August 2024

TABLE OF CONTENTS

COMMISSION DECISIONS

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

No Review Was Granted or Denied During The Month Of August 2024

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

August 29, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. CENT 2023-0120
v.	
MORTON SALT, INC.	

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

DECISION

BY: Jordan, Chair; Baker and Marvit, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act") and is before the Commission pursuant to our grant of interlocutory review.[1] The case arose when Morton Salt, Inc. ("Morton Salt") received a notification under section 104(e) of the Act that it had engaged in a pattern of violations which could significantly and substantially contribute to mine health or safety hazards.[2]

Any operator so notified is subject to an order requiring the immediate withdrawal of miners, if an inspection within 90 days discovers any additional significant and substantial violations at the operator's mine. Any subsequent inspections that reveal significant and

[1] The Judge below first certified the issue, finding that: (a) his ruling involves a controlling issue of law and (b) immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

[2] Section 104(e) of the Mine Act provides that "[i]f an operator has a pattern of violations of mandatory health or safety standards . . . which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists." 30 U.S.C. § 814(e)(1).

substantial violations will result in further withdrawal orders, until the mine achieves an inspection with no such violations. 30 U.S.C. §§ 814(e)(2), (3).[3]

It is the Secretary's initial written notification to an operator that a pattern of violations exists which is the subject of the instant appeal. Specifically, the question the Commission unanimously certified for interlocutory review is "whether the Commission has authority to review the Secretary's decision to issue a notice of pattern of violations." 45 FMSHRC 1023, 1024 (Dec. 2023). For the reasons set forth herein, we conclude that the Commission lacks such jurisdiction.

I.

Background

A. Pattern of Violations History

In 1977, following a series of fatal mine disasters, Congress took steps to strengthen the existing 1969 Coal Mine Health and Safety Act.[4] The resulting 1977 Mine Act included a new enforcement tool: a "pattern of violations" provision which was designed to improve compliance

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[3] Section 104(e)(2) provides, in pertinent part, that "a withdrawal order shall be issued by . . . the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until . . . such violation has been abated." 30 U.S.C. § 814(e)(2).

Section 104(e)(3) provides, in pertinent part, that "[i]f, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no [significant and substantial] violations of mandatory health or safety standards . . . the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply." 30 U.S.C. § 814(e)(3).

[4] These disasters included the Sunshine Silver Mine where, in 1972, 91 miners died of carbon monoxide asphyxiation. At Buffalo Creek, in 1972, 125 persons died when a dam burst. At Blacksville, in 1972, nine miners died in a mine fire. At Scotia, in 1976, 23 miners and three inspectors died in two explosions of accumulated methane gas. At the Potter Tunnel mine, in 1977, nine miners died when water inundated active workings. As the Supreme Court recognized in *Thunder Basin Coal Co. v. Reich*:

> The House and Senate Committee Reports observed that these accidents resulted from hazards that were remediable and that in many cases already had been the object of repeated enforcement efforts. *See generally* Leg. Hist. 362, 371, 592-93, 637. The 1972 Buffalo Creek disaster, for example, occurred after the mine had been assessed over $1.5 million in penalties, "not one cent which

(continued…)

in mines that had demonstrated recurrent significant and substantial ("S&S") violations of mandatory health and safety standards.[5]

It was not until 1990 that MSHA issued regulations implementing the Mine Act's pattern of violations provisions. 55 Fed. Reg. 31128 (July 31, 1990). However, after the Upper Big Branch mine disaster on April 5, 2010, that killed 29 miners, the U.S. Department of Labor's Office of the Inspector General audited MSHA's Pattern of Violations program and found that MSHA had not considered that mine's recurrent history of violations. The Inspector General's Report uncovered a litany of deficiencies within the program and recommended that MSHA revise the implementing regulations. *See* Office of Audit, Office of Inspector General, U.S. Dep't of Labor, Rep. No. 05-10-005-0-001, In 32 Years MSHA Has Never Successfully Exercised its Pattern of Violations Authority (2010). Therefore, in 2013, MSHA revised those regulations. 78 Fed. Reg. 5056-74 (Jan. 23, 2013). MSHA determined that its 1990 regulations contained too many processes, limiting the "effective use of [section 104(e)], resulting in delays in taking action against chronic violators and depriving miners of necessary safety and health protections." *Id*. at 5056. MSHA's revised regulation simplifies some procedures. For example, prior to the changes, MSHA issued mine operators intermediate notices that their mine had an elevated history of non-compliance and there was a *potential* that MSHA would later issue a Notice of Pattern of Violations. Under the new rules, MSHA provides operators with the ability to self-monitor their own compliance history with an online Monthly Monitoring Tool.

Under the revised rule, at least once each year, MSHA reviews certain compliance records for every mine in order to determine if the mine meets the screening criteria for a pattern of violations. 30 C.F.R. § 104.2. The regulations describe eight categories of information that are relevant to a pattern determination. *Id*.[6] Each category has been reduced to a specific numerical

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[4] (…continued)

had been paid." *Id*. at 631. Sixty-two ventilation violations were noted in the two years prior to the Scotia gas explosions, but the imposed penalties failed to coerce compliance. *Id*. at 629-30.

510 U.S. 200, 210 n.12 (1994).

[5] The Senate Subcommittee on Labor stated that the "pattern of violations" authority was intended to "to protect miners when the operator demonstrates his disregard for the health and safety of miners . . . ." S. Rep. No. 95-181 at 32, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978) ("*Legis. Hist.*").

[6] According to 30 C.F.R. § 104.2 the eight listed elements include:

(1) Citations for S&S violations;
(2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
(3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
(4) Imminent danger orders under section 107(a) of the Mine Act;

(continued…)

screening criterion. These numerical screening criteria are posted on MSHA's website and are subject to periodic revision. *Id.* § 104.2(b). The website explains that the Secretary will use two alternate methods of applying the screening criteria to make an initial determination of a pattern of violations designation. Any mine identified as meeting either set of criteria is subjected to further review by MSHA personnel. *Pattern of Violations*, MSHA (Apr. 2021), www.msha.gov/compliance-and-enforcement/pattern-violations-pov. Under this process, mine operators can proactively monitor the website to determine if their mine's violation history puts it at risk of a pattern designation.

If any mine meets MSHA's screening criteria, the agency Administrator issues a memorandum to the appropriate MSHA District Manager, who is asked to determine whether there are mitigating circumstances that justify postponing or declining to issue a pattern Notice.[7]

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[6] (…continued)
(5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
(6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
(7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
(8) Mitigating circumstances.

[7] MSHA's website provides the following Appendix regarding mitigating circumstances:

> For mitigating circumstances to be considered, the mine operator will have to establish such circumstances with MSHA before the Agency issues a POV notice. The types of mitigating circumstances that could justify a decision to not issue a POV notice, or to postpone the issuance of a POV notice to reevaluate conditions in the mine, may include, but are not limited to, the following:
>
> • An approved and implemented corrective action program containing concrete, meaningful measures specifically tailored to address the repeated S&S violations accompanied by positive results in reducing S&S violations;
> • A bona fide change in mine ownership that resulted in demonstrated improvements in compliance;
> • MSHA verification that the mine has become inactive;
> • The amount of time the corrective action program has been in place
> • Other factors affecting the accuracy with which the corrective-action program verifies reductions in S&S violations;
>
> (continued…)

Pattern of Violations Procedures Summary, MSHA (Apr. 2021), https://www.msha.gov/pattern-violations-pov-procedures-summary. An MSHA panel reviews the information provided by the District Manager, along with any additional information deemed necessary, and makes a recommendation to the Administrator. The Administrator then determines whether to issue a Notice of Pattern of Violations to the mine operator.

B. Morton Salt's Alleged Pattern of Violations

According to the Secretary, in the 12-month period from September 1, 2021, to August 31, 2022, Morton Salt received 82 citations describing significant and substantial violations, 45 of which involved loose-ground hazards in violation of 30 C.F.R. § 57.3200.[8] Sec'y Mot. for Summ. J. at 1. Loose ground conditions such as "scales" (a bulge of salt) expose miners to potentially fatal injuries if the scale were to fall while miners are in the area.[9]

On December 1, 2022 (after engaging in the above-described protocol) MSHA issued Morton Salt, a notice alleging that 45 citations represent a pattern of violating safety standards relating to "loose ground hazards on ceilings and/or ribs throughout the mine." Notice of Pattern of Violations No. 9679401.

After serving this notice, MSHA inspectors observed additional significant and substantial violations which, pursuant to section 104(e), resulted in the issuance of withdrawal orders. In the proceeding before the Judge, Morton Salt is challenging the violations that prompted the withdrawal orders, and also seeks to contest the Secretary's prior notice that Morton Salt had a pattern of violations.

The Secretary moved for summary decision, seeking an order affirming the validity of the Notice of Pattern of Violations. The Judge denied the Secretary's motion, concluding that the Secretary had failed to show there is "no genuine issue as to any material fact and that it is entitled to summary decision as a matter of law, particularly concerning how the Respondent's mitigating circumstances factored into the decision to issue the [Notice of Pattern of Violations]." Order at 2 (Dec. 5, 2023). The Secretary then filed a motion requesting that the Judge certify the case for interlocutory review. Following the Judge's certification, the

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[7] (…continued)

> No one mitigating circumstance necessarily shall be determinative, and all mitigating circumstances shall be weighed together on a case-by-case basis.

Pattern of Violations Procedures Summary, MSHA (Apr. 2021), www.msha.gov/pattern-violations-pov-procedures-summary.

[8] Section 57.3200 requires that ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area.

[9] *See e.g.*, Citation 9674895. Sec'y Pet. Ex. A.

Commission granted interlocutory review as to whether the Commission has the authority to review the Secretary's decision to charge an operator with a Notice of Pattern of Violations.

Before the Commission, the Secretary maintains that her decision to issue or not issue a Notice of Pattern of Violations is an exercise of her prosecutorial discretion and therefore unreviewable. No matter the outcome of this interlocutory appeal, the Secretary will bear the burden of proving before the Judge that a pattern of violations existed at the mine, and the operator will have every opportunity to defend itself by providing mitigating circumstances and challenging the citations that constitute the alleged pattern.

II.

Disposition

A. The Secretary's Decision to Issue a Notice of Pattern of Violations is a Decision Committed to the Agency's Discretion and is Not Subject to Commission Review.

The Commission is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers. *See, e.g.*, *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169-70 (Sept. 1988); *Old Ben Coal Co*., 1 FMSHRC 1480, 1484 (Oct. 1979); *Rushton Mining Co*., 11 FMSHRC 759, 764 (May 1989). The Commission cannot exceed the jurisdictional authority granted to it by Congress; it does not possess plenary authority to review all actions taken in accordance with the Mine Act. *Pocahontas Coal Co., LLC*, 38 FMSHRC 157, 159 (Feb. 2016); *Kaiser Coal*, 10 FMSHRC at 1169; *see also Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-73 (1977); *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 322 (1961).

Several provisions of the Mine Act grant subject matter jurisdiction to the Commission. Section 105(d) authorizes the Commission to review citations and orders issued by the Secretary when she determines that a violation of a safety standard has occurred. The Commission can also review challenges to the penalty proposed for the associated violation. 30 U.S.C. § 815(d). Nowhere in the Mine Act is the Commission granted authority to review the Secretary's issuance of a "notice" alleging a pattern of violations.

Instead, consistent with the Mine Act and Commission caselaw, when a section 104(e) withdrawal order is contested, the Secretary carries the burden of proving that an operator engaged in a pattern of violations. *Brody Mining, LLC*, 37 FMSHRC 1914, 1931 (Sept. 2015) ("*Brody II*"). In *Pocahontas Coal Co*., 38 FMSHRC 176, 183-84 (Feb. 2016), we explained that while an operator cannot directly contest a Notice of Pattern of Violations with the Commission, the operator can seek Commission review, pursuant to section 105(d), of any subsequently issued section 104(e) withdrawal order. In essence, that means that the operator must simply wait until there is immediate legal consequence before seeking Commission review. In exercising our jurisdiction pursuant to section 105(d) to review a contested section 104(e) withdrawal order, the Commission can require the Secretary to demonstrate that the operator has engaged in a pattern of violations. *Id*. Section 105(d) lists the various remedial actions the Commission can order and also "unambiguously sets forth a broad grant of the Commission authority to direct 'other appropriate relief.'" *Id*. Nothing in this decision diminishes the operator's ability to challenge the alleged pattern of violations using the process set forth in *Pocahontas Coal Co*. and *Brody II*.

In *Brody II*, the Commission defined a pattern of violations as "an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners." 37 FMSHRC at 1924. An operator challenging a section 104(e) withdrawal order can dispute the existence of the specific violation described in the order, but that operator can also challenge the existence of a pattern of violations. The burden remains on the Secretary to demonstrate the existence of the pattern to the satisfaction of the Commission Judge.

The Secretary must demonstrate the pattern based upon the specific S&S citations and orders listed in the previously issued pattern notice. *See id.* at 1931. No particular number of violations is necessarily indicative of a pattern. *Id*. at 1925. If the Secretary demonstrates the pattern to the Judge, and also proves the subsequent violation of the cited mandatory safety standard, the section 104(e) order is affirmed.[10] Conversely, if the Secretary fails to demonstrate that the citations and orders considered cumulatively demonstrate a disregard for the health and safety of miners, the associated Notice of Pattern of Violations is vacated and the contested section 104(e) order is modified to a section 104(a) citation.[11] Indeed, in the instant case, Morton Salt is actively engaged in this process before the Judge below.[12]

The Commission's ability to consider whether a pattern of violations exists must be distinguished from our lack of jurisdiction to review how or why the Secretary decided to *charge* an operator with a pattern notice. Section 105(d) *does not* provide the Commission with jurisdiction to review the Secretary's internal decision-making processes related to her decision to charge an operator. *Id.* at 1928-29 ("evidence should not be developed, nor should discovery be permitted, regarding MSHA's prosecutorial discretion in issuing a POV notice."). The determination of whether a pattern of violations exists is an exercise of prosecutorial discretion.[13]

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[10] The underlying pattern notice will automatically be terminated, pursuant to the statute, after an MSHA inspector performs an inspection of the mine and finds no further S&S violations. 30 U.S.C. § 814(e)(3).

[11] The Secretary's decision to charge a mine operator with a pattern of violations is based upon all *issued* citations (final and non-final). Accordingly, at a hearing on the contest of a section 104(e) order, the Secretary may also need to engage in associated litigation involving contested non-final citations and orders relied upon by the Secretary in concluding that a pattern exists. *See Brody Mining, LLC*, 37 FMSHRC 1914, 1929-30 (Sept. 2015) ("*Brody II*").

[12] We are treating Notices of Pattern of Violations as we would any other charging decision under the Act. In the same way, we do not allow challenges to the Secretary's decision-making process in issuing a 104(a) citation, but the Secretary maintains the burden of proving the existence of a violation.

[13] Our dissenting colleague, Commissioner Rajkovich, makes the argument that the Commission necessarily has subject matter jurisdiction over the Secretary's deliberative process preceding the issuing of the Notice of Pattern of Violations. In doing so, he mis-states the majority's argument as one concerning lack of subject matter jurisdiction. Slip op. at 24. The

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Following the panel recommendations and analysis of the screening criteria, the Secretary retains the discretion to determine whether the operator has engaged in a pattern of violations which could significantly and substantially contribute to mine health or safety hazards. *Pattern of Violations*, 78 Fed. Reg. 5056, 5065 (Jan. 23, 2013). Once the Secretary has determined that a pattern of violations exists, the purely ministerial task of issuing the notice is mandatory.

Notably, the mine operator faces *no immediate consequence* when issued a pattern notice. Only if an inspector observes a significant and substantial violation within the next 90 days—i.e., if the operator is found to be in further violation of the law—will MSHA issue an order withdrawing affected miners from the area. 30 U.S.C. § 814(e)(1). The operator may contest that withdrawal order before the Commission. Moreover, if an inspection of the mine reveals no S&S violations, the pattern notice expires.

The distinction between the jurisdiction to consider citations and orders as compared to a decision to charge an operator is not novel. In fact, in *Sec'y of Labor v. Twentymile Coal Co*., 456 F.3d 151 (D.C. Cir. 2006), the D.C. Circuit reversed a Commission attempt to review the Secretary's charging decision. *Id*. at 161 ("like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion"). The Court held that the Commission had no statutory authority to review the Secretary's decision to charge both the contractor and the mine operator for safety violations committed by the contractor.[14] The D.C. Circuit rationalized that under the Mine Act, "the Secretary's charging discretion is as uncabined as that of a United States Attorney under the Criminal Code."[15] *Id*. at 157. The Court chastised the Commission's attempt to review a charging decision and "substitute its views of enforcement policy for those of the Secretary, a power . . . the Commission does not possess." *Id*. at 158. Our colleagues make a similar mistake today.[16] The Mine Act and associated caselaw are

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[13] (…continued)
majority repeatedly states that the Commission has jurisdiction to review the pattern of violations once there is a final order. This jurisdiction, however, does not extend to the Secretary's deliberative process concerning her prosecutorial discretion. By framing both issues as being about subject matter jurisdiction, our dissenting colleague extends the bounds of that concept beyond where the courts have permitted the Commission to tread.

[14] The Mine Act defines an "operator" to mean "any owner, lessee, or other person who operators, controls, or supervises a . . . mine or any independent contractor performing services . . . at such mine." 30 U.S.C. § 814(a).

[15] "[W]ith respect to criminal charging decisions, the Supreme Court has made clear that the government's decision 'as to whom to prosecute' is generally unreviewable." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156-57 (D.C. Cir 2006) (citing *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

[16] Then-Judge Scalia, writing for the majority, stated in *Brock v. Cathedral Bluff's Shale Oil Co*.:

(continued…)

clear; we lack jurisdiction to review the Secretary's internal processes related to her exercise of discretion.

B. The Administrative Procedures Act Does Not Provide a Meaningful Standard for Review of the Secretary's Decision to Issue a Pattern of Violations Notice.

Our dissenting colleagues tacitly recognize that the Mine Act does not provide the Commission with jurisdiction to review the Secretary's decision-making processes concerning whether or not to issue a Pattern of Violations Notice. Instead, the dissents would ground review of the Secretary's enforcement decisions in section 706(2)(A) of the Administrative Procedure Act ("APA"), which requires setting aside agency action that is arbitrary, capricious, or an abuse of discretion. Slip op. at 22-23 (Althen dissent); Slip op. at 25-30 (Rajkovich dissent).[17]

However, under section 704 of the APA, agency actions are only reviewable if that review is provided for by statute or if there is a final agency action for which there is no other adequate remedy in court. 5 U.S.C. § 704. As noted above, nothing in the Mine Act states that the Secretary's decision-making process in issuing a Pattern of Violations Notice is subject to review. Therefore, the Secretary's actions here are only reviewable under the APA if final.

The issuance of a Notice of Pattern of Violations is not a final agency action. The Supreme Court has stated that to be "final," an agency action must satisfy two criteria. First, the action must mark the consummation of the agency's decision-making process—it must not be tentative or interlocutory in nature. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). Second, the

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[16] (…continued)

> [A]n agency's exercise of its enforcement discretion [is] . . . an area in which the courts have traditionally been most reluctant to interfere. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985); *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413, 78 S.Ct. 377, 379, 2 L.Ed.2d 370 (1958) (per curiam); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658 (6th Cir.1976), cert. denied, 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977). We think the policies underlying that restraint extend as well to interference by a quasi-judicial agency that has no enforcement responsibilities, such as the Federal Mine Safety and Health Review Commission. At the very least the Commission [ ] must be reluctant to find a secretarial commitment to refrain from enforcement where none clearly appears.

796 F.2d 533, 538 (D.C. Cir. Jul. 1986).

[17] We note that the Commission is expressly not bound by the APA in conducting its review. *See* 30 U.S.C. § 956. Nonetheless, Courts have previously looked to the APA for guidance in Mine Act proceedings. *See Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 159 (D.C. Cir. 2006) (holding that principles codified in the APA may be binding in Mine Act proceedings, even if the APA itself is not); and *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 316 n* (4th Cir. 2008).

action must be "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id*. at 178 (citations omitted).

We note that under this definition, the agency action at issue here is not final. A review of section 104.2, 30 C.F.R. § 104.2, shows that it describes an interlocutory or intermediate step of the Secretary's deliberative process, not the final agency action. As described *supra*, the Secretary's analysis of the screening criteria under section 104.2 does not dictate a decision, let alone a final one. Following the analysis under section 104.2, the Secretary must still convene a Pattern of Violations panel that must review the evidence (including mitigating circumstances) and, ultimately, make the decision whether to issue a Pattern of Violations Notice. Even after the Notice of Pattern of Violations is issued, it is at least arguable that legal consequences do not yet attach. Only after an inspection occurs, where an S&S violation is discovered, and the Secretary issues withdrawal orders pursuant to the Pattern of Violations Notice, is a final agency action committed. At that time, the operator can challenge the withdrawal order, as well as the underlying Pattern of Violations Notice. In short, the Secretary's consideration of mitigating circumstances pursuant to section 104.2(a) is not the consummation of the decision-making process, it is a discrete step in that process.

Even if we found that the Notice of Pattern of Violations was a final agency action, it would still not be reviewable under the exceptions provided by the Court. When review is precluded by statute, or when "agency action is committed to agency discretion by law" no review is available. *Bennett*, 520 U.S. at 175, *citing* 5 U.S.C. § 701(a). The first exception obviously does not apply here, as nothing in the Mine Act expressly precludes review of the Secretary's decision to issue a Pattern of Violations Notice and, thus, we need not consider it further. With respect to the second exception, an action is committed to agency discretion in instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *quoting* S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

The interlocutory review at issue here was precipitated by the Judge's decision to deny the Secretary's motion for summary decision and his ruling that he would conduct a hearing on the material factual disputes "concerning how the Respondent's mitigating circumstances factored into the [Secretary's] decision to issue the NPOV." Order. at 2 (Dec. 5, 2023). The Secretary considers mitigating circumstances when evaluating mines for a pattern of violations pursuant to 30 C.F.R. § 104.2. More specifically, after a mine is identified as meeting the screening criteria, the Secretary considers whether there are any mitigating circumstances which would make issuance of a Pattern of Violations Notice to that mine inappropriate. 78 Fed. Reg. at 5063 ("There may be extraordinary occasions when a mine meets the POV criteria, but mitigating circumstances make a POV notice inappropriate."). Therefore, the question before us is whether the Secretary's consideration of alleged mitigating circumstances under section 104.2 is committed to the Secretary's discretion when she considers whether to charge an operator by issuing a notice of pattern of violations. We believe that it is.

In essence, the Pattern of Violations regulations and screening criteria function as a sieve, allowing the Secretary to identify mines with acute compliance problems for further scrutiny. They also provide notice to the public and the regulated community about the kinds of

information the Secretary may consider during internal deliberations on whether to issue a Pattern of Violations Notice. The fact that the Secretary explains her sifting procedures and the kinds of information she will consider to the public does not change the fact that the Secretary decides, in her discretion, whether to issue a Pattern of Violations Notice. It also does not necessarily open the substance of the Secretary's deliberations to the Commission's scrutiny. *See Wayte*, 470 U.S. at 607 ("the decision to prosecute is particularly ill-suited to judicial review").

As we have previously determined, even after the Secretary applies the screening criteria, she has discretion in determining whether a particular mine exhibits a pattern of violations and therefore should be issued a Pattern of Violations Notice. *Brody Mining, LLC*, 36 FMSHRC 2027, 2050-51 (Aug. 2014) ("*Brody I*"). Specifically, "the screening criteria set forth language that indicates that even if a mine meets the criteria, MSHA still exercises discretion in determining whether a POV notice should be issued to the mine." *Id*. at 2049. Because the Secretary engages in further, internal deliberations after using the regulations and the screening criteria, neither the Mine Act nor 30 C.F.R. § 104.2 provide a standard of review for analyzing how the Secretary considers the relevant data. That is, there is no law to apply to the Secretary's deliberations.

As the D.C. Circuit recognized in *Twentymile*, the Mine Act does not provide a meaningful standard upon which to judge MSHA's exercise of charging discretion. 456 F.3d at 157. While *Twentymile* concerned MSHA's discretion in issuing a citation to a mine operator pursuant to section 104(a) of the Mine Act, section 104(e) is similarly constructed and silent as to a standard by which review could be conducted. *Cf*. 30 U.S.C. § 814(a) ("If upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine . . . has violated this chapter . . . he shall, with reasonable promptness, issue a citation to the operator."); 30 U.S.C. § 814(e)(1) ("If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine . . . he shall be given written notice that such pattern exists.").

The instant case demonstrates why 30 C.F.R. § 104.2 cannot fill the Mine Act's silence and provide the meaningful standard against which the Secretary's notice decision can be measured. Here, the Judge sought to hold a hearing to determine how the Secretary considered the operator's alleged mitigating circumstances. The question posed by the Judge was not "were there mitigating circumstances present here?" That is a judicial question, and the kind Commission Judges regularly answer in cases involving sections 104(a) and (d) of the Act, 30 U.S.C. §§ 814(a), (d). Instead, the question was, "how did the Secretary consider the alleged mitigating circumstances when deciding to issue the Pattern of Violations Notice?"

We find it impossible to conceptualize a legal analysis that asks whether the Secretary sufficiently analyzed certain material. How would we determine whether the Secretary properly utilized the factors in 30 C.F.R. § 104.2 in reaching her decision to issue a Notice of Pattern of Violations? What are the metrics against which the Secretary's actions would be compared? It is not a legal question, but instead a question into the nature of the Secretary's internal deliberations.

From a practical perspective, it is hard to understand what our review would encompass. If the issue is simply whether the Secretary had access to the alleged mitigation before issuing a Pattern of Violations Notice, then the issue here is moot. The Secretary provided in discovery several memoranda and internal documents, with only minor redactions, that set forth which mitigating circumstances she reviewed. *See* Sec'y Mot. for Summ. J. Ex. A, Attachs. 4 & 5.[18] Further, we note that any mitigating circumstances that the Secretary has access to would, necessarily, have come from the operator. As a result, the operator would also be aware of what alleged mitigation the Secretary had access to and when the Secretary received it.[19]

If the question is anything beyond whether the Secretary had access to the alleged mitigation, it would necessarily raise questions as to how the Secretary used that information: what weight did the Secretary give the alleged mitigation? How did the Secretary consider the alleged mitigation in light of the other factors? How did mitigation play into the totality of the circumstances that the Secretary considered before issuing a Pattern of Violations Notice? All of those questions go to the heart of the Secretary's deliberative process and are not subject to our review.

One of our dissenting colleagues argues that the Secretary's action here has no room for discretion because section 104(e) of the Act provides that "[i]f an operator has a pattern of violations of mandatory health or safety standards . . . he shall be given written notice that such pattern exists." 30 U.S.C. § 814(e)(1). That is, because the statute includes the imperative phrase "shall" that the Secretary *must* provide notice if there is a pattern of violations. Slip op. at 28 (Rajkovich Dissent). In our colleague's interpretation, this is not a judgment call: either there is or is not a pattern of violations and the Secretary is bound to take one action or the other, and then we can review that action to see if the Secretary met the standard in 30 C.F.R. § 104.2.

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[18] In his dissent, Commissioner Rajkovich states that this is the scope of the information sought, arguing "[t]he details of how an MSHA employee weighed a particular factor when considering whether to propose a mine for POV status would be of less interest than whether the Secretary considered that factor when she made the final decision to issue the POV Notice." Slip op. at 31. In this case, that issue has already been answered in the affirmative. The Secretary considered the alleged mitigation submitted by the operator.

Commissioner Althen's dissent appears to be built entirely around a misconception that this information was not provided.

[19] The operator may also introduce "mitigating circumstances" during the case on the merits before the Judge in order to rebut the Secretary's assertion that it acted with "disregard for the health or safety of miners."

We do not believe that to be a reasonable interpretation of the Mine Act. There is no question that there is unanimity among the Commissioners that the word "shall" denotes an imperative.[20] However, it is necessary to look to the context of the Act itself to see what Congress has demanded from the Secretary, and how our dissenting colleague conflates two distinct matters—one discretionary and one mandatory—to arrive at an incorrect answer. The Secretary's review of the screening criteria and panel recommendations, including mitigating circumstances, is used to make the determination of whether a pattern of violations exists. This deliberation and its outcome—that is, whether a mine has exhibited a pattern of violations—is discretionary. If the Secretary determines that a mine has exhibited such a pattern of violations then it *shall* issue a notice of pattern of violations. This second action is mandatory and ministerial. However, simply because the Secretary must notify the operator when it has been determined that its mine has exhibited a pattern of violations, does not open up the prior discretionary deliberations for review.

Section 104(e) of the Act describes a ministerial action that must occur *after* the Secretary has exercised her prosecutorial discretion and determined a pattern of violations exists. It is similar to section 104(a), which gives the Secretary discretion to determine when a violation exists, but then mandates that the Secretary issue a citation if she determines that such a violation exists.[21] This section does not imply the Secretary has no prosecutorial discretion to determine what is, or is not, a violation of a mandatory health standard. Obviously, an inspector is exercising his/her judgment at all times during an inspection and using delegated discretion to determine whether a given condition is a violation requiring a citation. The Act merely directs the Secretary to complete the ministerial task of issuing the citation to provide notice to the operator after that discretion has been exercised. In the same way, section 104(e) in no way diminishes the Secretary's discretion to determine when a Pattern of Violations Notice should be issued, she is simply required to serve the notice once she deems it necessary.

C. Commission Review of the Secretary's Discretionary Enforcement Decisions Would Encourage Piecemeal Litigation.

In addition to our lack of statutory authority, there are practical and policy considerations which counsel against Commission review of the Secretary's decision to issue a Notice of Pattern

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[20] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007), *citing Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' . . . to impose discretion-less obligations"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive."); Shall, *Black's Law Dictionary* 1375 (6th ed. 1990) ("[a]s used in statutes . . . this word is generally imperative or mandatory").

[21] "If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator." 30 U.S.C. § 814(a)(1).

of Violations. These considerations can be most clearly illustrated by considering what a hearing on this issue would look like, and the number of insurmountable issues stemming from such a hearing.

In *Fed. Trade Comm'n v. Standard Oil Co. of California*, 499 U.S. 232 (1980), the Supreme Court set forth several analogous practical concerns that would arise by allowing a respondent to challenge the validity of the government's decision to bring an enforcement action. For example, the Court stated that the effect of judicial review on the validity of the government's determination that there was "reason to believe" a respondent had violated the law:

> is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. *Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522 (1975). Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. *McGee v. United States*, 402 U.S. 479, 484, 91 S.Ct. 1565, 1568, 29 L.Ed.2d 47 (1971*)*; *McKart v. United States*, 395 U.S. 185, 195, 89 S.Ct. 1657, 1663, 23 L.Ed.2d 194 (1969). Furthermore. . . judicial review to determine whether the Commission decided that it had the requisite reason to believe would delay resolution of the ultimate question whether the Act was violated. Finally, every respondent to a Commission complaint could make the claim that [the Respondent] had made. Judicial review of the averments in the Commission's complaints ***should not be a means of turning prosecutor into defendant before adjudication concludes.***

Id. at 242-43 (emphasis added).

The Court's concerns about inefficient, piecemeal litigation are amply demonstrated by the procedures that would be required to provide the review sought by Morton Salt. After the issuance of a Notice of Pattern of Violations and consequent withdrawal orders, an operator would bring a challenge to the Commission. A Commission Judge would then trifurcate the proceeding. First, the Judge would consider whether the Notice was validly issued based on an assessment of whether the Secretary had properly considered the various factors contained in 30 C.F.R. § 104.2.[22] In this inquiry, it is not clear what, if any, evidence or testimony concerning internal deliberations the Secretary would be required to produce under well-established

[22] Commissioner Althen contends that the Judge here should also determine whether 30 U.S.C. 814(e) and 30 C.F.R. § 104.2 provide the Secretary with the authority to consider non-final violations when deciding to issue a Pattern of Violations Notice. Slip op. at 17 n.1, 20 n.4. This issue has previously been considered and decided by the Commission in *Brody I*, 36 FMSHRC at 2039-49 ("we find no abuse in the Agency's decision to rely on non-final issuances [in deciding to issue the Notice] even though some S&S designations may later be changed in adjudication") (citation omitted).

privileges. Presumably, the Judge would be looking at, for example, whether the Secretary had considered mitigating circumstances and assessing whether the Secretary had given that factor appropriate weight as compared to other considerations. It is not clear to the Commission how the Judge would be expected to make such a determination since the Pattern of Violations rule only states that the Secretary will consider such factors, but provides no requirements for the relative weight of each factor.[23]

If the Judge determined that the Secretary had validly issued the Notice, she would then turn to consider whether there was, in fact, a pattern of violations. This would be looking at the same evidence that had been presented in the previous portion of the hearing but would presumably consider whether the Secretary had established sufficient evidence to prove the existence of a pattern. *See Brody II*, 37 FMSHRC at 1924 ("an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners"). In essence there would be an entire hearing on the sufficiency of the Secretary's deliberations and then a second hearing on the fruit of those deliberations using the same evidence. Of course, the Judge may also be hearing contests of the underlying citations and their associated civil penalties. Then, only if the Judge determined that the Secretary had appropriately deliberated on the Notice and that a pattern of violations was, in fact, present, would the Judge then turn to the third portion of the hearing and consider the merits of the contested withdrawal order.[24] All of this complicated, redundant, and ad hoc judicial review of the Secretary's internal processes would often occur while the mine at issue was continuing to receive withdrawal orders.

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[23] In his dissenting opinion, Commissioner Althen would require the Secretary to submit her application of the pattern criteria in 30 C.F.R. § 104.2 for Commission review before permitting the Secretary to attempt to demonstrate that an operator has engaged in a pattern of violating the Mine Act. In effect, Commissioner Althen would flip the Secretary's role at the outset of a pattern hearing, requiring the Secretary to *defend* her decision to issue the notice instead of prosecute, a tactic which the Supreme Court found to be inappropriate at least in *Fed. Trade Comm'n v. Standard Oil Co. of California*, 449 U.S. 232 (1980).

