

April 2026

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No review was granted or denied during the month of April 2026.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 20, 2026

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. CENT 2022-0010-M

v.

CACTUS CANYON QUARRIES, INC.

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

DECISION

BY THE COMMISSION:

This matter, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) (“Mine Act” or “Act”), primarily concerns a question of Mine Act jurisdiction.

The Fairland Plant, operated by Cactus Canyon Quarries, Inc. (“Cactus Canyon”), is a surface facility that prepares stone for use in Terrazzo flooring.¹ During an inspection of the plant, an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Cactus Canyon three citations involving electrical equipment. Cactus Canyon argued below that MSHA lacked jurisdiction to issue the citations because the plant is not a “mine” subject to the Act.

A Commission Administrative Law Judge concluded that the Fairland Plant is a “mine . . . [the] products of which affect commerce” and is therefore subject to the provisions of the Mine Act. 45 FMSHRC 384, 388-89 (May 2023) (ALJ) (citing 30 U.S.C. § 803). He found that the sale of stone processed at the plant affects commerce; that the crushing and sizing activities occurring at the plant fall within the definition of “milling;” and that a facility engaged in milling qualifies as a mine irrespective of its proximity to an extraction site.² *Id.* at 389-95. The Judge ultimately affirmed two citations as issued, and one citation with a reduction in the degree of cited negligence. *Id.* at 402.

¹ Terrazzo refers to “[s]mall chips or pieces of stone . . . made by crushing and screening . . . used with portland cement in making floors, which are smoothed down and polished after the cement has hardened.” Am. Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 567 (2d ed. 1997) (“DMMRT”).

² The Mine Act defines a “mine” to include facilities used in “the work of *extracting* such minerals . . . or . . . the *milling* of such minerals, or the work of *preparing* coal or other minerals.” 30 U.S.C. § 802(h)(1)(C) (emphases added). That is, according to Congress milling is not an activity that occurs subsequent to “mining” but instead constitutes mining in its own right, as much as the extraction of minerals constitutes mining.

On appeal, Cactus Canyon again asserts that the Fairland Plant is not subject to MSHA jurisdiction. Specifically, it claims the Judge erred in considering whether the plant was engaged in commerce, in finding that the plant was engaged in milling, and in stating that proximity to an extraction site is not required for MSHA jurisdiction. PDR at 29.³

Cactus Canyon also individually challenges Citation No. 9643095, which alleges that access to a breaker box was blocked in violation of 30 C.F.R. § 56.12019 (requiring suitable clearance at stationary electrical equipment or switchgear). Specifically, Cactus Canyon claims the Judge erred in finding that the breaker box was covered by the standard. PDR at 10.

Cactus Canyon raises one final basis for appeal. At the start of this proceeding, the Secretary of Labor moved for an extension of time to file her penalty petition. The Chief Administrative Law Judge granted the motion, the Secretary filed her petition consistent with the extension, and the Judge below upheld the extension order. *See* 45 FMSHRC at 385-86. Cactus Canyon asserts on appeal that the Judge erred in upholding the Chief Judge’s order. PDR at 9.

For the reasons below, we affirm the Judge’s decision.

I.

Factual and Procedural Background

Cactus Canyon operates the Fairland Plant, a surface facility in Burnet County, Texas. The plant originally produced architectural precast from stone mined at Cactus Canyon quarries but has since shifted to preparing dimension stone for use in Terrazzo flooring. Approximately 10-15% of the plant’s stockpiled material originated at a Cactus Canyon quarry, while the rest is brought in from Mexico, Vulcan Materials sites, and local Texas mines. The plant does not engage in extraction, nor is it on or next to an extraction site. Tr. 142-43, 149-50, 152, 173.

Terrazzo flooring is made from mixed stone and epoxy that has been ground, smoothed and polished. Tr. 171. The stone must be a very particular size and shape—no more than 3/8 of an inch thick and almost perfectly cubical. Tr. 145-46, 149. The Fairland Plant sorts and resizes dimension stone to meet these specifications. Tr. 147-48, 171. The plant brings in stone that is 5-10 inches in diameter, which is washed, examined, sorted for color and quality, and stockpiled. Tr. 147-48, 153. Next, oversized stone is crushed using hydraulic hammers and cone crushers. The material is then screened and crushed again to achieve the desired size and shape. The stone is circulated through the crushing and screening process four to six times. Tr. 145-47, 152, 175-77. This process results in 10-15% loss of materials to “fines,” i.e., particles “smaller than the minimum specified size or grade.” Tr. 176; *DMMRT* 208. Once resized to specification, the stone is sold “across North America and . . . occasionally [Asia].” Tr. 145, 147.

³ Cactus Canyon has filed a motion requesting that the Commission accept its briefing in Docket No. CENT 2023-0045, which similarly addresses whether the Fairland Plant is subject to the Mine Act, as an additional brief in the current matter. Req. to Accept Pet. Br. (Mar. 4, 2025). The Commission grants the motion and notes that all legal arguments addressed in the additional briefing were considered in issuing this decision.

During a July 2021 inspection of the Fairland Plant, Cactus Canyon was issued three citations involving electrical equipment. Citation Nos. 9643093 and 9643094 allege that the operator failed to protect electrical conductors exposed to mechanical damage, in violation of 30 C.F.R. § 56.12004. Citation No. 9643095 alleges that access to a circuit breaker box was blocked in violation of 30 C.F.R. § 56.12019, which requires operators to provide “suitable clearance . . . at stationary electrical equipment or switchgear.”

Cactus Canyon timely contested the Secretary’s proposed penalty assessments, and the matter was docketed before the Chief Administrative Law Judge. The Secretary then requested an extension of time to file her penalty petition, which the Chief Judge granted. The Secretary filed her petition on January 18, 2022, consistent with the extension order, and the matter was assigned to the Judge below.

Cactus Canyon repeatedly and unsuccessfully challenged the validity of the extension order, alleged that the Secretary’s petition was late-filed without good cause, and sought to have the case dismissed.⁴ The Judge concluded that the Chief Judge had jurisdiction to rule on the Secretary’s request and no extraordinary circumstances warranted overturning the Chief Judge’s finding of good cause to grant the extension. 44 FMSHRC 609, 610-11 (Aug. 2022) (ALJ).

A hearing was held on February 28, 2023. MSHA Inspector Ray Hurtado was the only witness for the Secretary, while Cactus Canyon’s President was both sole counsel and the only witness for the Respondent.

In his decision after hearing, the Judge first concluded that Cactus Canyon’s Fairland Plant is subject to MSHA jurisdiction. He determined that the facility is a mine because the crushing and sizing activities at the facility fall within the commonly understood definition of milling, and facilities engaged in milling independently qualify as mines under the Mine Act. He also determined that the intra- and inter-continental sale of dimension stone processed at the plant clearly affects commerce. Accordingly, as a “coal or other mine . . . the operations or products of which affect commerce,” the Fairland plant is subject to the provisions of the Mine Act. 45 FMSHRC at 388-95, *quoting* 30 U.S.C. § 803.

Having concluded that MSHA had jurisdiction to issue the citations, the Judge then turned to the citations themselves. He affirmed Citation No. 9643093 as issued, and affirmed Citation No. 9643094 with a reduction in the cited negligence from moderate to low. These determinations have not been appealed. The Judge also affirmed Citation No. 9643095, on the basis that the blocked breaker box constituted “switchgear” requiring suitable access pursuant to 30 C.F.R. § 56.12019. 45 FMSHRC at 400-01.

⁴ Cactus Canyon first moved for reconsideration of the extension order, which the Chief Judge did not grant. It then filed a petition for discretionary review, which the Commission did not grant. It then petitioned the Fifth Circuit for review of the Commission’s denial of review. While the appeal was pending, Cactus Canyon moved to have the proceeding dismissed. The Judge stayed the motion during the pendency of the Fifth Circuit appeal. The circuit court ultimately dismissed Cactus Canyon’s petition, and the Judge lifted the stay and denied Cactus Canyon’s motion. *See* 44 FMSHRC 609 (Aug. 2022) (ALJ); 45 FMSHRC at 385-86, 386 n.7.

II.

Disposition

a. The Judge Did Not Materially Err by Granting the Secretary’s Request for an Extension of Time

As a preliminary matter, we find no error justifying dismissal in the Chief Judge’s order granting the Secretary an extension of time to file her penalty petition, or in the Judge’s decision upholding that order. Cactus Canyon asserts that a “jurisdictional error” has occurred. Br. at 13. However, we agree with the Judge that any errors surrounding the extension order and petition were, at worst, mere procedural irregularity. 44 FMSHRC at 611. Cactus Canyon claims the Secretary improperly requested permission *before* late-filing her petition and admits it “would not have protested” if the Secretary had requested permission to late-file *concurrently* with her delayed petition. Reply at 10-11. Assuming *arguendo* that an error occurred, a simple failure to submit filings in the correct order is procedural rather than jurisdictional.

Section 105(a) of the Act states that the Secretary is to provide the operator notice of a proposed penalty “within a reasonable time” after the issuance of a citation or order. 30 U.S.C. § 815(a). Section 105(d) of the Act states that when an operator files a notice contesting a proposed penalty, “the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing.” 30 U.S.C. § 815(d). Commission Procedural Rule 28 effectuates these statutory provisions by requiring the Secretary to file a penalty petition within 45 days of an operator’s contest to a proposed penalty. 29 C.F.R. § 2700.28. We note “only timing rules that have a statutory basis are jurisdictional.” *Youkelsone v. FDIC*, 660 F.3d 473, 475 (D.C. Cir. 2011); *see also Kontrick v. Ryan*, 540 U.S. 443, 452 (2004). Purely regulatory deadlines like the 45-day requirement in Rule 28 are always claim-processing rules and therefore do not deprive the Commission of jurisdiction. *See Youkelsone*, 660 F.3d at 475-76. The Commission has long recognized that the Secretary’s failure to meet the 45-day deadline in Rule 28 does not form a basis for dismissal, absent a showing of prejudice. *Long Branch Energy*, 34 FMSHRC 1984, 1990 (Aug. 2012) (“Commission enforcement of the filing time limits is a secondary consideration to the primary purpose of section 105(d), i.e., ensuring prompt enforcement of the Act’s penalty scheme.”); *see also NLRB v. Seine & Line Fisherman’s Union of San Pedro*, 374 F.2d 974, 981 (9th Cir. 1967); *Sage Products, LLC v. Stewart*, 133 F.4th 1376, 1386 (Fed. Cir. 2025). Here, as the Judge noted, Cactus Canyon has not asserted prejudice of any kind.⁵ 44 FMSHRC at 611. We find no basis to conclude that the Judge abused his discretion in upholding the Chief Judge’s order, nor do we find any error regarding the extension order or penalty petition that would justify dismissing the proceeding.

