borne his burden of proving that the violation was significant and substantial.

3. Negligence and Unwarrantable Failure

The factors at play in the unwarrantable failure analysis for this order are very similar to those discussed above for Order No. 9106663.³ First, I find that the extent of the violative condition is an aggravating factor due to the risk presented initially to 60 miners and then at least six miners for a longer period of time. Second, the duration of the violation is an aggravating factor given that the Secretary has proven that work continued for 30-60 minutes after Butler became aware of the elevated methane levels. Third, the hazard is dangerous given the combustion risks of methane, and this factor points toward a finding of unwarrantable failure. Fourth, the hazard was obvious in light of the methane sensors on the drill and on personal spotters, and the obviousness is an aggravating factor. Fifth, the operator had knowledge of the violative condition since Michael Butler knew about the elevated methane levels. This knowledge is an aggravating factor. Sixth, Respondent's efforts to abate the hazard—including its efforts to plug the borehole and to ventilate the area—weigh against a finding of unwarrantable failure. Finally, the Secretary has not shown any previous history of violation.

I again find that the violation constitutes high negligence and unwarrantable failure on the part of the operator. A prudent operator would not have permitted miners to continue working while methane spotters blared and showed over-range readings. Furthermore, just as with Order No. 9106663, the factors at play in the unwarrantable failure analysis tend to aggravate (rather than mitigate) the severity of the violation. Peabody permitted non-ventilation work to continue in an explosive methane environment, despite its knowledge of the high methane levels. The company repeatedly ignored obvious signs of the dangerous condition. To protect its miners, Peabody should have responded swiftly and decisively to follow the law and put a stop to the work that persisted underground. Accordingly, the Secretary has satisfied his burden in showing that Peabody's actions constitute an unwarrantable failure to comply with section 75.323(c)(2)(iii).

C. 110(c) Case Against Michael Butler

The Secretary also seeks to hold mine manager Michael Butler liable for his conduct in connection with the two violations discussed above. Section 110(c) of the Mine Act provides that when a corporate operator violates a mandatory safety standard or order under the Act, “any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to . . . civil penalties.” 30 U.S.C. § 820(c). The Commission's precedent elucidates a test for whether an agent of the mine can be individually liable: liability attaches when the agent (1) knew or had reason to know of the violative condition, (2) was in a position to remedy the condition, and (3) failed to act to correct the condition. *See Northshore Mining Co.*, 43 FMSHRC ___, slip op. at 8 (Jan 21, 2021); *Oak Grove Resources, LLC*, 38 FMSHRC 1273, 1281 (June 2016); *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981).

³ To the extent they are applicable, I incorporate my earlier findings into this analysis.

When Michael Butler arrived at the drill site, he faced a cacophony of alarming methane spotters and the loud rush of mine gases inundating the site. Butler testified that he knew of at least two spotters that reached an over-range methane reading, signaling methane accumulation of at least five percent. Tr. 370-71. One of those spotters was on his own person. Tr. 370-71. Nevertheless, Butler actively oversaw continued operation of the energized drill and the continued work of the miners as they attempted to plug the borehole. Butler therefore knew or had reason to know of the violative condition. Butler also testified that he was in a position to shut down the drill and evacuate the miners “if [he] felt that was needed.” Tr. 366. Finally, the overwhelming weight of the evidence demonstrates that, despite his knowledge of the methane levels and his authority to stop work, Butler allowed the drill to remain energized and permitted six miners including himself to continue working for at least half an hour in elevated methane conditions. That constitutes a failure to correct or remedy the violative condition. Therefore, I find that Butler is individually liable for the violations in Orders Nos. 9106663 and 9106664.

D. Order No. 9106665

1. The Violation

Finally, the Secretary alleges that Peabody violated section 75.512–2 of MSHA’s mine safety regulations, which states that “examinations and tests required by § 75.512 shall be made at least weekly” and that “[p]ermissible equipment shall be examined to see that it is in permissible condition.” 30 C.F.R. § 75.512–2. Mine operators must examine “[a]ll electrical equipment” and must remove equipment from service if the operator finds a “potentially dangerous condition.” 30 C.F.R. § 75.512. Order No. 9106665 alleges:

The operator failed to perform a weekly permissibility examination on the horizontal drill (serial #81134/2008800) located in the 2nd West Main at crosscut 65-66 for the week of 7/15/2018 thru 7/21/2018 according to permissibility records provided by the mine operator. Five permissibility deficiencies were found on 7/24/2018 which were not recorded on 7/11/2018. These permissibility deficiencies existed at the time of the accident on 7/23/2018 and the reasonable likelihood exist[s] that they would cause a methane ignition.