In seeking to require Commission review, Commissioner Althen implies that the Secretary may have ignored mitigating circumstances presented by Morton before deciding to issue the notice. However, the record before us demonstrates that the Secretary considered specific mitigating circumstances, including Morton's change in ownership, change in management, additional staffing, change in organizational structure and the implementation of a corrective action program, prior to issuing Morton a pattern notice. *See* Sec'y Mot. for Summ. J. Ex. A, Attachs. 4 & 5.

[24] It is significant that the Secretary's current process for issuing a Pattern of Violations Notice was created, at least in part, in reaction to an audit by the Department of Labor's Inspector General finding that its previous process, which included more intermediary steps (including the so-called PPOV ("potential pattern of violation" notice)) was never effectively implemented. *See Brody I*, 36 FMSHRC at 2029-30 (citing Office of Audit, Office of Inspector General, U.S. Dep't of Labor, Rep. No. 05-10-005-0-001, In 32 Years MSHA Has Never Successfully Exercised its Pattern of Violations Authority (2010)) (other citations omitted).

The process outlined above, with all of its attendant procedural hurdles and opportunities for interlocutory review would delay resolution of the ultimate question of whether Morton Salt in fact engaged in a pattern of violating mandatory health or safety standards. This would create a new procedural hurdle with no basis in the law or regulations. In essence, the practical impact of the review proposed by our dissenting colleagues would be to make the Secretary the defendant, forcing her to defend her decision-making processes rather than demonstrate that 45 loose-ground hazards represent a pattern of violations. For these reasons, the Commission should not review the Secretary's decision to *issue* the Notice of Pattern of Violations, but instead center its review on whether the Secretary has proven the *existence* of a pattern of violations.

III.

Conclusion

In summary, the Commission does not have jurisdiction to review the Secretary's decision to issue a Notice of Pattern of Violations. The case should proceed before the Judge so that he may determine whether the Secretary can demonstrate that Morton Salt has engaged in a pattern of violating mandatory health or safety standards.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

Commissioner Althen, dissenting:

We review a purely legal question. The legal issue taken by the Commission is "whether the Commission has authority to review the Secretary's decision to issue a notice of pattern of violations." 45 FMSHRC 1023, 1024 (Dec. 2023). Had the majority answered this question correctly, we would have returned the case for action by the Administrative Law Judge to determine whether the Secretary abused her discretion under the particular facts of this case. However, the majority has found that the Commission is powerless to review the issuance of a Notice of a Pattern of Violations ("POV Notice"). Therefore, the Commission essentially holds that the Secretary has unfettered discretion to issue a POV Notice even if she does not comply with her own regulations in finding a pattern of violation exists. That finding is clearly and dangerously incorrect.

As demonstrated below, there is a specific legislative rule governing MSHA's review for a pattern of violations. That rule incorporates specific screening criteria. The majority's decision of absolute discretion erroneously insulates MSHA from the obligation to follow the legislative rule promulgated by the Secretary, herself.[1] With this answer, the Secretary may ignore section 104.2(a) that requires consideration of specific enumerated elements, and the pattern criteria incorporated into the regulation under section 104.2(b). 30 C.F.R. §§ 104.2(a), (b). The majority do not deny that erroneous result; they embrace it.

I.

BACKGROUND

Due to the vagueness of section 104(e) of the Mine Act, 30 U.S.C. § 814(e), it was ignored for many years after the passage of the Act. In 1990, the Secretary published an initial regulation. *Pattern of Violations*, 55 Fed. Reg. 31128 (July 31, 1990). Years later, during the Obama Administration, the Secretary undertook a path toward enforcement. In 2011, the Secretary proposed a new regulation for enforcement of the pattern of violations section. 76 Fed. Reg. 5719 (Feb. 2, 2011). MSHA held many public meetings regarding the proposal and received

[1] There is still room for initial review. The operator contends that the statute and legislative rule do not permit the use of unproven citations in considering whether a pattern of violations exist. The Commission has previously ruled that the Secretary may use non-final citations. *Brody Mining, LLC*, 36 FMSHRC 2027, 2036-47 (Aug. 2014) ("*Brody I*"). At some point, that incorrect decision may become ripe for reversal by a circuit court. It is useful, therefore, for the Judge below to determine if removal of non-final citations would cause the Secretary's findings to fall below the requirements of the screening criteria thereby causing the initial notice to fall for lack of compliance with the Secretary's regulation when applied only to violations.

a substantial number of public comments. The Secretary then published a final rule on January 23, 2013.[2] 78 Fed. Reg. 5056 (Jan. 23, 2013). The regulation is found at 30 C.F.R. Part 104.

Surprisingly, the pattern of violations regulation does not define a pattern of violations. In subsequent litigation, the Commission defined a pattern of violations as "an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners." *Brody Mining, LLC*, 37 FMSHRC 1914, 1924 (Sept. 2015) ("*Brody II*"). Therefore, the test of whether a group of violations constitutes a "pattern" for purposes of Part 104 is the nature and relationship of the grouping of violations and whether that nature and relationship prove a "disregard" for the health or safety of miners.

According to Black's Law Dictionary, the term "disregard" means "[t]he action of ignoring or treating without proper respect or consideration . . . [t]he quality, state, or condition of being ignored or treated without proper respect or consideration." *Disregard*, Black's Law Dictionary (12th ed. 2024). In other words, the test under Part 104 is whether the violations show that the operator "ignored or disrespected" safety. To determine whether an operator has "disregarded" safety, an Administrative Law Judge must review all evidence, unfavorable and favorable, related to an operator's safety record and concern for safety matters. This consideration will include all areas identified in the Secretary's regulation at 30 C.F.R. § 104.2 and any other evidence bearing upon the issue.[3]

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[2] In the preamble to the publication of the final regulation, MSHA commented that, although the Mine Act requires a pattern of "violations," Congress did not "explicitly" forbid use of non-final citations, so MSHA may use non-final citations. *Pattern of Violations*, 78 Fed. Reg. 5056, 5060 (Jan. 23, 2023). Under the Secretary's odd logic, if one person tells another what he can do, that permission to perform some acts grants the other person the right to do anything that he has not been explicitly told he cannot do.

[3] One of the arguments between the parties in the substantive case below involves the issue of mitigation. Section 104.2(a) of the Secretary's rule includes mitigation as an element for whether a pattern exists. 30 C.F.R. § 104.2(a)(8). At least one of the operator's arguments against a pattern finding is that it mitigated concerns over the number of violations or safety issues. The outcome of the mitigation issue is not before us. Using mitigation as an example, the question in this limited case is not whether the operator mitigated its conduct or whether the Secretary did a sufficient job of taking mitigation into account. The Commission here is reviewing whether the Commission may review the issuance of a notice of a pattern of violations—that is, may the Secretary ignore the part of her legislative rule requiring consideration of mitigation. When the case goes to hearing, the regulation will permit the parties to introduce any evidence bearing upon mitigation—one of the elements identified in section 104.2(a) of the rules. Without speculating at all on any outcome, the operator may attempt to show mitigating circumstances that offset a finding that the operator "disregarded" miner safety. If so, then the operator is not in a pattern of violations within the Commission's definition. It will not be MSHA's judgment that controls the outcome; it will be the Administrative Law Judge's determination after reviewing any mitigation evidence.

Part 104 contains substantive provisions and issues that must be examined for enforcement. Section 104.2(a) identifies eight specific criteria that MSHA must review once every year to identify any mines with a pattern of violations. The attributes are:

> (1) Citations for S&S violations;
> (2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
> (3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
> (4) Imminent danger orders under section 107(a) of the Mine Act;
> (5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
> (6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
> (7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
> (8) Mitigating circumstances.

30 C.F.R. § 104.2(a).

The above listing is a discrete list of issues that, by rule, the Secretary must consider before making a POV determination. These are not mere guidelines, interpretive rules, policy statements, or agency precedents regarding a pattern of violations; these are matters that *must* be considered. This is a legislative rule created by the Secretary of Labor with express authorization from Congress. *See* 30 U.S.C. § 814(e)(4) (delegating authority to MSHA to establish criteria for determining when a pattern of violations exists). These rules carry the force of law and are binding on the agency. *United States v. Nixon*, 418 U.S. 683, 695 (1974) (superseded by statute on other grounds) (rule binding on agency because it had "the force of law").

The pure legal question before the Commission is not whether the Secretary followed her rules. That is in the contest between the parties. The question posed by the Commission here is whether the Secretary may ignore the requirements of Part 104 so that she has absolute discretion to issue a Notice of a Pattern of Violations notwithstanding the rules. Absolute discretion would exempt the Secretary from following her own legislative rule.

Section 104.2(a) identifies specific criteria that must be reviewed. Section 104.2(b) obligates MSHA to create specific pattern criteria. In turn, the criteria must be posted on MSHA's website. 30 C.F.R. §§ 104.2(a), (b). The obligations of section 104.2 are mandatory, and MSHA must comply by reviewing the criteria of section 104.2(a) and creating and posting under section 104.2(b) the specific criteria for determining a mine's pattern violator status.

Pursuant to section 104.2(b), MSHA created threshold criteria for consideration of a pattern of violation status. *See Pattern of Violations (POV)*, MSHA (Apr. 2021), https://www.msha.gov/compliance-and-enforcement/pattern-violations-pov. Under MSHA's scheme for determining pattern violator status, an operation that does not meet the criteria cannot be found

to be in a pattern of violation status. If the wording of section 104.2(b) does not make that clear, MSHA's application of the criteria does.

MSHA created, and it should be commended for this, a calculator tool that allows an operator to determine how close it is to pattern violator status under the pattern criteria promulgated by MSHA and incorporated by section 104.2(b). *POV Calculator*, MSHA, https://www.msha.gov/data-and-reports/data-sources-and-calculators/pov-calculator (last visited Aug. 27, 2023). Having created that tool in conjunction with the issuance of the criteria and having assured operators they may rely upon MSHA's calculation of compliance, MSHA would/should not be heard to argue that it may whimsically disregard the criteria in determining a mine's pattern of violation status.[4]

With this background, we turn to the issue on review. Does the Secretary have unfettered discretion to issue a Notice of a Pattern of Violations without regard to analyzing the factors required by her legislative rule?[5]

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[4] As noted above, the parties dispute whether MSHA may include citations—that is, unproven allegations—in its pattern analysis. The title of section 104(e) of the Act is "Pattern of violations; abatement; termination of pattern." 30 U.S.C. § 814(e). There is no reference in the Mine Act or regulations to a pattern of "allegations." If the Administrative Law Judge below refuses to accept citations when the case is returned to him, then, depending upon the facts, the POV notice may fall on summary judgment.

[5] The majority mischaracterizes many aspects of this dissent. They say this dissent implies that the Secretary may have ignored mitigating circumstances. Slip op. at 14-15 n. 23. This dissent is not concerned with the facts of this case. The Commission does not consider here whether the Secretary abused her discretion. We decide only whether the Secretary is exempt from a review of whether she followed her own rules. The issue of whether the Secretary complied with her rules in this particular case is not before us.

The majority states that issuance of a Notice of Pattern of Violations is a discretionary charging decision. *See* Slip op. at 7 n.12. That is true. However, if the Secretary does not apply the Mine Act or her own rules in making an otherwise discretionary charging decision, the Secretary's decision will be set aside. For example, under section 103(j) of the Mine Act, 30 U.S.C. § 813(j), in the event of any accident in a mine, the Secretary has the discretionary authority, where rescue and recovery work are necessary, to take action she deems appropriate to protect the life of any person. Such discretion may only be exercised when rescue and recovery work is necessary. If the Secretary does not comply with that requirement, the Commission will set aside the Secretary's action. *Big Ridge, Inc.*, 37 FMSHRC 1860 (Sept. 2015).

The majority says this dissent would require the Secretary to submit her application of the pattern criteria for Commission review before permitting the Secretary to attempt to demonstrate that a pattern exists. Slip op. at 14 n. 23. This is akin to the majority's groundless complaint about piecemeal litigation. Slip op. at 13-15. The defenses need not be made or considered *seriatim*. A defense of an abuse of discretion allegation should not suspend discovery or other aspects of prosecuting the case.

II.

DISCUSSION

We can make short work of the purely legal issue before the Commission: May the Commission review the Secretary's decision to issue a Notice of Pattern of Violations or, stated differently, does the Secretary have discretion to find a pattern of violations without consideration of the factors in her legislative rule for determining a pattern of violations? The answer is clear: She does not.[6]

As set forth above, the Secretary proposed a substantive rule and accepted extensive public comments; the Secretary published a final rule reflecting consideration of the comments; the Secretary's final rule obligates the Secretary to an annual review of all mines to find any pattern violators; that annual review must include eight specifically identified areas, including mitigating circumstances; the Secretary published on its website the specific minimum criteria for consideration of pattern violator status; the Secretary created a public "calculator" to permit operators to determine whether they are close to pattern violator status; and the Secretary affirmatively states that the criteria are a minimum threshold.

Federal agencies must comply with their own legislative rules. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954) (superseded by statute on other grounds). The *Accardi* principle is rock-solid law when applied to legislative rules. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'"); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) ("It is axiomatic that an agency must adhere to its own regulations."); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Blackwell as Tr. of Gary Blackwell Revocable Living Tr. v. Tennessee Valley Auth.*, 622 F.Supp.3d 543, 550 (W.D. Ky 2022); *Pitman v. United States Citizenship and Immigr. Serv.*, 485 F.Supp.3d 1349, 1352 (D. Utah 2020).

Indeed, in *Samirah v. Holder*, 627 F.3d 652 (7th Cir. 2010), the United States Court of Appeals for the Seventh Circuit held that "even if the applicable statutes confer complete discretion on agency actors, if those actors have the authority to constrain their discretion by promulgating legislative rules, and they choose to do so, they have created law that can serve as the basis for judicial review." *Id.* at 665, *quoting* Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 605 (2006); *see also § 4.22 Binding effect on the agency*, 1 Admin. L. & Prac. § 4.22 (3d ed.) ("One of the most firmly established principles in administrative law is that an agency must obey its own rules.")

The United States Court of Appeals for the Tenth Circuit states this principle in *New Mexico Farm and Livestock Bureau v. United States Dep't of Interior*:

[6] Commissioner Rajkovich demolishes the majority's mistaken position that the issuance of a Notice of a Pattern of Violations is not a final decision within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 500 et seq. Slip op. at 25-26 n.4. We do not seek to embellish upon his compelling discussion.

> Turning to the merits of the issue, we have held that "[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure." *Utahns for Better Transp. v. U.S. Dep't of Transp*., 305 F.3d 1152, 1165 (10th Cir. 2002). When an agency does not comply with its own regulations, it acts arbitrarily and capriciously. *Id*. at 1178; *see also Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004) ("[The APA] require[s] agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations.")

952 F.3d 1216, 1230-31 (10th Cir. 2020).

Going further, the Administrative Procedure Act codifies the nature and principles of judicial review of agency actions. *Sec'y of Labor v. Twentymile Coal Co*., 456 F.3d 151, 159 (D.C. Cir. 2006). Agency actions will be set aside when an agency does not observe procedures required by law. 5 U.S.C. § 706(2)(D). The Commission has affirmed the use of section 706 principles for review of the Secretary's actions. *See Mach Mining, LLC*, 34 FMSHRC 1784, 1790, 1790 n.11 (Aug. 2012).

The Secretary promulgated a legislative rule governing the determination of a mine's pattern of violation status. The Secretary must follow her rule in making that determination. Whether the Secretary did so must be determined by an Administrative Law Judge.

The Secretary's legislative rule requires:

> At least once each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any mines meet the pattern of violation criteria.

30 C.F.R. § 104.2(a).

The rule then lists eight specific factors that the review must include. These are factors one would expect, and the Secretary requires, to go into a pattern of violations determination. The Secretary does not have "prosecutorial discretion" to ignore the factors required for review by the rule. These duties undercut any claim to unfettered discretion to find a pattern of violations without making the necessary analyses. The Secretary could not justly claim that she decided to look at factors (i) through (iv) but decided to ignore factors (v) through (viii).

Failure to make the review required by section 104.2 and to apply all elements is arbitrary and capricious and an abuse of discretion. The Secretary's right to find a pattern of violations is not wholly discretionary. She is constrained by case law, statute, and regulations setting forth elements that must be reviewed before an adverse finding.

Charging a pattern of violations is not akin to a citation in which an inspector armed with education and experience must make an on-the-spot determination of whether a particular circumstance constitutes a violation. A determination of POV status is a studied determination that must be made on factors explicitly identified in the Code of Federal Regulations.

III.

CONCLUSION

If an Administrative Law Judge finds that the Secretary did not make the examinations required by her own rules, the Notice of a Pattern of Violations should be vacated and returned to the Secretary for compliance with the rules. The majority decision erases any chance of that fundamental right arising from basic notions of due process, settled case law, and Administrative Procedure Act principles.

As a practical matter, the majority's erroneous decision should not affect the outcome of the Secretary's claim. The Secretary bears the burden of proving by a preponderance of the evidence that, considering the inter-relationship among S&S violations and the operator's concern for safety, the actions of the operator show a disregard for health and safety. Both parties may introduce evidence on all the factors in 30 C.F.R. § 104.2 and any other evidence relevant to the issue of whether the operator disregarded safety. The Administrative Law Judge will then decide whether the operator disregarded safety.

I respectfully dissent from the majority's unwarranted grant of absolute discretion to the Secretary.

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

Commissioner Rajkovich, dissenting:

My colleagues in the majority hold that, because the Commission lacks subject matter jurisdiction over the Secretary's decision to issue a Notice of a Pattern of Violations ("POV Notice"), that decision is an entirely unreviewable exercise of prosecutorial discretion. I dissent. For the reasons discussed below, I believe the Supreme Court's test in *Heckler v. Chaney*, 470 U.S. 821, 828-30 (1985), provides the proper framework for determining whether acts of prosecutorial discretion are reviewable. I would further hold that the Secretary's decision to issue a POV Notice is bound by limited but meaningful standards, therefore *once subject-matter jurisdiction properly attaches* through the contest of a related withdrawal order issued pursuant to 30 U.S.C. § 814(e)(1), the Commission may conduct a limited review of the Secretary's issuance decision to determine whether it was arbitrary and capricious.

A. The majority incorrectly frames this interlocutory review as a question of subject matter jurisdiction.

The primary legal basis for the majority's holding is that the Commission cannot exceed its defined grants of subject matter jurisdiction, and we have not been explicitly granted such jurisdiction over the Secretary's decision to issue a POV Notice. *See* Slip op. at 6-9. I would find the majority's analysis insufficient to answer the question on review and inconsistent with our prior decision in *Pocahontas Coal Co.*, 38 FMSHRC 176 (Feb. 2016).

In *Pocahontas*, we held that the Commission lacks subject matter jurisdiction to review direct challenges to POV Notices. However, we also held that once jurisdiction properly attaches through the contest of a related withdrawal order, the Commission has the authority to review the underlying POV Notice to "dispose fully" of the case. *Id.* at 181-84. Here, Morton Salt has properly contested the relevant withdrawal orders. As part of that contest, the operator challenges the validity of the underlying POV Notice on various grounds, including the Secretary's consideration of mitigating circumstances when deciding to issue the POV Notice. The Judge noted genuine issues of material fact on that point, and the Secretary sought interlocutory review as to whether the Secretary's decision was reviewable. Functionally, the question on interlocutory review is whether, *in attempting to fully dispose of the case properly before him*, the Judge below may review the Secretary's decision-making process in issuing the POV Notice.

I agree with the majority that we lack the jurisdiction to review direct challenges to the Secretary's decision to issue a POV Notice. However, the question before us is whether we may review the Secretary's issuance decision in order to fully dispose of a case for which we already have subject-matter jurisdiction. For the reasons below, I would hold that *once subject matter jurisdiction attaches* through the contest of a related section 104(e) withdrawal order, the Commission may conduct review as necessary to fully dispose of the case, including determining whether the Secretary's action in issuing a POV Notice complied with the minimum procedural requirements in 30 C.F.R. Part 104.[1]

[1] The majority states that I frame the issue on appeal as a matter of subject matter jurisdiction, and that I would grant the Commission "subject matter jurisdiction over the Secretary's deliberative process preceding the issuing of the notice of pattern of violation." Slip (continued…)

B. **The Secretary's claim of unreviewable discretion must be rejected under the Supreme Court's *Heckler* Test.**

As described in further detail below, the Supreme Court has provided a framework for determining whether exercises of prosecutorial discretion are reviewable. The Secretary claims that her decision to issue a POV Notice is an unreviewable enforcement decision that has been committed to the Secretary's discretion by law. Specifically, she asserts that the decision to issue a POV Notice is a presumptively unreviewable exercise of prosecutorial discretion, and that no meaningful standard of review exists. Sec'y Br. at 7, 9-10. I would find that any presumption of unreviewability is overcome, because the Act and the Secretary's regulations provide sufficiently meaningful standards to allow limited review.

1. Legal Framework

As a general rule, agency actions are reviewable under the arbitrary and capricious standard unless Congress has expressed an intent to preclude review or the action is "committed to agency discretion by law."[2] 5 U.S.C. §§ 702, 706; *Heckler*, 470 U.S. at 828-30; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *see also Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 316-17 (4th Cir. 2008). With respect to the second exception, the Supreme Court has explained that decisions not to prosecute or enforce are generally committed to an agency's absolute discretion, and are therefore presumptively unreviewable.[3] *Heckler*, 470 U.S. at 831. However, this presumption of unreviewability may be overcome if the relevant statute "has indicated an intent to circumscribe agency enforcement

[1] (…continued)
op. at 7 n.13. To the contrary, as clearly stated above, I argue that the *majority incorrectly* frames the issue as one of subject matter jurisdiction, and I only claim for the Commission the authority to review the Secretary's POV issuance decision once subject matter jurisdiction over a related withdrawal order properly attaches. I make no claims of expanded subject matter jurisdiction.

[2] The relevant provisions of the Administrative Procedure Act were not conceived of in "jurisdictional terms." *Califano v. Sanders*, 430 U.S. 99, 106 (1977). Reviewability under the framework described herein does not convey, or remove, subject matter jurisdiction.

[3] There is some question as to whether this presumption of unreviewability applies to *all* exercises of prosecutorial discretion, or only to decisions *not* to prosecute or enforce. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993); *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Robbins v. Reagan*, 780 F.2d 37, 44-45 (D.C. Cir. 1985). If it is the latter, then the Secretary's decision to issue a POV Notice would not fall under the *Heckler* framework and would be presumptively reviewable. Regardless, I would find that any presumption of unreviewability is rebutted in this instance.

discretion, and has provided meaningful standards for defining the limits of that discretion."[4] *Id.* at 834.

In determining whether a meaningful standard of review exists, courts may look to agency regulations or policies that create binding norms. *Robbins v. Reagan*, 780 F.2d 37, 45-46 (D.C. Cir. 1985); *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003). The key inquiry is the extent to which the agency remains "free to exercise its discretion to follow or not to follow that general policy." *Nat'l Mining Ass'n* v. *Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009) (citation omitted).

With respect to POVs, the potentially relevant materials are comprised of Section 104(e) of the Mine Act, Section 104 of the Secretary's Regulations, and MSHA's website.

Section 104(e) of the Act provides that "[i]f an operator has a pattern of violations of mandatory health or safety standards . . . he shall be given written notice that such pattern exists," and directs the Secretary to "make such rules as [s]he deems necessary to establish criteria for determining when a pattern of violations . . . exists." 30 U.S.C. §§ 814(e)(1), (e)(4).

The Secretary accordingly promulgated a regulation which "establishes the criteria and procedures for determining whether a mine operator has established a pattern of significant and substantial (S&S) violations at a mine." 30 C.F.R. §104.1. The regulation states:

> (a) At least once each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any mines meet the pattern of violations criteria. MSHA's review to identify mines with a pattern of S&S violations will include:

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[4] The majority asserts that this framework does not apply here because the agency action at issue is not final. Slip op. at 9-10, *citing* 5 U.S.C. § 704. An agency action is final if it marks the consummation of the agency's decision-making process and if legal consequences flow from the action. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). My colleagues reasonably find that the Secretary's preliminary screening, which subjects a mine to further review and precedes the ultimate decision to issue a POV Notice, is not a final action. However, the question before us is whether we have "authority to review the Secretary's decision to issue a notice of a pattern of violations." Slip op. at 2. The agency action at issue is the *ultimate decision to issue the notice*, not the preliminary screening analysis that precedes it. The Secretary's decision to issue a POV Notice reflects her final determination that a pattern exists at a mine, and subjects that mine to enhanced penalties for future violations of mandatory health or safety standards. 30 U.S.C. § 814(e)(1). In other words, it marks the consummation of the decision-making process and results in legal consequences. The Secretary's decision to issue a POV Notice is a final agency action.

The majority appears to directly conflate 30 C.F.R. § 104.2 with the agency action at issue. Slip op. at 9 ("A review of section 104.2, 30 C.F.R. § 104.2, shows that it describes an interlocutory or intermediate step . . . not the final agency action."). As discussed in detail below, I would find that the requirements in section 104.2 are necessary but insufficient elements of the Secretary's decision to issue a POV Notice. Section 104.2 provides binding norms with which the Secretary must comply when taking the relevant final agency action, but does not *fully* define the scope of that action.

(1) Citations for S&S violations;
(2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
(3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
(4) Imminent danger orders under section 107(a) of the Mine Act;
(5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
(6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
(7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
(8) Mitigating circumstances.

(b) MSHA will post the specific pattern criteria on its Web site.

30 C.F.R. § 104.2.

MSHA's website currently provides two sets of pattern criteria. Mines that meet all the criteria in either set will be "further considered" to determine whether the operator should be issued a POV Notice, with specific consideration of an operator's MSHA-approved Corrective Action Program as a "mitigating circumstance" that may justify postponing or not issuing the POV notice. *See Pattern of Violations (POV)*, MSHA (Apr. 2021), https://www.msha.gov/compliance-and-enforcement/pattern-violations-pov.

In other words:

(1) If a mine has a pattern of violations, the Secretary must issue a POV Notice. 30 U.S.C. § 814(e)(1); *see also* 30 C.F.R. § 104.3(a).

(2) The Secretary's procedures for determining whether a pattern exists require the Secretary to conduct a review which must include eight categories of information. 30 C.F.R. §§ 104.1, 104.2. This includes mitigating circumstances.

(3) MSHA's website provides baseline requirements for some of the categories listed in 30 C.F.R. § 104.2. If a mine meets the baseline requirements, MSHA will give the mine further consideration and determine whether to issue a notice, i.e., whether a pattern exists.

Notably, the Commission has previously reviewed elements of the Secretary's POV Regulations under the arbitrary and capricious standard, but held that the website criteria were non-binding. *Brody Mining, LLC*, 36 FMSHRC 2027, 2035-38, 2047-51 (Aug. 2014) ("*Brody I*").

2. *Congress has expressed an intent to circumscribe the Secretary's discretion in issuing a POV Notice.*

The Mine Act provides that "[i]f an operator has a pattern of violations of mandatory health or safety standards . . . he *shall* be given written notice that such pattern exists." 30 U.S.C. § 814(e)(1) (emphasis added). In *Heckler*, the Supreme Court explicitly differentiated statutes which *require* the Secretary to act from statutes which *authorize* her to act. The Court stated that a statute under which the Secretary "shall" bring a civil action if she finds probable cause to believe a violation has occurred "quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." 470 U.S. at 833-34. Under the Mine Act, if the Secretary finds a pattern of violations, she must issue a notice. The decision has not been left entirely to the Secretary, i.e., the Mine Act has expressed an intent to circumscribe the Secretary's discretion.

3. *The Mine Act and the Secretary's regulations create a meaningful standard by which the Commission may review elements of the Secretary's decision to issue a POV Notice.*

A review of the Mine Act and the Secretary's regulations establishes that, while the Secretary retains significant discretion as to the details, there are baseline standards against which to compare her actions: In issuing a POV Notice, (1) the Secretary must have concluded that there was a pattern of violations, and (2) in concluding that there was a pattern of violations, the Secretary must have conducted a review that was consistent with Part 104.

Both the Mine Act and the Secretary's regulations require the Secretary to issue a notice if there is a pattern of violations. 30 U.S.C. § 814(e)(1); 30 C.F.R. § 104.3(a). Accordingly, the first meaningful standard of review is simply: Is there a pattern?

The Secretary has also established criteria and procedures for determining whether a pattern exists.[5] The question is whether these criteria and procedures create binding norms, or whether the Secretary remains free to exercise her discretion. *See Nat'l Mining Ass'n*, 589 F.3d at 1371 (citation omitted). The Commission has already found the POV criteria posted on

[5] The Secretary emphasizes that Congress delegated the creation of such criteria and procedures to her. 30 U.S.C. § 814(e)(4). However, having discretion to make rules is not the same as making a discretionary rule. *See Brody I*, 36 FMSHRC at 2035-36 (noting the express delegation of rulemaking authority in section 104(e)(4) and reviewing the resulting regulations under the arbitrary and capricious standard). The question is whether the rules, *once made*, impose binding norms on the Secretary's behavior.

MSHA's website to be non-binding.[6] *Brody I*, 36 FMSHRC at 2049-51. However, the Secretary's POV *regulations* clearly create binding norms. Section 104.2 states that MSHA "will review" various mine records to determine if any mines meet the pattern criteria, and that the review "will include" eight listed factors. 30 C.F.R. § 104.2. These procedural requirements must be met if the Secretary is to properly determine that a pattern exists and that a notice should be issued. While these requirements are not particularly stringent, they are requirements that the Secretary has bound herself to follow.

The Secretary claims her rules are merely meant to "guide" determinations as to whether to issue a POV Notice. Sec'y Br. at 12-13. That is broadly true—Part 104 and the website are structured so that the criteria generally indicate whether a mine *may* have a pattern, leaving the Secretary with some discretion to determine whether the mine in fact *has* a pattern and therefore must be issued a POV Notice. Mines that meet the website criteria are not automatically issued a notice but instead receive "further consideration" by MSHA personnel, who retain discretion to consider additional information and may choose *not* to issue a sanction.

However, the Secretary also chose to institute, through notice-and-comment rulemaking, *minimum regulatory procedural requirements* in determining whether a pattern exists. It is "axiomatic" that an agency must adhere to its own regulations. *Drummond Co.*, 14 FMSHRC 661, 677 (May 1992), *citing Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986). The Secretary cannot bind herself to procedural requirements and then claim her actions are *entirely* unreviewable. At the very least, the Commission may review the Secretary's decision to determine whether the Secretary considered the factors listed in section 104.2(a), and whether a pattern of violations exists.[7] If not, then the issuance was not "in accordance with" the

[6] The Secretary claims the Commission has also already found the Secretary's issuance of a POV Notice to be an unreviewable exercise of prosecutorial discretion. Sec'y Br. at 9, *citing Brody Mining, LLC*, 37 FMSHRC 1914, 1928-29 (Sept. 2015) ("*Brody II*"). In context, the Commission's reference to prosecutorial discretion in *Brody II*—which we did not call unreviewable—was simply part of a procedural discussion regarding development of the record. More significantly, we held that the Judge had jurisdiction to review the validity of the POV Notice and that "[t]he Secretary is ordinarily required to disclose his theory" of the pattern. *Id.* at 1928-29. These are not consistent with *unreviewable* discretion.

[7] While the scope of our review is narrow, I would be wary of imposing a bright line rule regarding "permissible" questions. As an obvious example, Judges are not limited to asking solely "if" a pattern of violations existed. Rather, the Secretary is "ordinarily required to disclose [her] theory of how the groupings in a POV notice constitute one or more patterns of violations." *Brody II*, 37 FMSHRC at 1928. More practically, almost any question can be phrased as a matter of *if*, *how*, or *why* a choice was made, or an action taken. Rather than a list of permissible questions, the Commission and its Judges have the authority to ask *questions as necessary* to determine whether the Secretary complied with the binding requirements in her regulations. If the Secretary believes a question exceeds our scope of review or impinges on her deliberative process protections, she may raise that issue on a case-by-case basis.

relevant statutes and regulations and may be arbitrary and capricious.[8] 5 U.S.C. § 706(2)(A). The scope of the Commission's review may be limited, but it serves the important function of ensuring that the Secretary adheres to its regulations.

The "mere fact that a statute grants broad discretion to an agency" does not render the agency's actions unreviewable "unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Robbins*, 780 F.2d at 44-45. Here, there is minimal but clear guidance as to how the Secretary's discretion is to be exercised: in deciding to issue a POV Notice, the Secretary must determine whether a pattern exists, which in turn requires the Secretary to conduct a review that includes certain types of records and eight specific factors. These requirements, though limited, sufficiently constrain the Secretary's actions to create a meaningful standard of review against which to judge those actions: If the Secretary fails to determine that the mine has met the pattern criteria, or in making that determination fails to conduct a proper review in accordance with Part 104, then any resulting POV Notice may be arbitrary and capricious. I would dissent from the majority and find that the Secretary's decision to issue a POV Notice is not unreviewable.

C. The Secretary's right to invoke the deliberative process privilege does not invalidate the Commission's review authority.

Nothing in this opinion is intended to revoke the protections afforded by the deliberative process privilege. As the Judge recognized here, the privilege protects against inquiries that "go[] beyond factual matters into internal deliberations, including the weight given to different pattern criteria and the thoughts and opinions of the agency's employees." Order at 2 (Nov. 13, 2023). If *any* line of questioning in a legal proceeding impinges upon the Secretary's internal deliberations, the Secretary may raise the privilege and challenge that line of questioning.

However, the existence of the privilege does not revoke the Commission's review authority. Deliberative process is a *privilege that may be asserted by the Secretary,* not a limitation on the Commission's authority. *See* Privilege, *Black's Law Dictionary* (11th ed. 2019) ("A privilege grants someone the legal freedom to do or not to do a given act"). The Secretary's right to assert the deliberative process privilege is a separate legal issue from the Commission's authority to review the Secretary's decision. Rather than serving as a blanket prohibition against inquiry regarding the Secretary's decision to issue a POV Notice, it should be raised on a case-by-case basis where the issue arises.