⁵ While unreasonable delay in filing a penalty petition may prejudice an operator, Cactus Canyon has made no such argument. Regardless, the irregularity here is not the delay in filing the petition, *it is the order in which the paperwork was filed*. The result of the irregularity was that the petition was filed on January 18, 2022—the same result that would have occurred if the proper procedure had been followed. The error had no effect on the proceeding.

b. The Judge Correctly Determined that the Fairland Plant is Subject to Mine Act Jurisdiction

The central issue in this matter is whether the Fairland Plant is subject to the Mine Act, such that MSHA may conduct inspections and issue citations. The Act states that “[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce . . . shall be subject to the provisions of th[e] Act.” 30 U.S.C. § 803. The record clearly establishes that the plant “affect[s] commerce.”⁶ 45 FMSHRC at 394-95. Accordingly, Mine Act coverage turns on whether the Fairland Plant is a “mine.” We uphold the Judge’s well-reasoned decision and find that it is.

The Judge found that the Fairland Plant is a mine because the plant’s crushing and sizing activities constitute milling, and milling facilities independently qualify as mines under the Act regardless of whether extraction occurs on or near the facility. He rejected Cactus Canyon’s argument that the separation of valuable constituents from undesired contaminants is essential to the milling process but noted that even if separation is essential to milling, such activity occurs at the plant. *Id.* at 389-92. For the reasons below, we agree on all points. We also reject the operator’s alternative argument that Fairland is a stone finishing plant and therefore exempt from Mine Act coverage.

We have long recognized that milling activity independently qualifies a facility as a mine. *E.g., Drillex, Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). The Mine Act defines a mine to include facilities used in “the work of *extracting* such minerals . . . or . . . the *milling* of such minerals, or the work of *preparing* coal or other minerals.” 30 U.S.C. § 802(h)(1)(C) (emphases added). This tripartite definition “provides an independent basis for jurisdiction over the enumerated subjects of the mining, milling, or coal preparation process.” *National Cement Co. of Cal., Inc.*, 30 FMSHRC 668, 676 (Aug. 2008).

In fact, in the legislative history of the Mine Act, Congress made it clear “that what is considered to be a mine and to be regulated under this Act be given the *broadest possibl[e] interpretation*.” S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978) (“Legis. Hist”) (emphasis added). Congress further stated that “doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act.” *Id.* Accordingly, the Commission has consistently construed section 3(h)(1) broadly in favor of Mine Act coverage and recognized that “jurisdictional doubts [shall] be resolved in favor of coverage by the Mine Act.” *Calmat Co. of Ariz.*, 27 FMSHRC 617, 624 (Sept. 2005) (holding that the cited haul trucks “were clearly related to mining operations and within MSHA’s jurisdiction.”).

⁶ Cactus Canyon’s President admitted that the Fairland Plant engages in intra- and inter-continental trade. Tr. 147-50; *see* 30 U.S.C. § 802(b). This is sufficient to meet the Secretary’s minimal burden with respect to the commerce requirement. *Jerry Ike Harless Towing*, 16 FMSHRC 683, 686 (Apr. 1994). On appeal, Cactus Canyon claims that engagement in commerce is irrelevant to Mine Act coverage, or alternatively, that the plant is exempt solely because its products do not *enter* commerce. *See* Br. at 9, 30-33. These arguments are patently incorrect in light of the plain language of the Act. 30 U.S.C. § 803.

Because the statute provides *independent* bases for jurisdiction over extraction, milling and preparation, milling or preparation facilities need not engage in extraction to be covered by the Mine Act. *E.g.*, *Power Fuels LLC*, 777 F.3d 214, 218 (4th Cir. 2015); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551-52 (D.C. Cir. 1984). Cactus Canyon relies on a geographical proximity requirement enunciated in *KC Transport*, 44 FMSHRC 211 (Apr. 2022), to argue that proximity to an extraction site is required. However, that decision does not require proximity to an *extraction* site, only proximity to a *mine* site, which it defines to include milling facilities. *Id.* at 225 (holding that “a facility not located on or appurtenant to a mine site and not engaged in any extraction, milling, preparation or other activities within the scope of subsection 3(h)(1)(A) is not a mine”). Nothing in *KC Transport* is inconsistent with the long-held understanding that milling provides an independent basis for jurisdiction. The Judge properly rejected Cactus Canyon’s argument that the lack of an extraction site is fatal to MSHA’s jurisdiction.⁷ 45 FMSHRC at 394.

To qualify as a milling facility subject to the Act, the Fairland Plant must meet the definition of milling. Congress has delegated to the Secretary the authority to determine what constitutes mineral milling for the purpose of the Act. 30 U.S.C. § 802(h)(1). Pursuant to this authority, MSHA created an Interagency Agreement with the Occupational Safety and Health Administration (“OSHA”) that delineates areas of authority between the two agencies in the context of milling operations. *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. 22827, 22828 (Apr. 17, 1979). The Agreement broadly states that MSHA has authority over milling operations as a “general principle” while OSHA has authority over “ancillary operations,” and notes that jurisdictional determinations should “reflect Congress’ intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.” *Id.* at 22827-8.

Appendix A of the Agreement then provides two descriptions of milling. First, it generally describes milling as “the art of treating crude crust . . . to produce therefrom primary consumer derivatives,” and notes that “the essential operation in all such processes is separation of one or more valuable desired constituents . . . from the undesired contaminants.” *Id.* at 22829. It then specifically states that milling “consists of one or more” of a list of “processes” including crushing, washing and sizing. *Id.* at 22829. However, the Agreement recognizes that even with these definitions “there will remain areas of uncertainty . . . especially in operations near the termination of the milling cycle.” *Id.* at 22828.

The record here unequivocally establishes that the Fairland Plant meets the “process” based definition of milling. Cactus Canyon’s President clearly and repeatedly explained that the plant *resizes* dimension stone through a process of *crushing* and screening. Tr. 145-49, 153, 171, 176. The Secretary has defined milling to consist of sizing and crushing, and common and

⁷ After the parties’ briefing in this matter, the D.C. Circuit reversed the Commission’s decision in *KC Transport, Inc.* No. 22-1071, 2026 WL 1042075 (D.C. Cir. Apr. 17, 2026), *reversing* 44 FMSHRC 211 (Apr. 2022). Cactus Canyon is located in Texas and therefore falls under the Fifth Circuit. Regardless, although the D.C. Circuit reversed the Commission in result, it held a facility is defined as a mine “when it is necessarily connected with the use and operation of extracting, *milling*, or processing coal and other minerals.” *Id.* at 41 (emphasis added). The circuit court’s decision remains consistent with the long-held understanding that a facility engaged in “milling” independently qualifies for MSHA jurisdiction.

industry usage also recognize crushing as a milling activity.⁸ 44 Fed. Reg. at 22829; *Merriam-Webster's Online Dictionary*, <https://www.merriam-webster.com/dictionary/mill> (last accessed Feb. 5, 2026) (defining a mill in part as a machine “for reducing something (as by crushing or grinding)”); *Dictionary.com*, <https://www.dictionary.com/browse/mill> (last visited Feb. 5, 2026) (defining a mill in the mining context as a place for “crushing or concentrating ore”); *Dictionary of Mining, Mineral and Related Terms*, 344 (2d ed. 1997) (“DMMRT”) (milling is “the grinding or crushing of ore”). Substantial evidence supports the Judge’s finding that the plant’s activities meet the widely understood definition of milling.

Cactus Canyon prioritizes the “separation” description of milling and claims that no such activity occurs at the Fairland Plant. Br. at 20-21. We note that both the D.C. Circuit and the Commission have found the Interagency Agreement to be non-dispositive and have rejected the argument that milling must involve the separation of desired from undesired materials. *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552-53, 1553 n.10 (D.C. Cir. 1984); *Watkins Eng'rs & Constr.*, 24 FMSHRC 669, 673-76 (July 2002); *see also DMMRT* 344 (stating that milling “may include” removing valueless constituents). The D.C. Circuit noted that the Agreement suffers from “internal inconsistency” and explained that jurisdictional questions should ultimately be resolved consistent with the statutory definition of a “mine” and Congress’ intent that close questions be resolved in favor of Mine Act coverage. *Carolina Stalite Co.*, 734 F.2d at 1552-53.

Regardless, substantial evidence supports the Judge’s finding that the plant *does* engage in separation of desired from undesired material. 45 FMSHRC at 392. Cactus Canyon’s President testified that the plant circulates dimension stone through crushers and screeners to achieve the very specific dimensions required for Terrazzo stone, with 10-15% loss of material to “fines.”⁹ Tr. 145-46, 149, 171, 176. He also testified that the stone must be sorted for color and quality, since the plant “will lose business” if contaminants or wrong-colored stone are included. Tr. 153. In other words, the operation *discards* contaminants and wrong-colored stones, then uses crushers and screeners to *separate* useful stones from “fines” that do not meet the required specifications for sale. We agree with the Judge that separating “valuable Terrazzo stone material” from material “that cannot be used in Terrazzo flooring” is the type of process contemplated by the Interagency Agreement. 45 FMSHRC at 392.