Ex. S-4. The inspector found that the condition was reasonably likely to cause an injury that could be expected to be fatal for 10 miners. *Id.* He marked the negligence as high and determined that the violation was S&S. *Id.*

There is no dispute that Peabody failed to conduct a permissibility examination on the drill between July 11 and July 24. Resp. Br. at 32. The Secretary introduced records and testimony showing that Respondent failed to carry out a permissibility exam on the drill for the week of July 15-21. Ex. S-7; Tr. 129. Peabody’s maintenance manager also testified to this effect. Tr. 430, 439. Accordingly, I find that no exam took place during the week in question, which constitutes a violation of section 75.512–2.

The Secretary’s gravity determination is also supported by the record. The permissibility examination, designed to alert mine operators as to electrical issues with equipment, is an

important safeguard that helps to ensure that electrical components are not spark risks in a high-methane environment. The operator's failure to conduct this exam subjected miners to reasonable risk that an electrical malfunction would cause a fatal injury when they hit the old works and the mine was inundated by methane-rich gases. No less than 60 individuals were affected by this risk. The Secretary has satisfied his burden in showing the fact of violation and the gravity by a preponderance of the evidence.

2. Significant and Substantial

The Secretary has also satisfied his burden in showing that the violation was S&S. First, he has proven the fact of violation as just discussed. Second, he has shown that the violation was reasonably likely to cause the occurrence of the discrete safety hazard that the standard is designed to address. Regular examinations are "of fundamental importance in assuring a safe working environment underground," and the inspector attested that permissibility exams in particular are meant to discover electrical issues that could spark a fire or even an explosion. *Buck Creek Coal Company, Inc.*, 17 FMSHRC 8, 15 (Jan. 1995); Tr. 132. Failing to conduct this exam before sending the equipment underground to drill near old mine works was therefore reasonably likely to cause the safety hazard that the regulation is directed against. Third, a fire or mine explosion would be reasonably likely to cause injury. Finally, an injury that follows a mine fire is reasonably likely to be serious. The Secretary has carried his burden in proving that the violation of section 75.512-2 is S&S.

3. Negligence and Unwarrantable Failure

The inspector found that Order No. 9106665 involved high negligence and an unwarrantable failure on the part of the mine operator.

a. Extent of the Violative Condition

The Secretary alleges that Peabody failed to examine the drill. The extent of the operator's oversight is therefore limited to a single piece of equipment. At the same time, the operator's failure to inspect the drill put no less than 60 miners at risk when the mine was inundated by methane and the drill lacked proper electrical inspection. These are both relevant considerations under extensiveness analysis. However, the Commission warns against using this factor as a proxy for the danger or obviousness of the hazard, counseling instead to focus on "the scope or magnitude of a violation." *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). I find that the scope of Peabody's violation was limited to its examination of one piece of equipment among hundreds, and accordingly this factor does not support a finding of unwarrantable failure.

b. Duration of the Violative Condition

The Secretary has proven that no permissibility examination occurred on the drill between July 11 and July 24. The violation itself, however, is for failure to conduct an exam during the week of July 15-21. Therefore, the violative condition arose on July 22 and only existed for two days. Furthermore, Respondent accurately notes that it is possible for thirteen days to pass between properly conducted permissibility exams under the regulation. The thirteen days that transpired

between examinations here is therefore not wholly unreasonable. Given these factors, I find that the short duration of the violative condition is a mitigating factor that weighs in Respondent's favor.

c. Degree of Danger

The discrete hazard at issue in this case is a mine explosion and fire. The drill at issue was used to perform exploratory mining near old works, actually breached the old mine, and caused an inundation of methane gas. The lack of a proper permissibility examination therefore presented great danger to the miners underground at that time, and this factor points toward a finding of unwarrantable failure.

d. Obviousness of the Hazard

The hazard presented by the absence of a permissibility examination was not immediately obvious. Peabody kept records indicating the dates that such examinations occurred, which should have helped it notice the issue. However, Respondent also notes that a lapse of thirteen days between exams is sometimes proper, so the issue was not readily obvious. The Secretary has not presented any other evidence indicating that the hazard was particularly obvious. Accordingly, I find that the obviousness of the hazard is a mitigating factor in the unwarrantable failure analysis.