[8] I do not suggest that any procedural inadequacy would inherently invalidate the resulting POV Notice. As noted, agency actions are generally reviewable under the arbitrary and capricious standard. 5 U.S.C. § 706. If the Commission were to conduct a review and conclude that the Secretary failed to comply with a procedural requirement, we would then determine whether that failure was arbitrary and capricious. For example, if the Secretary failed to consider a section 104.2 factor, the POV Notice may still be valid if the other factors so overwhelmingly supported the issuance of a POV Notice that the Secretary's decision to issue the notice was not arbitrary or capricious.

Nor does the privilege eliminate all potential lines of questioning as a practical matter. The privilege applies to information that is deliberative and pre-decisional.[9] *See In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992-94 (June 1992). The Secretary's *decision* to issue a POV Notice is inherently a final determination rather than a pre-decisional deliberation. More practically, an operator seeking to challenge (or a Judge reviewing the validity of) a POV Notice will logically be most interested in determinations *reflected in that final issuance*, rather than preliminary analyses that may not have even been adopted: The details of how an MSHA employee weighed a particular factor when considering whether to propose a mine for POV status would be of less interest than whether the Secretary considered that factor when she made the final decision to issue the POV Notice. While lines of questioning may (even accidentally) stray into pre-decisional matters, they would not naturally be the focus of review.[10] And, as noted, in the event a line of questioning does stray into pre-decisional deliberations, the Secretary may assert the deliberative process privilege.

D. Limited review by the Commission would not unduly disrupt litigation.

The majority asserts that Commission review of the Secretary's decision to issue a POV Notice would require a separate hearing, resulting in a "trifurcate[d]" proceeding and imposing unduly burdensome procedural hurdles and delays. Slip op. at 13-15. No such "trifurcation" has been suggested, nor is it necessary. I note that POV litigation is already routinely bifurcated: this case was bifurcated on September 5, 2023, with one proceeding to adjudicate the substantive citations and one to adjudicate the POV Notice. Adjudication of a POV Notice *already* permits some review of the Secretary's rationale in deciding that a pattern of violations exists. *Brody II*, 37 FMSHRC at 1928 (the Secretary is "ordinarily required to disclose [her] theory" underlying the pattern). The increased scope of review proposed in this opinion would merely allow an operator to raise, and a Judge to address, limited additional arguments *during the existing POV Notice proceeding*. Any "delays" arising from these additional arguments, for example, the need to take further testimony or address deliberative process objections, would be no more time-consuming than normal complications arising during litigation, and would not be sufficient

[9] There may also be an exception to the privilege "if a party can clearly show that the decision resulted from bias, bad faith, misconduct, or illegal or unlawful action." Privilege – Deliberative Process (1), *Black's Law Dictionary* (11th ed. 2019).

[10] Questions regarding the Secretary's consideration of mitigating circumstances, as at issue here, may be particularly likely to stray into internal deliberations (for example, questions as to why a particular circumstance was not given more weight). Notably, however, the Judge in this case phrased the issue as a dispute regarding how the circumstances "factored into" the issuance of the Notice. Order at 2 (Dec. 5, 2023). This could be interpreted as questioning the Secretary's post-decisional "theory of the pattern" rather than pre-decisional deliberations. Regardless, questions regarding the Secretary's consideration of mitigating circumstances should not be *inherently* prohibited, as consideration of mitigating circumstances is a procedural requirement in section 104.2(a). While the Secretary's frustration with this line of questioning is understandable, I do not believe the Judge erred as a legal matter in finding the Secretary's consideration of mitigating circumstances "material" to the case.

justification to abrogate our responsibility of ensuring that the Secretary abides by her binding regulations.

E. Conclusion

The Commission's role in Mine Act adjudication is to render proper review of actions taken under the statute. I would find that Commission review of the Secretary's decision to issue a POV Notice is authorized under the Mine Act, at least with respect to certain procedural requirements that bind the Secretary's exercise of prosecutorial discretion. Accordingly, I respectfully dissent.

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

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August 29, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JASON HARGIS	
v.	Docket No. SE 2021-0163
VULCAN CONSTRUCTION MATERIALS, LLC	Docket No. SE 2022-0001
JASON HARGIS	Docket No. SE 2022-0013
v.	
VULCAN CONSTRUCTION MATERIALS, LLC	

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

DECISION

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

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., 815(c)(2) (2018) ("Mine Act" or "Act"). They involve three cross-petitions for discretionary review by the Secretary of Labor ("Secretary"), Vulcan Construction Materials, LLC ("Vulcan" or "the operator"), and a miner, Jason Hargis ("Complainant" or "Hargis").

The proceedings originated from a back injury reported by Hargis on Monday, April 12, 2021. He first experienced the injury while working at the mine on Saturday, April 10, 2021. He was terminated on May 12, 2021.

Following his termination, Hargis filed a timely complaint of discrimination under section 105(c) of the Act with the Department of Labor's Mine Safety and Health Administration ("MSHA") on June 7, 2021. He alleged that his report of his injury was protected activity and that his firing one month later constituted unlawful retaliation. The Secretary found that Hargis' complaint was not frivolously brought. Upon agreement of the parties, the Administrative Law Judge entered an order temporarily economically reinstating Hargis, effective July 27, 2021.

On October 1, 2021, the Secretary filed her own discrimination complaint under section 105(c)(2)[1] of the Act. On December 13, 2021, she also filed a civil penalty petition alleging that the operator had failed to report Hargis' occupational injury to MSHA, as required by 30 C.F.R. § 50.20(a).[2]

After a hearing on the merits, the Judge issued a decision on December 1, 2022. 44 FMSHRC 733 (Dec. 2022) (ALJ). The Judge affirmed the Secretary's civil penalty case and held that the operator failed to report an occupational injury. The Judge dismissed the Secretary's discrimination complaint, and immediately dissolved his previously issued order, which had temporarily reinstated Hargis. All three parties filed petitions seeking discretionary review of the Judge's decision, which the Commission granted.

Hargis contends that the Judge erred in dismissing the merits of his discrimination complaint. Vulcan claims that the Judge erred in finding that mine management violated section 50.20(a)'s injury reporting requirement. The Secretary argues that the Judge erred in terminating Hargis' temporary reinstatement on the same day the Judge issued his merits decision, since his merits decision was not yet a "final order" under section 113(d)(1) of the Act. *See* 30 U.S.C. § 823(d)(1). The Secretary does not seek review on the merits of the Judge's finding regarding discrimination.

For the reasons stated below, we affirm the finding that the operator violated 30 C.F.R. § 50.20(a) by failing to report an occupational injury.

We also affirm the Judge's holding that the operator's explanation for terminating Hargis was not pretextual, but find that the Judge erred in applying the *Pasula-Robinette* test.

Finally, we hold that the Judge erred in dissolving his temporary reinstatement order immediately with his discrimination decision. We conclude, under sections 105(c)(2)[3] and

[1] Section 105(c) prohibits discrimination against miners in retaliation for exercising any protected right under the Act. *See generally* 30 U.S.C. § 815(c).

[2] Section 50.20(a) states that operators "shall report each accident, occupational injury, or occupational illness at the mine." 30 C.F.R. § 50.20(a). Section 50.2(e) defines an "occupational injury" as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job." 30 C.F.R. § 50.2(e) (2022).

[3] Section 105(c)(2) authorizes temporary reinstatement pending "final order on the complaint" and instructs that the "order shall become final *30 days* after [the] issuance" of the decision. 30 U.S.C. § 815(c)(2) (emphasis added).

113(d)(1)[4] of the Act, that temporary reinstatement expires 30 days after the Commission issues an appellate decision – or alternatively, if the Commission declines to grant review, we hold that temporary reinstatement expires 40 days after a judge issues his or her decision.

Accordingly, we affirm in part and vacate in part the Judge's decision.

I.

Factual and Procedural Background

A. Factual Background

1. Hargis' Work and Disciplinary History at the Mine

Vulcan operates the Wilson Quarry, a rock crushing facility in Tennessee. Tr. 502. Hargis was a miner at the Wilson Quarry from August 2018 until he was discharged on May 12, 2021. Tr. 11-12. He mainly worked as a plant operator during the time relevant to this proceeding. Tr. 305.

As plant operator, Hargis had a variety of duties, including running the plant's crushing machinery to break and size rocks mined at the quarry, Tr. 306; cleaning, e.g., shoveling, and maintaining an area assigned to him, Tr. 348; and lubricating or greasing the bearings of the crushing machine daily. Tr. 415.

While working at the mine, Hargis had been disciplined pursuant to the company's progressive discipline policy under which employees were verbally warned, then given a written warning, followed by a second written warning and three-day suspension. Sec. Ex. 7, 8. The second written warning provides that the employee may be terminated for any subsequent violation of company policies. Sec. Ex. 8.

Hargis' disciplinary issues were not related to his duty to run the plant's crushing machinery. Rather, they stemmed generally from his failures to completely clean and grease areas and equipment for which he was responsible before leaving work. Specifically, Hargis received his first written warning from his direct supervisor on December 4, 2020, for a failure to clean his area. Tr. 347. Hargis admitted that he had been counseled about the need to clean more thoroughly, but that he disagreed, and that he did not change what he was doing in response to his supervisor's input. Tr. 408-09. Hargis received his second written warning from another supervisor on February 8, 2021, for leaving work before the end of his February 1 shift without completing his cleaning.

2. Management at the Mine

[4] Section 113(d)(1) of the Act states that "[t]he decision of the administrative law judge of the Commission shall become the final decision of the Commission *40 days* after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission . . . ." 30 U.S.C. § 823(d)(1) (emphasis added).

Hargis worked under two direct supervisors, Kyle Parr and Chris Williams, who replaced Parr following Parr's resignation. The plant also employed a more senior manager, Anthony Humes, who managed the two plant supervisors.

Hargis testified generally that management was dismissive of miners' concerns regarding their treatment, and that he felt "targeted." Tr. 367. He also criticized Parr specifically, claiming that Parr had "no clue" about plant operations. Tr. 368. Other miner witnesses similarly criticized Parr's management style and testified that Parr seemed to target Hargis and others. *See, e.g.*, Tr. 59, 65 (testimony by Vulcan's lead man Andrew Tucker), *see also* Tr. 207 (testimony of equipment operator Cody Dycus), Tr. 241-42 (testimony of hourly employee Shane Stultz).

Parr resigned in January 2021, and Humes assumed Parr's duties. Tr. 700. Accordingly, Humes (rather than Parr) was the plant manager at the time of the events raised in Hargis' complaint. While some miner witnesses took issue with Humes' management style, their testimony indicates that Humes did not uniquely target Hargis. *See* Tr. 85-86, 111-14 (Tucker's testimony that Humes "yelled at everybody" but did not target Hargis); Tr. 258 (Schultz's testimony that Humes "had it out" for both Schultz and Hargis).

Williams was brought to the Wilson Quarry to replace Parr and assumed supervisory responsibility over the plant. Witnesses testified that Vulcan was generally a safety-conscious operator. *See* Tr. 79, 397-98.

3. Hargis' Injury, Request to See a Physician, and Termination

On Saturday, April 10, 2021, Hargis injured his back while working at the mine. Tr. 46-48, 314-16. He was working with his supervisor, Williams, and the lead man, Tucker, at the time. All three miners were working to install liner plates at the mine's rock crusher. Tucker was working inside the crusher with Williams working outside the crusher to attach plates from the outside. Hargis also worked on the outside of the crusher, handing the plates into the crusher to Tucker. Each plate weighed approximately 35 to 50 pounds. Tr. 314-15. Hargis had to reach, lean, and twist to pick up the plates and pass them into the crusher for installation. Tr. 315-16.

While handing the plates to Tucker, Hargis experienced pain and discomfort in his lower back, which he conveyed to Williams. Hargis mentioned it in passing to Tucker and Williams on April 10, but he felt that his back might get better if he rested over the remaining portion of the weekend before officially reporting the incident. Tr. 314-16, 415. During the weekend, Hargis used heat and ice to try to alleviate the pain, but it grew worse. Tr. 314. By Monday, April 12, 2021, his lower back condition had not improved, so he reported this to Williams and requested to see a physician.[5] Tr. 316. Williams responded that he would turn in Hargis's request, which Hargis understood to mean that Williams would inform other mine management. Tr. 316-17.

[5] TENN. CODE ANN. § 50-6-204(a)(1)(A) (2022) requires employers to furnish medical treatment to an employee, free of charge, when such employee suffers a qualifying work-related injury.

Hargis was placed on light duty through April 14, 2021, when he took medical leave for an unrelated cardiac procedure. Tr. 317-20. Hargis would operate the plant crusher but would not perform any of his other job duties, which included cleaning his work area of rock debris, and greasing equipment. Tr. 371.

On April 14, Hargis exchanged text messages with the safety manager Brandon Clemmons who confirmed Hargis' painful condition and his modified duty of only running the plant crusher. Sec. Ex. 9. Hargis testified that his injury made even running the plant crusher uncomfortable while other tasks, such as cleaning and greasing, were "very painful" to "unbearable." Tr. 323.

Hargis was thereafter off work for a cardiac procedure from April 15 through May 3, 2021. Hargis testified that when he returned to work at the mine on May 4, he was still experiencing back pain from the April 10 injury. Tr. 328. He testified that he reported the continued injury and pain to supervisors Williams and Humes. Tr. 329. Hargis further testified that around May 8, 2021, he told safety manager Clemmons that his back still hurt from the April injury, but Clemmons did not respond. Tr. 384. Clemmons denied that this interaction ever occurred. Tr. 748.

Williams and Humes testified that after his return on May 10-11, 2021, Hargis was still not completing his assigned duties as required. Specifically, Humes testified that Hargis was not cleaning his zone or greasing his equipment fully and was leaving hazards behind for the next morning. Tr. 612-13. This was discussed in both staff safety meetings with management and with Hargis one-on-one. Tr. 612-13.

Humes testified that Williams recommended terminating Hargis' employment for failing to clean his area and grease his equipment as well as for leaving work without telling anyone these tasks had not been completed. Humes then called Ellis at HR and recommended that Hargis be terminated. Tr. 631. As set forth above, the operator had previously warned and disciplined Hargis about such failures. This discipline included a three-day suspension and notice that an additional failure could or would result in termination of employment.

The next day, on May 12, 2021, Hargis told Williams that he could not deal with his back issues anymore, and again requested to see a doctor. Mine management witnesses testified that prior to Hargis' request to see a physician on May 12, they had already decided to terminate Hargis based upon his prior work writeups as well as his most recent poor job performance. Tr. 508-09, 520, 612-13, 630-31.

Later that day, management provided Hargis a panel of physicians for treatment under the Tennessee Workers' Compensation Act, in addition to terminating his employment. Ex. 6, Tr. 338. Hargis was advised that he was being terminated because of his two prior writeups and the most current job performance, and that the decision to terminate him bore no relationship to his request for seeing a physician. Tr. 631; 781-83. Ellis had law enforcement present during the termination based on misleading information from Williams that Hargis "normally had a gun on him." 44 FMSHRC at 746 (ALJ).

B. The Judge's Decision

The Judge held a hearing from April 12 to April 14, 2022. The hearing covered both the discrimination complaint and the alleged reporting violation. On December 1, 2022, the Judge affirmed the Secretary's civil penalty case and held that Hargis had experienced an occupational injury that the operator failed to report in violation of section 50.20(a). The Judge dismissed the Secretary's discrimination complaint. The Judge then immediately dissolved his previously issued order temporarily reinstating Hargis.[6]

II.

Disposition

A. The Judge properly found that the operator violated section 50.20(a) by failing to report Hargis' occupational injury.

Under section 50.20(a), operators "shall report each accident, occupational injury, or occupational illness at the mine." 30 C.F.R. § 50.20(a) (2022). The Secretary has defined an "occupational injury" as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job." 30 C.F.R. § 50.2(e) (2022).

The specific issue here is whether Hargis' injury resulted in an "inability to perform all job duties." 30 C.F.R. § 50.2(e)(3). After reviewing the Judge's decision, we conclude that substantial evidence supports the Judge's finding that Hargis' pain, along with Vulcan limiting his essential duties, Tr. 628, showed that Hargis was unable to perform all his job duties due to his injury. This made it a reportable "occupational injury" under 30 C.F.R. § 50.2(e).

Specifically, the ALJ relied on Hargis' testimony at hearing that his lower back pain was "extraordinary" and "unbearable." Tr. 323, 379. Hargis made it very clear to Williams on April 12 that his back pain was worsening, and that he could not perform his normal tasks at "a hundred percent." Tr. 381-82; *see also* Sec. Ex. 9 (text messages with safety director Clemmons confirming that Hargis was "taking it easy" due to his lower back injury). The Judge also credited Hargis' testimony that he asked Williams to see a doctor on April 12. 44 FMSHRC at 747. Furthermore, the Judge credited Hargis' co-worker Clint Evans' testimony that Hargis had let the crew know when he needed help cleaning, explaining that Hargis "would clean what he could" but that "his back would limit him." Tr. 177–78. Humes also testified that, because of his pain, Hargis was placed on "light duty," *i.e.,* he would not have to clean the passageways or

[6] Our dissenting colleague provides a timeline of these proceedings on appeal that is misleading, incomplete, and filled with ad hominem attacks against his colleagues. Our responses will be limited to our colleague's factual and legal arguments.

grease the crusher. Tr. 627-29. This is substantial evidence that supports the ALJ's conclusion that the miner suffered a reportable occupational injury pursuant to 30 C.F.R. § 50.2(e).[7]

Vulcan argues that even though Hargis' job was "painful" to do, he was not "unable" to do it, and therefore the reporting requirement was not triggered.

Further, Vulcan argues that even if Hargis were unable to perform all of his job duties, the operator was unaware of that fact. As stated above, the record establishes that mine management knew about Hargis' pain, and that they had placed him on modified light duty as a result. Tr. 381–82, 627-29 (Humes' testimony); Sec. Ex. 9. The ALJ credited this evidence over the testimony from Ellis that placing Hargis on light duty was out of "kindness" rather than necessity. *See* Tr. 538-39. When the Commission reviews a Judge's factual findings, "credibility determinations are entitled to great weight and may not be overturned lightly." *Pappas v. CalPortland*, 40 FMSHRC 664, 671 (May 2018) (citations omitted).

We hold that substantial evidence supports the Judge's determination that Hargis suffered an occupational injury, and that the operator had the requisite knowledge to support a finding of a violation of section 50.20(a).

B. The Judge erred in finding no nexus of discrimination, but the operator affirmatively defended the termination.

Section 105(c) of the Act prohibits discriminating against miners for exercising any protected right under the Act. A miner alleging discrimination under the Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom*. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817-18 (Apr. 1981) (the "*Pasula-Robinette*" analysis).

Under *Pasula-Robinette*, the operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone. *Id*. at 817-18; *Pasula*, 2 FMSHRC at 2799; *see also Con-Ag, Inc. v. Sec'y of Lab*., 897 F.3d 693, 700 (6th Cir. 2018) ("Discrimination claims

[7] The Secretary argues that we must interpret "inability" in section 50.2(e) to mean, as a matter of law, that the miner is suffering a "functional" rather than "literal" inability to work. Sec. Resp. Br. at 10. She claims that under the operator's interpretation, nothing less than total physical disability renders a miner unable to do something within the meaning of section 50.2(e). However, it is unnecessary to reach this issue or set forth a definition of "inability" beyond its regular, common meaning. The facts in this case show that Hargis was in considerable pain and as a result, unable to perform all his job duties. Tr. 177–78, 323, 379, 627-28. Therefore, substantial evidence supports the ALJ's determination regarding section 50.2(e).

under the Act are analyzed using the *Pasula–Robinette* framework."); *Boich v. Fed. Mine Safety & Health Rev. Comm'n*, 719 F.2d 194 (6th Cir. 1983) (same).[8]

Because direct evidence of discriminatory intent is rare, we look to common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant, with knowledge of the protected activity often being the most important factor. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (1981), *rev'd on other grounds sub nom. Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

1. The Judge erred in finding that there was no nexus between Hargis' protected activity and his termination.

We hold that the Judge erred in finding that there was insufficient evidence—either direct or indirect—to support a nexus between the protected activity on April 12 and May 12 and the adverse employment action on May 12.

a. The Judge erred in finding that no inference of discrimination may be found based on management knowledge of protected activity.

Hargis injured himself at work on Saturday, April 10, 2021, and contemporaneously mentioned the injury in passing to his supervisor, Chris Williams. The Judge found that over the weekend, the pain from the injury became worse, and on Monday, April 12, Hargis made a formal request to Williams to see a physician for the injury. 44 FMSHRC at 743, 747; *see also* Tr. 316. The supervisor responded that he would get the request "turned in" to upper management and placed Hargis on light duty. *Id*. at 743-744.

Despite the Judge's finding that management was aware of Hargis's injury on April 10 and his requests to see a doctor on April 12 and May 12, the Judge focused his analysis almost entirely on the May 12 request, finding that "Complainant's request for medical care on May 12 certainly had no effect on a termination decision that was well underway before the decisionmakers were aware of it." *Id*. at 759. The Judge based this holding on the fact that Williams appears not to have told upper management about Hargis's April 12 request for a doctor, and it was upper management that made the decision to terminate Hargis. While Ellis, the mine manager, might have been unaware of Hargis's request to see a doctor, the record clearly shows that Ellis's decision to terminate Hargis began with Williams and worked its way up to

[8] The Ninth Circuit in *Thomas v. CalPortland Co*., 993 F.3d 1204, 1210–11 (9th Cir. 2021) recently decided that Commission discrimination cases in that Circuit must apply the Supreme Court's "but for" analysis used for Title VII cases. *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). The instant case is not within the Ninth Circuit, and neither party has contested the application of the *Pasula-Robinette* standard. *Contrast Cont'l Cement Co. v. Sec'y of Lab.,* No. 23-2213, 2024 WL 827782 *3 (8th Cir. Feb. 28, 2024) (acknowledging Commission's application of *Pasula-Robinette* but following the Secretary's position that the approach "requires but-for causation.").

Ellis. According to the Judge's findings, "Mr. Humes said Mr. Williams recommended Complainant be terminated . . . " and "Mr. Humes called Mr. Ellis and explained the issue to him . . . [h]e recommended Complainant be terminated." *Id*. at 745. Stated differently, Hargis's supervisor, Williams, knew of Hargis's request for a doctor; Williams recommended to Humes that Hargis be fired; and Humes recommended to Ellis that Hargis be fired.

The Commission has acknowledged that an operator may not launder knowledge and animus through a neutral superior where superior had no knowledge of employee's protected activity, but 'acted in direct response to another supervisor's recommendation to dismiss an employee. *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1068 (May 2011), citing *Boston Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982); *see also Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) ("An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions."). Here, there is no question that Williams knew of Hargis's protected activity and that he was involved in the decision to fire Hargis. Therefore, his knowledge should be imputed to the ultimate decisionmakers.

b. The Judge erred in finding that there was no hostility or animus toward the protected activity.

The Judge found that Hargis properly reported his injury to his supervisor and requested to see a doctor due to the pain he was experiencing from the April 10th injury. Despite the supervisor's response that he would inform upper management, the supervisor appears to have taken no actions to ensure that Hargis be provided a doctor.

The Judge erred in finding that ignoring or evincing "indifference" towards a miner's injury and protected activity of requesting medical care did not constitute animus toward the protected activity. It is the very definition of animus towards a protected activity when a miner makes a health or safety complaint or engages in protected activity that requires attention, and the operator chooses to ignore it and do nothing. The Judge focused his entire analysis of animus on whether management treated Hargis unkindly following his protected activity.[9] While hostility directed towards a miner may indicate animus, the Commission has clearly stated that

[9] The Judge found that the way that the operator carried out the termination—with two sheriff's deputies present—was "unfortunately embarrassing" and based on information that may have been unflatteringly conveyed to Ellis. 44 FMSHRC at 746, n.18. The operator's use of law enforcement runs contrary to the Judge's holding that management did not show any hostility towards Hargis. The Judge noted that neither Humes nor Williams said anything about Hargis having a history of violence, and that "such a characterization would be inconsistent with the testimony of Complainant's co-workers and the demeaner I observed during the hearing." *Id*. Hargis testified that the presence of law enforcement was "intimidating" and "embarrassing." Tr. 338. The Judge found that Ellis made the decision to have law enforcement present because Williams and Humes told him that Complainant "normally had a gun on him," but Williams testified that although he had seen Hargis carry a gun "at times," he had never seen him have one at work. 44 FMSHRC at 746, n.18. This treatment of Hargis not only displayed hostility towards him generally, but also shows another instance of upper management making an independent decision with regards to the termination based on the recommendation of Williams.

the proper inquiry should focus on animus "specifically directed towards the alleged discriminatee's protected activity." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC at 2511.[10]

Animus towards a protected activity does not require that the operator display anger or unkindness towards the miner. If a miner makes a complaint about an unsafe condition at the mine and the supervisor responds with a smile and shrug but takes no action to investigate or correct the condition, the supervisor has displayed animus toward the protected activity. Here, Williams's refusal to provide Hargis with medical care, whether through indifference or ignoring the Complainant's exercise of his rights as a miner, constitutes a form of animus toward the protected activity. Just as with knowledge, the Commission has held that the animus of a supervisor who participates in the termination decision in any way can be imputed to the operator. *See Turner*, 33 FMSHRC at 1068; *Metric*, 6 FMSHRC at 230 n.4. Therefore, the Judge erred in holding that there was no evidence of animus because the operator ignored and displayed indifference toward Complainant's request for medical care.

c. The Judge erred in finding that the coincidence in time did not indicate discrimination occurred.

The Judge's decision focuses almost entirely on Hargis's May 12 request to see a doctor, finding that since the decision to fire Hargis had already been made by then, "the coincidence in time turns out to be just that—a coincidence." 44 FMSHRC at 761. However, the Judge engaged in no analysis as to whether Hargis's April 12th request for a doctor was sufficiently close in time to serve as one of the circumstantial indicia of discriminatory intent.

"We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *Sec'y of Labor on behalf of Hyles v. All Am. Asphalt*, 21 FMSHRC 119, 132 (Feb. 1999), quoting, *Hicks v. Cobra Mining, Inc.,* 13 FMSHRC 523, 531 (Apr. 1991). As a Commission judge has pointed out that:

> Improper motive has been found in cases with varying periods between the protected activity and the adverse action, ranging from a few hours to a few months. *See, e.g., Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986-87 (holding that the ALJ was correct in inferring a discriminatory motive from adverse action taken less than two hours after complainant's safety complaints); *Sec'y of Labor on behalf of Houston v. Highland Mining Co.*, 35 FMSHRC 1081, 1093 (Apr. 2013) (ALJ) (holding that a five-day gap between the adverse action and protected activity constituted circumstantial evidence of a nexus); *Baier*, 21 FMSHRC

[10] In the seminal *Chacon* decision, the majority makes clear that the focus of the inquiry is the animus *toward the protected activity*, while the dissent states that the focus of the analysis should be "the existence of employer hostility or animus *toward an employee*." *Chacon*, 3 FMSHRC at 2524 (Lawson dissenting) (emphasis added).

> at 959 n.7 (holding that two weeks between complainant's discussion with MSHA inspector and discharge was sufficiently coincidental in time to support a finding of discriminatory motive); *see also CAM Mining, LLC*, 31 FMSHRC at 1090 (holding that three weeks between the protected activity and adverse action was sufficient to find discriminatory motive); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (holding that an adverse employment action four months after a protected activity constituted close temporal proximity where the operator had knowledge of the protected activity); *Hyles*, 21 FMSHRC at 42, 46-47 (finding temporal proximity despite 15-month gap between miners' contact with MSHA and the failure to recall miners from layoff where only a month had passed from MSHA's issuance of penalty as a result of the miners' notification of the violations and given evidence of intervening acts of hostility, animus, and disparate treatment).

Sec'y of Labor on behalf of Vega v. Syar Indus., Inc., 40 FMSHRC 55, 64 (Jan. 2018) (ALJ).

In the instant case, Hargis was fired on May 12, one month after he first engaged in protected activity. Though one month is sufficient to support an inference of discrimination, the time period may even be considered shorter because Hargis was on medical leave during much of that month. Following the April 12th request to see a doctor, Hargis was on light duty from April 12-14, and then on unrelated medical leave from April 14-May 4. Hargis was fired approximately one week after he returned on May 4. Therefore, he was only on working status for approximately ten days from when he engaged in protected activity to when he was fired. The Judge's finding that the May 12th request for medical care was too late to inform the decision to fire Hargis, erred in failing to analyze whether the April 12th request was close enough in time to infer discriminatory intent.

d. Substantial evidence supports the Judge's finding that the evidence in the record does not support a finding of disparate treatment.

Substantial evidence supports the Judge's determination that the only evidence of any potential disparate treatment had occurred *before* Hargis' April 10th injury and his exercise of protected activity. *Id*. at 755-58; Sec'y Ex. 7 (December 4, 2020 written warning to Hargis); Sec'y Ex. 8 (February 8, 2021 second written warning and three-day suspension). However, "[t]he Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present." *Sec'y of Labor on behalf of Harrison v. Consolidation Coal Co*., 37 FMSHRC 1497, 1511 (July 2015) (ALJ), *citing Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510-13 (Nov. 1981).

Hargis argued that his February 8, 2021, receipt of a second written warning under Vulcan's progressive discipline policy (for leaving work before the end of a shift on February 1 with four coworkers) constituted disparate treatment by management, particularly on the part of

Parr. 44 FMSHRC at 755-56. In determining that this evidence did not demonstrate disparate treatment, the Judge noted that another miner, Clint Evans, also left early and was told by Williams that he would incur discipline for doing so. *Id*. at 756. The Judge also considered that, on another occasion, management gave a second written warning and three-day suspension to Caleb Walker due to a similar disciplinary history. *See* Tr. at 548, 549; Vulcan Ex. L at 36. Beyond the fact that Hargis was treated consistently with other miners, the Judge emphasized how this incident (and every action Hargis alleged was part of the campaign to "get rid" of him) *predated* Hargis' first exercise of protected activity on April 12, 2021 and therefore could not have motivated Vulcan's actions. Substantial evidence supports this determination.

Despite the Judge's finding that there was insufficient evidence to find disparate treatment, the Judge erred in finding that there was insufficient evidence to support an inference that Complainant was discriminated against because of his protected activity. The operator, however, "may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC at 2799-2800.

2. Substantial evidence supports the Judge's finding that Vulcan presented an affirmative defense that its termination of Hargis would have been taken based on unprotected activity alone.

Having found that the Complainant met his burden in presenting a *prima facie* case, the operator may rebut by showing that the "adverse action was in no part motivated by protected activity. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone."[11] *Sec'y of Labor on behalf of Pendley v. Highland Mining Co*., 34 FMSHRC 1919, 1920 (Aug. 2012) (citation omitted).

In the instant case, Hargis had received two written warnings according to the company's progressive discipline policy for not cleaning and greasing the areas and equipment for which he was responsible prior to leaving work. Tr. 347, 408-409. Hargis testified that he understood the employer's requirement that he clean his area, but stated that he did not change the manner in which he cleaned because he disagreed with his supervisor. Tr. 408-409.

On May 10 and 11, Hargis left work without cleaning and greasing his area properly, or telling anyone that he had not cleaned or greased his area. Tr. 630-631, 785. Hargis admitted that he did not clean or grease his areas on those days, and did not know if anyone else had done so. Tr. 422-424. Hargis testified that he could not grease his area on those days because he did not have the proper equipment. Tr. 435. This explanation does not excuse Hargis for leaving without

[11] Since the Judge in this case held that the Complainant had not made a *prima facie* case, he applied a pretext analysis. Having found that the Judge erred in holding that no inference of discrimination could be drawn, we now apply an affirmative defense analysis, which is effectively identical to the pretext inquiry.

informing anyone that he had not cleaned or greased his area. Due to the two previous write-ups, Hargis was on a last-chance agreement when he left without telling anyone that he did not clean or grease his area on May 10-11. Tr. 712. The operator has adequately shown that it followed its progressive discipline policy and would have fired Hargis for a non-discriminatory reason alone.

C. The Judge erred in dissolving the temporary reinstatement order, prior to it becoming a final order of the Commission.

The Judge abused his discretion when he dissolved the temporary reinstatement order upon the issuance of his decision on the merits of the complaint. Temporary reinstatement terminates upon a "final order on the complaint" (30 U.S.C. § 815(c)(2)) and a Judge's decision does not become a final order of the Commission immediately upon issuance.[12]

In *Sec'y on behalf of Bernardyn*, 21 FMSHRC 947 (Sep. 1999), the Commission unanimously reversed a Judge when he attempted to dissolve a temporary reinstatement order upon the issuance of his decision on the merits of the complaint. The Commission held that:

> . . . when the judge purportedly dissolved the temporary reinstatement order, the time had not yet passed for the Commission to review the judge's decision on the merits of Bernardyn's discrimination complaint. Accordingly, the judge's decision had not yet become a final Commission decision. 30 U.S.C. § 824(d)(1). Thus, the judge lacked statutory authority to dissolve the temporary reinstatement order concurrently with his discrimination decision or at any time before we could direct review. Since we have granted the Secretary's petition for review of the judge's determination on the merits, the judge's dismissal of the complaint will not become a final decision under section 113(d)(1) of the Act until we review and issue a decision upon that matter.

21 FMSHRC at 949.

Section 105(c)(2) of the Act states, once it has been determined that an application for temporary reinstatement has not been frivolously brought, the Commission, "shall order the immediate reinstatement of the [] miner pending final order on the complaint." 30 U.S.C.

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[12] Our dissenting colleague argues that by the term "final" decision, the Secretary means a final non-appealable decision by the Commission, a United States Circuit Court of Appeals, or the United States Supreme Court." Slip op at 27. This argument exceeds the bounds of the parties' arguments or the issues before us. In fact, the Secretary simply noted, "[w]hether temporary reinstatement continues pending review by a court of appeals is beyond the scope of the supplemental briefing order." Sec'y Supp. Br. at 2, n.1. Moreover, the Commission lacks authority to order a Circuit Court or the Supreme Court to either continue a temporary reinstatement or dissolve it, once jurisdiction passes to the federal tribunals. As a result, we need not address this issue here.