We reject Cactus Canyon’s technical argument that the fines are not valueless because they can be sold (“if profitable”) for use in cement and agricultural applications. *E.g.*, Br. at 10-11. The Agreement refers to “desired” and “undesired” elements. 44 Fed. Reg. at 22829. The Fairland Plant prepares dimension stone for Terrazzo flooring: the “desired” product is stone that meets the specifications for sale to producers of Terrazzo. The ability to recoup some financial value through the off-label sale of the plant’s waste material does not make the fines a desired constituent of the Terrazzo process. We also note that the record has not been developed on this

⁸ While the Secretary’s list of milling processes does not explicitly include screening, the Commission has noted that screening is used to *size* material. *See State of AK, Dep’t of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014). We also note that the Fairland Plant washes stone (Tr. 153) and “washing” is included in the Secretary’s list. 44 Fed. Reg. 22827, 22829 (Apr. 17, 1979).

⁹ Fines are, by definition, “smaller than the minimum specified size.” *DMMRT* 208.

issue, and that this argument does not account for stones discarded due to poor color or quality during the initial sorting process.

In sum, the record establishes that the Fairland Plant sorts, crushes and sizes stone to achieve the specifications required for Terrazzo, and as part of this process, some material is discarded or lost to fines. Under either definition provided in the Interagency Agreement, substantial evidence supports the Judge's finding that the plant was engaged in milling, and therefore independently qualifies as a mine subject to the Act.

As a final jurisdictional matter, we reject Cactus Canyon's argument that the Fairland Plant is a stone finishing operation and therefore expressly excluded from Mine Act coverage. Br. at 15-17. Cactus Canyon is correct that the Interagency Agreement excludes custom stone finishing operations from MSHA jurisdiction. However, stone finishing "commences at the point when milling, as defined, is completed, and the stone is polished, engraved, or otherwise processed to obtain a finished product." 44 Fed. Reg. at 22830. As the Agreement recognizes, operations often exist on a continuum, and jurisdictional uncertainty may arise near the end of the milling cycle and the beginning of the manufacturing cycle. *Id.* at 22828. With respect to stone finishing operations, however, the Agreement is clear: MSHA jurisdiction does not cease until milling cycle is "completed" and production of a "finished product" begins.

The crushing and sizing activities at the Fairland Plant clearly constitute milling rather than finishing. Milling is characterized by activities such as crushing and sizing, while finishing is characterized by polishing, engraving, or otherwise obtaining a finished product. *Id.* at 22828-30. Only the former occurs at the Fairland Plant.¹⁰ We acknowledge that the Fairland Plant occupies an intermediate point in the continuum: It further mills stone that has already been sized to between 5-10 inches in diameter. Tr. 145, 171. However, the milled stone is then sold onward to be finished into flooring by others. At no point does the plant complete its milling operation and begin processing the stone to obtain a finished product suitable for consumers. *Cf. Carolina Stalite*, 734 F.2d at 1551 (finding a facility that processed slate into stalite but did not manufacture the end-product for which the stalite was intended was reasonably characterized as a mine rather than a stone finishing facility). The Fairland Plant is not a stone finishing facility.

c. The Judge Did Not Err in Affirming Citation No. 9643095

As a final matter, the Judge did not err in affirming Citation No. 9643095. The citation alleges that access to a circuit breaker box was blocked, therefore the operator had failed to provide "suitable clearance . . . at stationary electrical equipment or switchgear" in violation of 30 C.F.R. § 56.12019. The Judge interpreted the term "switchgear" to include circuit breaker boxes and ultimately affirmed the citation as issued. 45 FMSHRC at 400-01. On appeal, Cactus Canyon asserts that breaker boxes are not "switchgear" subject to the regulation. Br. at 13-14.

The Secretary's regulations do not define the term "switchgear." As the Judge notes, words that are not defined in a statute or regulation are given their common, ordinary meaning. *Eg., Hecla Ltd.*, 38 FMSHRC 2117, 2129 (Aug. 2016), *citing Perrin v. United States*, 444 U.S.

¹⁰ Cactus Canyon's witness refers to the plant's resizing operation as "finishing" (Tr. 146) but strategic word choices do not change the underlying nature of an activity.

37, 42 (1979). “Switchgear” is “a general term applied to . . . controlling, metering, protective, and regulating devices, as well as assemblies of those devices with associated . . . supporting structures.” *DMMRT* 557. In turn, circuit breakers “measure fault current . . . [and provide] overcurrent protection.” *DMMRT* 100. Rationally, therefore, a breaker box is a structure supporting an assembly of devices that regulate and protect current, i.e., a switchgear.

Cactus Canyon has challenged the citations in this proceeding in two respects: it broadly claims the citations should be vacated because MSHA lacked the jurisdiction to issue them, and narrowly challenges the applicability of section 56.12019 with respect to Citation No. 9643095. For the reasons above, we find that the Fairland Plant is subject to MSHA jurisdiction and that the Judge reasonably interpreted section 56.12019 to apply to the breaker box in Citation No. 9643095. Accordingly, the Judge’s decision is affirmed in its entirety.

III.

Conclusion

For the reasons above, we conclude that the Fairland Plant is a mine subject to the Mine Act, such that MSHA had jurisdiction to issue the relevant citations. Additionally, the Judge

below reasonably concluded that the breaker box in Citation No. 9643095 was “switchgear” subject to 30 C.F.R. § 56.12019. Finally, we find no prejudicial error justifying dismissal in the Chief Judge’s order granting the Secretary an extension of time to file her penalty petition or in the Judge’s decision upholding that order. Accordingly, the Judge’s decision is affirmed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Moshe Z. Marvit
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 21, 2026

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

v.

CACTUS CANYON QUARRIES, INC.,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket Nos. CENT 2023-0045
CENT 2023-0046
CENT 2023-0047
CENT 2023-0048
CENT 2023-0049
CENT 2023-0050
CENT 2023-0051
CENT 2023-0052
CENT 2023-0053
CENT 2023-0054
CENT 2023-0089

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

DECISION

BY THE COMMISSION:

These matters, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) (“Mine Act” or “the Act”), concern a question of Mine Act jurisdiction and a request for recusal regarding the presiding Commission Administrative Law Judge.

The case involves the Fairland Plant, operated by Cactus Canyon Quarries, Inc. (“Cactus Canyon”), which is a surface facility that prepares stone for use in Terrazzo flooring.¹ During an inspection of the plant, an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Cactus Canyon ten citations. Cactus Canyon argued below that MSHA lacked jurisdiction to issue the citations because the plant is not a “mine” subject to the Act.

The Judge concluded that the Fairland Plant is a “mine,” the products of which “affect commerce,” and is therefore subject to the provisions of the Act. 46 FMSHRC 710, 730 (Aug. 2024) (ALJ) (citing 30 U.S.C. §§ 802(h)(1), 803). He determined that the sale of stone processed at the plant affects commerce; that the crushing, sizing, and roasting activities occurring at the plant fall within the definition of “milling;” and that a facility engaged in milling qualifies as a mine irrespective of its proximity to an extraction site. *Id.* at 727, 730.

The Judge also ruled on the merits of all ten citations involved in the case – vacating four citations, affirming three citations as issued, modifying one citation to lower the assessed gravity,

¹ Terrazzo refers to “[s]mall chips or pieces of stone . . . made by crushing and screening . . . used with portland cement in making floors, which are smoothed down and polished after the cement has hardened.” *Dictionary of Mining, Mineral and Related Terms* 567 (2d ed. 1997).

and modifying two citations to raise their negligence level and penalty amounts (and lowering the assessed gravity for one of the two). *Id.* at 736-69.

Finally, the Judge denied Cactus Canyon’s motion for the Judge to withdraw from this case due to his alleged personal bias and other disqualifications. The Judge found that “the [operator’s] affidavit evidence in support of the request and the statements and actions cited by Cactus Canyon do not provide sufficient evidence of antagonism, bias, or prejudice so as to warrant the [Judge’s] recusal.” *Id.* at 770.²

For the reasons below, we affirm the Judge’s decision.

I.

Factual and Procedural Background

A. Factual Background

Cactus Canyon operates the Fairland Plant, a surface facility in Burnet County, Texas. It prepares stone to be used in terrazzo floors. The plant does not currently undertake any extraction of stone (or any other materials) onsite, nor does any extraction occur adjacent to the plant. The operator does, however, rely on 10 to 15 percent of its sales from dimensional stone extracted from one of its leased, intermittent pits that send the material to the plant. Otherwise, the stone arrives at the Fairland Plant by truck or rail from sources in Mexico and other locations. The material that the plant receives is partially processed dimensional stone. 46 FMSHRC at 717-18, 726-27; Tr. 147, 557-59, 591, 610, 737-38.

Upon arrival, the stone is washed and sorted to remove any “contaminant or wrong-colored stone.” 46 FMSHRC at 726; Tr. 568 (direct examination of Andy Carson, president and head of operations for Cactus Canyon). Then it is crushed, sized, and roasted. 46 FMSHRC at 719; Tr. 63, 565-66, 570-71, 601-02.

Specifically, the MSHA inspector observed crushers and screens used for sizing rock. The rock passes through the machinery multiple times until it reaches the desired size. Carson acknowledged that the Fairland Plant uses crushers and screens for sizing rock to produce three sizes of stone for terrazzo flooring: three-eighths, one-eighth, and one-sixteenth inches. Stone may be run through the machines five or six times in the process of crushing and sizing the rock. During this process, some amount of the stone is rejected as too small for use in terrazzo stone and is used either in the construction of Cactus Canyon’s roadways or for sale in a secondary, less profitable market. The small pieces of stone that are deemed acceptable are sold to terrazzo installers to be used in the terrazzo flooring. 46 FMSHRC at 717, 726, 732; Tr. 563, 570-71, 574, 663-64.

² Based on his recusal findings, the Judge initiated a disciplinary proceeding against the operator’s counsel for allegedly seeking to impugn the Judge’s qualifications and integrity, under Commission Procedural Rule 80, 29 C.F.R. § 2700.80. On March 19, 2025, the Commission created a separate docket number, CENT 2025-0180, for the disciplinary proceeding and issued a stay order. The Commission does not address the disciplinary proceeding in this decision.

During the inspection, MSHA issued the ten citations for various hazardous conditions – none of which are at issue individually on appeal. 46 FMSHRC at 711. In short, as it relates to the merits of the case, the operator only appealed the jurisdictional question.

B. Procedural History

The ten contest dockets and the related civil penalty proceeding were assigned to the Judge on January 13, 2023.