e. Operator's Knowledge of the Violation

Respondent argues that its failure to perform the permissibility exam was due to a miscommunication among its miners. Resp. Br. at 32. Peabody's maintenance manager testified that David Justen, the supervisor of one of the crews tasked with conducting permissibility exams, was told by one of his crew members that the drill had indeed been inspected. Tr. 429-32, 439-40. Justen then relayed this information to mine management. Tr. 429. Clearly, someone along this chain of communication was mistaken because the exam was never done. However, the weight of the evidence supports Respondent's claim that the error was inadvertent and was based on a miscommunication among its employees. The Secretary has therefore failed to show that Respondent had knowledge of the violation, and this factor mitigates against a finding of unwarrantable failure.

f. Abatement Efforts

An operator's abatement efforts are a relevant consideration in the unwarrantable failure analysis, but only where the operator has been placed on notice of the violative condition. Respondent did act promptly to address the issue once the inspector issued an order, but post-citation efforts are not relevant to the determination of whether the operator engaged in aggravated conduct. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Peabody did not receive notice of the violative condition until the inspector's issuance of the order, and therefore this factor does not affect the unwarrantable failure inquiry.

g. Notice to the Operator that Greater Efforts Were Necessary

The Secretary's Exhibit 1 indicates that Respondent had been cited regarding its permissibility examinations over twenty times in the two years prior to this incident. Ex. S-1. Even though it appears that only one of those violations concerned the precise regulation at issue here, Peabody should have been on notice that greater efforts were necessary to ensure that permissibility exams were properly conducted and recorded. This final factor is therefore aggravating and weighs in favor of an unwarrantable failure finding.

h. Conclusion

A preponderance of the evidence supports a finding that Peabody was highly negligent. Clearly, Peabody's miners relied on the weekly maintenance and examination of the equipment. Michael Butler testified at hearing that he felt comfortable operating the drill in the high-methane environment in part because he "knew that permissibility was good" on that piece of equipment. Tr. 386. However, the permissibility exam was not current, and miners were left operating non-permissible equipment underground during a methane inundation. Peabody also should have known from past citations that greater efforts were necessary to conduct and record permissibility examinations properly. Given these circumstances, a prudent operator with knowledge of the mining industry, the relevant facts, and the protective purpose of the regulation would have implemented more rigorous examination and recording protocols to ensure that equipment is permissible before it is deployed underground. *See Leeco*, 38 FMSHRC at 1637. The Secretary has thus satisfied his burden in showing high negligence.

However, Peabody's failure to follow the regulation was not unwarrantable. There is no evidence that Peabody's management knew about the lapsed examination. Rather, due to a miscommunication, management mistakenly believed that the exam *had* been conducted. The exam was only a few days out-of-date—not weeks or months—and only one piece of equipment was affected. Altogether, the mitigating factors outweigh the aggravating factors here. The Secretary has therefore failed to prove that this violation constituted unwarrantable failure, and this 104(d)(1) order accordingly becomes a 104(a) citation.

IV. PENALTY

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

- (1) the operator's history of previous violations,
- (2) the appropriateness of such penalty to the size of the business of the operator charged,
- (3) whether the operator was negligent,
- (4) the effect on the operator's ability to continue in business,
- (5)

the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

A. Peabody's Penalty

For Order Nos. 9106663 and 9106664, the Secretary proposed a penalty of \$45,455.00 for each violation. Peabody is a large operator, and the proposed penalty would not impair its ability to stay in business. *See* Jt. Stip. 6. MSHA cited Peabody for 494 violations in the fifteen-month period preceding this incident. Ex. S-1. No citations during that period, however, were issued for violating section 75.323(c). Ex. S-1. With regard to gravity, each of these two violations was proven to be S&S. Peabody was also highly negligent, but I must note that Peabody worked to abate the hazard and swiftly evacuated Unit 3 instead of allowing mining to continue underground following the inundation. The operator also showed good faith by cooperating with MSHA after notification of the violation. After careful consideration of the penalty criteria, I assess a penalty of \$38,000 for each violation, resulting in a total of \$76,000 for Orders No. 9106663 and 9106664.