§ 815(c)(2). Section 113(d)(1) of the Act states that "[t]he decision of the administrative law judge . . . shall become the final decision of the Commission 40 days after its issuance *unless* within such period the Commission has directed that such decision shall be reviewed . . . ." 30 U.S.C. § 824(d)(1) (emphasis added). Consistent with these statutory mandates, the Commission "vacate[d] the judge's order, and order[ed] the continued temporary reinstatement of Bernardyn pending a final Commission decision on the complaint." *Id*. at 951. *See also Sec'y on behalf of Alvaro Saldivar,* 45 FMSHRC 947 (Nov. 2023); *Sec'y on behalf of Grant Noe,* 22 FMSHRC 705, 706 (June 2000).

In the instant case, the operator argues that the Commission's construction of the Act in *Secretary of Labor on behalf of Bernardyn* was later rejected by the Sixth and Seventh Circuits in *North Fork Coal Corp*., 691 F.3d 735 (6th Cir. 2012), and *Vulcan Constr. Materials*, 700 F.3d 297 (7th Cir. 2012). The operator is incorrect, conflating the provisions of 105(c)(2) and 105(c)(3) of the Act.

In contrast to the instant case, the actions before the Court in *North Fork* and *Vulcan* were filed by miners on their own behalf pursuant to section 105(c)(3) of the Act, rather than by the Secretary on the miners' behalf pursuant to section 105(c)(2).[13] As noted, section 105(c)(2) provides that temporary reinstatement shall continue "pending final order on the complaint." The Sixth and Seventh Circuits clarified that the statutory basis for temporary reinstatement expires if the Secretary concludes her investigation and determines that no violation has occurred, i.e., decides not to file a complaint under section 105(c)(2). *North Fork*, 691 F.3d at 743; *Vulcan*, 700 F.3d at 310 ("the temporary reinstatement order lasts only as long as the proceedings [are] governed by § 815(c)(2)"). The holdings in *North Fork* and *Vulcan* are entirely consistent with the Commission's ruling in *Bernardyn*.

Vulcan now argues that because Hargis, and not the Secretary, filed the petition seeking review of the Judge's decision, this proceeding is more akin to a section 105(c)(3) proceeding. According to Vulcan, the temporary reinstatement order should be dissolved. This argument does not account for the Act's plain requirements; once the Secretary determines that the Act was violated and files a complaint pursuant to section 105(c)(2), temporary reinstatement is to continue until there is a final order on that complaint. 30 U.S.C. § 815(c)(2). There is no mechanism under the Act that transforms a complaint filed pursuant to section 105(c)(2) to a

[13] According to section 105(c)(2), if the Secretary finds that a miner's allegations of discrimination are "not frivolously brought" the Secretary applies for the miner's temporary reinstatement. The Secretary, thereafter, conducts further investigation, and if she determines that the requirements of section 105(c) have been violated, she files a complaint of discrimination with the Commission. 30 U.S.C. § 815(c)(2). In *North Fork* and *Vulcan*, the Secretary initially applied for temporary reinstatement, which the Commission granted. After further investigation, however, the Secretary determined that unlawful discrimination had not occurred, and declined to file a section 105(c)(2) complaint. Instead, the miners filed complaints of discrimination on their own behalf as permitted under section 105(c)(3), which does not provide for temporary reinstatement. 30 U.S.C. § 815(c)(3). As will be discussed further below, our dissenting colleague makes this same error in his analysis by treating the Secretary's decision not to appeal the merits of this case as equivalent to those cases where the Secretary determined during the course of an investigation that no discrimination occurred.

section 105(c)(3) action. Rather, the Act clearly delineates between these two types of cases. The complaint at issue was filed pursuant to section 105(c)(2). The Secretary may file a motion to withdraw her section 105(c)(2) complaint if she determines, during the litigation process, that section 105(c) of the Act was not violated. *See, e.g., PCS Phosphate Co.*, 33 FMSHRC 5, 6 (Jan. 2011). This has not happened.

Although the Secretary has not petitioned for review of the Judge's decision on the merits, that decision is independent from her investigation and determination that the operator violated section 105(c)(2) of the Act.[14] Sec'y Rep. Br. at 7. Here, the Commission granted review of the Judge's decision on the merits of the Secretary's section 105(c)(2) complaint.[15] Accordingly, the order is not final; temporary reinstatement continues.

We are not persuaded by Vulcan's argument that as a matter of due process, the temporary reinstatement must end once the Judge issues its decision in the 105(c)(3) case. Courts have long held that the process for temporary reinstatement before the Commission is sufficient, and that Congress intended employers to bear a proportionately greater burden of the risk of erroneous temporary reinstatement. *See Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990) ("JWR"), *quoting Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 263 (1987). It has been well-established that due process is satisfied so long as the "pre-reinstatement procedures establish a reliable initial check against mistaken decisions, and complete and expeditious review is available.'" *JWR*, 920 F.2d at 745-46. Prior to the Secretary petitioning for temporary reinstatement, it conducted an investigation, wherein the operator had the opportunity to provide evidence and information concerning the Complainant's termination. Following this investigation, once the Secretary determined that a non-frivolous claim of discrimination had been made, Vulcan had the right to a hearing on whether the miners' allegations were frivolous,

[14] We reject the operator's attempts to apply our "abandonment" doctrine to this case. This is not a situation where a party is attempting to raise an argument on its own behalf in a reply brief for the first time, nor is it a scenario in which a party has raised an issue in its petition for discretionary review but then failed to raise it in its subsequent briefing. *See, e.g.*, *Sunbelt Rentals, Inc*., 42 FMSHRC 16, 22 (Jan. 2020).

We similarly reject the dissent's characterization of the posture of this case as the Secretary having "dropped the claim of discrimination." Slip op. at 27. The Secretary filed briefings on appeal concerning when the temporary reinstatement ends, but declined to appeal the Judge's holding on the merits. There are many reasons why a party may choose not to appeal a Judge's decision while still believing in the merits of the case, including resource allotment, internal analyses on the likelihood of success, and triaging caseloads. Choosing not to appeal the merits of a case is in no way equivalent to instances when the Secretary conducts an investigation and determines that no discrimination occurred. The dissent's attempts to blur these lines misunderstands basic elements of how cases proceed before agencies and courts.

[15] Though the Commission here ultimately upholds the Judge's decision, it should be noted the majority found legal error in the Judge's discrimination analysis.

but chose not to exercise that right, instead agreeing to economically reinstate the miner.[16] We reiterate that the process available to operators is sufficient, especially considering that it is balanced against the strong public interest inherent in protecting miners who make safety complaints, which persists regardless of the exercise of the government's litigation strategies. Temporary reinstatement plays a central role in the statutory scheme.[17]

In addition to the arguments raised by the operator, our dissenting colleague raises several additional concerns regarding due process. While acknowledging that "[t]he constitutional correctness of this minimal temporary reinstatement process is not in question in this case," the dissent nonetheless claim that the Commission's process falls short of the general Constitutional requirements. Slip op. at 29.

At the outset, we note that the dissent's characterization of the law is not accurate. Certainly, the Supreme Court has consistently held that to satisfy due process, "some kind of hearing is required at some time before a person is finally deprived of his property interests." *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). However, nothing in the law indicates that litigation must always be accompanied by full discovery, cross examination, and credibility determinations. Instead, a review of the Supreme Court's case law regarding due process shows that, as with most constitutional principles, it requires a balancing test that weighs the particular property interest deprived against the process due. *See Cafeteria Workers v. McElroy*, 367 U.S.

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[16] Our dissenting colleague makes much of the fact that the operator has been required under the law to pay the complainant without receiving work in exchange. However, the miner was ordered to be temporarily reinstated to work. The operator and complainant filed a joint motion requesting that the complainant be temporarily economically reinstated—that is, paid his salary without returning to work—so the decision to not receive work in exchange for payment was the mutual choice of the operator and complainant.

[17] In passing the Act, Congress recognized that "[i]f our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. 95-181 at 5-6. Congress further stated that "temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id*. at 37.

As for operators' private interests, our dissenting colleague argues repeatedly that Vulcan has been deprived of large sums of money during the course of this litigation. Slip op. at 26, n.1. However, both the Supreme Court in *Brock* and the 11th Circuit in *JWR* defined the employer's interest for due process purposes as control of the workforce, without reference to money. As the Court in *JWR* observed: "[a]ny material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits." 920 F.2d at 748, n. 11. Vulcan's decision to offer economic reinstatement in this case, wherein Hargis was paid but not required to work, was voluntary. Vulcan's voluntary decision to offer money without demanding labor does not change the due process analysis.

886, 895 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

Nonetheless, the dissent argues broadly that the Commission's temporary reinstatement procedures and standards are so lax that any challenge by an operator is necessarily futile.[18] Slip op. at 29 n.9. That assertion is not borne out by Commission caselaw. The Commission has certainly denied applications for temporary reinstatement.[19] The dissent also raises more specific challenges to the Commission's procedures. Our colleague alleges that Mine Act Respondents are afforded fewer due process protections than those approved by the Supreme Court in *Brock*, claiming for example that *Brock* affords a right to credibility determinations at the temporary reinstatement stage.[20] Slip op. at 31. Our colleague has the issue backwards. With respect to proceedings under the Surface Transportation Act, *Brock* explicitly reserved credibility determinations for the administrative law judge's decision on the merits, rather than the investigator's preliminary "reasonable cause" determination. 481 U.S. at 266. The Court also more broadly noted that witness examinations at the temporary reinstatement stage "need not be formal" and need not afford cross-examination. *Id.* at 264. Significantly, the Eleventh Circuit has compared the Commission's procedures to those afforded in *Brock*. *JWR*, 920 F.2d at 747-748. Contrary to our dissenting colleague's allegation, the Eleventh Circuit unequivocally stated that the Commission's process was more robust, finding that our procedure of affording the

[18] To bolster this claim, the dissent provides, without citation, figures on the number of successful temporary reinstatement claims. These unsubstantiated figures do not appear to include instances where a miner filed a discrimination complaint and, after the Secretary's investigation of the matter, determined that it lacked merit. Furthermore, the Supreme Court has cautioned against using statistics to prove due process violations, stating, "[b]are statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process." *Mathews v. Eldridge*, 424 U.S. at 346.

[19] For example, temporary reinstatement has been denied where the Secretary failed to present any evidence regarding protected activity. *See, e.g.*, *Sec'y on behalf of of Hagene v. Prairie State Generating Co., et al.*, 38 FMSHRC 290 (Feb. 2016) (ALJ). Likewise, Temporary Reinstatement has been denied where the Secretary failed to produce any evidence demonstrating the miner suffered an adverse employment action. *See, e.g.*, *Sec'y on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153 (Feb. 2000).

[20] The dissent also repeatedly criticizes the "not frivolously brought" standard as being an unduly low burden of proof as contrasted with the "reasonable cause to believe" standard. Slip op at 30, n.7. We note the reviewing courts have consistently held these standards to be synonymous. *See JWR*, 920 F.2d at 747; *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1877 (Aug. 2012).

opportunity for a full evidentiary hearing prior to temporary reinstatement "far exceed[s] the minimum requirements" of the Constitution as articulated in *Brock*.[21] *Id.*

Our dissenting colleague further argues that the parties' interests regarding temporary reinstatement should be reweighed once the Judge has issued a decision on the merits of the complaint. Specifically, the dissent argues that the Judge's decision after a "full and fair" hearing on the merits is more reliable than the Judge's determination at the temporary reinstatement stage, therefore if a Judge determines no discrimination occurred, the balance of interests no longer favors temporary reinstatement. Slip op at 28-30, 34.

First, we note that the phrase "full and fair hearing" is found nowhere in the Mine Act or Commission regulations, nor does it appear to have any specialized meaning within the law in general.[22] *See, e.g., Galke v. Duffy*, 645 F.2d 118 (2nd Cir. 1981). A term which does not appear to have any particular legal meaning cannot overcome statutory language providing that temporary reinstatement remains in place until a final decision on the merits is reached. Moreover, the entire theory of appellate review is that a Judge may have made errors, as the Judge in the instant case did. In other words, it is not certain (until after review) that a Judge's hearing on the merits *was* full or fair, given those terms' colloquial meaning. The dissent would create a rule that a Judge's decision is presumed to be without error even before the Complainant has the opportunity to seek review. There is no basis for that presumption in the law. To the

[21] The dissent takes footnote 11 in *JWR* out of context. The Court was not conceding that the two standards were distinct, but rather simply arguing in the alternative to make a further point about the sufficiency of additional existing procedures for due process. This is why the Court explicitly found that the two standards were "strikingly similar" and the "functional equivalent" of each other. *Id*. at 747.

[22] It is not entirely clear why the dissent leans so heavily on the phrase "full and fair hearing," which he treats as both a term of art and as possessing a common sense meaning upon which all reasonable people would agree. Contrary to the dissent's repeated assertions, the phrase does little to resolve his concerns, and instead turns longstanding due process jurisprudence on its head. *See, e.g*., Slip op. at 28 ("Due process in litigation ordinarily occurs through a full and fair hearing during which each party presents witnesses and evidence, cross-examines witnesses, and makes arguments for its position."). This, and similar assertions peppered throughout the dissent, are simply incorrect and contrary to the cases cited by the dissent. Citing a long line of cases, the Supreme Court held that "[t]hese decisions underscore the truism that '(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected." *Mathews v. Eldridge*, 424 U.S. at334 (citations omitted). In specifically addressing the issue that so troubles our dissenting colleague—that many administrative hearings often have a more limited format—the *Mathews* Court reiterated "the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.'" *Id*. at 348.

contrary, Congress expressly sought to allow miners to have the benefit of temporary reinstatement until a final decision on the merits is reached.

Our dissenting colleague's final due process argument is that delays in the Commission's handling of this matter amounted to a due process violation. Slip op. at 27, 29-30, 34, n.9. It should be highlighted that no party has raised these arguments in any briefing or argument before the Commission, and it is inappropriate for the dissent to argue and advocate on behalf of a party. Doing so violates the party presentation principle and implicates parties' due process rights. The Supreme Court has stated that "[i]n our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 'in both civil and criminal cases, in the first instance and on appeal ..., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" *U.S. v Sineneng-Smith*, 590 U.S. 371, 375 (2020) (citations omitted). The Supreme Court has repeatedly held that "[t]he core of due process is the right to notice and a meaningful opportunity to be heard. *Lachance v. Erickson*, 522 U.S. 262, 266 (1998). The dissent's sua sponte introduction of an argument not made by the parties deprives the parties of notice of the issues under consideration on appeal and an opportunity to be heard on those issue. *See* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002). We see no reason to create Constitutional challenges that the parties did not even raise. Consistent with *JWR*, we conclude that there are no due process concerns in this case.

Moving beyond due process claims, Vulcan argues that if the Secretary is not litigating the appeal, the operator lacks an important safeguard to prevent meritless appeals to the Commission. We are not persuaded. Appeals to the Commission are not a matter of right, but rather granted on a discretionary basis. Therefore, the Commission serves as the gatekeeper, preventing meritless appeals. The Commission has instituted safeguards to prevent undue delay of proceedings, regardless of the Secretary's involvement, such as expediting cases and setting deadlines. *See* 29 C.F.R. Part 2700.

We also reject the operator's argument that its continued voluntary payment of Hargis' economic reinstatement renders the Secretary's appeal moot and the Judge's error harmless. A party cannot moot a claim by voluntarily ceasing unlawful behavior or by promising to continue engaging in lawful behavior. *See North Am. Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012). Additionally, Hargis has a right to be temporarily reinstated to his prior position, pending a final order on the complaint, pursuant to section 105(c)(2) of the Act. Accordingly, the Judge's error in immediately terminating the temporary reinstatement order was not harmless. An error is not harmless if it affects a party's "substantial rights." Fed. R. Civ. P. 61; *CFE Racing Products, Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 584 (6th Cir. 2015) (citing *Morales v. Am. Honda Motor Co*., 151 F.3d 500, 514 (6th Cir. 1998). Moreover, the Judge's error implicates the rights of all miners on whose behalf the Secretary has sought temporary reinstatement and subsequently filed a complaint.

Accordingly, for the reasons above, we find that a reading of the Mine Act that provides for temporary reinstatement through a final decision best comports with the plain language of the Act and raises no due process concerns.

D. Temporary reinstatement continues for 30 days after the issuance of a Commission appellate decision; alternatively, if the Commission declines to grant review, temporary reinstatement expires 40 days after the Judge issues his or her merits decision.

Vulcan further argues that temporary reinstatement must end 30 days after a Judge dismisses a discrimination case on its merits, *regardless* of whether the Commission directs review. Vulcan relies on language in section 105(c)(2) which states that orders affirming, modifying or vacating the Secretary's discrimination complaint "shall become final 30 days after [ ] issuance." 30 U.S.C. § 815(c)(2). In so arguing, Vulcan misreads the Act and our caselaw.[23]

Consistent with our decision in *Bernardyn,* the 30-day language in section 105(c)(2) refers to decisions issued by the *Commission*, not our Judges. Section 113(d)(1) states that Judges' decisions "shall become the final decision of the Commission *40 days* after its issuance unless within such period the Commission has directed that such decision shall be reviewed . . ." 30 U.S.C. § 823(d)(1) (emphasis added). Under section 113(d)(2)(A)(i), 30 U.S.C. § 823(d)(2)(A)(i), "[a]ny person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision." The Commission has the remaining days of the 40-day period to consider the petition and grant review.[24]

Section 113(d)(1) contains language that is generally applicable to all Administrative Law Judge issuances pursuant to the Act. Section 113(d) by its terms applies to Judge's decisions in section 105(c) cases because it applies to "*any proceeding* instituted before the Commission . . . , assigned to [an] administrative law judge by the chief administrative law judge of the Commission or by the Commission." 30 U.S.C. § 823(d)(1) (emphasis added). This includes section 105(c)(2) cases.

Conversely, the 30-day language in the Act routinely refers to appellate Commission decisions. *See* 30 U.S.C. §816(a)(1) (circuit court review of final agency decisions may be sought "30 days following the issuance" of a Commission order). Reading the 30-day language of section 105(c)(2) in the context of section 113(d)'s appellate review provisions, so that

[23] The dissent engages in a similar misreading of the Mine Act and Commission caselaw.

[24] Alternatively, the Commission may grant review sua sponte within 30 days of the issuance of a Judge's decision. 30 U.S.C. § 823(d)(2)(B).

Commission appellate decisions become final within 30 days but Judges' issuances become final after 40 days, best reconciles the statutory language of each section.[25] It is also consistent with the language of section 105(c)(2) itself. The provision states that temporary reinstatement shall continue pending "final order on the complaint." 30 U.S.C. § 815(c)(2). It goes on to state that the Secretary shall "file a complaint with the Commission," and that "the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order." *Id.* It concludes by stating that "[s]uch order shall become final 30 days after its issuance." *Id.* Based on this plain language, the "order" that shall become final after 30 days is the *Commission's* order on the Secretary's complaint.

Vulcan's arguments that extending temporary reinstatement until there is a final order on the complaint violates its right to due process of law are not availing. Similar arguments were considered and dismissed by the Eleventh Circuit in *Jim Walter Resources*, 920 F.2d 738 (11th Cir. 1990) as discussed *supra*. In fact, in *Jim Walter Resources*, the Eleventh Circuit recognized that the temporary reinstatement order that was before it, continued to remain in effect, even though the Commission reversed the Judge's finding of a violation and remanded the case for further analysis. *See* 920 F.2d at 743 n.2 ("Because no final determination of the ultimate merits of [the miners] complaints has yet been reached, the temporary reinstatement order continues to affect the parties' rights and interests in this case.").

[25] A contrary approach would create a strange result. Under the operator's approach, a Judge's finding on the merits would be "final" after 30 days for purposes of temporary reinstatement but would not yet be a final order on the *discrimination complaint* because it would still be subject to review by the Commission for another ten days. A decision is either *final* or *not*, it cannot be both. If the Judge's issuance is deemed final with respect to *both* temporary reinstatement and the merits case after 30 days, this would remove the statutory 10-day window granted to the Commission under section 113(d)(1) to decide whether to grant a party's petition for discretionary review. 30 U.S.C. §823(d)(1).

III.

Conclusion

For the foregoing reasons, we affirm in part and reverse in part the Judge's decision. We uphold the portion of the Judge's decision that affirmed the violation of section 50.20(a)'s injury reporting requirements. We also affirm the portion of the Judge's decision that dismissed the discrimination complaint under section 105(c). We find that the Judge erred in his nexus analysis, but that it constituted excusable error because of the operator's affirmative defense. Finally, we vacate the portion of the Judge's decision immediately terminating Hargis' temporary reinstatement. No additional payments are necessary, however, because the operator has been voluntarily paying Hargis' temporary reinstatement during the course of this appeal. Temporary reinstatement terminates **30 days** after the date of this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

Commissioner Rajkovich, concurring:

I fully concur with the majority in Parts II.A, C, and D of the Disposition. I also concur in result with the majority's holdings in Part II.B that Vulcan did not discriminate against Hargis and that he was ultimately terminated due to unprotected activity. I disagree solely with the majority's finding in Part II.B.1 that the complainant met his *prima facie* case of discrimination. My colleagues conclude that the Judge erred by finding insufficient evidence of a motivational nexus between Hargis' protected activity and his adverse employment action. I would find that substantial evidence supports the Judge's determination that the complainant failed to show discriminatory intent sufficient to establish a motivational nexus, and that Vulcan's decision to terminate Hargis was not motivated in any part by his protected activity on April 12 and May 12.

A. The Judge properly found insufficient evidence to support a nexus between Hargis' protected activity and the adverse employment action.

As the majority notes, a miner seeking to establish a *prima facie* case of discrimination must show that he or she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity, in other words, that a motivational nexus existed between the protected activity and the adverse action. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817 (Apr. 1981).

In order to determine whether a motivational nexus existed, the Commission may consider indirect indicia of discriminatory intent such as (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-12 (1981), *rev'd on other grounds sub nom. Donovan on behalf of Chacon v. Phelps Dodge*, 709 F.2d 86 (D.C. Cir. 1983).

For the reasons below, substantial evidence supports the Judge's conclusion that Hargis failed to show sufficient indicia of discriminatory intent to support a finding of discrimination.

1. Substantial evidence supports the Judge's finding that no inference of discriminatory intent may be found based on management knowledge of protected activity.

Regarding Hargis' May 12 request, the Judge acknowledges that management was aware of the request *on May 12*, but notes that the decision to terminate Hargis was "well underway" by then. 44 FMSHRC at 754, 759. The record shows that Hargis was recommended for termination on May 11. Tr. 508-09, 630-31. When deciding to take the relevant adverse action, mine management could not have had knowledge of a request that had not yet occurred. As for Hargis' April 12 request, the Judge notes that the complainant was unable to produce any evidence that Williams discussed the request with anyone else in the company. 44 FMSHRC at 761-62 n.29. Substantial evidence supports the Judge's finding that management was unaware of the April and

May requests *prior to taking adverse action*. Accordingly, discriminatory intent cannot be inferred from management knowledge.[1]

2. Substantial evidence supports the Judge's finding that there was no hostility or animus toward the protected activity.

The Judge properly found no evidence of animus toward Hargis' requests to see a doctor. The Judge notes that every disciplinary action prior to his termination occurred *prior* to his protected activity, and that the record did not demonstrate any adverse responses to Hargis' requests from mine management. 44 FMSHRC at 758-59. To the contrary, the Judge noted that Williams showed concern for the condition of Hargis' back, even placing Hargis on light duty after the April 12 injury report. *Id.* at 748, n.19, 762.

Hargis points to other alleged evidence of animus, claiming that Vulcan engaged in a course of conduct to "get rid of him" going back to December 2020. Tr. 20, 637. However, as noted, all of the alleged incidents occurred either *before* Hargis' first request for a physician on April 12, or *after* management had already decided to terminate Hargis' employment. The Judge reasonably found that any alleged animus before the protected activity or after the adverse action could not serve as evidence of a motivational nexus *between* the protected activity and the adverse action.

The majority challenges the Judge's finding that Vulcan's "indifference" towards Hargis' request for medical care does not constitute animus towards protected activity. Slip op. at 9-10. My colleagues claim that choosing to do nothing when a miner engages in protected activity is the "very definition of animus." *Id.* at 9. In support of this proposition, they cite the long-standing Commission proposition that the focus of an animus inquiry is animus towards the complainant's protected activity, rather than animus toward the complainant him-or herself. *Id.*, *citing Chacon*, 3 FMSHRC at 2511.

The proper inquiry is certainly whether animus was directed toward the complainant's protected activity. However, it is unclear how that proposition establishes that *indifference* towards protected activity constitutes *animus* towards protected activity. Animus is generally

[1] My colleagues in the majority state that Williams' knowledge of the April 12 request may be imputed to management while also emphasizing that Williams recommended Hargis' termination, implying a motivational connection. Slip op. at 8-9. As the majority notes, the rationale behind imputing knowledge is to prevent an operator from "launder[ing]. . . knowledge and animus through a neutral superior." *Id. at 8*, *citing Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1068 (May 2011). Here, as discussed below, nothing in the record suggests Williams' recommendation was directed at protected activity. Even if Williams' *knowledge* can be imputed to management, there is no *motivation* to impute to management. Nothing in the record indicates an attempt to "launder" discriminatory intent through a neutral party.

understood to contain some element of intent, particularly intent to take negative action.[2] This is consistent with the general purpose of the animus analysis in the discrimination context, which is to locate indicia of "*discriminatory intent*" to determine whether the complainant's protected activity *motivated* the operator's decision to take adverse action. *Chacon*, 3 FMSHRC at 2510 (emphasis added). It is unclear how a *lack* of intent to take action in response to protected activity would demonstrate discrimination.

More narrowly, it is arguable whether the Judge truly found indifference toward Hargis' protected activity. The only reference to "indifference" in the Judge's decision states:

> There is no evidence that Mr. Ellis was aware that Complainant requested to see a doctor before making the decision to terminate his employment, or that he discussed any previous requests with Mr. Humes, Mr. Williams, or Mr. Clemmons. Nor is there any evidence that any of the other individuals involved in the decision to discharge Complainant ever evinced anything worse than *indifference* in response to his request to see a doctor.

44 FMSHRC at 759 (emphasis added).

In context, it appears the Judge was discussing the impact of Hargis' requests on the *disciplinary decision-making process*—the decision-makers were "indifferent" to the protected activity *when deciding whether to terminate Hargis*. There is nothing in the Judge's opinion that suggests Vulcan was "indifferent" to the requests themselves or unwilling to arrange for medical visits.[3] The Judge's finding here was merely that, in this instance, the protected activity did not motivate the adverse action.

3. Substantial evidence supports the Judge's finding that no inference of discriminatory intent was found based on coincidence in time.

The Judge acknowledged the coincidence in time between Hargis' protected activity and his termination. 44 FMSHRC at 760. However, he noted that Hargis had already been placed on a "last chance" disciplinary agreement prior to both the April 12 and May 12 requests, and that Hargis had already been recommended for termination *prior* to the May 12 request, such that the latter request "did not influence, but rather interrupted" the execution of the adverse action. *Id.* at 760-61. Finally, he noted the lack of any corroborating facts to suggest that the coincidence in time indicated discriminatory intent, particularly noting Williams' care for Hargis' health issues. *Id.* at 762. Accordingly, the Judge concluded that the coincidence in time was, in truth, just a

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[2] *See Animus*, Collinsdictionary.com, *https://www.collinsdictionary.com/dictionary/english/animus* (last visited Aug. 26, 2024) ("an animating force or underlying purpose; intention . . . a feeling of strong ill will or hatred."); Dictionary.com, https://www.dictionary.com/browse/animus (last visited Aug. 26, 2024) ("strong dislike or enmity . . . motivating purpose or intention; animating spirit.").

[3] To the contrary, Hargis was provided with a panel of physicians in response to his May 12 request. Tr. 513.

coincidence. *Id.* at 761. Substantial evidence supports the Judge's reasoning. Tr. 20-21, 466, 508-09, 430-31, 630-31, 666.

4. Substantial evidence supports the Judge's finding that there was no disparate treatment of Hargis due to protected activity.

The majority correctly accepts the Judge's finding that the only evidence of potential disparate treatment occurred before Hargis' protected activity. Slip op. at 11. The majority considers this insufficient to overcome other indicia of discriminatory intent, while I find it to be consistent with the lack of record evidence indicating discriminatory intent.

B. Substantial evidence supports the Judge's finding that Vulcan's explanation for the termination is not pretextual; Vulcan terminated Hargis based on unprotected activity alone.

My colleagues find that the complainant met his initial burden, but that the operator has successfully rebutted the *prima facie* case through an affirmative defense. As discussed above, I would find that the complainant *did not* meet his initial burden in presenting a *prima facie* case, therefore no affirmative defense is required. However, as the majority notes, the affirmative defense analysis is similar to the pretext inquiry conducted by the Judge below. Slip op. at 12, n. 11. I concur with the majority's factual findings in Part II.B.1.d.1 and agree that Vulcan has "adequately shown that it followed its progressive discipline policy and would have fired Hargis for a non-discriminatory reason alone." *Id.* at 12. Accordingly, substantial evidence supports the Judge's conclusion that Vulcan's business justification was not pretextual.

In sum, I would affirm the Judge's findings that the complainant failed to establish a motivational nexus between his protected activity and the adverse action, and that the operator's business justification was not pretextual. Accordingly, I concur with the majority in result and would find that no discrimination occurred.

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

Commissioner Althen, joining in part, concurring in part, and dissenting in part:

I join Part II.A to affirm the citation for failure to report an occupational injury.

I join with Commissioner Rajkovich's concise and dispositive concurrence of Part B that substantial evidence supports the Administrative Law Judge's decision denying Jason Hargis' discrimination claim.

I write separately to dissent on the discrete issues presented in Parts II.C and II.D concerning the continuation of temporary reinstatement after an ALJ decision following a full and fair hearing.

I.

CONTINUATION OF TEMPORARY REINSTATEMENT AFTER AN ADMINISTRATIVE LAW JUDGE FINDS NO DISCRIMINATION FOLLOWING A FULL AND FAIR HEARING VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

A. BACKGROUND

On June 7, 2021, Hargis filed a discrimination complaint against Vulcan Construction Materials, LLC. The Secretary of Labor sought temporary reinstatement. The parties filed a Joint Motion for Economic Reinstatement. On July 27, 2021, the Administrative Law Judge temporarily reinstated Hargis pending further adjudication. That Order implemented an agreement between the parties in which Vulcan agreed to pay Hargis $1,014.87 per week plus benefits. The Commission is not aware of any modification or suspension of that Order or the payments. If payments have not been suspended, the total amount of temporary reinstatement payments to a lawfully discharged employee will be approximately $155,000.[1]

On December 1, 2022, the ALJ found that Vulcan had not discriminated against Hargis and terminated temporary reinstatement. The Secretary challenged the termination of temporary reinstatement. Since December 1, 2022, Hargis has continued to receive economic reinstatement and will continue to do so until thirty days after the date of this decision.

After the ALJ decision, the Secretary dropped the claim of discrimination. Nonetheless, the Secretary filed a Petition for Discretionary Review asserting the ALJ erred in dissolving the

[1] The operator has been required to "temporarily reinstate" the losing complainant for more than three years – more than twenty-two months after the ALJ's decision denying the claim and more than nine months after the Commission open meeting. There is no explanation for the failure to complete this case in a timely manner. The Commission owes the operator an apology for its neglect of this case. However, the majority refused to express any regret for its inexcusable nonfeasance thereby necessitating this footnote. Moreover, we cannot blow off, as federal bureaucrats are wont to do, $155,000 dollars as if it were pocket change for private citizens. It is unfortunate that the operator has no means to obtain redress from the Commission for the Commission's neglect of the operator's rights.

temporary reinstatement order on the date of his fully considered decision of no discrimination—a decision on the merits that the Secretary accepted.

The Secretary asserts that Hargis must remain temporarily reinstated until a "final" decision. By the term "final" decision, the Secretary appears to mean a final non-appealable decision by the Commission, a United States Circuit Court of Appeals, or the United States Supreme Court. Specifically, the Secretary claims "Once a complaint is filed on a miner's behalf [by the Secretary], the miner has a defined path to pursue recourse: appeal an unfavorable decision of the judge to the Commission, and appeal an unfavorable Commission decision to the federal court of appeals." Sec'y Reply Br. at 12.

The majority does not accept the Secretary's argument regarding the length of temporary reinstatement but instead finds that temporary reinstatement exists 30 days after this decision by the Commission.[2] After three years of delay, the Commission at least finds that temporary reinstatement need not continue for the many months it would take to resolve an appeal. That is certainly an unsatisfying salve for the injured party's wounds.

B. THE CONSTITUTIONAL ISSUE

The Secretary claims that temporary reinstatement under the nonfrivolous standard of proof without credibility determinations or consideration of factual disputes continues after a full hearing and decision by an ALJ. According to the Secretary, the expedited and sharply limited hearing under a non-frivolous standard of proof is sufficient due process for reinstatement to last not only for the many months it takes for an ALJ to rule on the case after a full hearing but also for a year or more after the ALJ decision. Vulcan responds that continuation of reinstatement based upon the initial cursory non-frivolous standard after a full and fair hearing before an ALJ deprives it of due process rights.[3]

The Secretary's position in this case is a dramatic change from the position taken by the Secretary before Congress in 1999. The Assistant Secretary for Mine Safety and Health under the Clinton administration, Davitt McAteer, wrote in an addendum to congressional testimony that temporary reinstatement is "effective *until the ALJ rules on the merits of the miner's discrimination complaint.*" INCREASING MSHA AND SMALL MINE COOPERATION: HEARING BEFORE THE SUBCOMM. ON EMPLOYMENT, SAFETY, AND TRAINING OF THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,

[2] The Commission's majority holding means it believes that Congress passed a law requiring an employer that lawfully discharged an employee for misconduct must allow the employee to work for another thirty (30) days after a determination by the Commission that the discharge was lawful. This interprets the Mine Act as creating a statutorily mandated 30 days of continuing work or pay for a fully adjudicated mal or mis performing worker. That alone is unconstitutional. *See* U.S. Const. amend. XIV.