On January 24, 2023, Cactus Canyon filed a Motion for Summary Decision seeking dismissal of five citations issued at the Clendennen Ranch³ on jurisdictional grounds, arguing that the intermittent mine lacked a valid mine identification number and that the Secretary failed to establish that it was part of the Fairland Plant and Quarries. In a written order dated March 13, 2023, the Judge denied summary decision, finding that the Commission lacked jurisdiction to review MSHA’s mine identification practices and that genuine issues of material fact existed regarding ongoing mining activity and the validity of the citations.

Thereafter, Cactus Canyon filed additional motions, including a supplemental reply, a second motion for summary decision, and a motion to reconsider, all of which were denied during a prehearing conference held on March 30, 2023. A hearing was held April 4-6, 2023, during which testimony was received from Cactus Canyon’s President and Head of Operations, Andy Carson,⁴ and MSHA representatives. On June 16, 2023, Cactus Canyon filed a request for the Judge’s recusal, providing 24 examples of the Judge’s legal rulings and conduct at the hearing to allege evidence of bias. Req. Withdraw at 10-19.

II.

The Judge’s Decision

A. Jurisdiction

In his decision after the hearing, the Judge first concluded that MSHA possesses jurisdiction over both the Fairland Plant and Clendennen Ranch pit. 46 FMSHRC at 721. The Judge concluded that the Fairland Plant is a “mine” pursuant to the statutory definition in the Mine Act whose operations affect commerce and which is therefore subject to the Act and MSHA’s regulatory jurisdiction. The Judge determined that Cactus Canyon is engaged in “milling” at the Fairland Plant by crushing, sizing, and roasting dimensional stone to be used in terrazzo flooring. *Id.* at 730.

³ The Clendennen Ranch is an intermittent mine site pit that is 3.1 miles away from the Fairland Plant. At that site, dimensional stone is extracted. It accounts for one percent of Cactus Canyon’s sales to its Terrazzo flooring manufacturers. Tr. 68-69.

⁴ Carson is also a licensed attorney who serves as Cactus Canyon’s legal counsel and corporate representative in this case.

The Judge also explained that Appendix A of the Interagency Agreement between MSHA and the Occupational Safety and Health Administration (“OSHA”) identified “milling” as an activity subject to MSHA’s jurisdiction. 46 FMSHRC at 723, *citing* 44 Fed. Reg. 22,829. The Judge laid out the Interagency Agreement’s definition of milling and stated that Appendix A lists general definitions of milling processes that MSHA has authority to regulate, including crushing, sizing, and roasting. *Id.*

The Judge held that milling independently qualifies an operation as a mine under the Act, regardless of whether extraction occurs there. *Id.* at 727, *citing* *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994)). He rejected Cactus Canyon’s reliance on *KC Transport, Inc.*, 44 FMSHRC 211 (Apr. 2022) and *Maxxim Rebuild Co. LLC v. FMSHRC*, 848 F.3d 737 (6th Cir. 2017), concluding those cases do not extend to milling. 46 FMSHRC at 728. He further noted that both the Commission in *KC Transport* and the Sixth Circuit in *Maxxim* recognized that MSHA’s jurisdiction encompasses locations and equipment where extraction, milling, and preparation occur. *Id.*

The Judge also rejected Cactus Canyon’s arguments that the facility was a “stone finishing” plant under OSHA’s jurisdiction. He noted there was no evidence of any polishing or engraving, and that the testimony showed that finishing occurs only after the stone is sold. *Id.* at 726. He further rejected the operator’s claim that it was not engaged in “separation.” In doing so, the Judge found that the testimony confirmed the plant washes, sorts, and removes unwanted materials, consistent with the definition of milling. *Id.* Finally, the Judge concluded that the operations and products of the Fairland Plant affect commerce within the meaning of the Mine Act, 30 U.S.C. § 803, because Cactus Canyon sells the products milled there across North America and other places. 46 FMSHRC at 730-32.

B. The Citations

Having concluded that MSHA has jurisdiction over the Fairland Plant, the Judge ruled on the merits of all ten citations. He vacated four citations, affirmed three citations as issued, modified one citation to lower the assessed gravity, and modified two citations to raise the negligence level and penalty amounts for both, but lower the assessed gravity for one of the two. As stated above, the citations were challenged solely on jurisdictional grounds; Cactus Canyon did not appeal the merits of the Judge’s determinations regarding any of the citations.

C. Recusal

Finally, the Judge considered and denied the operator’s Request to Withdraw. In doing so, he discussed the Commission’s procedural rules governing recusal. 46 FMSHRC at 769

citing 29 C.F.R. § 2700.81(c).⁵ The decision found that “the affidavit evidence in support of the request and the statements and actions cited by Cactus Canyon do not provide sufficient evidence of antagonism, bias, or prejudice so as to warrant the [Judge’s] recusal.” *Id.* at 770.

The Judge found that Cactus Canyon’s allegations of bias largely concerned judicial rulings and routine case management, including clarifying questions, limiting repetitive testimony, and admonishing counsel. *Id.* at 772. He explained that when he “limited” questioning, he encouraged counsel to move on, explain relevance, or avoid issues already addressed. *Id.* The Judge concluded there was “insufficient evidence of any deep-seated antagonism, prejudice, or favoritism sufficient to warrant recusal” and emphasized that Cactus Canyon had a full opportunity to present its case within normal procedural confines. *Id.* He also methodically refuted many specific bias claims. *Id.* at 776–85.

In a footnote, the Judge took judicial notice that the operator’s “brazen” efforts to restrict MSHA’s jurisdiction had escalated. He cited related litigation in the U.S. District Court for the Western District of Texas where the Secretary obtained an injunction requiring access to the Fairland Plant after Cactus Canyon denied entry and warned MSHA it would be treated as a trespasser. *Id.* at 785 n.22. The Judge relied on the operator’s behavior as support for his finding that most of the operator’s allegations of bias sought to impugn the Judge’s integrity to secure his withdrawal and delay MSHA’s exercise of jurisdiction. *Id.* As such, he denied the motion for recusal and made a recommendation for attorney discipline. *Id.*

Cactus Canyon filed two petitions for discretionary review (“PDR”). PDR I requested review of the denial of the motion for recusal. PDR II requested review of the decision’s finding of MSHA jurisdiction. The Commission directed review of both PDRs and stayed briefing except as to the issue of recusal. The Commission subsequently lifted the stay and ordered briefing on the issue of MSHA jurisdiction.

III.

Disposition

We conclude that the Fairland Plant is a “mine” for purposes of MSHA jurisdiction under 30 U.S.C. § 802(h)(1)(C). We further hold that the Judge properly denied the operator’s motion for recusal.

⁵ Rule 81(c), dealing with the “Procedure if . . . ALJ does not withdraw,” states that:

If, upon being requested to withdraw pursuant to paragraph (b) of this section, the . . . ALJ does not withdraw from the proceeding, the . . . ALJ shall so rule upon the record, stating the grounds for such ruling. *If the ALJ does not withdraw*, the ALJ shall proceed with the hearing, or, *if the hearing has been completed, the ALJ shall proceed with the issuance of a decision, unless the Commission stays the hearing or further proceedings upon the granting of a petition for interlocutory review of the ALJ’s decision not to withdraw.*

29 C.F.R. § 2700.81(c) (emphases added).

A. The Judge Properly Affirmed MSHA’s Jurisdiction.

The first issue in this case is whether the Fairland Plant is subject to the Mine Act, such that MSHA may conduct inspections and issue citations. The issue and evidence here are almost identical to what the Commission addressed in *Cactus Canyon Quarries, Inc.*, 48 FMSHRC 156, No. CENT 2022-0010 (April 20, 2026) (“*Cactus Canyon Quarries I*”). As such, we follow the analysis in the decision issued in that case and incorporate by reference the legal analysis regarding the definition of a “mine” contained therein.

B. The Judge Did Not Abuse His Discretion in Denying the Operator’s Request for His Recusal.

The second issue in this case is whether the Judge erred in denying the operator’s motion for recusal.⁶ Cactus Canyon’s PDR on the issue raises three specific arguments. First, it contends that the Judge’s denial of its request for recusal violated Commission Procedural Rule 81(c), 29 C.F.R. § 2700.81(c). The rule requires that a judge who declines to recuse must state the grounds for the ruling on the record. Cactus Canyon argues the Judge failed to sufficiently justify his grounds for denying the recusal request.

⁶ The Commission reviews a Judge’s decision on recusal for an abuse of discretion. *Medusa Cement Co.*, 20 FMSHRC 144, 147 (Feb. 1998). “Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” *Sec’y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 302 (June 2021). A judge’s conduct warrants recusal only if it demonstrates “deep-seated favoritism or antagonism” making fair judgment impossible. *Liteky v. U.S.*, 510 U.S. 540, 555 (1994).

In the context of recusal, “the analysis of allegations, the balancing of policies, and the resulting decision whether to disqualify are in the first instance committed to the district judge. And, since in many cases reasonable deciders may disagree, the district judge is allowed a range of discretion. The appellate court, therefore, must ask itself not whether it would have decided as did the trial court, but whether that decision cannot be defended as a rational conclusion supported by reasonable reading of the record.” *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981). For purposes of analyzing recusal, Commission Judges are analogous to Federal District Court Judges and the Commission itself analogous to an appellate court. *Cf. Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 154-55 (1991) (“Congress intended to delegate to the [Occupational Safety & Health Review] Commission the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context”); *see also Sec’y of Lab. on behalf of Wamsley v. Mut. Min., Inc.*, 80 F.3d 110, 114-15 (4th Cir. 1996) (applying *Martin v. OSHRC*’s analysis to FMSHRC); *Mid-Continent Res., Inc.* 11 FMSHRC 2399, 2401-02 (Dec. 1989) (“appeals to the Commission from judge’s decisions pursuant to section 113(d) arise in an adjudicative context in which traditional adversarial litigation, conducted in a two-tiered administrative arena of trial-type hearings and discretionary review, is the vehicle for dispute resolution.”) (emphasis added).