For Order No. 9106665, which is now a 104(a) citation in light of my findings above, the Secretary proposed a regularly assessed penalty of \$45,455.00. The gravity here is again high. Peabody does have a history of previous violations that relate to permissibility examinations, but its history of violating this particular regulation is less extensive. Further, while Peabody was negligent in its failure to conduct the exam, its negligence did not rise to the level of unwarrantable failure as in the other orders. Finally, once alerted to the violation, Peabody immediately conducted the permissibility exam. In light of Peabody's quick response and the lack of an unwarrantable failure designation, I find that a penalty of \$20,000 is appropriate for this violation.

B. Michael Butler's Penalty

The Secretary has proposed that Butler pay a penalty of \$7,800.00 for knowingly authorizing or carrying out violations of 30 C.F.R. §§ 75.323(c)(2)(ii) and 75.323(c)(2)(iii) as an agent of the mine. The parties have stipulated that the proposed penalties would not affect Butler's personal financial obligations. Jt. Stip. 8. Butler did act knowingly, and the gravity of each violation was high. However, the Secretary has not introduced any evidence that Butler has been responsible for such violations in the past. Butler also acted in good faith to abate the hazard, and he cooperated with MSHA personnel to address the violation and the hazard once the personnel arrived at the scene. I find that Butler's actions warrant a penalty of \$3,000 for each violation, resulting in a total penalty of \$6,000.

V. ORDER

It is hereby **ORDERED** that Orders Nos. 9106663 and 9106664 are **AFFIRMED**. Order No. 9106665 is hereby **MODIFIED** from a section 104(d)(1) order to a section 104(a) citation and as otherwise set forth above. The section 110(c) liability of Michael Butler is **AFFIRMED**. Peabody Midwest Mining, LLC is hereby **ORDERED** to pay the Secretary of Labor the total sum

of \$96,000.00 within 30 days of this decision.⁴ Michael Butler is **ORDERED** to pay a civil penalty of \$6,000.00 within 30 days of this decision.

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

Distribution: (Email⁵)

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⁴ 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.

⁵ For the foreseeable future, Federal Mine Safety and Health Review Commission (FMSHRC) notices, decisions, and orders will be sent only through electronic mail. Because FMSHRC will not be monitoring incoming physical mail or faxes, parties are encouraged to submit all filings through the agency's electronic filing system. If you are not able to file through our electronic filing system, please send an email copy and we will file it for you.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 13, 2022

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

v.

GMS MINE REPAIR,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2021-0431
A.C. No. 46-09029-537541 MVK

Mine: Mountaineer II Mine

ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION
ORDER GRANTING SECRETARY’S MOTION FOR SUMMARY DECISION
ORDER TO PAY

Before: Judge Lewis

On November 19, 2021, The Secretary of Labor (“Secretary”) and GMS Mine Repair (“Respondent”) filed with the undersigned cross-motions for Summary Decision in Docket No. WEVA 2021-0431. The Respondent filed its Reply Brief on November 23, 2021, and the Secretary filed its Reply Brief on December 10, 2021. The sole issue in question concerns the method of calculating an operator’s violation history for purposes of proposing a penalty amount, and whether citations/orders that were issued prior to the 15-month period preceding the citation/order, but became final within the 15-month period, may be included in the operator’s violation history.

Undisputed Facts

The parties submitted the following joint stipulations:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977.
2. GMS Mine Repair is an operator under Section 3(d) of the Act.
3. Operations of GMS Mine Repair are subject to the jurisdiction of the Act.
4. GMS Mine Repair is a contractor who performs services at various mines.
5. Pursuant to contract with Mingo Logan Coal, LLC, the operator of the Mountaineer II Mine, GMS Mine Repair was performing services at the mine on April 20 and 27, 2021 when the citations at issue in this proceeding were issued.