[3] The opinion upon the constitutionality of extending temporary reinstatement after a decision following a full hearing is not confined to the twenty months between the ALJ decision and the Commission decision in this case. However, the particular facts of this case do well illustrate the fundamental unfairness of the Commission's approach.

106th Cong. 174 (Comm. Print 1999) (emphasis added.). Assistant Secretary McAteer's statement correctly interpreted the law. The current Acting Secretary and my colleagues now veer from the constitutional approach taken in 1999.

To reach a constitutional issue, a case must involve a deprivation of rights. Section 105(c) of the Mine Act creates a right for employees to not have adverse employment consequences because they have exercised protected rights.[4] A miner's claim under section 105(c), therefore, raises a claim of statutory rights.

Separately, Vulcan has a constitutionally protected right to manage its workforce including a right to fire an employee. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260-61 (1987); *see* ; *Business Commc'ns, Inc. v. U.S. Dept. of Educ.*, 739 F.3d 374, 379 (8th Cir. 2013); *Chernin v. Lyng*, 874 F.2d 501, 506 n.3 (8th Cir. 1989). Consequently, proceedings challenging an employer's management actions implicate the employer's rights and, therefore, constitutional considerations.

It is not unusual for the constitutional rights of separate parties to come into tension. Such occurrences include, as here, cases in which an employer wishes to assert its lawful management rights while an employee believes the employer's action violated his statutory rights. This situation brings into play the due process rights of the respective parties.

Due process in litigation ordinarily occurs through a full and fair hearing during which each party presents witnesses and evidence, cross-examines witnesses, and makes arguments for its position. A party is entitled to assert its rights "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citations omitted).

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[4] Section 105(c)(1) provides:,

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, . . . , or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. §815(c)(1).

The Mine Act and Commission rules provide little due process—indeed, virtually no process at all—preceding temporary reinstatement. If, following an initial, expedited investigation, the Secretary finds that the miner's complaint is not "frivolous," the Mine Act requires the Secretary to seek temporary reinstatement. Commission rules of procedure require a highly expedited procedure for temporary reinstatement requests. 29 C.F.R. § 2700.45.

A temporary reinstatement hearing is sharply limited. The "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.,* 9 FMSHRC 1305, 1306 (Aug. 1987), *citing* 30 U.S.C. § 815(c)(2) (other citations omitted), *aff'd*, 920 F.2d 738 (11th Cir. 1990). The proceedings are greatly expedited. The ALJ may not make credibility determinations and may not resolve conflicts in testimony. These limitations provide the miner's testimony the benefit of the doubt on any contested fact even when his testimony strains credulity or appears inconsistent with other factual testimony. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (citations omitted) ("It was not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings."). As a result of an almost non-existent standard of proof, great expedition, the absence of credibility determination, and the absence of resolution of factual disputes, the operator has little or no chance of prevailing at this stage of the proceeding.[5]

The constitutional correctness of this minimal temporary reinstatement process is not in question in this case. Here, however, the Secretary goes further and claims that temporary reinstatement under the nonfrivolous standard of proof, without credibility determinations or any consideration of factual disputes, continues after a full and fair hearing before an ALJ until the complainant exhausts its appeal rights. Delays in obtaining disposition of a temporary reinstatement through appeal to the Commission add a minimum of many months or, as here, years, to the length of temporary reinstatement. In essence, the operator's right to a "final" decision after a full and fair hearing is delayed/denied for months/years while the operator must

[5] Settlements of temporary reinstatement claims are not unusual. They are the norm. Faced with the lowest standard of proof known to the law (a "nonfrivolous" claim), strict limits on factual review, no credibility determinations, and the virtual certainty of loss at a temporary reinstatement hearing, operators often choose to forego the expense of an inevitably futile temporary reinstatement hearing. A review of Commission records by our Librarian and Docket Clerk for fiscal years 2016 through 2023 shows that the Secretary requested temporary reinstatement 107 times. Eighty-two were granted. Twenty-four were settled, withdrawn, or abandoned. Only one was denied. In that case, the Secretary failed to present any evidence of any protected activity. The majority, apparently seriously, counters by arguing that operators have a good chance at a temporary reinstatement hearing. They cite two cases 16 years apart demonstrating only that every decade and a half the Secretary's lawyers fail to allege a critical element necessary for temporary reinstatement. Slip op. at 16 n.19. Further, the majority suggests that it is fine for a business to retain a former disgruntled employee discharged for misconduct in its workforce for a number of years. They are untroubled by a business having to "temporarily reinstate" a disgruntled, non-performing employee for years amid its workforce or pay for years to avoid disruption of its operations.

employ an unsafe or ineffective worker even though an ALJ upheld the discharge after a full and fair evidentiary hearing.[6]

In *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), the Supreme Court reviewed Section 405 of the Surface Transportation Assistance Act of 1982 ("STAA"). That section authorizes the Secretary of Labor to order the reinstatement of an employee under the "reasonable cause to believe" standard. As enacted, the Act did not require the Secretary to inform the employer of the basis of the claims or allow the employer to address those claims. In *Brock*, the employer challenged the constitutionality of this process.[7]

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[6] The majority attempts to dodge the substantial constitutional questions in this case by focusing on temporary reinstatement hearings. Then, they go so far as to say they do not really know what is meant by a full and fair hearing. Indeed, they respond to a constitutional argument by writing that the phrase "'full and fair hearing' is found nowhere in the Mine Act." Slip op. at 17-18. Are their views so radical as to suggest operators are not entitled to full and fair hearings under the Mine Act or that discrimination hearings are not full and fair? They cite one case between a union member and his union to support their incredible claim that the concept of a full and fair hearing is not a well understood or applied legal concept. In any event, the complainant has not suggested the hearing was not fair. He suggests the decision was wrong, not that he did not receive a fair hearing on his claim. The occurrence of a full and fair hearing is when the constitutional balance shifts in this case.

[7] In *Jim Walter Resources, Inc. v. Federal Mine Safety & Health Review Commission,* 920 F.2d 738 (11th Cir. 1990), the Eleventh Circuit affirmed the *temporary reinstatement procedures* as constitutional and, obviously, did not consider the circumstances after a full ALJ hearing. The circuit court analogized the "not frivolously brought" standard to the "reasonable cause to believe" standard applied by other federal statutes. It conceded "not frivolously brought" could be interpreted as "less stringent" than a "reasonable cause to believe" standard but upheld "not frivolous" even if it is a lesser standard. 920 F.2d at 748 n.11. The majority cites this one case for the incorrect proposition that courts "have consistently held these standards to be synonymous." Slip op. at 17 n.20. A "reasonable cause to believe" facially requires more than a "non-frivolous" claim. Black's Law Dictionary defines a "frivolous claim" as "a claim that has no legal basis or merit, esp. one brought for an unreasonable purpose such as harassment." *Claim*, Black's Law Dictionary (12th ed. 2024). When no credibility determinations may be made and no factual determinations may be made, it is inevitable that, unless a complainant fails to allege a necessary element such as adverse action, the claim must almost always be found "non-frivolous."

Worse yet, the circuit court referred to a temporary reinstatement hearing as a "full evidentiary hearing." 920 F.2d at 747. It is clearly incorrect to refer to a hearing at which neither credibility determinations nor factual findings may be made as a full hearing. A hearing at which a party may speak but the Judge may not listen is not a full hearing. In any event, this case deals not with temporary reinstatement procedures but whether "temporary reinstatement" achieved hastily through a seriously compromised procedure may continue after a full and fair hearing results in a considered decision adverse to the complainant.

A plurality of the Court consisting of Justice Marshall, Justice Blackmun, Justice Powell, and Justice O'Connor found the failure to notify the employer of the basis of the claim of discrimination or to allow the employer to respond violated the employer's constitutional rights. 481 U.S. at 268. The plurality held the employer had a constitutional right to receive "notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses." *Id.* at 264. Those factors are critical to whether there was a "reasonable cause to believe."

Importantly, the Court's decision inevitably envisions weighing the statements of rebuttal witnesses regarding the facts. Undoubtedly, the Court took it as a given that the Secretary would be neutral in applying the reasonable cause to believe standard to the claims and evidence presented by the parties. Therefore, the right under the STAA to have rebuttal statements by witnesses and credibility, along with the reasonable cause to believe standard, makes the procedures identified by the Supreme Court in *Brock* substantially more robust than the procedures under the Mine Act as interpreted by the Commission where the standard of proof is "non-frivolous," no credibility determinations may be made, and factual disputes may not be decided.

The Court found that in the context of temporary reinstatement, the limited procedures were sufficient if an opportunity is given to present rebuttal and dispute the factual allegations. The plurality held that it was not unconstitutional to reinstate temporarily under a reasonable cause-to-believe standard without an evidentiary hearing provided the employer could present fact witnesses to the Secretary.

For purposes of this case, it is critical to understand that *Brock* involves an initial determination and not a determination made by a truly neutral judge after a full and fair hearing. Critically, the Court repeatedly emphasizes the rights of employers. The Court stated:

> The property right of which Roadway asserts it has been deprived without due process derives from the collective-bargaining agreement between Roadway and its employees' union. It is the right to discharge an employee for cause.

Id. at 260.

> Reviewing this legislative balancing of interests, we conclude that the employer is sufficiently protected by procedures that do not include an evidentiary hearing before the discharged employee is temporarily reinstated. So long as the prereinstatement procedures establish a reliable "initial check against mistaken decisions," *Loudermill, supra,* at 545, 105 S.Ct., at 1495, and ***complete and expeditious review is available***, then the preliminary reinstatement provision of § 405 fairly balances the competing interests of the Government**,** the employer, and the employee, and a prior evidentiary hearing is not otherwise constitutionally required.

Id. at 263 (emphasis added).

> This is not to say, however, that the employer's interest in an expeditious resolution of the employee's complaint can never provide a basis for a due process violation. ***At some point, delay in holding postreinstatement evidentiary hearings may become a constitutional violation***. *See Loudermill,* 470 U.S., at 547, 105 S.Ct., at 1496. *Barry v. Barchi,* 443 U.S. 55, 66, 99 S.Ct. 2642, 2650, 61 L.Ed.2d 365 (1979); *Mathews,* 424 U.S., at 341–342, 96 S.Ct., at 905–06.

Id. at 267 (emphasis added).

In the above-quoted passages, the Court emphasizes the due process problem of a delay in holding an evidentiary hearing, the step the Commission accomplished through the ALJ hearing. This case is far worse; it deals with years of delay after a full and fair hearing.[8]

Justice Brennan, in dissent, emphasized:

> The adequacy of predeprivation procedures is in significant part a function of the speed with which a postdeprivation or final determination is made. Previously the Court has recognized that "[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." *Mackey v. Montrym,* 443 U.S. 1, 12, 99 S.Ct. 2612, 2618, 61 L.Ed.2d 321 (1979). *See also Loudermill, supra,* 470 U.S., at 547, 105 S.Ct., at 1496. ("At some point, a delay in the post-termination hearing would become a constitutional violation"). Were there any guarantee that the final hearing would occur promptly—within a few weeks, for example—the procedure endorsed by the Court might suffice. No such guarantee exists.

Id. at 270.

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[8] The Court referred to delay "in holding post-reinstatement **evidentiary** hearings." 481 U.S. at 267. Here, we consider the constitutionality of continuing payments **after** that evidentiary hearing. It is not an excuse to claim that this case presents an extraordinary delay. The central point is that after a full adjudicatory hearing both parties have received due process. Think of a balance. On one side there is an expedited decision after an almost non-existent, summary, and expedited hearing without any credibility determinations and without any findings on disputed facts. On the other side, there is a fully adjudicated decision after discovery, credibility judgments, and findings on all the facts. Surely, the constitutional balance swings to the adjudicated hearing.

Justice Brennan found the absence of a full hearing constituted an insuperable barrier to constitutionality. He concluded that the government's interest did not justify the entry of a reinstatement order based on evidence that was not disclosed to the employer and tested by cross-examination in an adversary proceeding before the order became effective. Foreshadowing the disregard of fundamental fairness present in this case, Justice Brennan wrote, "The combination of uncertainty and delay inherent in the Secretary's regulatory scheme eliminates any possibility that it might compensate for the inadequacy of the predeprivation hearing." *Id*. at 271. Here, as distinguished from *Brock*, **we are at the post-hearing stage**; yet the Secretary argues a nonfrivolous claim must still be honored.

The obligation for a timely hearing to resolve fully the rights of the parties is controlled by the Court's decision in *Barry v. Barchi*, 443 U.S. 55, 66 (1979). There, a finding of drugs in a horse resulted in the suspension of a horse trainer's license. The relevant state statute provided for a summary suspension of a license for 15 days upon an initial finding of an unlawful drug in a horse. The statute further provided for a full hearing but did not specify any time obligation for such a hearing. *It required a final decision within 30 days after the full hearing*. 443 U.S. at 61. Barchi challenged the constitutionality of the statute.

In a decision presaging *Brock*, the Supreme Court upheld the immediate temporary suspension finding that the State was entitled "to impose an interim suspension, *pending a prompt judicial or administrative hearing that would definitively determine the issues*, whenever it has satisfactorily established probable cause [note the higher standard] to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging." *Id.* at 64 (citations omitted).

The Court went on to find that after a temporary infringement on a person's property interest, the judicial pendulum necessitates a prompt final resolution. Recognizing that Barchi had an important property interest, the Court struck down the statute based on the failure to ensure a timely evidentiary hearing. The Court opined,

> [I]t was necessary that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay. Because the statute as applied in this case was deficient in this respect, Barchi's suspension was constitutionally infirm under the Due Process Clause of the Fourteenth Amendment.

Id. at 66.

Based upon the Court's definitive statement, the Court certainly would not have allowed the temporary suspension to continue after a full hearing which found no fault on the part of the trainer. Nonetheless, my colleagues now find such reinstatement must continue after a full and fair hearing at the cost of many more months or years of deprivation of the operator's basic rights.

The majority writes as if the constitutional issue in this case is the balance of rights before temporary reinstatement. That is not an issue in this case. The issue here is the balance of

rights after a full and fair hearing, not whether the operator received sufficient due process **before** the issuance of the Order of Temporary Reinstatement. It is whether the displacement of the protected rights of the operator may continue indefinitely **after** an ALJ affirms the discipline following a full hearing.[9] Perhaps the easiest way to demonstrate the folly in the majority's position is to suppose the statute did not provide for immediate temporary reinstatement but instead provided for a greatly expedited full and fair hearing. No one, I think, would argue that it would pass constitutional muster to compel reinstatement if the unproven claim at that hearing had not been wholly frivolous. However, effectively, that is now the case before us.

II.

TEMPORARY REINSTATEMENT CEASES WHEN THE SECRETARY DECIDES NOT TO PURSUE AN INDIVIDUAL'S COMPLAINT OF DISCRIMINATION.

A complainant may receive temporary reinstatement if the Secretary finds within an expedited time frame that the claim is not frivolous and files a complaint with the Commission. The Secretary then continues to review the claim. Without a doubt, if the Secretary decides not to follow through as an advocate for the complainant, temporary reinstatement ends. *Vulcan Constr. Materials, L.P. v. Fed. Mine Safety & Health Rev. Comm'n*, 700 F.3d 297, 310 (7th Cir. 2012); *North Fork Coal Corp. v. Fed. Mine Safety & Health Rev. Comm'n*, 691 F.3d 735, 744 (6th Cir. 2012). This is the established law of the Commission.

By failing to appeal the ALJ's decision, the Secretary gives up on its complaint and accepts the ALJ's decision that the operator did not discriminate within the meaning of 30 U.S.C. § 815(c). There is no reason to treat this conclusion by the Secretary differently from a conclusion by the Secretary after an investigation, that discrimination did not occur.

Indeed, consider the scenario in which the Secretary files a complaint after an investigation but, after later discovery, determines discrimination did not occur. Certainly, the Secretary is not required to pursue a case in which the Secretary no longer believes a finding of

[9] The majority inserts a long passage apparently premised upon the false thought that the due process issue here is the time between the ALJ's decision and the issuance of the opinion in this particular case. Certainly, that could be argued. However, as stated repeatedly, the primary issue here is the balance of rights after the ALJ hearing. Moreover, if the argument did turn upon the palpable neglect of the Commission, the majority makes the argument that the parties did not brief the issue. Slip op. at 18. The parties hardly could brief constitutional issues raised by Commission's neglect before it occurred. Certainly, no one could argue that the Commission has considered this case in a "timely" manner in this case. *Armstrong v. Manzo, 380 U.S.* at 552; *Mathews v. Eldridge*, 424 U.S. at 334. This claim by the majority is of a kind with its claim that there is no commonsense meaning of a full and fair hearing. As the Supreme Court has explained, the commonsense meaning is a hearing at a meaningful time and in a meaningful manner. The nature of the required hearing may vary by the circumstances. However, no-one could argue that the ALJ hearing in this case was not a full and fair hearing. The Commission is not a "gatekeeper, preventing meritless appeals." Slip op. at 18-19. If the Commission does not take an appeal, the appellant has a right to appeal to a United States Circuit Court of Appeals.

discrimination may be made. If the Secretary withdraws from a case after filing a complaint, the parties are in the same position as if the Secretary had not filed a complaint in the first place. This policy must apply when the Secretary decides to withdraw a previously filed complaint and must also apply when the Secretary gives up its claim and accepts an ALJ's decision of no discrimination.

Yet, the majority today finds that if an ALJ finds after a full hearing that discrimination did not occur and the Secretary decides not to pursue the claim further, the Secretary's decision not to prosecute the case is irrelevant, and temporary reinstatement continues through a lengthy appeals process despite the absence of the Secretary. I cannot join my colleagues in finding that Congress could mean to create a nonsensical procedure so that, when the Secretary drops out before a hearing, temporary reinstatement ceases, but if the Secretary drops out after a full hearing finds no discrimination, temporary reinstatement continues.

In summary, the Secretary contends that after the Secretary no longer supports or proposes a finding of discrimination, the "temporary" reinstatement must continue through an appeal to the Commission and then through possibly multiple appeals because many months previously the Secretary filed a complaint before an ALJ. Given the Commission's record of taking months to issue decisions and the time inevitably involved in further appeals, final action on the discrimination complaint by a circuit court of appeals could not be reached until July 2025 at the earliest.[10] Temporary reinstatement would have lasted a year from its initial grant and then another twenty months on appeal, meaning temporary reinstatement would continue long past a ruling of no discrimination by an ALJ after a full and fair hearing.

III.

THE TEXT OF THE MINE ACT REQUIRES REINSTATEMENT END 30 DAYS AFTER ISSUANCE OF THE ALJ'S DECISION.

The Mine Act states that temporary reinstatement shall be ordered pending " final order on the complaint." 30 U.S.C. § 815(c)(2). Historically, when determining the final order date, the Commission has relied on the general rule pertaining to appeals of ALJ decisions. *See Sec'y ex rel. Bernardyn v. Reading Anthracite Co*., 21 FMSHRC 947, 949 (Sept. 1999).[11] This rule states that "[t]he decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission…" 30 U.S.C. § 823(d)(1).

[10] In this case, rather than fight the Secretary's demand for continued temporary, the operator has continued to make reinstatement payments for more than a year after the ALJ decision.

[11] In *Bernardyn*, the Commission found that section 113(d)(1) of the Mine Act governs when a discrimination order becomes final for the purposes of determining when temporary reinstatement ends. *Sec'y ex rel. Bernardyn v. Reading Anthracite Co*., 21 FMSHRC 947, 949 (Sept. 1999). The Commission, in that case, did not address the language contained in section 105(c)(2) and, as such, is not relevant to the issue currently before the Commission. However, to the extent that *Bernardyn* deviates from the Act, it should be overturned.

However, section 113(d)(1) conflicts with 105(c)(2) of the Mine Act which governs temporary reinstatement and discrimination proceedings. Section 105(c)(2) deals specifically with temporary reinstatement and provides that after temporary reinstatement is ordered, the Commission "shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. **Such order shall become final 30 days after its issuance**." 30 U.S.C. § 815(c)(2) (emphasis added).

Thus, one section of the Mine Act states that orders become final 40 days after a hearing with the ALJ unless the order is appealed, in which case, the final order date is extended. The other standard states that orders become final 30 days after the hearing and finality is not extended based on an appeal of the ALJ's initial decision. The conflict in these two sections of the Mine Act is a novel question that the Commission has not yet addressed. Accordingly, on July 6, 2023, the Commission directed the parties to file supplemental briefing to explain the apparent conflict between sections 113(d)(1) and 105(c)(2).

In the Secretary's supplemental brief, the Secretary argues that the statutory text and structure of the Act support applying the 40-day rule to determine when discrimination cases become final orders. This reading of the Act would have the Commission align the two sections by reading section 105(c)(2)'s 30-day rule to apply to Commission decisions, not ALJ decisions. Therefore, an ALJ's decision would become final after 40 days, unless appealed, when it would become final 30 days after the Commission's decision. The Secretary argues that this interpretation comports with basic principles of statutory construction, is in line with Commission precedent, and promotes the purposes of the Mine Act.[12] Importantly, the Secretary does not argue that the Mine Act is ambiguous, nor does the Secretary seek deference in support of that position.

The Secretary's attempted adherence to a textualist approach to reconciling these two sections fails in producing a standard consistent with the Mine Act. First, if all Commission orders are final 30 days after the Commission issues a decision on appeal, it seems odd that Congress, in its wisdom, would decide to randomly remind readers of this general proposition in the middle of a section on temporary reinstatement and discrimination proceedings. The Secretary and the majority do not explain why the 30-day rule would be inserted in section 105(c)(2). Thus, the Secretary's reading of the Act would relegate the 30-day rule in section 105(c)(2) to mere surplusage—redundant language.

Second, the Secretary's reading ignores the fact that section 105(c)(2) refers to the order issued after hearing and based on findings of fact. The Federal Mine Safety and Health Review Commission is an independent agency comprised of a core of administrative law judges and a five-member Commission that reviews Judge's decisions. The Mine Act uses the word

[12] It bears repeating that an Assistant Secretary for Mine Safety and Health head of MSHA acknowledged in an addendum to his congressional testimony that temporary reinstatement is only effective "until the ALJ rules on the merits of the miner's discrimination complaint. INCREASING MSHA AND SMALL MINE COOPERATION: HEARING BEFORE THE SUBCOMM. ON EMPLOYMENT, SAFETY, AND TRAINING OF THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, 106th Cong. 174 (Comm. Print 1999).

"Commission" to refer to both the agency as a whole and just the appellate body. When section 105(c)(3) directs the "Commission" to afford an opportunity for a hearing, the section is referring to the agency, not the appellate body. The Commission, as an appellate body, does not hold hearings, nor does it make findings of fact. Those powers are reserved exclusively for the Commission's ALJs. Section 105(c)(2) requires that the order become final 30 days after a hearing and "based upon findings of fact." 30 U.S.C. § 815(c)(2). Accordingly, the text does not support an interpretation where the 30-day rule is applied to Commission decisions.

One of the most fundamental principles of statutory interpretation is *generalia specialibus non derogant*. This canon of interpretation instructs readers of the law that, where there is a conflict between a general provision and a specific provision, the specific provision prevails. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . .").

The Mine Act provides a general rule in section 113(d)(1) whereby the decision of an ALJ will become final in 40 days with the possibility that the final order will be further delayed pending appeal. This definition applies to a vast majority of cases before the Commission that primarily address alleged violations of mandatory health and safety standards. Section 105(c)(2), however, is specific to the small number of cases of discrimination that come before the Commission. This section prescribes novel concepts like an investigation by the Secretary into the miner's claims and temporary reinstatement, that warrant special treatment. In this special context, Congress instructed that the parties be afforded a hearing and should be issued an order based on findings of fact. Upon the issuance of that order, the section clearly states that the order becomes final in 30 days at which time temporary reinstatement ends. Section 105(c)(2) uses a different calculation for finality (30, rather than 40, days) and makes no mention of appeals. Given the clear instruction of this section based on the specificity concerning discrimination proceedings and the proximity to the language requiring the reinstatement to extend only to the "final order on the complaint," it is difficult to see how anyone could rationalize extending the termination date beyond 30 days.

Moreover, reading the Act to require that temporary reinstatement end after 30 days of an ALJ's finding of no discrimination avoids exacerbating the constitutional questions raised above. *See* sections I, II, *supra*. When interpreting the Mine Act, the Commission should also be mindful of the interpretive canon requiring readers of the law to avoid statutory construction that raises "grave and doubtful constitutional questions." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

Contrary to the assertion of the majority, the application of the 30-day rule to ALJ discrimination decisions does not conflict with the purpose of the Mine Act. Temporary reinstatement is injunctive relief offered before a due process hearing and thus must be applied only insofar as the public interest in protecting a miner's income during a complaint outweighs the operator's innate interest in directing its workforce. The Mine Act offers temporary reinstatement, not to every miner who files a complaint, but rather, only to miners who have at least a nonfrivolous chance of prevailing on the merits of their discrimination claims. In the first instance, temporary reinstatement can be denied by the Secretary after a cursory examination of the facts of the case.

Applying the 30-day rule is in keeping with this principle. The miner in a section 105(c)(2) case would be temporarily reinstated until the ALJ issues a decision on the merits of the discrimination case. If the ALJ finds that no discrimination occurred, the balance between the public and private interest shifts, and the miner is given 30 days of continued reinstatement to get their affairs in order before the period of reinstatement ends.

The majority seeks to apply a rule that is contrary to the purposes of the Act. By extending temporary reinstatement after the miner fails to prove discrimination on the merits, the majority creates a perverse incentive to appeal non-meritorious claims to extend temporary reinstatement for months or even years. This is not the result that Congress would have intended.

IV.

CONCLUSION

I join my colleagues in finding that substantial evidence supports the ALJ's finding of no discrimination and his finding that the operator should have reported the injury. I cannot vote to affirm a procedure that continues temporary reinstatement under a nonfrivolous claim not tested by any factual or creditability determinations after an ALJ finds after a full hearing that discrimination did not occur. After a full and fair hearing, the balance of rights falls to the employer against a nonfrivolous claim awarded with only the barest minimum of rights.

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

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August 30, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. LAKE 2021-0160
KNIGHT HAWK COAL, LLC	

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

DECISION

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

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), involves the interlocutory review of a Commission Administrative Law Judge's denial of a proposed settlement between the Secretary of Labor and Knight Hawk Coal, LLC ("Knight Hawk"). 44 FMSHRC 23 (Jan. 2022) (ALJ).

At issue is whether the Secretary has unreviewable discretion to remove a significant and substantial ("S&S") designation[1] from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).[2] For the reasons that follow, we answer that question in the negative, affirm the Judge's denial of the settlement motion, and remand the case to the Judge.

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

[2] Section 110(k) provides in relevant part:

> No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.

30 U.S.C. § 820(k).

I.

Factual and Procedural Background

This case originally involved three citations, Citation Nos. 9198030, 9198038, and 9198165, issued to Knight Hawk at its Prairie Eagle-Underground mine by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Secretary submitted to the Judge a motion to approve a settlement pursuant to Section 110(k). In that motion, the Secretary proposed removing S&S designations from two citations: Citation Nos. 9198165 and 9198038. The third citation remained unaltered. Additionally, the motion requested a penalty reduction from $7,960.00 to $4,590.00.

The Judge denied this settlement motion. In doing so, he requested clarification regarding why the parties believed that the circumstances surrounding Citation Nos. 9198165 and 9198038 were not reasonably likely to contribute to an event with the potential to cause significant injuries for S&S purposes.

The Secretary subsequently submitted three amendments to the motion to approve settlement. Although the Judge determined that the amended explanation for the removal of the S&S designation from Citation No. 9198165 was satisfactory, he remained unsatisfied with the parties' justification for removing the S&S designation from the remaining citation, Citation No. 9198038. He noted that Citation No. 9198038 "arises from an alleged violation of the operator's roof control plan, which appears to have been discovered after a roof fall occurred." 44 FMSHRC at 33.

The Judge held that given the lack of an adequate justification for removing the S&S designation from Citation No. 9198038, approval would unfairly compromise the public interest. Therefore, pursuant to the Commission's longstanding authority to approve settlements under section 110(k) of the Act, he issued an order denying the motion to approve settlement.

The Judge subsequently granted the Secretary's motion to certify this case for interlocutory review. The Commission granted interlocutory review on the issue of "whether the Secretary has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act."[3]

[3] Our dissenting colleague has opted to issue a consolidated dissent for both *Knight Hawk* and *Crimson Oak*, which the Commission is issuing on the same date. 46 FMSHRC ___, slip op. at 13, No. SE 2021-0112, et. al. (August 30, 2024). However, as we have not consolidated the instant proceedings with *Crimson Oak*, the issues raised in *Crimson Oak* exceed the scope of our interlocutory review in this matter, and we do not address them here. *See* 29 C.F.R. § 2700.76(d).

II.

The Parties' Arguments

The Secretary argues that the Judge abused his discretion by denying the settlement motion, based on an "improper understanding of the law." S. Op. Br. at 10; *see Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014); *see also Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003) (citations omitted) (articulating *de novo* standard of review). The Secretary asserts that she has unreviewable prosecutorial discretion to remove an S&S designation because S&S designations are "enforcement decisions," not "penalties," under the language of section 110(k). S. Op. Br. at 10-18.

The Secretary grounds her claim to this authority in the Administrative Procedure Act ("APA"), arguing that enforcement agencies are generally presumed to have unreviewable discretion to settle enforcement actions. She submits that such a presumption can be overcome only when the controlling statute both (1) indicates an intent to circumscribe agency enforcement discretion; and (2) provides meaningful standards for defining the limits of that discretion (citing as support the "*Heckler* Test" established in *Heckler v. Chaney*, 470 U.S. 821, 834 (1985)). The Secretary asserts that the presumption of unreviewability cannot be overcome for the removal of S&S designations because section 110(k) fails to meet the second prong of the *Heckler* test; that is, it does not provide any meaningful standards for judicial review of the Secretary's S&S decisions, but only for penalty amounts.

The Secretary cites to the Commission's decisions in *Mechanicsville Concrete, Inc*. and *American Aggregates of Michigan, Inc*. to support her position that she need only depend on her discretion when vacating S&S designations in settlements. S. Mot. ¶ 6(C)(2); *Am. Aggregates of Mich., Inc*., 42 FMSHRC 570, 576–79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879–89 (June 1996)).

The Secretary further relies on the Act's split-enforcement scheme to argue that the Mine Act precludes Commission review of the Secretary's decision to remove an S&S designation. According to the Secretary, the role of the Commission is limited to adjudicating disputes and not to "second-guess the Secretary's enforcement choices or to make its own." S. Op. Br. at 18-19.

Finally, the Secretary argues that other considerations support the Secretary's unreviewable discretion to remove S&S designations, such as fairness to operators, public confidence in enforcement of the Mine Act, and the Equal Access to Justice Act ("EAJA").

The operator filed a response brief reiterating many of the same arguments made by the Secretary.

III.

Disposition

For the reasons set forth below, we hold that the Secretary does not have unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Act. We further hold that the parties must provide sufficient reasoning and justification to support the removal of an S&S designation in a settlement motion.[4] Accordingly, we conclude that the Judge did not abuse his discretion by denying the settlement motion.

A. Sections 110(k) and 110(i) of the Mine Act Demonstrate an Intent to Circumscribe the Secretary's Enforcement Discretion and Supply a Meaningful Standard of Review to Evaluate the Secretary's Removal of S&S Designations in Settlement Proceedings.

Agency decisions not to enforce, including an agency's decision to settle, are generally committed to the agency's discretion and are therefore presumptively unreviewable. *Heckler v. Chaney*, 470 U.S. at 831; *see, e.g.*, *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459-60 (D.C. Cir. 2001). However, this presumption of unreviewability may be overcome if the relevant statute "has indicated an *intent to circumscribe* agency enforcement discretion, and has provided *meaningful standards* for defining the limits of that discretion." 470 U.S. at 834 (emphasis added).

For the reasons below, we hold that the Mine Act meets both requirements of the *Heckler* test, therefore the Secretary does not have unreviewable authority to settle proceedings under the Mine Act.

1. Section 110(k) of the Act demonstrates an intent to circumscribe the Secretary's enforcement discretion to remove S&S designations in the context of settlement proceedings.

The Commission has held that, in the settlement context, section 110(k) rebuts the general rule of unreviewability. Section 110(k) expressly curtails the Secretary's authority to exercise a basic power of prosecutorial discretion: the power to settle a case. As stated in *American Coal Co.*, 38 FMSHRC 1972, 1980 (Aug. 2016) ("*AmCoal I*"), "section 110(k) is an

[4] Our dissenting colleague states the issue in this case as "whether an ALJ may disapprove a settlement based upon disagreement with the Secretary of Labor's discretionary decision to vacate a special finding of a Significant and Substantial ("S&S") violation." Slip op. at 15. This is not an accurate characterization of the issue before us. The question before us is not whether a Judge may subjectively "disagree" with the Secretary, but whether a Judge may review a proposed settlement to determine whether the Secretary has provided sufficient justification for her decision to remove an S&S designation. Under Commission Rule 76(d), "review shall be confined to the issues raised in the Judge's certification," and the dissent's attempt to answer a different question than the one certified violates the Commission's procedural rules. 29 C.F.R. 2700.76(d).

explicit expression of Congressional authorization that rebuts any presumption of unreviewability" under *Heckler*. As a result, the remaining question before us is the scope of the intended circumscription.

A review of the language, the legislative history, comparisons to other health and safety statutes, and practical considerations all signal an expansive role for the Commission. This includes the authority to review S&S removals in citations within settlements as a necessary component of its settlement review authority. In reaching this holding, we do not grant the Commission any new settlement review authority beyond that of *AmCoal I*, 38 FMSHRC at 1972 and *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*").