Second, PDR I argues that the Judge violated Commission Procedural Rules 81(c) and 69(b),⁷ in issuing the recusal ruling at the same time as the merits ruling. Rule 81(c) requires that a Judge who does not recuse shall proceed with issuing the decision, unless the Commission grants a petition for interlocutory review of the recusal decision and stays further proceedings. 29 C.F.R. § 2700.81(c). Cactus Canyon argues that Rule 81(c) does not permit a judge to rule simultaneously on a recusal motion and the merits. PDR I at 2-3.

Cactus Canyon also argues that under Rule 69(b), which provides that a Judge's jurisdiction terminates when a decision is issued, the simultaneous merits ruling caused the Judge to lose jurisdiction over the recusal request, rendering the Judge's recusal decision invalid. PDR I at 3. It argues that these errors deprived it of the ability to seek interlocutory review.

Third, Cactus Canyon argues that the Judge's reference to the separate District Court injunction case – *i.e.*, information not specifically in evidence in this particular case – was evidence of bias that required his recusal. PDR I at 4-8.

1. The Judge Adequately Explained His Denial Under Rule 81(c).

Cactus Canyon argues that the Judge provided “no findings whatsoever,” failed to engage with 200 record citations, and ignored the 24 additional alleged instances of bias identified in its subsequent motion for the Judge's recusal that it filed after the hearing concluded, citing specific aspects of the Judge's conduct during the hearing. PDR I at 2, 3, 9. Most notably, the operator alleges that the Judge participated in criminal activity in concert with the representatives for the Secretary of Labor, *i.e.*, by aiding and abetting alleged false testimony by the Secretary. The operator claims that the Judge's denial of the operator's Motion to Withdraw was conclusory, untimely, and deprived it of meaningful review.

We find these arguments to be completely unfounded. Rule 81(c) requires only that the Judge “[state] the grounds for such ruling” on the record. The Judge dedicated more than 16 pages to addressing the motion and its allegations, citing transcript passages, Commission rules, and precedent. *See* 46 FMSHRC at 769-86. In doing so, he addressed numerous specific examples of allegations by the operator. *Id.* He also specifically refuted the allegations of criminal activity. *Id.* at 784-85 (explaining the legally erroneous – as well as conclusory and unsubstantiated – nature of the operator's claims). The Judge thoroughly explained that the claims of alleged misconduct – interruptions, evidentiary rulings, limits on repetitive testimony – reflected ordinary trial management, not bias. *Id.* at 769-86. He expressly found “insufficient evidence of any deep-seated antagonism, prejudice, or favoritism.” *Id.* at 772.

We hold that the Judge's decision is sufficient under Rule 81(c). The rule does not require a point-by-point refutation of every allegation. Instead, the Judge must simply articulate his reasoning. By framing the conduct at issue as routine judicial administration, the Judge met the standard.

⁷ Rule 69(b) states: “Except to the extent otherwise provided herein, the jurisdiction of the ALJ terminates when the ALJ's decision has been issued.” 29 C.F.R. § 2700.69(b).

2. The Application of Rules 69(b) and 81(c) to the Timing of the Ruling do not Support a Finding of Reversible Error.

Cactus Canyon argues that the Judge's issuance of the recusal denial simultaneously with his merits decision violated Rule 81(c) and Rule 69(b). It contends that Rule 81(c) requires separate and prompt rulings, to preserve interlocutory review rights. According to the operator, Rule 69(b) terminates a judge's jurisdiction once a decision "has been issued." 29 C.F.R. § 2700.69(b). By the time the merits were decided, the Judge had no jurisdiction to rule on recusal.

According to the Secretary, Rule 81(c) expressly instructs that if a recusal motion is filed after the hearing, the judge "shall proceed with the issuance of his decision" unless interlocutory review has been granted, and that is what occurred here. She maintains that Rule 69(b) terminates jurisdiction after a decision is issued but does not bar a judge from resolving multiple issues – including recusal – in the same decision. The Secretary contends that the Commission retains full authority to review the recusal denial now. Sec. Resp. Br. at 9-10. The Secretary also emphasizes that Cactus Canyon suffered no prejudice because the Commission can grant relief if it finds error, including recusal and reassignment.

We find that any procedural error the Judge may have committed by issuing his decision on recusal simultaneously with his decision on the merits was harmless. The operator was able to obtain review by filing a PDR under section 113(d)(1) of the Act, 30 U.S.C. § 823(d)(1), and is in fact receiving that review here. For this reason, we agree with the Secretary that Cactus Canyon suffered no prejudice under these facts. *Salt Lake Cnty Rd. Dep't*, 3 FMSHRC 1714, 1717 (July 1981) (holding that procedural irregularities are not grounds for reversible error absent a showing of prejudice); *Long Branch Energy*, 34 FMSHRC 1984, 1991 (Aug. 2012); *cf. Big Horn Calcium Co.*, 12 FMSHRC 1493, 1496 (Aug. 1990) (recognizing the appropriateness of examining prejudice to the operator in recusal cases).

As such, we conclude that the Judge's frustration of the operator's procedural rights envisioned by Rule 81(c) did not constitute reversible error.

3. The Judicial Notice of the Federal Injunction Proceeding Does Not Support the Claim of Impermissible Bias.

As stated above, the Judge noted that, following the hearing, Cactus Canyon sent MSHA a letter denying entry, prompting the Secretary to obtain a federal injunction requiring access with U.S. Marshals present. The Judge used this to characterize Cactus Canyon's tactics as "brazen."

The operator claims that this reference relied on facts outside the record, misstated aspects of the injunction (e.g., that Cactus Canyon was ordered to pay fees for U.S. Marshal expenses, the number of subsequent MSHA inspections), and showed bias. It claims that the Judge improperly used the case to disparage counsel and chill jurisdictional defenses.

The Secretary points out that judicial notice of related proceedings is permissible when learned in the Judge’s judicial capacity, which is the case here. *See Tejero v. Portfolio Recovery Assocs.*, 955 F.3d 453, 463-64 (5th Cir. 2020). We note that the injunction case was closely tied to the same jurisdictional disputes and involved the same parties. And in the Commission case before the Judge, Cactus Canyon itself frequently cited to other *Cactus Canyon* litigation. *See e.g.*, Tr. 66 (alluding to the Judge’s rulings on jurisdiction).⁸ We decline to allow the operator the benefit of citing to the other cases without inuring any detriment from doing so.

Even if some details in the Judge’s footnote were imprecise, as the operator claims, they do not demonstrate “deep-seated favoritism or antagonism” on the part of the Judge, as required under *Liteky*, “to make fair judgment impossible.” *Liteky v. U.S.*, 510 U.S. 540, 555 (1994).

The Judge’s statement certainly reveals a potential degree of distaste towards the operator’s counsel and his litigation conduct. But “expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display,” do not establish bias. *Id.* at 555-56; *see also Tejero*, 955 F.3d at 464. We find that the Judge taking notice of the related Federal injunction proceeding and using the word “brazen” in this context fit within the scope of proper judicial conduct. They do not support the operator’s claim of impermissible bias.

C. The Operator’s Allegations of Bias Lack Merit.

Cactus Canyon attached to its PDR (which it also designated as its opening brief) a copy of its Request for Withdrawal that it filed in the proceedings before the Judge. The operator appears to have sought review of all the issues mentioned in that Request – for example, the 24 specific instances of the Judge’s conduct at trial that allegedly demonstrated his bias against Cactus Canyon. These included allegations such as interrupting Cactus Canyon’s cross-examinations, summarizing witnesses’ testimony, or chastising counsel.

The Secretary argues that the Commission should limit its consideration of the recusal issues solely to the three assignments of error raised in the operator’s PDR. She stresses that the Commission’s jurisdiction is confined to issues properly raised in a PDR. The Secretary argues that the 24 examples of bias identified in the operator’s “Request to Withdraw,” appended to its opening brief, are outside the Commission’s jurisdiction. According to the Secretary, attachments cannot cure a PDR that fails to “separately number[] and plainly and concisely state[]” issues, as required by section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii) and Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d).

Section 113(d)(2)(A)(iii) of the Mine Act states: “review shall be limited to the questions raised by the petition.” 30 U.S.C. § 823(d)(2)(A)(iii). Our caselaw shows that we have sometimes invoked this limitation when a party seeks to raise wholly new issues after the Direction for Review (“DFR”) is issued. *See Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1432 (D.C. Cir. 1989) (Commission barred from considering issues not in PDR); *Sunbelt*

⁸ In fact, in a separate *Cactus Canyon* case, *Cactus Canyon Quarries, Inc.*, 48 FMSHRC 156, No. CENT 2022-0010 (April 20, 2026) (“*Cactus Canyon Quarries P*”), the operator requested the Commission to accept a brief that it had filed here.

Rentals, Inc., 42 FMSHRC 16, 22-23 (Jan. 2020); *see also Sec’y of Labor v. KC Transp., Inc.*, 77 F.4th 1022, 1034 (D.C. Cir. 2023), *cert. granted, vacated on other grounds sub nom. KC Transp. Inc. v. Su*, 144 S. Ct. 2708, 219 L. Ed. 2d 1314 (2024) (“The Commission’s jurisdiction is limited to questions that were reviewed by the ALJ, and then included in the petition for discretionary relief on appeal. *See* 30 U.S.C. § 823(d)(2)”).

The Commission has recognized it has flexibility when a PDR frames an issue broadly. *See Black Beauty Coal Co.*, 36 FMSHRC 1121, 1123 (May 2014). “The Commission has held that section 113(d)(2)(iii) does not preclude review if the issue was implicitly raised in the PDR or is sufficiently related.” *Id.* (citing *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 (Sept. 1997)). However, the Commission will not review “entirely separate” issues raised in subsequent briefing. *Central Sand & Gravel Co.*, 23 FMSHRC 250, 260 (Mar. 2001).

We conclude that the operator’s PDR generally set forth its argument regarding bias and its argument that the ALJ erred in failing to recuse himself from this case. The operator’s allegations regarding the 24 specific examples of bias are sufficiently related to that allegation to have been implicitly raised. As a result, we will consider the operator’s arguments regarding those allegations.