6. MSHA Inspectors Andrew Bell and Paul Fought were acting in their official capacity and as authorized representatives of the Secretary of Labor when each of the citations at issue in this proceeding were issued.
7. The total proposed penalty amounts for the five citations at issue in this matter have been proposed by MSHA pursuant to 30 U.S.C. Section 820(a) of the Act and 30 CFR Part 100.3.
8. Payment of the total proposed penalty amount, \$7,331, for the five citations at issue in this matter would not affect the ability of GMS Mine Repair to remain in business.
9. Copies of the citations at issue in this matter, along with all continuation forms and modifications, were served on GMS Mine Repair or its agent as required by the Act.
10. The copies of the five citations that were included with the Secretary's penalty petition, attached as part of Exhibit A, are accurate and authentic copies of those citations, with all modifications and abatements, and may be admitted into the record in this matter.
11. The violations cited in each of the citations at issue in this matter were abated in good faith and were subject to a 10% penalty reduction.
12. The Respondent agrees to accept all five citations at issue in this docket as issued, including any findings of gravity and negligence.
13. The only issues being contested by Respondent in this proceeding are the method of calculating the proposed penalty amounts used by the Secretary and the total amount of the proposed penalties.
14. The Respondent agrees that the penalty point computations shown on Exhibit A are correct except for the number of points assigned for history of violations in the column "VPID Pts."
15. "VPID" refers to violations per inspection day.
16. For a contractor, such as Respondent, the overall history of violations points is calculated based upon the total number of citations and orders issued to the contractor at all mines at which it operates which is different from a mine operator which only considers citations/orders issued at a particular mine.
17. In assessing the penalty points for the VPID criteria MSHA considers all citations or orders that became final during the 15-month period immediately preceding the issuance of the citation or order being assessed.
18. For the four citations in this case that were issued on April 20, 2021, the relevant time period for determining the Respondent's history of violations and the amount of penalty points was January 20, 2020 through April 19, 2021.
19. For the remaining citation in this case that was issued on April 27, 2021, the relevant time period for determining the Respondent's history of violations and the amount of penalty points was January 27, 2020 through April 26, 2021.

20. The dispute in this case is over which citations and orders are to be included in determining the Respondent's history of violations.
21. Under the Secretary's approach, all citations and orders that became final during the relevant 15-month period are included in the determination of an operator's violation history.
22. The Respondent argues that only citations and orders that were both issued during the relevant 15-month period and became final during that period should be included in the determination of the Respondent's violation history.
23. If the Secretary's approach is ultimately upheld, the penalty points for the VPID criterion is correct and the penalty amounts are correct as shown on Exhibit A.
24. Under the Respondent's approach to calculating the history of violations criterion for each of the citations at issue in this proceeding, five previous citations would be considered which corresponds to 0 penalty points.
25. Under the Respondent's approach to calculating the history of violations criterion for each of the citations in this docket, with 0 penalty points for history of violations, the following penalty amounts would be applicable per Part 100, 100.3:

<u>Citation</u>	<u>Total Points</u>	<u>Penalty (including good faith reduction)</u>
9298012	86	\$1,006
9298012	86	\$1,006
9298015	46	\$125
9298016	46	\$125
9293663	86	\$1,006
Total		\$3,268

26. Regardless of the administrative law judge's decision addressing this dispute, both parties reserve the right to appeal any decision to the Commission.

Secretary's Motion for Summary Decision, 3-6.

Summary Decision Standard

The Court may grant summary decision where the "entire record...shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also* *UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is "a fact that is significant or essential to the issue or matter at hand." *Black's Law Dictionary* (9th ed. 2009, *fact*). "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation

omitted). The court must evaluate the evidence “in the light most favorable to ... the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn “from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.” *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party’s claims. *Celotex*, 477 U.S. at 323. “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

Analysis

Section 110 of the Mine Act, in relevant part, provides:

(a) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 [currently \$73,901] for each such violation.

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 USC § 820(a)(1)(i).

The Secretary has promulgated regulations, which implement the statutory requirements contained in Section 110 of the Mine Act, which state in relevant part:

History of previous violations. An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.

(1) Total number of violations. For mine operators, penalty points are assigned on the basis of the number of violations per inspection day (VPID)(Table VI). Penalty points are not assigned for mines with fewer than 10 violations in the specified history period. For independent contractors, penalty points are assigned on the basis of the total number of violations at all mines (Table VII). This aspect of the history criterion accounts for a maximum of 25 penalty points.

30 CFR §100.3(c).

The dispute in this case concerns what precisely gets counted as the operator's violation history in the 15-month period. There is no disagreement that citations and orders that have become final in the 15-month period are included. However, the Respondent argues that in order to count towards the operator's history, the violation must have both occurred and been paid, adjudicated, or have become a final order of the Commission during the 15-month period. The Secretary argues that all citations and orders that have become final in the 15-month period are counted, regardless of when they were issued.

On its face, the regulation is ambiguous and can be read to support either party's position. Based on the language of the regulation, it is unclear if the second sentence is intended to limit the violations mentioned in the first sentence to those that were issued and finalized in the preceding 15-month period, or if it is intended to clarify that the 15-month period is only in reference to the finalization date. Both competing interpretations are reasonable.