With respect to the language of section 110(k), it is highly significant that Congress included the terms "compromised" and "mitigated" in addition to "settled" in section 110(k), 30 U.S.C. § 820(k). *See AmCoal I*, 38 FMSHRC at 1975-76. In order to grasp that significance, it is important first to understand what the words in section 110(k) mean in context. "Compromise" and "mitigate" are not defined in the Act. In the absence of a statutory definition, courts typically "construe statutory term[s] in accordance with [their] ordinary or natural meaning[s]." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).[5] Furthermore, when Congress uses multiple terms, such as here, the courts construe each term to have a particular, non-superfluous meaning. *See, e.g.*, *Bailey v. U.S.*, 516 U.S. 137, 145-46 (1995) (rejecting interpretation that would have made "uses" and "carries" redundant in a statute penalizing using or carrying a firearm in commission of offense), *superseded by statute*, Criminal Use of Guns 1998, Pub.L. 105–386, § 1(a)(1), 112 Stat. 3469, *as recognized in U.S. v. O'Brien*, 560 U.S. 218, 232–233 (2010) (discussing statutory amendment known as the "Bailey fix").

Therefore, the inclusion of the terms "compromised," "mitigated," and "settled" in section 110(k) indicates a Congressional intent for Judges to apply a holistic approach to reviewing settlements. The fact that Congress chose these words instead of using narrower language specifying that a penalty amount may not be lowered without Commission approval demonstrates that Judges must be able to review more than the mere settlement of civil penalty dollar figures. Congress did not simply state that the Commission could review penalty settlements, instead it used additional, broad terms like "compromise" and "mitigate" to ensure that the Commission's review authority was broad and encompassing. Congress' choice of broad language further demonstrates that penalties are closely intertwined with the allegations set forth in citations in settlement proceedings.

Our reading of section 110(k) is consistent with previously announced interpretations of the Mine Act. For instance, the Commission has recognized that Judges must "accord due

[5] The term "compromise," has been defined as the "settlement of differences or by consent reached by mutual concessions." *Compromise*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/compromise (last visited Aug. 27, 2024). The term "mitigates" has been defined as "to cause to become less harsh" or "to make less severe or painful" (i.e., or ameliorate, lessen, or balance out something). *Mitigate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/mitigate (last visited Aug. 27, 2024).

consideration to the *entirety* of the proposed settlement package, including *both its monetary and nonmonetary aspects*." *AmCoal II*, 40 FMSHRC at 989 (emphases added). During settlement review, a Judge cannot be limited to looking solely at discrete penalty dollar amounts, but rather must be able to take a holistic approach to analyzing settlements. Judges may look at compromises of the citation's allegations, and those compromises may impact the penalty amount or have other legal consequences.

The legislative history and policy considerations of section 110(k) reinforce the need for Commission review of the Secretary's removal of S&S designations in settlement proceedings. As we have previously recognized, Congress unquestionably delegated to the Commission the power to administer section 110(k) by granting the Commission the authority to review *all* settlements of citations under the Act. *See AmCoal I*, 38 FMSHRC at 1975. Congress explained that section 110(k) was intended to assure that prior abuses involved in the unwarranted lowering of penalties, because of off-the-record negotiations, would be avoided by providing for independent Commission settlement review. S. Rep. No. 95-181, at 44-45 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632–33 (1978) (*Leg. Hist*.).

Congress knew that having such authority is a necessary component of the Commission's ability to meaningfully review the "compromise," "mitigation," and "settlement" of penalties as a whole and to effectively deter future violations. 30 U.S.C. § 820(k). Section 110(k) serves to maintain the deterrent effect of violations and penalties, in part by preventing the Secretary from abusing her authority to settle such violations without appropriate justification. *See AmCoal I*, 38 FMSHRC at 1975-76 (citing S. Rep. No. 95-181, at 44-45, *reprinted in Leg. Hist*. at 632-33). The Commission cannot effectively review the Secretary's reduction of a penalty without examining the factors that go into it. This underscores the importance of a meaningful, all-encompassing review by the Commission that goes beyond mere dollar amounts.

Congress' intent is further reinforced by a comparison of the Mine Act to the Occupational Safety and Health Act ("OSH Act"). The OSH Act contains similar language to section 110(k), but with an important distinction. Section 655(e) of the OSH Act states that "[w]henever the Secretary [of the Occupational Safety and Health Administration] promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register." 29 U.S.C. § 655(e). Although the caselaw and legislative history of the OSH Act do not specify what the terms "compromises" or "mitigates" a penalty means, the legislative history makes it clear that these actions are within the purview of the Secretary. *See generally* S. Rep. 91-1282 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5177.

It is important to distinguish that in the OSH Act, the Secretary is *authorized* to take such actions *without approval* by the Occupational Safety and Health Review Commission ("OSHRC"), while in the Mine Act – which was passed seven years later – Commission approval is required. *See* 30 U.S.C. § 820(k). As with the Mine Act's legislative history, this comparison between the language of the statutes elucidates Congress' intent, in drafting the

Mine Act, to avoid the abuses arising from off-the-record negotiations by the Secretary, by envisioning a greater role for the Commission under the Act.

Finally, practical and common-sense considerations support an interpretation of the statute that grants broad authority to the Commission to approve or deny settlement motions. In fact, it is hard to fathom any meaningful review under section 110(k) if all relevant factors are not considered.

That is evident in this case. Specifically, here, the Secretary's removal of an S&S designation in a citation during a settlement proceeding resulted in a reduced penalty amount. Whether the penalty amount is appropriate cannot be properly determined without consideration of how other changes to the citation impact the penalty. Further, this case demonstrates that non-monetary considerations in one citation may have monetary consequences later. For example, an operator might be willing to pay the full amount of a proposed penalty in exchange for the Secretary's removal of an S&S designation in order to avoid a Pattern of Violations ("POV") notice in the future thereby "mitigat[ing]" the harshness of the proposed penalty. All factors, rather than simply the penalty amount, are part of the bargained-for exchange, i.e., the "compromise" that occurs in Mine Act settlements.

The Secretary would interpret section 110(k) narrowly, as applying only to monetary "penalties." Specifically, the Secretary argues that she has the unreviewable authority to remove S&S designations in a settlement proceeding without the Commission's approval because "[t]he 'particular language' of section 110(k) . . . grants the Commission only the authority to approve the settlement of 'penalties,'" S. Op. Br. at 17. The Secretary further argues that S&S removals are not "penalties." *Id*. She also relies on the language of section 104(h), which provides for the Secretary's authorityto "modif[y], terminat[e], or vacat[e]" citations or orders. 30 U.S.C. § 814(h). The Secretary asserts that removing an S&S designation in a settlement is analogous to modifying a citation, and that "Congress would not have given the Secretary the independent authority to modify violations if Congress did not mean for the Secretary to exercise that authority independently." S. Op. Br. at 17. According to the Secretary, the language and overall structure of the Act and the "nature of the administrative action at issue" confirm that the Secretary's decisions to remove S&S designations in citations are unreviewable decisions in a settlement, as distinct from her decisions to settle "penalties." *Id*. at 17-18.

In essence, the Secretary's argument boils down to an assertion that Congress must have meant something different from what the language obviously says, which is *the Commission must approve settlements*. However, other language in the Mine Act, relevant for other purposes, does not negate this clear Congressional intent. Further, the Secretary's interpretation would effectively undermine Congressional intent, by allowing for unfettered discretion to modify any settlement if the penalty amount remains the same. Taken to its logical conclusion, this would enable the Secretary to take an end run around Commission review of settlements, rendering such review a nullity. Accordingly, we necessarily read section 110(k) as circumscribing the Secretary's discretion for her removal of S&S designations in settlement proceedings.

2. Sections 110(i) and 110(k) supply a meaningful standard of review to evaluate the Secretary's removal of S&S designations in settlement proceedings.

Having determined that Congress clearly intended to circumscribe the Secretary's enforcement authority in Section 110(k), we now turn to the question of whether the statute in question provides "*meaningful standards* for defining the limits of that discretion." *Heckler*, 470 U.S. at 822. (emphasis added). Whether a statute provides a "meaningful standard" depends on "the particular language and overall structure of the statute in question, . . . as well as 'the nature ofthe administrative action at issue.'" *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 317 (4th Cir. 2008) (citing *Webster v. Doe*, 486 U.S. 592, 600-01 (1988) and quoting *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002)). If there are "no judicially manageable standards . . . for judging how and when an agency should exercise its discretion," then those discretionary decisions are unreviewable. *Heckler*, 470 U.S. at 830.

We hold that section 110(i), 30 U.S.C. § 820(i), of the Mine Act provides a judicially manageable standard that constrains the Secretary's discretion and allows Commission Judges to evaluate how and when the Secretary should exercise her decision-making when removing S&S designations in settlement proceedings. *See Speed Mining*, 528 F.3d at 317. This standard is set forth in the six penalty factors that the Commission must consider in assessing a penalty.

Although section 110(i) does not explicitly reference S&S, it does require consideration of evidence of the "gravity" of the violation. 30 U.S.C. § 820(i). The Commission has held that gravity and S&S, although not identical, are "based frequently upon the same or similar factual circumstances." *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n. 11 (Sept. 1987), *citing* 30 U.S.C. §§ 820(i), 814(d). S&S is essentially the interplay between the "likelihood" and "severity" components of "gravity" in the Mine Act and its related regulations.[6] *See e.g.* 30 C.F.R. § 100.3, Tables XI, XII. In short, the Commission's review of the Secretary's decision to remove an S&S designation is not arbitrary but is instead guided by the statutory language in section 110(i) regarding gravity.

In addition to section 110(i), the Commission has interpreted section 110(k) to require settlements to be "fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal I*, 38 FMSHRC at 1976. This standard also applies with respect to the Secretary's decision to remove an S&S designation.

[6] MSHA has effectively conceded the interrelatedness of S&S and gravity. For example, when evaluating the penalty points for gravity, MSHA is required to assign additional points for any violation where the "event against which a standard is directed" is "reasonably likely" to occur, which is similar to the language used in the *Mathies* test for S&S. *See* 30 C.F.R. § 100.3, Table XI; *compare Mathies Coal Co*., 6 FMSHRC 1, 3 (Jan. 1984). Similarly, the MSHA Inspector Citation Handbook and MSHA Handbook both structure their guidance on S&S within the gravity context. *See generally* MSHA Handbook Series U.S. Dep't of Labor, Mine Safety and Health Administration, Dec. 2020 Handbook Number PH20-I-3, *Citation and Order Writing Handbook*, *available at:* https://arlweb.msha.gov/READROOM/HANDBOOK/ PH20-I-13.pdf (listing "S&S" as subsection 10(c) of section 10 which is entitled "gravity").

Thus, sections 110(i) and 110(k) provide a "judicially manageable standard[] . . . for judging how and when [the Secretary] should exercise [her] discretion" in removing S&S designations in settlement proceedings. *Speed Mining*, 528 F.3d at 317. Accordingly, we hold that the *Heckler* presumption of unreviewability for the Secretary has been overcome. *Heckler*, 470 U.S. at 834.

B. The Secretary's Broad Reliance on *Mechanicsville* and *American Aggregates* is Misplaced and Overlooks Contrary Commission Caselaw.

As noted above, the Secretary argued that the Commission decisions in *Mechanicsville* and *American Aggregates* render her decision to remove an S&S designation unreviewable. However, those cases are inapposite.

Mechanicsville is distinguishable in two respects. First, as the Judge noted below, *Mechanicsville* involved a *Judge's* attempt to *add* an S&S designation while the current case involves a proposal by the *Secretary* to *eliminate* an S&S designation. 18 FMSHRC 877, 879-80 (June 1996) (holding that, where MSHA has not charged an S&S violation, a Judge may not make an S&S finding on his or her own initiative).[7] Second, *Mechanicsville* relies on a line of precedent stemming from a case brought under the OSH Act. *See RBK Constr., Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993), *citing Cuyahoga Valley Ry. Co v. United Transp. Union*, 474 U.S. 3, 6-7 (1985). As noted above, the OSH Act and the Mine Act diverge regarding the Secretary's authority over settlements. Therefore, precedent developed under the OSH Act does not inherently apply to the Mine Act in the settlement context.

We also agree with the Judge's determination that the Secretary's reliance on *American Aggregates* is also "misplaced." 44 FMSHRC at 25 In *American Aggregates*, 42 FMSHRC at 576-81, "the Commission vacated a Judge's decision to deny a settlement motion because the Judge ignored information that was relevant to the reasonableness of the settlement under the *AmCoal* criteria." 44 FMSHRC at 25; see *AmCoal I*, 38 FMSHRC at 1979-81; *AmCoal II*, 40 FMSHRC at 991. That information had "included several facts that were relevant to, and plausibly supported, a decrease in gravity and negligence, and the removal of the S&S designation." 44 FMSHRC at 25. As the Judge stated, the Commission reversed the Judge's denial of the settlement, including the removal of the S&S designation, solely because the Judge had failed to consider the relevant factual support provided. *Id*. Nothing in that case supports the parties' broad, sweeping position that the Secretary's decision to remove an S&S designation in a settlement constitutes unreviewable prosecutorial discretion.

Thus, neither *Mechanicsville* nor *American Aggregates* supports the parties' positions in this case that S&S determinations made in the context of a settlement are presumptively unreviewable "enforcement decisions."

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[7] Our dissenting colleague states "[n]o one would suggest that, before or after a hearing, an ALJ could add a special S&S finding even though the violation was not cited as S&S." Slip op. at 18. We agree. That issue is well-settled and not before us at this time. For the reasons outlined above, the question of whether the Secretary has unfettered discretion to eliminate an S&S designation is a legally distinct issue.

In fact, long-standing Commission caselaw holds that Commission Judges must review *all* settlements of citations, as the Commission has consistently required its Judges to consider reasoning and justifications that are both substantive and relevant to proposed modifications before a motion to approve *any* settlement may be granted. *See, e.g., Solar Sources Mining, LLC*, 41 FMSHRC 594, 601, 605-06 (Sept. 2019) (reversing Judge's determination that the parties presented no justification to support settlement, when the parties "actually presented relevant facts," including the non-applicability of the standard); *Hopedale Mining, LLC*, 42 FMSHRC 589, 597-602 (Aug. 2020) (reversing the Judge's settlement denial because the Secretary had provided relevant justification in part to support the lowering of negligence and gravity).

Here, the Secretary failed to submit sufficient support showing why the citation involving a roof control plan violation was not S&S although a roof fall had occurred. The Secretary merely stated that the area in question at the mine had never been deemed to be wider than the roof control plan allowed, so that additional bolts had not been installed, and that the condition was not obvious, had not been noted on prior inspections, and did not present visible signs that a roof fall was imminent. While the Judge found that "these facts would support a reduction in negligence, they would not support a reduction of the likelihood of injury in an area where a roof fall occurred." 44 FMSHRC at 33.[8]

Although Judges need not engage in fact-finding, weighing conflicting evidence, or making credibility determinations, they must still "probe gaps or inconsistencies in the explanation offered in support of a settlement motion." *Cf*. *Hopedale Mining*, 42 FMSHRC at 595 (offered in response to the dissent); *see also Black Beauty Coal Co*., 34 FMSHRC 1856, 1863, n.6 (Aug. 2012) (holding that the Judge did not abuse her discretion in noting gaps and inconsistencies in settlement motion); *Solar Sources Mining LLC*, 41 FMSHRC at 602 (stating that Judges are "expected to . . . determine whether the facts support the penalty agreed to by the parties").[9] Here, the parties failed to provide the Judge with sufficient justifications to serve as the basis for an evaluation for why the citation for an alleged roof control plan violation issued after a roof fall was not S&S under *AmCoal I*.

[8] Our dissenting colleague notes that the parties can only settle "if they can explain to the Commission how the compromise penalty comports with the penalty criteria expressly established in section 110(i)." Slip op. at 21. However, that is exactly what the parties failed to do here: they failed to explain how the facts they assert comport with the penalty they agreed to assess. Specifically, the parties failed to explain how the facts asserted could reasonably be cited for the compromised gravity determination they agreed upon. The ALJ gave the parties opportunities to provide that explanation for this compromise, but they failed to provide one.

[9] Our dissenting colleague characterizes this analysis as a "mini hearing" on the merits of the case. Slip op. at 22. That is not an accurate characterization of what has occurred here. The ALJ did not convene a hearing, he did not question witnesses or make credibility determinations. Instead, he simply read the submissions provided by the parties, noticed inconsistencies between the facts asserted and the penalty assessed, and requested clarification. The parties failed to provide sufficient clarification and the ALJ denied the settlement.

C. The Secretary's Policy Arguments Relying on the Mine Act's Split-Enforcement Scheme Are Unpersuasive in the Context of Settlements.

The Secretary also claims that the Act's split-enforcement scheme precludes Commission review of the Secretary's S&S decisions during settlement proceedings. According to the Secretary, the role of the Commission is limited to adjudicating disputes and not to "second-guess the Secretary's enforcement choices or to make its own." S. Op. Br. at 18-19. Applying this principle, the Secretary describes the Commission's assertion of settlement authority here as a "pernicious" intrusion into the Secretary's enforcement decisions, which would "invite [the Commission] to substitute its views of enforcement policy for those of the Secretary, a power that . . . the Commission does not possess." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 158 (D.C. Cir. 2006)[10]; *Speed Mining*, 528 F.3d at 319. The Secretary speculates that, as a result of this "intrusion," a Commission Judge could presumably reject the Secretary's S&S removals, forcing her to pursue elevated enforcement actions that she does not believe to be warranted, thus violating Commission Procedural Rule 6(b)(2), 29 C.F.R. § 2700.6(b)(2) (stating that the signer of a document certifies that the document "is well grounded in fact and is warranted by existing law . . . ."). S. Op. Br. at 19.

We reject the Secretary's argument. If any relevant circumstances exist to plausibly suggest that an S&S enforcement action is unwarranted, all the Secretary needs to do is provide justification for removing the S&S designation to the Judge in her settlement motion – and her motion must be granted. *AmCoal I*, 38 FMSHRC at 1982; *Hopedale*, 42 FMSHRC at 601. If a Judge were to still reject the motion, the Secretary could employ various procedural safeguards to protect herself from having to pursue an unwarranted S&S enforcement action. She could, for example, seek interlocutory review, as she did in this case. Even if a Judge were to deny or disregard the Secretary's motion for interlocutory review, the parties could seek review of that denial or disregard of the motion before the Commission and the Courts of Appeals.[11]

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[10] Our dissenting colleague cites *Twentymile Coal Co.*, for the proposition that "the Secretary's charging discretion is as uncabined as that of a United States Attorney under the Criminal Code." Slip op. at 22, *quoting Twentymile Coal Co.* 456 F.3d at 157. In *Twentymile*, the D.C. Circuit reversed a Commission decision which overturned a decision by the Secretary of Labor to cite both the owner-operator of a mine, as well as its independent contractor, for safety violations committed by the contractor. *Id*. at 152. The court determined that because the Mine Act provided no meaningful standards against which to judge the Secretary's decisions regarding which parties to cite, the Commission is generally without authority to review such decisions. *Id*. That is distinguishable from the situation here. As discussed at length above, sections 110(i) and 110(k) evince Congress' desire to limit the Secretary's discretion during settlement and provide a standard of review for the Commission to analyze the Secretary's actions.

[11] *See, e.g.*, *Hopedale*, 42 FMSHRC at 592-94 (holding that a Judge erred in convening a hearing rather than ruling on a motion seeking interlocutory review); *see also Shamokin Filler Co*., 33 FMSHRC 1753 (Aug. 2011). The Commission has repeatedly granted interlocutory review of orders denying approval of settlement motions. *See, e.g.*, *Solar Sources*, (continued…)

D. The Secretary's Remaining Policy Arguments Relying on Fairness to Operators, Public Confidence in Mine Act Enforcement, and EAJA Considerations are not Sufficiently Compelling Reasons to Withhold Commission Review of S&S Removals in Settlements.

The Secretary contends that being able to prevent her from removing an S&S designation would improperly place the Commission in the role of the prosecutor, as well as risk serious unfairness to operators. According to the Secretary, an operator who receives a safety and health conference and presents facts warranting removal of an S&S designation will have it removed, but if the operator contests the citation *before* presenting identical facts, there would be no guarantee that the Commission would agree to the Secretary's decision to remove the special finding. The Secretary argues that an operator's ability to present information to the Secretary, and to have special findings removed when warranted, should not depend on *when* a citation negotiation happens to occur in the contest process.

We conclude that these procedural fairness concerns are outweighed here by the safety policies of the Act. As declared by section 2 of the Act, "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner." 30 U.S.C. § 801(a). Here, the Commission's interpretation of section 110(k) and 110(i) furthers this purpose by maintaining the deterrent effect of violations and penalties, in part by preventing the Secretary from abusing her authority to settle such violations without appropriate justification. *See AmCoal I*, 38FMSHRC at 1975-76 (citing S. Rep. No. 95-181, at 44).

"Statutes are hardly, if ever, singular in purpose," but rather, "most laws seek to achieve a variety of ends in a way that reflects the give-and-take of the legislative process." *Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 494 (D.C. Cir. 2016). Here, the Commission's interpretation of section 110(k) reflects a reasonable accommodation of the safety goals and other policies of the Act.

Furthermore, the Secretary's EAJA arguments lack merit. The Secretary claims that being able to prevent her from removing an S&S designation in a settlement could inappropriately force her to assume EAJA risk when she has decided not to. The Secretary again paints a hypothetical scenario where an operator contests a citation and, during settlement negotiations, it presents facts that warrant removal of an S&S designation. In this scenario, the Secretary agrees to modify the citation and informs a Judge of that decision but refuses to inform the Judge of the exculpatory justifications presented by the operator. As a result, the Judge refuses to permit the settlement modification. The operator, unwilling to accept a citation with a special finding the Secretary has already agreed to remove, goes to hearing. Subsequently, the Judge, Commission, or court of appeals vacates the citation, and the operator seeks EAJA fees.

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[11] (…continued)
LLC, 41 FMSHRC 594 (Sept. 2019); *Am. Aggregates of Michigan, Inc*., 41 FMSHRC 270 (Jun. 2019); *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018); *AmCoal II*, 40 FMSHRC at 983; *Amax Lead Co. of MO*, 4 FMSHRC 975 (Jun. 1982).

In such a scenario, according to the Secretary, it could be difficult for her to prove that her position (litigating the citation that includes the S&S designation) was "substantially justified"[12] because of her earlier agreement to remove the designation – which could effectively be used against her. The Secretary claims that this risky and undesirable litigating position would flow from the Commission's refusal to grant the Secretary unfettered discretion to remove S&S designations in settlements.

We reject this argument. As discussed above, if any relevant facts exist to plausibly suggest that an S&S enforcement action is unwarranted, all the Secretary needs to do is provide the reasoning and justification for removing the S&S designation to the Judge – and the settlement motion must be granted. *AmCoal I*, 38 FMSHRC at 1973-74; *Black Beauty*, 34 FMSHRC at 1863; *Cf*. *Hopedale*, 42 FMSHRC at 589. Furthermore, if a Judge were to still reject the settlement motion, as stated above, the Secretary would still have the benefit of various procedural safeguards, such as being able to petition for interlocutory review, to protect herself from having to pursue an unwarranted S&S enforcement action. *See, e.g.*, *Hopedale*, 42 FMSHRC at 592-94 (holding that a Judge erred in convening a hearing rather than ruling on a motion seeking interlocutory review); *Shamokin Filler Co*., 33 FMSHRC at 175. Further, it is a bedrock principle of American jurisprudence that a party's settlement positions and offers cannot be used against a party in litigation to show inconsistency or contradiction. *See e.g.* Federal Rule of Evidence 408.

In sum, we conclude that sections 110(k) and 110(i) of the Mine Act demonstrate an intent to circumscribe the Secretary's enforcement discretion and supply a meaningful standard of review to evaluate the Secretary's removal of S&S designations in settlement proceedings. We find unpersuasive the Secretary's arguments to the contrary.

[12] 5 U.S.C. § 504 authorizes the payment of attorney's fees to a prevailing party in an action against the United States unless the government can show that its position in the underlying litigation "was substantially justified."

IV.

Conclusion

For the reasons stated above, we hold that the Secretary does not possess unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Act. Further, we hold that the parties must provide sufficient factual support to remove an S&S designation under such circumstances. We therefore conclude that the Judge did not abuse his discretion by denying the settlement motion. Accordingly, we affirm the Judge's denial of the motion and remand the case to the Judge.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

Commissioner Althen, dissenting:

This opinion addresses two cases presently being acted upon by the Commission. These cases involve a total of six settlement dockets now pending before the Commission concerning whether a Commission Administrative Law Judge ("ALJ") may interfere with the Secretary's exercise of prosecutorial discretion. In each case, I respectfully dissent.

In *Crimson Oak Grove Resources, LLC*, Docket No. SE 2021-0112 et al., the Commission considers whether an ALJ may disapprove a settlement based upon disagreement with the Secretary's discretionary decision to vacate a citation.[1] In *Knight Hawk Coal, LLC*, Docket No. LAKE 2021-0160, the Commission considers whether an ALJ may disapprove a settlement based upon disagreement with the Secretary of Labor's discretionary decision to vacate a special finding of a Significant and Substantial ("S&S") violation.[2] In each case, the Commission majority seeks to wrest discretionary policy and enforcement decisions from the Secretary. The majority does so by misconstruing the wording, purpose, and limit of section 110(k) of the Mine Act, 30 U.S.C. § 820(k) and refusing to accept the Secretary's policymaking and enforcement authority.[3]

Common threads join the cases—the Secretary's exclusive executive authority to make enforcement decisions and the Commission's failure to have any policy-making authority. Rather than writing separate opinions, I consolidate my dissenting opinion into one opinion to be issued in each case, respectively.

The express terms of the Mine Act and the established enforcement authority of the Secretary undercut the ALJ's and Commission's desire to become an enforcement agency through its review of penalty settlements rather than properly tending to its adjudicative function and the review of penalties. The Commission's decisions in these cases would allow ALJs to second-guess discretionary enforcement decisions ranging from vacating citations to designations of S&S violations finding unwarrantable failures, finding flagrant violations, and

[1] In *Crimson Oak* the question for review is, "whether section 110(k) of the Mine Act authorizes review of the Secretary's decision to vacate a citation in the context of a settlement, when the vacatur is contingent upon the resolution of other citations." 46 FMSHRC ___, slip op. at 2, No. SE 2021-0112, et. al. (August 30, 2024).

[2] The Commission's Order for Interlocutory review in *Knight Hawk* is "whether the Secretary has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act." Unaccountably, the majority misstates the issues before us in both of their opinions.

[3] The other dockets included in the cases identified above are: *Greenbrier Minerals, LLC*, Docket No. WEVA 2022-0403, *Crimson Oak Grove Res., LLC,* Docket No. SE 2021-0134*, River City Stone-Div/Mathy Construction Co.*, Docket No. LAKE 2021-0145, and *Holcim (US) Inc*., Docket No. YORK 2021-0023.

beyond. Interference by ALJs with the Secretary's substantive authority is a legal error and a very large step backward for the efficient and lawful administration of the Mine Act.[4]

I.

BACKGROUND

In 1966, Congress enacted the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 et seq. (1976). Congress placed standard-setting and enforcement authority in the Department of the Interior. It further created a Federal Metal and Nonmetallic Mine Safety Board of Review possessing authority to review citations contested by operators. The President appointed five members to the Board with the advice and consent of the Senate.

Building upon this effort to increase mine safety for metal/nonmetal mines, Congress turned its attention to the coal industry in 1969. It enacted the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977). Again, Congress granted regulatory authority to the Department of Interior. That Department created the Mining Enforcement and Safety Administration to conduct mine safety enforcement activities.

Notwithstanding improvements, a frightening number of injuries and accidents continued to occur. An incomplete summary includes the death of 91 miners from carbon monoxide asphyxiation at the Sunshine Silver Mine in 1972, the death of 125 persons due to the bursting of an impoundment at the Buffalo Creek Mine in 1972, and the 1976 Scotia disaster in which twenty-three miners and three federal inspectors died in two explosions of accumulated methane gas with some blaming MESA for the failure to detect or address ongoing inadequate ventilation deficiencies. *See* Tim Talbott, Kentucky Historical Society*, Scotia Mine Disaster,* https://explorekyhistory.ky.gov/items/show/238 (last visited Aug. 28, 2024); MSHA, *Sunshine Mine Disaster*, https://www.msha.gov/sunshine-mine-disaster (last visited Aug. 28, 2024); MSHA, *Buffalo Creek Mine Disaster 50th Anniversary*, https://www.msha.gov/buffalo-creek-mine-disaster-50th-anniversary (last visited Aug. 28, 2024).

In response to these tragedies, Congress undertook a comprehensive review of mine safety in the mid-1970s. This review led to the passage of the Federal Mine Safety & Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or the "Act").

Dissatisfied with the performance of the Department of Interior generally and especially its assessment and collection of penalties, Congress shifted the authority to regulate and inspect mines from the Department of Interior to the Department of Labor ("DOL"). DOL established

[4] MSHA data reveals that in calendar year 2022, MSHA issued 87,474 citations. MSHA, Dept. of Labor, *MSHA Enforcement Data, MSHA Violations*, https://enforcedata.dol.gov/views/data_catalogs.php (last visited Aug. 28, 2024). Internal Commission records show that challenges to citations resulted in creation of 1,751 Commission dockets. The Commission resolved 1411 of those dockets by settlement, 314 for miscellaneous reasons, and only 13 by a decision after a hearing. In sum, the Commission processed more than 100 times more settlements than decisions after hearings.

the Mine Safety and Health Administration ("MSHA"). Under its authority from the Mine Act, MSHA exercises broad regulatory powers over the mining industries including promulgating mandatory standards and regulations. Additionally, by statute, MSHA conducts frequent and comprehensive inspections of all mines. During inspections, MSHA issues citations for violations of standards and regulations. Subsequently, it proposes penalties for the cited violations. Generally, those proposals result from the application of a penalty point system at 30 C.F.R § 100.3 that accounts for all elements prescribed by Congress for penalty proposals in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i). Occasionally, MSHA will propose a special assessment.

The Mine Act also created a smaller but constitutionally important federal agency—the Federal Mine Safety and Health Review Commission ("FMSHRC"). Congress assigned important functions to the Commission. These are (1) due process adjudication of alleged violations of standards and regulations promulgated by MSHA and of discrimination complaints; and (2) the assessment of penalties for established violations. The Mine Act grants the Commission authority to assess all civil penalties and identifies six specific factors for the Commission to consider when setting penalties.

The Secretary and Commission perform important but distinctly different functions within their separate jurisdictions. MSHA is the sole agency authorized to set policies and regulations for the regulation and enforcement of the Mine Act. The Secretary, through MSHA, also performs frequent and thorough inspections of mines and other investigations to enforce the Act and the Secretary's regulations. Only MSHA may issue and enforce a citation. MSHA is the sole enforcement authority for the Act and exercises plenary jurisdiction in enforcement.

The Commission is an adjudicative agency and does not have any policymaking or enforcement responsibilities. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 171 (D.C. Cir. 2006) ("[T]he Commission has no 'policymaking role,'" *id.* at 154, 111 S.Ct. 1171. Instead . . .'the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness.' *Id.* at 154–55, 111 S. Ct. 1171. And, like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion."), *citing Martin v. OSHRC*, 299 U.S. 144 (1991); *Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 463 (D.C. Cir. 1994); *Sec'y of Labor v. Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996).

In the cases under review, the majority interjects the Commission into discretionary Secretarial enforcement decisions—decisions to vacate a previously issued citation and, separately, to vacate a special finding that a violation was S&S. The majority's assertion of a right to second-guess discretionary enforcement decisions by the Secretary is contrary to the Congressionally intended split of authority between the Secretary and the Commission. The designation of a violation as S&S and many other prosecutorial enforcement functions are wholly reserved for the Secretary. The Secretary, acting through MSHA, has the discretionary and only authority to issue or vacate a citation or S&S designation.

Policy-making and discretionary enforcement decisions are left wholly to the Secretary. *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 159 (4th Cir. 2016) ("[W]e have

previously recognized that the Secretary is the authoritative policymaking entity under the Mine Act's scheme."); *Energy West Mining Co. v. FMSHRC,* 40 F.3d at 463. The Commission does not exercise any enforcement role other than setting penalties and must remain neutral and impartial concerning enforcement. *Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996) ("As the Supreme Court concluded for an analogous adjudicatory body, the Commission operates as a 'neutral arbiter' . . . that possesses 'nonpolicy-making adjudicatory powers.'").

To put this case in perspective, if an ALJ may use a settlement to make decisions regarding maintaining a citation or finding a special S&S violation, it would open a host of other discretionary enforcement areas to ALJ interference—flagrant violations, unwarrantable failures, etc. No one would suggest that, before or after a hearing, an ALJ could find the Secretary showed more violations than had been cited or add to the number of violations. No one would suggest that, before or after a hearing, an ALJ could add a special S&S finding even though the violation was not cited as S&S. An ALJ may not use consideration of a settlement to second-guess the Secretary's enforcement decisions.

II.

SECTION 110(K) ADDRESSES THE COMPROMISE OF PENALTIES; IT DOES NOT PERMIT COMMISSION REVIEW OF POLICY DECISIONS BY THE SECRETARY.

The majority incorrectly seeks to justify incursion into areas of prosecutorial discretion by turning to the penalty section of the Mine Act. The penalty section, its history, and its implementation by the Commission demonstrate conclusively that the Commission does not have the authority to encroach upon the Secretary's enforcement authority.

Section 110 of the Mine Act sets out a comprehensive roadmap for penalty assessments. Section 110(i) grants the Commission authority over all civil penalties by providing,

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

30 U.S.C. § 820(i).

The section accomplishes three goals. First, it grants the Commission the authority to assess "all" civil penalties. Second, it sets forth the specific factors the Commission must consider in setting penalties. Third, consistent with the Commission's ultimate authority, the Secretary may propose a penalty for review by the Commission without making findings of fact related to its proposal of penalties.

Two other sections of the Act confirm the Commission's authority over penalties. First, Section 105 provides that if an operator does not contest a proposed assessment within 30 days, "the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. § 815(a). So, even when the Commission is not directly involved in setting a penalty, the penalty is deemed an order of the Commission.