The operator’s allegations are vague and generally lack substantiation. Viewed cumulatively they fall into four categories: (1) allegations related to the Judge’s procedural and evidentiary rulings; (2) claims regarding the Judge’s active case management and questioning of witnesses; (3) assertions of favoritism, coaching, or prejudgment; and (4) accusations of bad faith, dishonesty, and criminal conduct. Req. Withdraw at 10-19. As discussed below, each category fails as a matter of law and fact, and collectively they fall far short of establishing the “deep-seated favoritism or antagonism” required to compel recusal. *Litky*, 510 U.S. at 555.

1. Category I Allegations: Procedural and Evidentiary Rulings

We agree with the Judge that many of Cactus Canyon’s allegations reflect an attempt to relitigate adverse procedural and evidentiary rulings through a Commission Rule 81(b) recusal motion and to take judicial comments out of context to support unfounded claims of personal bias. 29 C.F.R. § 2700.81(b); Req. Withdraw at 6-9, 19-20. For example, the operator alleges that the Judge demonstrated bias by disregarding a “mandatory” discovery disclosure sanction under Fed. R. Civ. P. 37(c)(1) and by characterizing undisclosed evidence as “compelling,” thereby purportedly constructing the Secretary’s jurisdictional case. Req. Withdraw at 5-6.

The record does not support this allegation. The Judge made no finding that any evidence was “compelling,”⁹ nor did he admit or rely upon undisclosed evidence. Rather, the Judge merely observed, based on the parties’ prior interactions, that MSHA’s jurisdiction would likely be at issue at trial and noted that – apart from materials withheld on privilege grounds – the Secretary had produced evidence concerning its jurisdictional review conducted at the operator’s

⁹ In fact, the only statements the Judge made in the record using the word “compelling” were him explaining that Fed. R. Civ. P. 37(c)(1) and Commission Procedural Rule 59 provide for discovery sanctions, such as a judge granting an order “compelling” evidence to be disclosed when a party refuses to turn it over. Tr. 100.

request. Tr. 13-18. The Judge's comments reflected case-management observations regarding the anticipated scope of the hearing, not a ruling on the admissibility, weight, or sufficiency of any evidence.

The operator also alleges that the Judge demonstrated bias by acknowledging limited prior "experience" with "jurisdictional facts not stipulated," by allegedly seeking to please the Secretary during the second prehearing conference, and by purportedly constructing the Secretary's jurisdictional case at trial based on undisclosed and unqualified opinions regarding the applicability of the OSH Act. Req. Withdraw at 7 n.6.

The record does not support these allegations either. The conduct cited from the second prehearing conference consisted solely of the Judge extending professional pleasantries by asking a district manager – who was not serving as the Secretary's representative in these proceedings – to convey greetings to Department of Labor officials he was scheduled to meet on the first day of the hearing. This exchange did not reflect favoritism, advocacy, or bias, and did not bear on any evidentiary or legal determination in this matter. The operator's characterization of this courtesy as evidence of personal bias is unsupported by the record.

Adverse judicial rulings and comments alone – even if numerous or strongly contested – do not establish bias absent evidence of extrajudicial animus or deep-seated antagonism. *Liteky*, 510 U.S. at 555. The record does not support the operator's claims in this category.

Cactus Canyon alleged that the Judge exhibited bias by delaying rulings on motions for summary decision and by allegedly ruling that the Secretary could carry her burden "by pleadings alone." Req. Withdraw at 8. The Judge refuted these claims, explaining that the contest dockets were assigned in January and March 2023; summary decision was denied on March 13, 2023; reconsideration was denied on March 23, 2023; and the hearing commenced on April 4, 2023. 46 FMSHRC at 777. He correctly concluded that this timeline does not reflect undue delay. *Id.*; see *Telecom. Research & Action Ctr. v. FCC*, 750 F.2d 70, 76-77 (D.C. Cir. 1984).

The Judge further explained that he never ruled that the Secretary could prevail "by pleadings alone," but instead denied summary decision because genuine disputes of material fact existed regarding jurisdiction and mining activity. 46 FMSHRC at 777-78; see also Order Denying Mot. for Sum. Dec. at 3. During the hearing, the Judge reiterated that the Secretary bore the burden of proof. Tr. 143. These actions reflect adherence to governing procedural standards, not bias.

The operator further alleged that the Judge failed to narrow issues, improperly "built" the Secretary's jurisdictional case, and transformed denials of summary decision into rulings on the merits. Req. Withdraw at 7, 9, 20. The Judge rejected these claims, correctly pointing out that Cactus Canyon made "no reference to [any] specific duty that the [Judge] allegedly failed to undertake, nor [did] he point to any instance in the record where the [Judge] failed to abide by his duties as an [ALJ]." 46 FMSHRC at 778. The Judge further explained that he merely clarified the scope of the issues for hearing and emphasized that jurisdiction and mining activity remained factual questions to be resolved at trial. *Id.* at 770, 777, 780.

The transcript confirms that the Judge repeatedly clarified the issues without prejudging them. See Tr. 117-18, 133-34; *see also* Order Denying Mot. for Sum. Dec. at 3 (describing scope of hearing and restricting issues to “whether the Fairland Plant and Quarries was engaged in active mining after its purported permanent closure on August 11, 2022, and whether the citations issued at the Clendennen Ranch intermittent mine on October 25-26, 2022, were validly issued as part of that mining.”); Clarifying issues for trial is a core judicial function and does not constitute advocacy. *Medusa Cement Co.*, 20 FMSHRC 144, 149-50 (Feb. 1998). As such, we find the operator’s allegations here to be without merit.

2. Category II Allegations: Active Case Management and Witness Questioning

Cactus Canyon next alleged bias based on the Judge’s active management of the hearing, including interruptions of cross-examination, questioning of witnesses, and limits placed on certain lines of inquiry. Req. Withdraw at 10-15. These allegations misunderstand the role of a Commission Judge.

There is no question that the Judge took an active role in the hearing. He frequently asked questions of witnesses to clarify his understanding of the issues under examination and to expedite the trial proceedings. He interrupted the examination of witnesses to encourage the parties to stipulate to issues and shorten the examination. *See, e.g.*, Tr. 102, 136-37 (interrupting the Secretary’s witness, Fisher, based off an apparent inconsistency with his prior testimony). In addition, as stated above, the Judge announced to counsel what, in his view, were the significant issues in the case, to allow them to tailor their examination of witnesses. *See, e.g.*, Tr. 135-36 (requesting that Carson narrow his questioning to the citations actually at issue and not to a hypothetical future violation that might be issued to Cactus Canyon).

Commission Judges, however, have an affirmative duty to conduct orderly proceedings, clarify testimony, and prevent repetitive or irrelevant questioning. 29 C.F.R. §§ 2700.55(c), (e); *Medusa Cement*, 20 FMSHRC at 148-50. Active judicial engagement does not suggest bias unless it prevents a party from presenting its case.

The operator cited the Judge’s questioning regarding whether the Clendennen Ranch constituted a mine, as evidence of bias. Req. Withdraw at 11; Tr. 102. The Judge explained that this inquiry was necessary to clarify Carson’s jurisdictional theory and the relationship between the Clendennen Ranch and the Fairland Plant. 46 FMSHRC at 780-81. We find this clarification was intended to assist the Judge’s understanding of the issues and not to benefit the Secretary. Similarly, the Judge intervened to clarify testimony regarding MSHA’s inspection history and cited equipment. Tr. 403-05. Such clarifying questions fall squarely within a judge’s discretion. *Medusa Cement*, 20 FMSHRC at 150 (“[W]e note that a judge has wide discretion to interject questions in order to clarify testimony.”); *see Deary v. City of Gloucester*, 9 F.3d 191, 194-95 (1st Cir.1993) (“mere active participation by the judge does not create prejudice”); *see also U. S. v. Webb*, 83 F.3d 913, 917 (7th Cir. 1996) (stating that a judge is not prohibited from asking questions to clarify an important issue in the case); *U. S. v. Olmstead*, 832 F.2d 642, 648 (1st Cir. 1987) (stating that comments and questions remedied leading questions, clarified lines of inquiry, or developed witness’ answers and were within court’s discretion), *cert. denied*, 486 U.S. 1009 (1988”).

The operator also complained that the Judge improperly limited its cross-examination. Req. Withdraw at 13-14. The Judge explained that any limitations occurred only after extensive testimony had already been elicited and were accompanied by encouragement to move to new topics or explain relevance. 46 FMSHRC at 772.

The record in fact demonstrates that counsel for the operator was afforded extraordinary latitude. Nearly 50 pages of transcript were devoted to jurisdictional questioning alone. Tr. 109-157. In addition, counsel was permitted to testify in narrative form for approximately 163 transcript pages, largely uninterrupted. Tr. 554-717. These facts alone undermine any claim that the Judge's case management hindered the operator's presentation of its case.

3. Category III Allegations: Favoritism, Coaching, or Prejudgment

Cactus Canyon further alleged that the Judge demonstrated bias by favoring the Secretary, coaching MSHA witnesses, or prejudging the outcome of the case. Req. Withdraw at 14-16. As with the prior allegations, these claims fail because they conflate permissible judicial clarification and case management with advocacy, and because they disregard the legal standard governing claims of prejudgment.

A Judge's efforts to summarize testimony, confirm the scope of prior answers, or redirect questioning do not constitute favoritism or coaching. Rather, such conduct reflects routine judicial efforts to ensure that the record is clear, coherent, and complete. *See Liteky*, 510 U.S. at 555 (judicial remarks or interventions "that are critical or disapproving of, or even hostile to, counsel" do not establish bias absent deep-seated antagonism).

The operator cited several instances in which the Judge restated or summarized MSHA witness testimony, asserting that these summaries improperly supplied testimony or advocated on the Secretary's behalf. Req. Withdraw at 2-3, 14-15. The Judge examined each cited instance and demonstrated that his summaries accurately reflected the witnesses' own statements and were employed to prevent duplicative questioning or to clarify what had already been established on the record. 46 FMSHRC at 778-82. The record confirms this. *See, e.g.*, Tr. 135-37, 140 (Judge restating Fisher's prior testimony to confirm scope, clarify any inconsistency, and redirect questioning).