MSHA is entitled to deference of an MSHA regulation as long as its interpretation is not "plainly erroneous or inconsistent with the regulation." *MSHA v. Spartan Mining Co.*, 415 F.3d 82, 84 (D.C. Cir. 2005)(quoting *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994)); see *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C.Cir.2003). "In fact, deference is appropriate when the agency advances a permissible interpretation even if that interpretation diverges from what a first-time reader of the regulation would conclude is the best interpretation of the regulation." *MSHA v. Hecla Ltd.*, 38 FMSHRC 2117, 2122 (Aug. 2016).

In support of its interpretation, the Secretary submits language from the Preamble to the Final Rule, as well as MSHA's Program Policy Manual. Courts have held that agency interpretations that lack the force of law, such as those in opinion letters and policy manuals, are not entitled to Chevron-style deference when used to interpret ambiguous statutes, but do receive deference under *Auer* when interpreting ambiguous regulations. See *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000). In response to some commenters' concerns about the changes, the Final Rule states, "As each penalty contest becomes final, however, the violation will be included in an operator's history as of the date it becomes final." *Secy. Mot.*, Exhibit B, at 13604. MSHA's Program Policy Manual states that "Overall history is based on the number of citations/orders issued to the mine operator at the applicable mine that became final orders of the Federal Mine Safety and Health Review Commission (Commission) in the 15 months preceding the occurrence date of the violation being assessed." *Sec'y Mot.*, Exhibit C.

Various passages of the Preamble also support the Respondent's argument. *See Resp. Mot.* at 4. In response to some commenters' concerns about the Final Rule shortening the relevant time-period from 24 to 15 months, MSHA replied that the agency determined that it took approximately three months for a penalty assessment to become final, so the 15-month period would provide the agency with a full year of data. *Secy. Mot.*, Exhibit B, at 13604. Furthermore, the agency justified the shortening of the time-period by stating that it would provide the agency with "a more recent compliance history" and that "MSHA believes that operators who violate the Mine Act and MSHA's health and safety standards and regulations should receive penalties for those violations as close as practicable to the time the violation occurs in order to provide a more appropriate incentive for changing compliance behavior." *Id.* However, it is not for this Court to determine which interpretation is the most reasonable. The Supreme Court has held that "it is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. Rather, the Secretary's view need be only reasonable to warrant deference." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991)(citations omitted).

Furthermore, Respondent's interpretation of the regulation would likely lead to an absurd application of the statutory provision in the Mine Act concerning an operator's history of previous violations. Section 110(i) of the Act makes clear Congress's intent that an operator's history of previous violations is one of the criteria that must be considered in assessing a penalty. 30 USC 820(a)(1)(i). However, under the Respondent's interpretation of the regulation, most (if not all) violations would not be considered in the penalty assessment. This is due to the fact that when an operator contests a citation or order, it rarely becomes final within 15 months. *See Secy Mot.* at 13-16. Respondent's interpretation would likely lead to a perverse incentive for operators to simply contest every citation and order until the expiration of 15 months as a way of lowering assessed penalties by placing most previous violations out of the realm of consideration. This framework would wholly negate the clear congressional mandate that the operator's history of previous violations be considered in assessing penalties.

WHEREFORE, the Secretary's Motion for Summary Decision is **GRANTED** and the Respondent's Motion for Summary Decision is **DENIED**. Furthermore, Respondent GMS Mine Repair is **ORDERED** to pay the Secretary of Labor the sum of \$7,331.00 within 30 days of this order.¹

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

¹ 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.

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May 13, 2022

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

v.

CIVIL, LLC,
Respondent

TEMPORARY REINSTATEMENT

Docket No. WEVA 2022-0317
MSHA Case No.: HOPE CD 2022-04

Mine: CV #2 Surface Mine
Mine ID: 46-09105

**ORDER GRANTING TEMPORARY REINSTATEMENT
OF FRANK CAFEGO**

Before: Judge Lewis

Pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor (“Secretary”) on April 28, 2022, filed an Application for Temporary Reinstatement of miner Frank Cafego (“Complainant”) to his former position as an equipment operator and truck driver with Civil, LLC. (“Respondent”) at Respondent’s mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary’s application for temporary reinstatement. 29 C.F.R. § 2700.45(c). The Application for Temporary Reinstatement was served on Respondent by electronic mail on April 29, 2022. My management analyst provided Respondent with Commission Rule 45 on May 4, 2022. The Respondent has not filed a timely Request for Hearing. The Secretary proposed on May 11, 2022, an Order of Temporary Reinstatement, which I approve herein.