Second, and most importantly here, Congress recognized a potential hole in the Commission's authority. If the Secretary compromised a penalty proposal and the operator did not contest it, the compromised penalty would be deemed an order of the Commission under section 105 cited above. Congress closed that loophole in the Commission's penalty authority in the penalty section relevant to this case.

Section 110(k) closes the loophole thereby confirming the Commission's authority providing that "[n]o proposed penalty which has been contested before the Commission under section 105(a) of this Act shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k) (emphasis added).

This section fits neatly into the Congressional direction for penalties by assuring the Commission's ultimate authority over penalties notwithstanding an MSHA proposal to settle a penalty. It explicitly and only applies to a "proposed penalty."

Congress could have granted the Commission oversight generally of all compromises or settlements by writing "no case brought before the Commission under section 105(a) of this Act." It did not do so. It wrote, "[n]o proposed penalty which has been contested before the Commission under section 105(a) of this Act." Congress could have applied the language to "citations," or "violations." It did not do so. Congress could have given the Commission broader authority in the section of the Mine Act that created the Commission and its adjudicative authority—Section 113, 30 U.S.C. § 823. It did not do so. Section 110(k) affirmed the Commission's authority over penalties.

Congress granted the Commission oversight for penalty settlements, and it did so only in the penalty section of the Act. Previously, the Commission recognized the specificity of section 110(k). In *The American Coal Company*, the Commission wrote, "[i]n exercising its discretion, the Commission evaluates whether a proposed reduction in a penalty or penalties 'is fair, reasonable, appropriate under the facts and protects the public interest.'" 40 FMSHRC 330, 332 (Mar. 2018), *citing The American Coal Co.*, 38 FMSHRC 1972, 1982 (Aug. 2016) ("*AmCoal I*").

Section 110 is headed "Penalties." The section only addresses penalties. In the words of a prior Commission decision, the Commission "does not review the Secretary's decision to settle.

Rather the Commission reviews the proposed reduction of civil penalties in settlements." *AmCoal I*, 38 FMSHRC at 1982 (emphasis in original).

In *American Coal*, the Commission expressly recognized that the Commission's review of penalties in settlements is limited by boundaries. "Such boundaries are provided by section 110(i) of the Mine Act, the Act's legislative history, and the Commission's Procedural Rules." *Id.* Section 110 does not provide for assessing a penalty based upon an S&S violation, unwarrantable failure, or other substantive requirements of the Mine Act.[5]

The legislative history of the Mine Act confirms this interpretation. Congress repeatedly and expressly emphasized its dissatisfaction with penalties assessed under the Coal Act. Early in the Senate Report, the Senate said:

> The assessment and collection of civil penalties under the Coal Act has also been a great disappointment to the Committee. The Committee firmly believes that the civil penalty is one of the most effective mechanisms for insuring lasting and meaningful compliance with the law.

S. Rep. No. 95-181, at 15 (1977), as *reprinted in* 1977 U.S.C.C.A.N. 3401, 3415.

Later in its report, the Senate focused upon its desire for public awareness of penalty compromises, writing:

> In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the *compromising of the amounts of penalties* actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent *the compromising of assessed penalties does not come under public scrutiny*. . . .
>
> . . . The Committee strongly feels that the *purpose of civil penalties*, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.

[5] An S&S violation has occurred if (1) there is an underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). Although S&S violations contain a gravity element, an S&S finding is not the same as a finding on gravity, and gravity is treated as a distinct and separate element in the assessment of penalties.

> To remedy this situation, Section 111(1) [section 110(k) in the final Act] provides that *a penalty once proposed and contested* before the Commission may not be compromised except with the approval of the Commission.

S. Rep. No. 95-181 at 44–45 (emphasis added).

The legislative history of section 110(k) demonstrates that the reduction of penalties through settlements was the target of section 110(k). Low penalties were the motivating concern for sections 110(i) and 110(k) expressly articulated by Congress. Previously, the Department of Interior could settle a case by reducing the penalty. An operator could bargain for a reduction in penalty to avoid litigation over a citation. Thus, a deal could be reached without any consideration of the penalty factors.

MSHA and the operator may still undertake such compromises. However, they may only do so if they can explain to the Commission how the compromise penalty comports with the penalty criteria expressly established in section 110(i). There is no evidence, hint, or insinuation in any of this to suggest the Commission may interfere in enforcement policy decisions such as whether to issue or enforce a citation, charge an S&S violation, charge a flagrant violation, charge an unwarrantable failure or any other substantive aspect of the Mine Act with exclusive expertise and authority of the Secretary.

Commission authority over the settlement of penalties does not appear in section 105 setting out the procedures for enforcement and for operators' right to challenge citations (30 U.S.C. § 815) or section 113 establishing and providing rules for the governance of the Commission (30 U.S.C.§ 823). The express words of section 110(k) and legislative history show the only concern of section 110(k) is the reduction of penalties.

The third bounding element also demonstrates the Commission's formal acceptance that its settlement authority applies to penalties. The Commission's relevant procedural rules, identified in *American Coal*, *supra*, as a third boundary upon the review of settlements, is expressly limited to penalties. The settlement rule, Procedural Rule 31, is limited to a "Penalty Settlement" and provides, *inter alia*, that "[a] motion to approve a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary . . . ." 29 C.F.R. § 2700.31(b)(1) (emphasis added). Further, Rule 31(c)(1) states:

> Factual support. A proposed order approving a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties.

29 C.F.R. § 2700.31(c)(1).

Consequently, the factors expressly held by the Commission as boundaries of Commission authority—the express words of the statute, the legislative history, and the

Commission's rules—demonstrate that an ALJ's settlement authority consists of reviewing the penalty proposed in the settlement. In doing so, the ALJ may consider the application of the six penalty factors but that does not mean the ALJ may conduct mini hearings.

In *Hopedale Mining, LLC*, the Commission properly explained that a settlement does not present an opportunity or a right for ALJs to engage in a fact-finding proceeding.

> During the review of a proposed settlement, the Judge is not expected to engage in fact finding as she would post-hearing. *See Solar Sources*, 41 FMSHRC at 602 ("At the pre-hearing settlement stage of a Commission proceeding, no evidence has been adduced into the record and the Judge is not required to engage in fact finding."). Judges are "expected to consider the facts as alleged by the parties in their settlement, evaluate such information under the applicable Commission standard for review, and determine whether the facts support the penalty agreed to by the parties. *Id*.

42 FMSRHC 589, 595 (Aug. 2020). The ALJ is not permitted to demand evidence or make findings concerning discretionary enforcement decisions by the Secretary.

As we see below, not only do the words of the Act, its legislative history, and Commission rules limit the Commission's authority to review penalties, but also strong and prevailing case law reserves discretionary enforcement authority to the Secretary at every stage of a proceeding.

III.

PROSECUTORIAL DECISIONS SUCH AS WHETHER TO VACATE A CITATION OR CHARGE A VIOLATION AS SIGNIFICANT AND SUBSTANTIAL ARE EXERCISES OF PROSECUTORIAL DISCRETION RESERVED FOR THE SECRETARY.

Policy-making and discretionary enforcement decisions are left wholly to the Secretary. *Mutual Mining, Inc.*, 80 F.3d at114 ("As the Supreme Court concluded with respect to an analogous adjudicatory body, the Commission operates as a 'neutral arbiter.'"); *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985); *Knox Creek Coal Corp.*, 811 F.3d at 159 ("[W]e have previously recognized that the Secretary is the authoritative policymaking entity under the Mine Act's scheme."); *Twentymile Coal Co.*, 456 F.3d at 158; *Energy West Mining Co.,* 40 F.3d at 463. The Commission must be neutral and does not have jurisdiction over enforcement decisions. Certainly, it does not have jurisdiction to find a violation the Secretary has not cited or to contradict a Secretarial decision to vacate a citation, special S&S finding, flagrant violation, or a host of other enforcement decisions.

The D.C. Circuit authoritatively holds only MSHA has the authority to make enforcement decisions under the Mine Act and that authority is not bounded by the Commission. In short, "the Secretary's charging discretion is as uncabined as that of a United States Attorney under the Criminal Code." *Twentymile Coal Co.* 456 F.3d at 157. Indeed, the Circuit Court characterized

the attempt by the Commission to assert a right for the Commission to review enforcement decisions as "pernicious," writing "the most pernicious aspect of employing this purported standard as a check on charging decisions is that it invites the reviewing body to substitute its views of enforcement policy for those of the Secretary, a power that . . . the Commission does not possess." *Id*. at 158. The Commission and courts have repeatedly applied the fundamental principle of the Secretary's exclusive authority over the broad range of enforcement decisions and policies, including the right to vacate citations and S&S enforcement.

A. Citations

The Secretary annually conducts thousands of meticulous inspections of mines. MSHA inspectors use their training, knowledge, and experience to make judgment calls concerning compliance with the thousands of requirements governing the mining industries. As a result, MSHA issues tens of thousands of citations. Thereafter, MSHA supervisors may review, approve, revise, or overrule inspectors' decisions. If a contest is filed, trained representatives of the Secretary pore over the citations reviewing the facts and the penalty assessment. Maintenance of a citation is one of the basic, if not the most basic, exercises of the Secretary's enforcement authority.

In *RBK Construction, Inc.*, 15 FMSHRC 2099 (Oct. 1993) ("*RBK*"), the Commission held that the Supreme Court's decision in *Cuyahoga Valley*, 474 U.S. 3*,* mandated that the Secretary had the dispositive authority to vacate a citation. The Commission correctly ended its decision with a short, declarative acknowledgment of the Secretary's authority, "We agree with the Secretary that he has the authority to vacate the citations in issue." *RBK,* 15 FMSHRC at 2101. For thirty years until today, no Commission has challenged this holding.

The Commission emphasized the Secretary's authority by instructing the Secretary and operators that they "may in the future file stipulations of dismissal signed by all parties to a proceeding, in order to effect voluntary dismissal. . . . Upon the parties' filing of the appropriate stipulation, the presiding Commission Judge shall enter an order dismissing the proceeding." *Id.* at 2101 n.2.[6] Therefore, if the parties had presented the vacation decisions separately from penalty adjustment on other citations being resolved, the ALJ would simply have ordered dismissal. It would be silly and counterproductive for the Secretary to have to resort to such gamesmanship to exercise her right to settle enforcement actions. The Secretary's unreviewable right to vacate a citation is the clear and long-standing discretionary right of the Secretary.

- In *Bixler Mining Company*, 16 FMSHRC 1427 (July 1994), the ALJ issued a default judgment against the operator for failing to comply with a prehearing order. More than 30 days later, the Secretary filed a motion to vacate the default decision, vacate the underlying citation, and dismiss the proceeding. The Commission reopened the case and

[6] Based upon this instruction on procedure by the Commission, when the Secretary is resolving a group of contests included in one docket, the Secretary may dispose of the vacation of a citation by filing the appropriate motion and, in turn, the ALJ "shall"—that is, "must"—approve. *RBK,* 15 FMSHRC at 2101 n.2.

vacated the citation. The Commission "concluded that the Secretary has unreviewable authority to vacate or withdraw his own enforcement actions." *Id.* at 1428.

- In *Bridger Coal Company*, 17 FMSHRC 270 (Mar. 1995), the Secretary sought to dismiss the Secretary's own previously filed PDR. Notably, the Secretary's motion stated the motion was made "in an effort to effectively utilize his resources." *Id.* at 270l. Affirming the dispositive effect of *RBK*, the Commission unanimously granted the motion. *Id*. at 271. The Secretary, not the Commission, decides upon the appropriate use of Secretarial resources.

- In *Mechanicsville Concrete, Inc. T/A Materials Delivery*, 18 FMSHRC 877 (June 1996), the principal issue was the ALJ's decision to enter an S&S finding even though the Secretary had not made a special finding of S&S. The Commission held that the Commission does not have authority to make an S&S finding not sought by the Secretary. Without a supporting finding by the Secretary, the ALJ did not possess the authority to add a new finding. *Id*. at 879-80, *citing Mettiki Coal Co*., 13 FMSHRC 760, 764-765 (May 1991). Further, the Commission reemphasized the ongoing guiding principle: "The Commission has recognized that the Secretary's discretion to vacate citations is unreviewable." *Id*. at 879.[7]

- In *United Metro Materials*, 24 FMSHRC 140 (Feb. 2002), Chairman Verheggen and Commissioner Beatty summarily granted the Secretary's motion to dismiss a Direction for Review of citations. Then-Commissioner (now Chair) Jordan separately concurred writing, "The [Supreme] Court pointed out that allowing the Commission to overturn the Secretary's decision to withdraw a citation would amount to allowing the Commission 'to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend.'" *Id*. at 142 (citing *Cuyahoga Valley*, 474 U.S. at 7).

- Following *Cuyahoga*, 474 U.S. 3, this Commission in *RBK,* 15 FMSHRC at 2101, concluded that it lacked the authority to overturn a Secretarial decision to withdraw or vacate a citation.

- In *United Mine Workers of America on behalf of Local 1248, District 2 v. Maple Creek Mining*, *Inc*., 29 FMSHRC 583 (July 2007), the Commission reversed an ALJ's decision to permit litigation of a Withdrawal Order notwithstanding the Secretary's settlement. It did so even though, "[w]e are aware that vacating the judge's denial of the operator's motion for summary decision may have an adverse impact upon miners who might otherwise have been eligible for up to a week's compensation for the time they were not permitted to work due to the withdrawal order. We are sympathetic to their position. However, the Secretary has broad authority to vacate orders she has issued." *Id.* at 596-7.

[7] Oddly, the majority attempts to negate the clear holding of *Mechanicsville* by arguing it derived from the Commission's own prior dispositive decision in *RBK*. Slip op at 9-10.

- In *North American Drillers, LLC*, 34 FMSHRC 352, 355-56 (Feb. 2012), the Commission wrote: "The Commission has acknowledged that it lacks authority to overturn a decision by the Secretary to withdraw or vacate a citation under the Mine Act. *RBK,* 15 FMSHRC at 2101, *citing Cuyahoga*, 474 U.S. at 7-8; *Mechanicsville Concrete, Inc.,* 18 FMSHRC 877, 879 (June 1996). The Commission and the courts have also recognized that under the Mine Act, Congress intended to delegate such enforcement authority to the Secretary, not the Commission. *Mechanicsville,* 18 FMSHRC at 879; *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006); *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 319 (4th Cir. 2008)."

The majority does not provide any basis for veering from the express language of the Mine Act, its legislative history, the Commission's rules, or established case law to undercut the established principle of the Secretary's right to vacate a citation—the most basic exercise of her exclusive enforcement authority. In summary, the basic principles of split enforcement agencies, the Secretary's exclusive right to exercise prosecutorial discretion, the plain language of section 110(k), the legislative history of section 110(k), and the Commission's rules demonstrate the Secretary's right to vacate citations at any point.[8]

B. S&S Designations

The standard for determining if an S&S violation has occurred is whether (1) there is an underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020).

If an S&S determination is challenged, an ALJ reviews the evidence and decides which party has made the more convincing argument. However, before and after the hearing, the Secretary has a right and duty to review the facts and decide whether to press a special S&S finding.

The Commission has understood the Secretary's enforcement power and the absence of Commission authority to interfere with the Secretary's authority:

[8] Even if those overwhelming principles were insufficient, commonsense principles of government decision-making mandate the absence of authority for the Commission to refuse to accept a decision to vacate a citation. The Commission cannot compel the Secretary to litigate a citation. If the Secretary finds a citation should be vacated, she may simply decline to prosecute it. In the absence of the presentation of a case by the Secretary, the citation must fail. It would be an unworkable and futile policy to attempt to force the Secretary to prosecute a citation once she has decided not to do so. Moreover, the Secretary recognizes that it is grossly unfair to the private citizen for a group of lawyers on the Commission to force the knowledgeable and experienced Secretary to prosecute the citizen despite her decision not to do so.

> As is true under the OSH Act, "enforcement of the [Mine] Act is the sole responsibility of the Secretary," 499 U.S. at 152, 111 S.Ct. 1171 (internal quotation marks omitted), and the Commission has no "policymaking role," *id.* at 154, 111 S.Ct. 1171. Instead, "Congress intended to delegate to the Commission the type of nonpolicy-making adjudicatory powers typically exercised by a *court* in the agency-review context." *Id.* "Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." *Id.* at 154-55, 111 S.Ct. 1171. And, like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion.

Twentymile Coal Co., 456 F.3d at 161 (emphasis in original).[9]

In *Mechanicsville*, 18 FMSHRC 877, the Commission recognized the breadth and scope of MSHA's prosecutorial discretion. The Commission explained the distinctly different roles of MSHA and the Commission under the Mine Act, finding that the Commission must adjudicate disputes under the Mine Act; the Commission does not enforce the Mine Act itself. *Id*. at 879-80.

In *Heckler v. Chaney,* 470 U.S. 821 (1985), the Supreme Court held an agency's decision not to institute enforcement proceedings to be presumptively unreviewable under 5 U.S.C. § 701(a)(2). *Id*. at 831. An agency's "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id*. Numerous other decisions reiterate this fundamental principle. *Lincoln v. Vigil,* 508 U.S. 182, 191 (1993); *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Robbins v. Reagan*, 780 F.2d 37, 44-45 (D.C. Cir. 1985).

Citing *Heckler* and *Brock v. Cathedral Bluffs Shale Oil Co.,* 796 F.2d 533, 538 (D.C. Cir. 1986), the Commission found that MSHA, as the enforcing administrative agency, has "virtually unreviewable discretion in making decisions not to take particular enforcement action relating to its statutory or regulatory authority." *Mechanicsville*, 18 FMSHRC at 879. An ALJ forcing the Secretary to continue an enforcement action that she has decided not to pursue directly contradicts this seminal principle.

In *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570 (August 2020), the Commission held that an Administrative Law Judge may "not to engage in fact finding as he

[9] A host of cases affirm these basic premises. *See, e.g., Speed Mining, Inc*. v. *FMSHRC*, 528 F.3d 310, 319 (4th Cir. 2008); *RAG Cumberland Res. LP v. FMSHRC*, 272 F.3d 590, 595-96 (D.C. Cir. 2001); *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 5-6 (D.C. Cir. 2003); *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1303 (D.C. Cir. 2000).

would post-hearing." *Id.* at 576.[10] The Commission recognized MSHA's right to determine whether to assert with an S&S claim stating, "[w]hether a violation is S&S is a matter in the first instance of prosecutorial discretion. The Mine Act, therefore, recognizes the expertise of MSHA in judging whether a violation is S&S." *Id.*

Determination of whether a violation should be designated S&S is a fact-based inquiry requiring the exercise of prosecutorial discretion. If an S&S designation is contested at a hearing, the ALJ is presented with evidence by both parties and may decide the merits of the designation. That authority, however, does not permit an ALJ to add an S&S finding to a citation that MSHA did not designate with a special S&S finding. By parity of legal reasoning, if MSHA withdraws an S&S designation before a hearing, an ALJ could not make a post-hearing decision finding an S&S violation. Similarly, it is an impermissible abuse of discretion for an Administrative Law Judge effectively to engage *sua sponte* in a fact-based inquiry and determine that the Secretary may not remove an S&S designation before settling a case.

[10] A searching factual inquiry by the ALJ into the Secretary's exercise of prosecutorial discretion to vacate a violation or a special S&S finding almost certainly precludes the ALJ from continuing as the Judge at a hearing. For example, in *Knight Hawk*, Docket No. LAKE 2021-0160, the ALJ wrote, "the *operator may yet establish* by evidence that there was no violation or that any violation was not S&S." Unpublished Order Denying Motion to Approve settlement, at 5 n.4 (Sept. 30, 2021) (emphasis added). Although the Judge does not formally find S&S and disclaims finality, he places the burden of proof on the operator to establish at a hearing that the violation was not S&S. Having reached that view before the presentation of any evidence, he could not possibly continue as the trial Judge.

IV.

CONCLUSION

The controlling element of these decisions is the exclusive enforcement authority of the Secretary. Granting the Commission power to review the Secretary's policy decisions to enforce the Mine Act would place numerous such decisions in the hands of an ALJ who has heard no evidence, who has no mining experience, and to whom the parties have presented agreed-upon facts. Moreover, the Commission cannot, and should not be able, to force the Secretary to undertake prosecutions she no longer supports.

The express words of the Mine Act, its legislative history, Commission rules, established case law, and sound policy demonstrate the right of the Secretary of Labor to issue citations, vacate citations, issue special S&S findings, vacate special S&S findings, issue flagrant violation citations, vacate flagrant violation citations, assert unwarrantable failures, withdraw the assertion of unwarrantable failures, and engage in a host of other enforcement, policy-driven, qualified expert decisions. ALJs and Commissioners must resist the siren call to self-importance; they must stay within the boundaries of the law. The Secretary has the "uncabined" right to assert or to vacate citations, special S&S findings, and other enforcement decisions.

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

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August 30, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. SE 2021-0112 Docket No. SE 2021-0134
CRIMSON OAK GROVE RESOURCES LLC	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. LAKE 2021-0145
RIVER CITY STONE-DIV/MATHY CONSTRUCTION CO.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. YORK 2021-0023
HOLCIM (US) INC.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2021-0294
GREENBRIER MINERALS, LLC	

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

DECISION

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

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). They come before us upon five Administrative Law Judge's certifications for interlocutory review wherein the Judge denied the Secretary's motions to settle or dismiss the proceedings. In each of these cases, the Judge denied the motions because he concluded that the Secretary had failed to provide sufficient information to support the vacating of certain citations. The Judge had requested that the Secretary either: 1) certify that the decision to vacate certain citations was not contingent upon the resolution of the remaining citations, or 2) explain how the decision to vacate is an appropriate compromise, mitigation, or settlement pursuant to section 110(k) of the Mine Act. *See* 30 U.S.C. § 820(k).

Section 110(k) provides as follows:

> No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

30 U.S.C. § 820(k).

On interlocutory review, the question before the Commission is whether section 110(k) of the Mine Act authorizes review of the Secretary's decision to vacate a citation in the context of a settlement, when the vacatur is contingent upon the resolution of other citations.

For the reasons discussed below, we conclude that the Secretary does not possess unfettered prosecutorial discretion to vacate a citation in consideration of an operator's concessions. Rather, the Mine Act requires the Commission to review the vacating of citations when done in the context of a settlement. Therefore, we remand these cases to the Judge for proceedings consistent with this ruling.[1]

[1] Our dissenting colleague has opted to issue a consolidated dissent for both *Knight Hawk* and *Crimson Oak*, which the Commission is issuing on the same date. *Knight Hawk*, 46 FMSHRC ___, slip op. at 15-28, No. LAKE 2021-0160 (August 30, 2024). However, as we have not consolidated the instant proceedings with *Knight Hawk*, the issues raised in *Knight Hawk* exceed the scope of our interlocutory review in this matter, and we do not address them here. *See* 29 C.F.R. § 2700.76(d).

I.

Factual and Procedural Background

A. Proceedings Before the Administrative Law Judge

1. Crimson Oak – Docket No. SE 2021-0112

This case involves two section 104(a) citations and one section 104(g) order.[2] On September 27, 2021, the Secretary filed a Motion to Dismiss. The motion states that the operator decided to withdraw its contest of a citation and order and that the Secretary decided to vacate the remaining citation. The motion further states that the parties agreed to bear their own attorney fees, including waiving fees that might be available under the Equal Access to Justice Act. Maintaining that no issues remained for adjudication, the Secretary requested that the case be dismissed.

On October 6, 2021, the Judge issued an Order Denying Motion to Dismiss Civil Penalty Proceeding. The Judge noted that the Secretary had vacated the smaller penalty in this case and surmised that this could indicate that the Secretary had "acknowledged an error in the issuance of the vacated citation, and that this acknowledgement, in the context of discussions of the relative strengths and weaknesses of the matters in controversy, was sufficient inducement for the operator to acquiesce to the payment of the others." Order at 3.

However, the Judge rejected the Secretary's reliance on *RBK Construction*, 15 FMSHRC 2099 (Oct. 1993), to support her unreviewable authority to vacate a citation in the context of a settlement. According to the Judge, the Commission's succinct holding in *RBK* did not specifically address a vacated citation in the context of a quid-pro-quo settlement and relied primarily on the Supreme Court's rationale in a case involving the Occupational Safety and Health Review Committee ("OSHRC"). *See Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3 (1985). Accordingly, the Judge found that absent certification that the vacation of the citation was coincidental and not contingent upon dismissal of the remaining violations, the parties would need to explain the appropriateness of the compromise, mitigation, or settlement pursuant to section 110(k) of the Mine Act.

2. Crimson Oak – Docket No. SE 2021-0134

This case involves five section 104(a) citations. On September 28, 2021, the Secretary filed a Motion to Approve Settlement. The proposed settlement states that the "Secretary has agreed to vacate Citation No. 9493063. Additionally, as part of this settlement Respondent agrees to accept citation No. 9493062." Each of the citations had a proposed penalty of $6,858. The parties agreed to modify the negligence of the remaining three citations from "High" to "Medium" with a corresponding reduction in penalty. The motion further stated that the parties

[2] A 104(a) citation is issued whenever the Secretary believes that an operator has violated the Act or any health or safety standard promulgated pursuant to the Act. 30 U.S.C. § 812(a). A 104(g) order is issued whenever the Secretary determines that a miner has not received the requisite safety training required by the Act. 30 U.S.C. § 812(g).

agreed to bear their own attorney fees, including waiving fees that might be available under the Equal Access to Justice Act.

On October 1, 2021, the Judge reached out to the parties through email to notify them that he required an explanation for the decision to vacate. He instructed the parties to "[p]lease provide a written statement or amend the settlement proposal motion to include language that the vacation is independent from, and not contingent upon, the compromise or settlement [of] the other violations in the motion." On October 5, 2021, the Secretary requested that the ALJ reduce the denial of the motion to approve settlement to a final order. On October 7, 2021, the Judge issued an Order Denying Motion to Dismiss Civil Penalty Proceeding utilizing the same rationale as outlined in Docket No. SE 2021-0112, *supra*.

3. River City Stone-Div/Mathy Construction Company – Docket No. LAKE 2021-0145

This case involves two section 104(a) citations. On October 5, 2021, the Secretary filed a Motion to Dismiss. The motion stated that the operator had decided to withdraw its contest of one citation and that the Secretary had decided to vacate the other citation. The motion further stated that the parties agreed to bear their own attorney fees, including waiving fees that might be available under the Equal Access to Justice Act. As no issues remained for adjudication the Secretary requested that the case be dismissed.

On October 8, 2021, the Judge issued an Order Denying Motion to Dismiss Civil Penalty proceeding relying on the same rationale as outlined in Docket No. SE 2021-0112, *supra*.

4. Holcim (US) Inc. – Docket No. YORK 2021-0023

This case involves thirteen section 104(a) citations. On August 3, 2021, the Secretary filed a Motion for Decision and Order Approving Settlement. In the motion, the operator agreed to withdraw contests of five citations. The Secretary agreed to vacate four citations and the parties agreed to a reduction in penalty in the remaining four citations and reduce the negligence finding in one citation. The motion further stated that the parties agreed to bear their own attorney fees, including waiving fees that might be available under the Equal Access to Justice Act.

On August 26, 2021, the Judge notified the parties that, if the decision to vacate was part of an agreement with the operator to accept other citations as written, the parties would need to provide an explanation for the Judge to review pursuant to section 110(k). On August 31, 2021, the Secretary requested that the ALJ reduce the denial of the motion to approve settlement to a final order. On September 28, 2021, the Judge issued an Order Denying Motion to Approve Settlement utilizing the same rationale as outlined in Docket No. SE 2021-0112, *supra*.

5. Greenbrier Minerals – Docket No. WEVA 2021-0294

This case involves six 104(a) citations. On August 5, 2021, the Secretary filed an Amended Motion to Approve Settlement.[3] In the motion, the operator withdrew contest of four citations. The Secretary agreed to vacate two citations. The motion further states that the parties agreed to bear their own attorney fees, including waiving fees that might be available under the Equal Access to Justice Act.

On August 26, 2021, the Judge notified the parties that, if the decision to vacate was part of an agreement with the operator to accept other citations as written, the parties would need to provide an explanation for the Judge to review pursuant to section 110(k). On September 1, 2021, the Secretary requested that the Judge express the denial of the motion to approve settlement in a final order. On September 30, 2021, the Judge issued an Order Denying Motion to Approve Settlement utilizing the same rationale as outlined in Docket No. SE 2021-0112, *supra*.

B. The Granting of Interlocutory Review

The Judge subsequently certified for review the orders denying the settlement or dismissal in each of the five cases.[4] The Commission granted review "of the Judge's orders denying the motions and the issue of whether section 110(k) of the Mine Act authorizes review of the Secretary's decision to vacate a citation in the context of a settlement, when the vacatur is contingent upon the resolution of other citations." Order Granting Interlocutory Review (Mar. 2, 2022).

C. The Secretary's Arguments

On review, the Secretary maintains that she possesses unreviewable prosecutorial discretion in determining whether to vacate a citation or order. She argues that the Mine Act's split-enforcement scheme grants the Secretary the sole authority to enforce the statute, thus precluding review of her decision to vacate a citation or order. The Secretary relies on the Supreme Court's holding in *Cuyahoga Valley* that the power to issue citations necessarily requires the Secretary to have the power to withdraw them. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (Nov. 1985) ("*Cuyahoga Valley*"); *RBK Construction Inc.*, 15 FMSHRC 2099 (Oct. 1993) ("*RBK Construction*" or "*RBK*"). The Secretary contends that, like OSHRC, the Commission is to serve as a neutral arbiter and is strictly limited to the confines of the role traditionally assumed by adjudicatory bodies. According to the Secretary, review of her vacatur decisions would amount to an intrusion into her enforcement authority, forcing her to pursue enforcement actions where she does not believe there is any violation.

[3] There is no other Motion to Approve Settlement in the record, so it is unclear what was being amended.

[4] Pursuant to Rule 76, the Commission, at its discretion, may grant a motion for interlocutory review upon a "determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76.

The Secretary further contends that section 110(k) of the Mine Act does not restrict her enforcement discretion in vacatur decisions. The Secretary argues that section 110(k) only applies to the settlement of penalty amounts. The Secretary asserts that in cases where she has vacated a citation, the elimination of the penalty is merely an incidental effect of the enforcement decision to vacate the underlying citation. According to the Secretary, the decision to vacate a citation has consequences for potential pattern-of-violations, history of violations and other enforcement actions. Thus, the Secretary maintains that vacatur is solely an enforcement decision, not a penalty decision.

Finally, the Secretary points out that Congress did not explicitly grant the Commission the authority to review vacatur decisions in the Mine Act. Nor does anything in the legislative history expressly mention the Commission's authority to review vacated citations. Instead, the Secretary argues, the legislative history is concerned primarily with transparency and ensuring that there is no unwarranted lowering of penalties stemming from off-the-record settlement negotiations. The Secretary maintains that, had Congress intended the Commission to review vacatur decisions, it would have provided the Commission with a meaningful standard by which to judge the validity of such enforcement actions.

II.

Disposition

For the reasons stated below, we hold that the Secretary does not have unreviewable discretion to vacate a citation or order without the Commission's approval under section 110(k) of the Act. We further hold that the parties must provide sufficient facts to support the vacatur of a citation or order in a settlement proceeding. Accordingly, we conclude that the Judge did not abuse his discretion by denying the settlement motions in these cases.

The Commission derives its authority to review the adequacy of settlements proposed by the Secretary from section 110(k) of the Act, which states that: "[n]o proposed penalty which has been contested before the Commission under section [105(a)] shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). As demonstrated below, section 110(k) of the Act authorizes the Commission to review the adequacy of all settlements proposed by the Secretary.

A. The Legislative History of Section 110(k)

In drafting the Mine Act, Congress made clear that it wanted to avoid the pitfalls of the prior regulatory regime.[5] The Senate Report states that the "compromising of the amounts of penalties actually paid" had reduced "the effectiveness of the civil penalty as an enforcement tool." S. Rep. No. 95-181, at 44 (1977), reprinted in Senate Subcomm. on Labor, Comm. on

[5] Until enactment of the Federal Mine Safety and Health Act of 1977, enforcement of the 1969 Coal Act was the responsibility of the Secretary of the Interior. The Department of Interior's enforcement functions, except those assigned under section 501 of the 1969 Coal Act and those expressly transferred to the Commission, were transferred to the Secretary of Labor when the 1977 Mine Act took effect. 30 U.S.C. § 961(a) (Supp. III 1979).

Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632 (1978) ("*Legis. Hist.*"). The Committee explained that in investigating the penalty collection system under the Coal Act, it learned "that to a great extent the compromising of assessed penalties [did] not come under public scrutiny," and that "[n]egotiations between operators and Conference Officers of MESA [MSHA's predecessor] are not on the record." *Id*. It noted that even after a petition for civil penalty had been filed, "settlement efforts between the operator and Solicitor [were] not on the record, and a settlement need not be approved by the Administrative Law Judge." *Id*.

Accordingly, Congress drafted section 110(k) with the intent that the settlements of penalties be open to scrutiny in order to better serve the purpose of civil penalties by encouraging operators' compliance with mandatory standards. The Senate report further provided:

> The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.

Id. at 633. Thus, Congress made clear, when it enacted the 1977 Mine Act, that the terms of all settlements had to be on the record and that the Commission has the final word on the settlement of contested cases. *The American Coal Co.*, 38 FMSHRC 1972, 1975-76 (Aug. 2016) ("*AmCoal I*").

Based on the clear expression of Congressional intent and the unambiguous language in the Mine Act, the Commission has held that section 110(k) "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981). To perform that function in exercise of its statutory authority, the Commission has promulgated Rule 31, which provides, inter alia, that a motion to approve a penalty settlement shall include facts in support of the penalty agreed to by the parties. *See* 29 C.F.R. § 2700.31(b)(1). Thus, "[s]ettlements are committed to the 'sound discretion' of the Commission and its judges" and they "are not bound to endorse all proposed settlements." *Madison Branch Mgmt.*, 17 FMSHRC 859, 864 (June 1995).