The Commission and the Courts have repeatedly held that restating testimony for clarity does not constitute advocacy. *Medusa Cement*, 20 FMSHRC at 147-150; *U.S. v. Olmstead*, 832 F.2d at 648; *see also U.S. v. Berber-Tinoco*, 510 F.3d 1083, 1091 (9th Cir. 2007) (stating that judicial clarification of testimony does not show bias). Here, the Judge's summaries neither added new facts nor altered witness testimony; they simply reflected what had already been said.

Nor do the operator's allegations establish prejudgment. The Judge repeatedly emphasized that jurisdiction, mining activity, and liability remained issues to be proven by the Secretary at hearing. Tr. 143, 145. References to prior rulings or to the procedural posture of the case merely acknowledged the existence of unresolved factual disputes and the need to address them through testimony. 46 FMSHRC at 777-78. Expressions of familiarity with the record or impatience with repetitive questioning do not demonstrate prejudgment.

Moreover, even if the Judge had expressed skepticism regarding certain arguments, such skepticism would not constitute bias. Judges are permitted to form tentative views based on the record as it develops, so long as they remain open to persuasion. *Liteky*, 510 U.S. at 555-56; *see also FTC v. Cement Institute*, 333 U.S. 683, 701 (1948) (denying motion for disqualification, reasoning that “the fact that the [Federal Trade] Commission had entertained [certain] views . . . did not necessarily mean that the minds of its members were irrevocably closed”). Nothing in the record suggests that the Judge closed his mind to the operator’s evidence or arguments. Accordingly, the operator’s allegations of favoritism, coaching, and prejudgment fail both factually and legally.

4. Category IV Allegations: Bad Faith, Dishonesty, and Criminal Conduct

Finally, Cactus Canyon alleged that the Judge acted in bad faith, fabricated facts, revised testimony, sabotaged the operator’s case, or aided and abetted false testimony. Req. Withdraw at 14-19. These allegations are serious and accuse the Judge of intentional misconduct. For the reasons stated below, we reject the allegations as wholly unsupported.

The operator’s accusations centered on the testimony of Inspector Davis concerning MSHA’s prior inspections and jurisdictional determinations. Req. Withdraw at 16-18. The Judge stated that Davis’s testimony reflected his understanding of MSHA’s inspection history and jurisdictional conclusions; during the hearing, the Judge sometimes interjected to *clarify* points already raised. Tr. 361-68; 46 FMSHRC at 785.

The operator’s allegations of dishonesty are not substantiated with any evidence that any testimony was fabricated, altered, or supplied by the Judge. The fact that the operator disagrees with a witness’s testimony or the Judge’s credibility determinations does not render such testimony false. *See Liteky*, 510 U.S. at 555 (“Judicial rulings alone almost never constitute valid basis for bias or partiality motion for disqualification.”). For instance, the operator alleges that the Judge “interrupted [a witness] to fabricate false recollection about 2 different mirror citations.” Req. Withdraw at 17 (citing Tr. 405). The operator offers no evidence or explanation to support its accusation.

Accordingly, we conclude that the operator’s allegations of bad faith, dishonesty, and criminal conduct are meritless. The Request to Withdraw relies largely on rhetoric and counsel’s own inchoate inferences. The absence of evidentiary support is dispositive.

In summation, the record establishes that the Judge’s behavior showed evenhanded treatment. Courts reviewing denials of recusal motions place great weight on whether the judge treated both parties or both attorneys similarly. *E.g., U.S. v. Powers*, 500 F.3d 500, 513 (6th Cir. 2007) (“[I]mportantly, the district court displayed equal impatience with both counsel.”); *see also U.S. v. Ransom*, 428 F. App’x 587, 589 (6th Cir. 2011) (summarizing that “[c]ases in which recusal was warranted have involved, for example, instances in which the trial judge consistently interrupted the proceedings in a one-sided manner.”).

The Judge here admonished both parties. His rulings also showed no signs of bias. As noted above, he vacated four citations, reduced the gravity on two others, and pressed the

Secretary's counsel on their weaknesses. Transcript examples include him criticizing the Secretary, questioning both sides, and granting fairness accommodations to the operator (e.g., granting breaks, precluding the Secretary from discussing notes that had not been disclosed). *See, e.g.*, Tr. 490.¹⁰ The Judge also had many cordial interactions with Cactus Canyon's counsel.¹¹ Furthermore, even though the Judge denied counsel's request for an expedited hearing on the ten citations in a written order on January 23, 2023, he set a hearing in short order for early April 2023. These all serve as examples of evenhanded treatment by the Judge.

We hold that the Judge's conduct fell within the scope of "ordinary trial management," reflecting evenhanded behavior within his discretion and consistent with Commission precedent. *Rock of Ages Corp.*, 20 FMSHRC at 125. Furthermore, the Judge's decision can be "defended as a rational conclusion supported by reasonable reading of the record." *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981). Accordingly, his conduct is not grounds for recusal. *In re City of Milwaukee*, 788 F.3d at 721-22.¹²

¹⁰ *See* Tr. 263-64 (the Judge expressing doubts about the Secretary's ability to prove interstate commerce and chastising the Secretary's counsel for not subpoenaing Cactus Canyon's miners); Tr. 303 (the Judge admonishing the Secretary's counsel to "step it up here"); Tr. 307 (the Judge critiquing the Secretary's counsel with "Next question. Poor question."); Tr. 317 (the Judge arguing back-and-forth with the Secretary's counsel and reproaching him that "this isn't rocket science here. This is formal legal proceeding. So if he's answered, let's go."); Tr. 680 (the Judge chiding the Secretary's counsel that "before you close your case, you should have moved to amend the standard to conform with the proof or whatever. So, in any event, both of you should have done, I think, something differently from my point of view.");

¹¹ *See, e.g.*, Tr. 352 (the Judge granting Cactus Canyon's counsel request for a break and apologizing to him for the long stretch without a break); Tr. 562 (the Judge politely reminding Cactus Canyon's counsel to describe his movements with the cursor on the photograph "for the reader of the record, please, sir. Thank you."); Tr. 681 (the Judge granting another request by Cactus Canyon's counsel for a two-to-three-minute break, saying "Sure. Let's take five minutes."); Tr. 668 (Cactus Canyon's counsel offering, unprompted, "I'm trying to get through this, Your Honor" and the Judge responding "I appreciate that").

¹² As observed in Footnote 2, the ALJ instituted disciplinary proceedings against operator's counsel in Docket No. CENT 2025-0180. Necessarily, many of the issues in that proceeding are related to the allegations of misconduct discussed here. We note that the Commission here has considered only the facts on record; the Commission does not find facts. *Brody Mining, LLC*, 37 FMSHRC 1914, 1931 (Sep. 2015). We make no preclusive findings of fact regarding Docket No. CENT 2025-0180, which will be decided on its own record.

IV.

Conclusion

For the reasons above, we conclude that the Fairland Plant is a mine subject to the Act, such that MSHA had jurisdiction to issue the relevant citations. We further conclude that the Judge did not abuse his discretion by denying the operator's motion to withdraw. Accordingly, the Judge's decision is affirmed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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COMMISSION ORDERS

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April 3, 2026

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

MATERIAL SAND & STONE CORP.

Docket No. YORK 2025-0020
A.C. No. 37-00068-604329

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

ORDER

BY: Rajkovich, Chair; Jordan, and Baker, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) (“Mine Act”). On July 31, 2025, the Commission received from Material Sand & Stone Corporation (“MSSC”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On January 22, 2025, the Chief Administrative Law Judge issued an Order to Show Cause in response to MSSC’s perceived failure to answer the Secretary of Labor’s November 19, 2024, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on February 24, 2025, when it appeared that the operator had not filed an answer within 30 days.

MSSC asserts that it never received the Order to Show Cause, which was allegedly served on the operator solely via email. It also asserts that it timely responded to the Secretary’s Penalty Petition on December 19, 2024, when it sent an answer to the Conference Litigation Representative (“CLR”) representing the Secretary in this matter. The operator subsequently contacted the relevant CLR after receiving a delinquency notice for unpaid penalties on May 15, contacted the Mine Safety and Health Administration’s Office of Assessments and local District Office after receiving a collections letter from the Department of the Treasury dated July 15, and was ultimately directed to the Commission’s procedures for filing a motion to reopen.

The Secretary opposes MSSC’s motion to reopen this proceeding. She asserts that the operator’s misunderstanding of its obligation to file an answer with the Commission (rather than with the Secretary of Labor) is not a proper justification for relief. She further notes that the operator has a recent history of defaults.

A Judge’s jurisdiction terminates when a default occurs. 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).

A review of Commission records indicates that the Order to Show Cause was not properly served on the operator and therefore did not result in a final order of default. Accordingly, the operator's motion is denied as moot. *See, e.g., Iron Mountain Quarry, LLC*, 42 FMSHRC 901, 902 (Nov. 2020). This case remains open, and 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 2700.¹

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

¹ MSCC's submissions suggest it may not understand that the Commission is a separate entity from the Department of Labor. Filings in Commission proceedings (including answers to the Secretary's Penalty Petition) must be submitted *to the Commission*. 29 C.F.R. §§ 2700.5, 2700.29.

Commissioner Marvit, concurring:

I write to agree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the operator was not served the Order to Show Cause and Order of Default. As such, there is no final order to reopen. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority as the Commission is not reopening the matter.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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April 23, 2026

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

MATERIAL SAND & STONE CORP.

Docket No. YORK 2025-0043
A.C. No. 37-00068-610998

Docket No. YORK 2025-0044
A.C. No. 37-00212-611000

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

ORDER

BY: Rajkovich, Chair; Jordan and Baker, Commissioners

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) (“Mine Act”). On August 17 and 18, 2025, the Commission received two motions from Material Sand and Stone Corporation (“Material”) seeking to reopen penalty assessment proceedings and relieve it from two Default Orders entered against it.¹

On April 9, 2025, the Chief Administrative Law Judge issued two Orders to Show Cause in response to Material’s perceived failure to answer the Secretary of Labor’s February 7, 2025 Petitions for Assessment of Civil Penalty. By their terms, the Orders to Show Cause were deemed Default Orders on May 12, 2025, when it appeared that the operator had not filed answers within 30 days.