The Secretary has found that the Complaint was not frivolously brought and, as explained below, has provided evidence supporting that determination. Therefore, consistent with Section 105(c) of the Act, the temporary reinstatement of Frank Cafego is granted.

Law and Regulations

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. § 815(c)(1-2). The plain language of the Act also provides that “if the Secretary finds that the complaint was not frivolously brought, the Commission, on an expedited basis upon application by the Secretary, *shall* order the immediate

reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2) (emphasis added).

The Commission’s regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(c). If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary’s application and, if based on the contents thereof, the Judge determines that the miner’s complaint was not frivolously brought,¹ shall issue immediately a written order of temporary reinstatement. *Id.*

If there is a hearing, the Judge must determine whether the complaint of the miner “is supported by substantial evidence and is consistent with applicable law.”² *Sec’y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). In the instant case, however, the Respondent has not timely filed a request for hearing. Thus, Commission Procedural Rule 45(c) compels me to review the Secretary’s determination that the complaint in this matter was not frivolously brought. *See* 29 C.F.R. § 2700.45(c).

Disposition

The Secretary has provided the evidentiary basis for his determination that the complaint in this matter has not been frivolously brought. The Act requires the Secretary to investigate the miner’s complaint of discrimination. 30 U.S.C. § 815(c)(2). The Secretary’s application includes the Complaint filed by Complainant (Exhibit “A” to the Application) and the Declaration of Special Investigator Russell Richardson indicating that this was done (Exhibit “B.”)

Mr. Richardson’s Declaration provides facts in support of the Secretary’s conclusion that the complaint was not frivolously brought:

1. At all relevant times, Civil, LLC, (“Civil”) was a Limited Liability corporation and is a “person” as defined in § 3(f) of the Mine Act.

¹ The Act’s legislative history suggests that a complaint is not frivolously brought if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress’ “appears to have merit” standard, the Commission and the courts have also equated “not frivolously brought” to “reasonable cause to believe” and “not insubstantial.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990).

² “Substantial evidence” means “such relevant evidence as a reliable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

2. Applicant was employed as an equipment operator and truck driver at Civil, LLC, and therefore, was a “miner” within the meaning of § 3(g) of the Mine Act.
3. Applicant was employed at the mine for approximately three months, from January 2022 until he was discharged from his employment on March 25, 2022.
4. On April 7, 2022, Cafego filed a discrimination complaint with MSHA for being fired on March 25, 2022.
5. Applicant alleges that he was fired because he engaged in protected activities.
6. Applicant alleges that he complained to management about the condition of the equipment that he was assigned to operate on numerous occasions prior to his being discharged. For instance, Mr. Cafego complained to management repeatedly during his employment of an anti-freeze leak and lack of air conditioning in the truck he was assigned to operate, which required him to operate the truck with the windows open and exposed him to excessive amounts of dust being generated at the worksite.
7. The investigation into Cafego’s complaint is ongoing. To this point, I have interviewed several employees and management personnel at the mine. Employees and management corroborated that Cafego complained about the condition of the equipment on numerous occasions. Management personnel admitted that they were aware of Cafego’s complaints. Management personnel stated that the reason Mr. Cafego was discharged was in part because he complained too much.

Dec. of Russell Richardson, April 28, 2022 (Ex. “B” to App. For Temp. Reinst.)

The facts provided in support of the agency’s decision, if true, would establish jurisdiction, a timely complaint of discrimination, and that Complainant engaged in protected activity and suffered an adverse action close in time to the protected activity, under circumstances that provide a reasonable cause to believe that there was a causal nexus between his participation in an MSHA investigation and his termination.

Findings and Conclusion

At this stage, the facts alleged by the Secretary are undisputed. Therefore, I find that the complaint for discrimination has not been frivolously brought, and that Complainant Frank Cafego is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **Frank Cafego** be **immediately TEMPORARILY REINSTATED** to the position he held on the date of his discharge from Civil, LLC, or a comparable position within the same commuting area and at the same rate of pay and benefits he received prior to his discharge.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint as soon as possible.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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Frank Cafego, P.O. Box 293, Kincaid, WV 25119 (cafegofrank@gmail.com)