In both motions, Material states that “there was a time when [the operator] did not receive any Petitions or Show Cause Orders” due to a change of personnel in the Warrendale District Office of the Department of Labor’s Mine Safety and Health Administration (“MSHA”). In the motion pertaining to Docket No. YORK 2025-0044, it additionally submits that it “never even received the option to contest.”

The Secretary of Labor opposes the motions. With respect to the operator’s claim that it never received the option to contest, the Secretary states that the operator did, in fact, receive the option to contest because it was served with the proposed penalty assessment, and the operator signed for the assessment. She asserts that, moreover, the operator subsequently contested the assessment.

With respect to both proceedings, the Secretary also submits that the show cause orders were properly issued to the operator. The Secretary notes that Show Cause Orders are sent by the Commission rather than by MSHA, so that personnel changes in an MSHA district office are

¹ For the limited purpose of addressing these motions to reopen, we hereby consolidate Docket No. YORK 2025-0043 and Docket No. YORK 2025-0044, involving similar procedural issues. 29 C.F.R. § 2700.12.

irrelevant to that process. She further maintains that copies of the underlying penalty petitions and notices of appearance were also sent to the operator. The operator did not respond to any of these filings. The Secretary notes that Material has had prior experiences with default but, nonetheless, has failed to correct its internal processes.

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 orders here have become final decisions 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).

Material states that there was a time when the operator did not receive penalty petitions or show cause orders. However, it does not specify that it failed to receive show cause orders in these proceedings. A review of Commission records reveals that the Commission properly served the Orders to Show Cause on the operator. *Cf. Material Sand & Stone Corp.*, 48 FMSHRC 184, No. YORK 2025-0020 (April 3, 2026) (finding the operator's motion moot where the Commission did not properly serve the operator with the show cause order). The operator's motions contain no explanation for its failure to respond. For example, there are no affidavits attesting to the operator's non-receipt of the Commission's Orders.

We conclude that in the absence of a sufficient explanation, the operator has not demonstrated good cause for its failure to timely respond. *See Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010) (requiring that "[a]t a minimum, the applicant must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response."). Simply stating that the Orders were not received is not sufficient. *See Southwest Rock Prods., Inc.*, 45 FMSHRC 747, 748 (Aug. 2023) ("a grant of relief under Rule 60(b) requires more than "general assertions or conclusory statements as to why an operator failed to timely contest"); *Leroy's Excavating, Inc.*, 48 FMSHRC 124, No. CENT 2025-0031 (Mar. 9, 2026) (denying relief from default when

operator provided general statement that it had not received show cause order). Therefore, the motions are denied.

Having reviewed the operator's requests and the Secretary's responses, we conclude that the operator has failed to establish good cause for a failure to timely file responses to the Commission's Orders to Show Cause. The motions are denied.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Commissioner Marvit, concurring:

I write to agree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's orders became final. The Majority denies reopening in its opinion because the operator has not provided any explanation for its failure to respond to the Commission's Orders to Show Cause. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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ADMINISTRATIVE LAW JUDGE ORDERS

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April 17, 2026

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

v.

GMS MINE REPAIR,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2026-0005
A.C. No. 36-07230-629336 (MVK)

Mine: Bailey Mine

ORDER GRANTING JOINT MOTION TO HOLD CASE IN ABEYANCE

This matter is before me upon the Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor against GMS Mine Repair pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. On February 17, 2026, Acting Chief Administrative Law Judge Michael G. Young assigned me this civil penalty docket, containing a single section 104(a) citation with a proposed penalty of \$1,320.00, and attached a copy of my prehearing order. On April 7, 2026, the parties filed their Joint Motion to Hold Case in Abeyance Pending Commission Decision on Docket VA 2023-0021, which is akin to a motion to stay.

I. JOINT MOTION

In the joint motion, the parties ask me to hold this case in abeyance until the Commission reaches a final resolution in Docket No. VA 2023-0021—which was directed for review on October 16, 2024, and is currently pending on appeal—arguing the subject of that appeal addresses issues identical to those in dispute in the docket before me. (Mot. at 1.) In Docket No. VA 2023-0021, CONSOL appealed Administrative Law Judge Jacqueline Bulluck’s Summary Decision that: (1) there was no preclusive effect on the issues in the case; (2) the cited safeguard was valid and enforceable against GMS; and (3) GMS violated the safeguard. *GMS Mine Repair & Maintenance, Inc.*, 46 FMSHRC 824 (Sept. 2024) (ALJ Bulluck).

In the motion, the parties cite a Supreme Court case and a D.C. Circuit case, respectively—*American Life Insurance Co. v. Stewart*, 300 U.S. 203, 215 (1937), and *Belbacha v. Bush*, 520 F.3d 452, 457 (D.C. Cir. 2008)—for the proposition that a court may hold a case in abeyance pending the outcome of a case when the parties and the issues are the same. (Mot. at 1.) In support of their joint motion, the parties argue that “[t]he key disputed issues in both the appeal and this matter are 1) whether safeguards issued to mine operators are enforceable against contractors working at those mines absent the Secretary providing a written notice of the safeguard to the contractor, and 2) whether the Secretary is collaterally estopped from enforcing the disputed citation against GMS under a prior decision in *GMS Mine Repair & Maintenance, Inc.*, 42 FMSHRC 135 (Feb. 2020) (ALJ Rae).” (Mot. at 2.) Additionally, the parties note that

the pending appeal of Docket No. VA 2023-0021 is between the same parties as the case before me. (Mot. at 2.)

II. ANALYSIS

In *American Life Insurance*, the Supreme Court noted that a court has control over its own docket and in the exercise of sound discretion may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same. *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). In making such a determination, the Supreme Court noted the need to weigh the hardships and benefits of the individual circumstances and ascertain a balance. *Id.* at 216. The parties also cite *Belbacha v. Bush*, a criminal case that does not seem apposite. *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008). Neither of the two cases cited by the parties requires a court to hold a case in abeyance pending the appeal of a similar case. The parties cite no Commission case law in their motion. I thus rely on *American Life Insurance* with its directive to weigh the hardships and benefits of the individual circumstances to determine whether holding this case in abeyance is appropriate.

A. Ascertaining a Balance of Hardships and Benefits

In exercising my discretion under *American Life Insurance*, I must review the hardships and benefits and ascertain a balance. *Am. Life Ins. Co. v. Stewart*, 300 U.S. at 215. In its Petition for Discretionary Review (“PDR”) of Judge Bulluck’s summary decision in Docket No. VA 2023-0021, GMS raises multiple arguments. (Resp’t Pet. for Discretionary Review at 4–9.) Two arguments on appeal are germane to the parties’ joint motion. First, GMS argues that the Secretary is collaterally estopped from enforcing the disputed citation against GMS, as a contractor, under a prior decision in *GMS Mine Repair & Maintenance, Inc.*, 42 FMSHRC 135 (Feb. 2020) (ALJ Rae).¹ (Resp’t Pet. for Discretionary Review at 4.) Second, GMS asserts in its PDR that because the Secretary never advised GMS in writing of the cited safeguard, she violated 30 C.F.R. § 75.1403-1(b), and therefore the safeguard cannot be enforced against GMS. (Resp’t Pet. for Discretionary Review at 5.) GMS clearly raises both these issues in the case pending before me. (Mot. at 2.)

Whether the Secretary is required to provide direct written notice of safeguards to contractors is an issue of first impression for the Commission. *See GMS Mine Repair & Maintenance, Inc.*, 42 FMSHRC at 141 (ALJ) (noting the Commission has never been confronted with the Secretary’s interpretation that a “‘mine-by-mine basis’ means safeguards are perpetually enforceable against all operators present at the mine property, not just the operator that was served with the safeguard in writing”). Consequently, if the Commission decides the

¹ Judge Priscilla Rae, in the prior case involving this same contractor at a different mine, held that “[a] private employment contract between a mine owner and an independent contractor does not authorize the Secretary to enforce a safeguard that was issued to the mine owner and is otherwise unenforceable against the contractor.” *GMS Mine Repair & Maintenance, Inc.*, 42 FMSHRC at 142. Whereby, Judge Rae concluded that “only the operator that was advised of the safeguard in writing may be held responsible for implementing the remedial measures prescribed by that safeguard or penalized for failing to do so.” *Id.*

Secretary must provide written notice of a safeguard to a contractor, then the disputed citation before me becomes invalid. Likewise, if the Commission decides that the Secretary is collaterally estopped from enforcing the disputed citation against GMS, then the disputed citation before me also becomes invalid.

As a result, a benefit accrues to the litigants and to the Court in awaiting resolution of the appeal, which may resolve the case in its entirety. This weighs heavily in favor of granting the parties' motion. The parties point to no hardships. I note the case does not involve a withdrawal order under section 104(d) of the Mine Act, and the parties jointly seek to stay the matter accepting the delay.

Commission Procedural Rule 55, 29 C.F.R. § 2700.55, grants Commission Judges broad powers to issue orders and procedurally manage the cases before them. In considering the efficient use of agency resources, I note that both cases involve the same parties and the same regulatory standard. Additionally, the Commission's decision in the case on appeal (Docket No. VA 2023-0021) may invalidate the citation based on insufficient notice or collateral estoppel and thereby resolve the case currently pending before me. Under these circumstances, staying this case pending before me would preserve judicial resources. After weighing the individual circumstances of this matter, I am on balance persuaded that the parties' motion to hold the case in abeyance should be granted.

To promote judicial economy, I therefore conclude that rather than hold the parties to the terms of my Prehearing Order, the best course of action is to place this case on stay until the Commission reaches a final resolution in Docket No. VA 2023-0021. Accordingly, the parties' Joint Motion to Hold Case in Abeyance Pending Commission Decision on Docket VA 2023-0021 is hereby **GRANTED**.

III. ORDER

WHEREFORE, it is hereby **ORDERED** that Docket No. PENN 2026-0005 is **STAYED**, pending the Commission's decision in Docket No. VA 2023-0021.

Counsel for the Secretary and GMS are hereby **ORDERED** to contact my Law Clerk, Molly Keck, at mkeck@fmshrc.gov, with a status update once the Commission has issued a decision in Docket No. VA 2023-0021.

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

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