B. The Secretary Does Not Have Unreviewable Prosecutorial Discretion to Settle Cases by Vacating Citations

While there is a general presumption of unreviewability of decisions not to enforce, Congress may withdraw an agency's discretion over such decisions. In *Heckler v. Chaney*, the Supreme Court recognized that the presumption of unreviewability may be overcome if a statute "has indicated [Congress's] intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion . . . ." 470 U.S. 821, 834 (1985).

In the settlement context, section 110(k) provides an exception to the general rule of unreviewability. That provision expressly curtails the Secretary's authority to exercise a basic power of prosecutorial discretion: the power to settle a case. As stated in *AmCoal I*, 38 FMSHRC at 1980, "section 110(k) is an explicit expression of Congressional authorization that rebuts any presumption of unreviewability." Indeed, the Secretary "has acknowledged that the [*Heckler*] presumption is rebutted by the existence [of] section 110(k)." *Id*. at 1980 n.10, *citing AmCoal I*, Sec'y Reply Br. at 4.

The remaining issue under *Heckler* is whether the Commission would have a "meaningful standard" to apply in determining whether the Secretary has met her burden of justifying a proposed settlement. The Commission has recognized that the standards to be applied may be found in section 110(i), which sets forth the six statutory factors for assessing penalty amounts.[6] *AmCoal* I, 38 FMSHRC at 1981. In addition, the Commission has interpreted Section 110(k) to require the Judge to determine whether the proposed settlement is fair, reasonable, appropriate under the facts, and protects the public interest. *Id*. at 1976. The Commission's parameters of review are set out in section 110(i), the Act's legislative history, and the Commission's Procedural Rules. Thus, the Secretary's argument of unreviewable prosecutorial discretion is erroneous.[7]

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[6] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

[7] Our dissenting colleague *cites Twentymile Coal Co.*, for the proposition that "the Secretary's charging discretion is as uncabined as that of a United States Attorney under the Criminal Code." Slip op. at 21, quoting *Sec'y of Labor v. Twentymile Coal Co.* 456 F.3d 151, 157 (D.C. Cir. 2006). In that case, the Commission overturned the Secretary of Labor's decision to cite both the owner-operator of a mine, as well as its independent contractor, for the contractor's safety violations. *Twentymile*, 456 F.3d at 152. The D.C. circuit determined that because the Mine Act provided no meaningful standards against which to judge the Secretary's decision regarding which party to cite, the Commission is generally without authority to review such decisions. *Id*. That is distinguishable from the situation here. As discussed at length above, Sections 110(i) and 110(k) evince Congress' desire to limit the Secretary's discretion during settlement and provide a standard of review for the Commission to analyze the Secretary's actions.

C. The Cases Upon Which the Secretary Attempts to Rely Are Readily Distinguishable

The core of Secretary's argument that she possesses unreviewable discretion to vacate citations, regardless of the context, relies on two cases: *Cuyahoga Valley* and *RBK Construction*.

In the OSH Act case of *Cuyahoga Valley*, 474 U.S. at 4-5, the Secretary of Labor moved to vacate a penalty citation on the grounds that the Federal Railway Administration, not OSHA, had jurisdiction over the relevant safety conditions. The Supreme Court agreed that the Secretary had unreviewable discretion to withdraw a citation, finding that encroaching on the prosecutorial decisions of the Secretary would unduly hamper enforcement of the Act by discouraging settlement and commingling of roles that Congress did not intend. *Id*. at 6-7.

In *RBK Construction, Inc*., 15 FMSHRC at 2101, a case closely mirroring the facts of *Cuyahoga Valley*, the Secretary of Labor notified the Commission that it had vacated all the citations at issue because jurisdiction of the site should have been under OSHA, not MSHA. Relying on the Supreme Court's decision in *Cuyahoga Valley*, the Commission reasoned succinctly that "[w]e agree with the Secretary that he has the authority to vacate the citations in issue, and, therefore, we grant the motions to dismiss." *Id*.

These cases can be easily distinguished from the present case on three major points. First, as noted above, *Cuyahoga Valley* is an OSH Act case, and not a Mine Act case. This is important because the OSH Act does not contain any provision identical to section 110(k), i.e., a provision that authorizes the Commission to review the Secretary's proposed settlements and disapprove settlements when appropriate.

While there are similarities in the OSH Act and the Mine Act, a sponsor of the Mine Act expressly stated that the Mine Act was intended to adopt the stronger features of the OSH Act while learning from areas where prior laws fell short. *See* 123 Cong. Rec. 4387–88 (1977) (statement of Sen. Williams, the Mine Act's sponsor, upon introduction of the Act).[8] One such area of improvement was granting review of settlements to the Commission. By contrast, the OSH Act grants OSHRC no authority to review settlements, instead only requiring that such settlements be published in the Federal Register. 29 U.S.C. § 655(e). As such, application of the holding in *Cuyahoga Valley* in Commission cases is severely limited in the settlement context.

Second, *RBK* and *Cuyahoga Valley's* motions to dismiss were done in the context of a voluntary dismissal, not a settlement, and that is of significant consequence. As explained above, we have recognized that the Secretary has a general presumption of unreviewability in her decisions not to enforce. However, section 110(k) provides an exception to this presumption in the limited context of settlements.

[8] The Legislative History of the Mine Act is replete with bipartisan references to the weakness of the OSH Act and its administration. *See*, *e.g.*, *Legis. Hist.* at 964-65 (Senator Schmitt noting reluctance to move mine safety regulation to the DOL because OSHA has been "strongly criticized for its handling of those health and safety programs" under their jurisdiction); *id*. at 976 (Senator Williams noting OSHA's "ineptness" in the past); *id*. at 1002 (Senator Hatch noting the "poor administration" of OSHA); *id*. at 1037 (Senator Domenici discussing why the history of OSHA has largely been one of failure).

Third, in both *RBK* and *Cuyahoga Valley*, the administrative agency provided the court with an explanation as to why the withdrawal or vacatur was taken. The Secretary in *Cuyahoga Valley* conceded that the relevant safety violation was under the Federal Railway Administration's jurisdiction, not OSHA's. 474 U.S. at 4. Similarly, in *RBK*, the Secretary explained that the operator was under the jurisdiction of OSHA, not MSHA, and provided evidence of policy controlling the jurisdictional dispute. 15 FMSHRC at 2099. In the present case, the crux of the matter is that the Secretary has declined to even state if the vacatur of citations was an independent decision, or whether the decision was in consideration for the operator accepting the other civil penalties at issue.[9]

D. Application of Section 110(k) in These Cases

Assuming that the Secretary had reached a deal with the operator in these cases to vacate citations in exchange for the mitigation or acceptance of the proposed penalty, section 110(k) grants the Commission the responsibility to review this arrangement.[10] In each of these cases, there are at least two civil penalties, contested pursuant to section 105(a), at issue: the one vacated by the Secretary and the one accepted by the operator. Even if there were some validity to the Secretary's argument that the penalty for the vacated citation is not relevant because the removal of the penalty is merely incidental to the vacatur of the enforcement action, the civil penalty that the operator has agreed to no longer contest is still part of the deal.

The deal that the parties have reached involving citations clearly constitutes a settlement. In order to effectuate the resolution of a contentious legal matter, the parties have mutually agreed to take actions against their own self-interest without the intervention of a court.[11]

[9] Our dissenting colleague states "[t]he majority does not provide any basis for veering from the express language of the Mine Act, its legislative history, the Commission's rules, or established case law to undercut the established principle of the Secretary's right to vacate a citation . . ." Slip op. at 23. However, the Dissent does not recognize or address the arguments and analysis set forth in this section of the majority opinion.

[10] Our dissenting colleague notes that the parties can only settle "if they can explain to the Commission how the compromise penalty comports with the penalty criteria expressly established in section 110(i)." Slip op. at 19. However, that is exactly what the parties failed to do here: they failed to explain how the facts they assert comport with the penalty they agreed to assess. Specifically, the parties failed to explain why they agreed to accept one citation and vacate another. The ALJ gave the parties opportunities to provide that explanation for this compromise, but they failed to provide one.

[11] *See, e.g., "*Settle,*"* Black's Law Dictionary (10th ed. 2014) (defining "settle" as "to bring to a conclusion (what has been disputed or uncertain);" "to adjust differences; to come to a good understanding").

Moreover, the broad language of 110(k) goes beyond mere settlements of civil penalties.[12] The Mine Act also requires that the Commission review all "compromises" and "mitigations" of civil penalties as well. 30 U.S.C. § 820(k).[13] The inclusion of such language contemplates Commission review of arrangements between the Secretary and the operator that, by themselves, may not directly affect a civil penalty but are integral to the settlement package. *See The American Coal Co*., 40 FMSHRC 983, 989 (Aug. 2018) ("*AmCoal II*").

In these five cases, the Secretary has agreed to vacate citations and their corresponding penalties. In exchange, the operator appears to have agreed to forfeit its right to contest the citations by accepting the proposed penalties as written or with minor changes. The operator is also waiving its right to bring an Equal Access to Justice Act claim before the Commission.

The legislative history is clear that such arrangements are the types of arrangements that Congress intended for the Commission to review. The Senate Committee stated unambiguously that section 110(k) was intended to create transparency in the previously opaque settlement process and serve as a check on the Secretary of Labor so that settlements further the public interest and promote the remedial nature of the Mine Act. S. Rep. No. 95-181, at 44 (1977), *reprinted in Legis. Hist*. at 632-633. If the Secretary was able to exchange vacatur for concessions from the operator without Commission oversight, there would be very little opportunity for miners, Congress, and other interested parties to assess the fairness and effectiveness of MSHA. It would be easy for the Secretary to hide arbitrary enforcement actions. Similarly, without Commission review, there would be no check on the Secretary's ability to vacate legitimate citations for unsafe conditions.

One of the Secretary's errors is that she fails to treat a proposed settlement as an integral package consisting of related citations, orders, and vacaturs. She instead deals separately with each part of the settlement package and thus fails to acknowledge, for example, that a vacatur will likely have a significant impact on other elements of the package. Indeed, the Commission has recognized that during settlement review, a Judge must "accord due consideration to the

[12] Our dissenting colleague would read section 110(k) narrowly to only require Commission review when the parties have agreed to lower the penalty for a citation. However, such a narrow view of the law stands in stark contrast to the broad language of Congress in which all settlements, mitigations, or compromises of civil penalties be subject to Commission review. Had Congress intended to proscribe review of settlements of civil penalties involving vacated citations, it would have placed clear limits on the Commission's review.

[13] The term "compromise," has been defined as the "settlement of differences or by consent reached by mutual concessions." *Compromise*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/compromise (last visited Aug. 27, 2024). The term "mitigates" has been defined as "to cause to become less harsh" or "to make less severe or painful" (i.e., or ameliorate, lessen, or balance out something). *Mitigate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/mitigate (last visited Aug. 27, 2024).

entirety of the proposed settlement package, including both its monetary and nonmonetary aspects." *AmCoal II*, 40 FMSHRC at 989 (internal citations omitted).[14]

Because civil penalties are so closely intertwined with citations, the vacatur of a citation in a proposed settlement will result in a change in penalty amounts and affect the operator's agreement to pay. Of course, the ultimate penalty change occurs when the citation in question is vacated, and the civil penalty becomes zero. Nevertheless, under the Secretary's position, the Commission and the public would have no ability or right to understand what has happened. This position is clearly inconsistent with section 110(k) of the Mine Act.

[14] Our dissenting colleague characterizes the ALJ's analysis here as a "mini-hearing" on the merits of the case. Slip op. at 20. That is not an accurate characterization of what has occurred here. The Judge did not convene a hearing nor did he question witnesses or make credibility determinations. Instead, he simply read the submissions provided by the parties, noticed inconsistencies between the facts asserted and the penalty assessed, and requested clarification. The parties failed to provide sufficient clarification and the ALJ denied the settlement.

III.

Conclusion

For the reasons stated above, we hold that the Secretary does not possess unreviewable discretion to vacate a contested citation without the Commission's approval under section 110(k) of the Act. Further, we hold that the parties must provide sufficient factual support to vacatur under such circumstances. We therefore conclude that the Judge did not abuse his discretion by denying the settlement motions. Accordingly, we affirm the Judge's denial of the motions and remand the cases to the Judge.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

Commissioner Althen, dissenting:

This opinion addresses two cases presently being acted upon by the Commission. These cases involve a total of six settlement dockets now pending before the Commission concerning whether a Commission Administrative Law Judge ("ALJ") may interfere with the Secretary's exercise of prosecutorial discretion. In each case, I respectfully dissent.

In *Crimson Oak Grove Resources, LLC*, Docket No. SE 2021-0112 et al., the Commission considers whether an ALJ may disapprove a settlement based upon disagreement with the Secretary's discretionary decision to vacate a citation.[1] In *Knight Hawk Coal, LLC*, Docket No. LAKE 2021-0160, the Commission considers whether an ALJ may disapprove a settlement based upon disagreement with the Secretary of Labor's discretionary decision to vacate a special finding of a Significant and Substantial ("S&S") violation.[2] In each case, the Commission majority seeks to wrest discretionary policy and enforcement decisions from the Secretary. The majority does so by misconstruing the wording, purpose, and limit of section 110(k) of the Mine Act, 30 U.S.C. § 820(k) and refusing to accept the Secretary's policymaking and enforcement authority.[3]

Common threads join the cases—the Secretary's exclusive executive authority to make enforcement decisions and the Commission's failure to have any policy-making authority. Rather than writing separate opinions, I consolidate my dissenting opinion into one opinion to be issued in each case, respectively.

The express terms of the Mine Act and the established enforcement authority of the Secretary undercut the ALJ's and Commission's desire to become an enforcement agency through its review of penalty settlements rather than properly tending to its adjudicative function and the review of penalties. The Commission's decisions in these cases would allow ALJs to second-guess discretionary enforcement decisions ranging from vacating citations to designations of S&S violations finding unwarrantable failures, finding flagrant violations, and

[1] In *Crimson Oak* the question for review is, "whether section 110(k) of the Mine Act authorizes review of the Secretary's decision to vacate a citation in the context of a settlement, when the vacatur is contingent upon the resolution of other citations." Slip op. at 2.

[2] The Commission's Order for Interlocutory review in *Knight Hawk i*s "whether the Secretary has unreviewable discretion to remove an [S&S] designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act." 46 FMSHRC ___, slip op. at 1, No. LAKE 2021-0160 (August 30, 2024) (citation omitted). Unaccountably, the majority misstates the issues before us in both of their opinions.

[3] The other dockets included in the cases identified above are: *Greenbrier Minerals, LLC*, Docket No. WEVA 2022-0403, *Crimson Oak Grove Res., LLC,* Docket No. SE 2021-0134*, River City Stone-Div/Mathy Construction Co.*, Docket No. LAKE 2021-0145, and *Holcim (US) Inc*., Docket No. YORK 2021-0023.

beyond. Interference by ALJs with the Secretary's substantive authority is a legal error and a very large step backward for the efficient and lawful administration of the Mine Act.[4]

I.

BACKGROUND

In 1966, Congress enacted the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 et seq. (1976). Congress placed standard-setting and enforcement authority in the Department of the Interior. It further created a Federal Metal and Nonmetallic Mine Safety Board of Review possessing authority to review citations contested by operators. The President appointed five members to the Board with the advice and consent of the Senate.

Building upon this effort to increase mine safety for metal/nonmetal mines, Congress turned its attention to the coal industry in 1969. It enacted the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977). Again, Congress granted regulatory authority to the Department of Interior. That Department created the Mining Enforcement and Safety Administration to conduct mine safety enforcement activities.

Notwithstanding improvements, a frightening number of injuries and accidents continued to occur. An incomplete summary includes the death of 91 miners from carbon monoxide asphyxiation at the Sunshine Silver Mine in 1972, the death of 125 persons due to the bursting of an impoundment at the Buffalo Creek Mine in 1972, and the 1976 Scotia disaster in which twenty-three miners and three federal inspectors died in two explosions of accumulated methane gas with some blaming MESA for the failure to detect or address ongoing inadequate ventilation deficiencies. *See* Tim Talbott, Kentucky Historical Society*, Scotia Mine Disaster,* https://explorekyhistory.ky.gov/items/show/238 (last visited Aug. 28, 2024); MSHA, *Sunshine Mine Disaster*, https://www.msha.gov/sunshine-mine-disaster (last visited Aug. 28, 2024); MSHA, *Buffalo Creek Mine Disaster 50th Anniversary*, https://www.msha.gov/buffalo-creek-mine-disaster-50th-anniversary (last visited Aug. 28, 2024).

In response to these tragedies, Congress undertook a comprehensive review of mine safety in the mid-1970s. This review led to the passage of the Federal Mine Safety & Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or the "Act").

Dissatisfied with the performance of the Department of Interior generally and especially its assessment and collection of penalties, Congress shifted the authority to regulate and inspect mines from the Department of Interior to the Department of Labor ("DOL"). DOL established the Mine Safety and Health Administration ("MSHA"). Under its authority from the Mine Act,

[4] MSHA data reveals that in calendar year 2022, MSHA issued 87,474 citations. MSHA, Dept. of Labor, *MSHA Enforcement Data, MSHA Violations*, https://enforcedata.dol.gov/views/data_catalogs.php (last visited Aug. 28, 2024). Internal Commission records show that challenges to citations resulted in creation of 1,751 Commission dockets. The Commission resolved 1411 of those dockets by settlement, 314 for miscellaneous reasons, and only 13 by a decision after a hearing. In sum, the Commission processed more than 100 times more settlements than decisions after hearings.

MSHA exercises broad regulatory powers over the mining industries including promulgating mandatory standards and regulations. Additionally, by statute, MSHA conducts frequent and comprehensive inspections of all mines. During inspections, MSHA issues citations for violations of standards and regulations. Subsequently, it proposes penalties for the cited violations. Generally, those proposals result from the application of a penalty point system at 30 C.F.R § 100.3 that accounts for all elements prescribed by Congress for penalty proposals in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i). Occasionally, MSHA will propose a special assessment.

The Mine Act also created a smaller but constitutionally important federal agency—the Federal Mine Safety and Health Review Commission ("FMSHRC"). Congress assigned important functions to the Commission. These are (1) due process adjudication of alleged violations of standards and regulations promulgated by MSHA and of discrimination complaints; and (2) the assessment of penalties for established violations. The Mine Act grants the Commission authority to assess all civil penalties and identifies six specific factors for the Commission to consider when setting penalties.

The Secretary and Commission perform important but distinctly different functions within their separate jurisdictions. MSHA is the sole agency authorized to set policies and regulations for the regulation and enforcement of the Mine Act. The Secretary, through MSHA, also performs frequent and thorough inspections of mines and other investigations to enforce the Act and the Secretary's regulations. Only MSHA may issue and enforce a citation. MSHA is the sole enforcement authority for the Act and exercises plenary jurisdiction in enforcement.

The Commission is an adjudicative agency and does not have any policymaking or enforcement responsibilities. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 171 (D.C. Cir. 2006) ("[T]he Commission has no 'policymaking role,'" *id.* at 154, 111 S.Ct. 1171. Instead . . .'the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness.' *Id.* at 154–55, 111 S. Ct. 1171. And, like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion."), *citing Martin v. OSHRC*, 299 U.S. 144 (1991); *Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 463 (D.C. Cir. 1994); *Sec'y of Labor v. Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996).

In the cases under review, the majority interjects the Commission into discretionary Secretarial enforcement decisions—decisions to vacate a previously issued citation and, separately, to vacate a special finding that a violation was S&S. The majority's assertion of a right to second-guess discretionary enforcement decisions by the Secretary is contrary to the Congressionally intended split of authority between the Secretary and the Commission. The designation of a violation as S&S and many other prosecutorial enforcement functions are wholly reserved for the Secretary. The Secretary, acting through MSHA, has the discretionary and only authority to issue or vacate a citation or S&S designation.

Policy-making and discretionary enforcement decisions are left wholly to the Secretary. *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 159 (4th Cir. 2016) ("[W]e have previously recognized that the Secretary is the authoritative policymaking entity under the Mine

Act's scheme."); *Energy West Mining Co. v. FMSHRC,* 40 F.3d at 463. The Commission does not exercise any enforcement role other than setting penalties and must remain neutral and impartial concerning enforcement. *Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996) ("As the Supreme Court concluded for an analogous adjudicatory body, the Commission operates as a 'neutral arbiter' . . . that possesses 'nonpolicy-making adjudicatory powers.'").

To put this case in perspective, if an ALJ may use a settlement to make decisions regarding maintaining a citation or finding a special S&S violation, it would open a host of other discretionary enforcement areas to ALJ interference—flagrant violations, unwarrantable failures, etc. No one would suggest that, before or after a hearing, an ALJ could find the Secretary showed more violations than had been cited or add to the number of violations. No one would suggest that, before or after a hearing, an ALJ could add a special S&S finding even though the violation was not cited as S&S. An ALJ may not use consideration of a settlement to second-guess the Secretary's enforcement decisions.

II.

SECTION 110(K) ADDRESSES THE COMPROMISE OF PENALTIES; IT DOES NOT PERMIT COMMISSION REVIEW OF POLICY DECISIONS BY THE SECRETARY.

The majority incorrectly seeks to justify incursion into areas of prosecutorial discretion by turning to the penalty section of the Mine Act. The penalty section, its history, and its implementation by the Commission demonstrate conclusively that the Commission does not have the authority to encroach upon the Secretary's enforcement authority.

Section 110 of the Mine Act sets out a comprehensive roadmap for penalty assessments. Section 110(i) grants the Commission authority over all civil penalties by providing,

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

30 U.S.C. § 820(i).

The section accomplishes three goals. First, it grants the Commission the authority to assess "all" civil penalties. Second, it sets forth the specific factors the Commission must

consider in setting penalties. Third, consistent with the Commission's ultimate authority, the Secretary may propose a penalty for review by the Commission without making findings of fact related to its proposal of penalties.

Two other sections of the Act confirm the Commission's authority over penalties. First, Section 105 provides that if an operator does not contest a proposed assessment within 30 days, "the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. § 815(a). So, even when the Commission is not directly involved in setting a penalty, the penalty is deemed an order of the Commission.

Second, and most importantly here, Congress recognized a potential hole in the Commission's authority. If the Secretary compromised a penalty proposal and the operator did not contest it, the compromised penalty would be deemed an order of the Commission under section 105 cited above. Congress closed that loophole in the Commission's penalty authority in the penalty section relevant to this case.

Section 110(k) closes the loophole thereby confirming the Commission's authority providing that "[n]o proposed penalty which has been contested before the Commission under section 105(a) of this Act shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k) (emphasis added).

This section fits neatly into the Congressional direction for penalties by assuring the Commission's ultimate authority over penalties notwithstanding an MSHA proposal to settle a penalty. It explicitly and only applies to a "proposed penalty."

Congress could have granted the Commission oversight generally of all compromises or settlements by writing "no case brought before the Commission under section 105(a) of this Act." It did not do so. It wrote, "[n]o proposed penalty which has been contested before the Commission under section 105(a) of this Act." Congress could have applied the language to "citations," or "violations." It did not do so. Congress could have given the Commission broader authority in the section of the Mine Act that created the Commission and its adjudicative authority—Section 113, 30 U.S.C. § 823. It did not do so. Section 110(k) affirmed the Commission's authority over penalties.

Congress granted the Commission oversight for penalty settlements, and it did so only in the penalty section of the Act. Previously, the Commission recognized the specificity of section 110(k). In *The American Coal Company*, the Commission wrote, "[i]n exercising its discretion, the Commission evaluates whether a proposed reduction in a penalty or penalties 'is fair, reasonable, appropriate under the facts and protects the public interest.'" 40 FMSHRC 330, 332 (Mar. 2018), *citing The American Coal Co.*, 38 FMSHRC 1972, 1982 (Aug. 2016) ("*AmCoal I*").

Section 110 is headed "Penalties." The section only addresses penalties. In the words of a prior Commission decision, the Commission "does not review the Secretary's decision to settle. Rather the Commission reviews the proposed reduction of civil penalties in settlements." *AmCoal I*, 38 FMSHRC at 1982 (emphasis in original).

In *American Coal*, the Commission expressly recognized that the Commission's review of penalties in settlements is limited by boundaries. "Such boundaries are provided by section 110(i) of the Mine Act, the Act's legislative history, and the Commission's Procedural Rules." *Id.* Section 110 does not provide for assessing a penalty based upon an S&S violation, unwarrantable failure, or other substantive requirements of the Mine Act.[5]

The legislative history of the Mine Act confirms this interpretation. Congress repeatedly and expressly emphasized its dissatisfaction with penalties assessed under the Coal Act. Early in the Senate Report, the Senate said:

> The assessment and collection of civil penalties under the Coal Act has also been a great disappointment to the Committee. The Committee firmly believes that the civil penalty is one of the most effective mechanisms for insuring lasting and meaningful compliance with the law.

S. Rep. No. 95-181, at 15 (1977), as *reprinted in* 1977 U.S.C.C.A.N. 3401, 3415.

Later in its report, the Senate focused upon its desire for public awareness of penalty compromises, writing:

> In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the *compromising of the amounts of penalties* actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent *the compromising of assessed penalties does not come under public scrutiny*. . . .
>
> . . . The Committee strongly feels that the *purpose of civil penalties*, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.

[5] An S&S violation has occurred if (1) there is an underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). Although S&S violations contain a gravity element, an S&S finding is not the same as a finding on gravity, and gravity is treated as a distinct and separate element in the assessment of penalties.

> To remedy this situation, Section 111(1) [section 110(k) in the final Act] provides that *a penalty once proposed and contested* before the Commission may not be compromised except with the approval of the Commission.

S. Rep. No. 95-181 at 44–45 (emphasis added).

The legislative history of section 110(k) demonstrates that the reduction of penalties through settlements was the target of section 110(k). Low penalties were the motivating concern for sections 110(i) and 110(k) expressly articulated by Congress. Previously, the Department of Interior could settle a case by reducing the penalty. An operator could bargain for a reduction in penalty to avoid litigation over a citation. Thus, a deal could be reached without any consideration of the penalty factors.

MSHA and the operator may still undertake such compromises. However, they may only do so if they can explain to the Commission how the compromise penalty comports with the penalty criteria expressly established in section 110(i). There is no evidence, hint, or insinuation in any of this to suggest the Commission may interfere in enforcement policy decisions such as whether to issue or enforce a citation, charge an S&S violation, charge a flagrant violation, charge an unwarrantable failure or any other substantive aspect of the Mine Act with exclusive expertise and authority of the Secretary.

Commission authority over the settlement of penalties does not appear in section 105 setting out the procedures for enforcement and for operators' right to challenge citations (30 U.S.C. § 815) or section 113 establishing and providing rules for the governance of the Commission (30 U.S.C.§ 823). The express words of section 110(k) and legislative history show the only concern of section 110(k) is the reduction of penalties.

The third bounding element also demonstrates the Commission's formal acceptance that its settlement authority applies to penalties. The Commission's relevant procedural rules, identified in *American Coal*, *supra*, as a third boundary upon the review of settlements, is expressly limited to penalties. The settlement rule, Procedural Rule 31, is limited to a "Penalty Settlement" and provides, *inter alia*, that "[a] motion to approve a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary . . . ." 29 C.F.R. § 2700.31(b)(1) (emphasis added). Further, Rule 31(c)(1) states:

> Factual support. A proposed order approving a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties.

29 C.F.R. § 2700.31(c)(1).

Consequently, the factors expressly held by the Commission as boundaries of Commission authority—the express words of the statute, the legislative history, and the Commission's rules—demonstrate that an ALJ's settlement authority consists of reviewing the penalty proposed in the settlement. In doing so, the ALJ may consider the application of the six penalty factors but that does not mean the ALJ may conduct mini hearings.

In *Hopedale Mining, LLC*, the Commission properly explained that a settlement does not present an opportunity or a right for ALJs to engage in a fact-finding proceeding.

> During the review of a proposed settlement, the Judge is not expected to engage in fact finding as she would post-hearing. *See Solar Sources*, 41 FMSHRC at 602 ("At the pre-hearing settlement stage of a Commission proceeding, no evidence has been adduced into the record and the Judge is not required to engage in fact finding."). Judges are "expected to consider the facts as alleged by the parties in their settlement, evaluate such information under the applicable Commission standard for review, and determine whether the facts support the penalty agreed to by the parties. *Id*.

42 FMSRHC 589, 595 (Aug. 2020). The ALJ is not permitted to demand evidence or make findings concerning discretionary enforcement decisions by the Secretary.

As we see below, not only do the words of the Act, its legislative history, and Commission rules limit the Commission's authority to review penalties, but also strong and prevailing case law reserves discretionary enforcement authority to the Secretary at every stage of a proceeding.

III.

PROSECUTORIAL DECISIONS SUCH AS WHETHER TO VACATE A CITATION OR CHARGE A VIOLATION AS SIGNIFICANT AND SUBSTANTIAL ARE EXERCISES OF PROSECUTORIAL DISCRETION RESERVED FOR THE SECRETARY.

Policy-making and discretionary enforcement decisions are left wholly to the Secretary. *Mutual Mining, Inc.*, 80 F.3d at114 ("As the Supreme Court concluded with respect to an analogous adjudicatory body, the Commission operates as a 'neutral arbiter.'"); *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985); *Knox Creek Coal Corp.*, 811 F.3d at 159 ("[W]e have previously recognized that the Secretary is the authoritative policymaking entity under the Mine Act's scheme."); *Twentymile Coal Co.*, 456 F.3d at 158; *Energy West Mining Co.,* 40 F.3d at 463. The Commission must be neutral and does not have jurisdiction over enforcement decisions. Certainly, it does not have jurisdiction to find a violation the Secretary has not cited or to contradict a Secretarial decision to vacate a citation, special S&S finding, flagrant violation, or a host of other enforcement decisions.

The D.C. Circuit authoritatively holds only MSHA has the authority to make enforcement decisions under the Mine Act and that authority is not bounded by the Commission. In short, "the Secretary's charging discretion is as uncabined as that of a United States Attorney under the Criminal Code." *Twentymile Coal Co.* 456 F.3d at 157. Indeed, the Circuit Court characterized the attempt by the Commission to assert a right for the Commission to review enforcement decisions as "pernicious," writing "the most pernicious aspect of employing this purported standard as a check on charging decisions is that it invites the reviewing body to substitute its views of enforcement policy for those of the Secretary, a power that . . . the Commission does not possess." *Id*. at 158. The Commission and courts have repeatedly applied the fundamental principle of the Secretary's exclusive authority over the broad range of enforcement decisions and policies, including the right to vacate citations and S&S enforcement.

A. <u>Citations</u>

The Secretary annually conducts thousands of meticulous inspections of mines. MSHA inspectors use their training, knowledge, and experience to make judgment calls concerning compliance with the thousands of requirements governing the mining industries. As a result, MSHA issues tens of thousands of citations. Thereafter, MSHA supervisors may review, approve, revise, or overrule inspectors' decisions. If a contest is filed, trained representatives of the Secretary pore over the citations reviewing the facts and the penalty assessment. Maintenance of a citation is one of the basic, if not the most basic, exercises of the Secretary's enforcement authority.

In *RBK Construction, Inc.*, 15 FMSHRC 2099 (Oct. 1993) ("*RBK*"), the Commission held that the Supreme Court's decision in *Cuyahoga Valley*, 474 U.S. 3*,* mandated that the Secretary had the dispositive authority to vacate a citation. The Commission correctly ended its decision with a short, declarative acknowledgment of the Secretary's authority, "We agree with the Secretary that he has the authority to vacate the citations in issue." *RBK,* 15 FMSHRC at 2101. For thirty years until today, no Commission has challenged this holding.

The Commission emphasized the Secretary's authority by instructing the Secretary and operators that they "may in the future file stipulations of dismissal signed by all parties to a proceeding, in order to effect voluntary dismissal. . . . Upon the parties' filing of the appropriate stipulation, the presiding Commission Judge shall enter an order dismissing the proceeding." *Id.* at 2101 n.2.[6] Therefore, if the parties had presented the vacation decisions separately from penalty adjustment on other citations being resolved, the ALJ would simply have ordered dismissal. It would be silly and counterproductive for the Secretary to have to resort to such gamesmanship to exercise her right to settle enforcement actions. The Secretary's unreviewable right to vacate a citation is the clear and long-standing discretionary right of the Secretary.

- In *Bixler Mining Company*, 16 FMSHRC 1427 (July 1994), the ALJ issued a default judgment against the operator for failing to comply with a prehearing order. More than 30

[6] Based upon this instruction on procedure by the Commission, when the Secretary is resolving a group of contests included in one docket, the Secretary may dispose of the vacation of a citation by filing the appropriate motion and, in turn, the ALJ "shall"—that is, "must"—approve. *RBK,* 15 FMSHRC at 2101 n.2.

days later, the Secretary filed a motion to vacate the default decision, vacate the underlying citation, and dismiss the proceeding. The Commission reopened the case and vacated the citation. The Commission "concluded that the Secretary has unreviewable authority to vacate or withdraw his own enforcement actions." *Id.* at 1428.

- In *Bridger Coal Company*, 17 FMSHRC 270 (Mar. 1995), the Secretary sought to dismiss the Secretary's own previously filed PDR. Notably, the Secretary's motion stated the motion was made "in an effort to effectively utilize his resources." *Id.* at 270l. Affirming the dispositive effect of *RBK*, the Commission unanimously granted the motion. *Id*. at 271. The Secretary, not the Commission, decides upon the appropriate use of Secretarial resources.

- In *Mechanicsville Concrete, Inc. T/A Materials Delivery*, 18 FMSHRC 877 (June 1996), the principal issue was the ALJ's decision to enter an S&S finding even though the Secretary had not made a special finding of S&S. The Commission held that the Commission does not have authority to make an S&S finding not sought by the Secretary. Without a supporting finding by the Secretary, the ALJ did not possess the authority to add a new finding. *Id*. at 879-80, *citing Mettiki Coal Co*., 13 FMSHRC 760, 764-765 (May 1991). Further, the Commission reemphasized the ongoing guiding principle: "The Commission has recognized that the Secretary's discretion to vacate citations is unreviewable." *Id*. at 879.[7]

- In *United Metro Materials*, 24 FMSHRC 140 (Feb. 2002), Chairman Verheggen and Commissioner Beatty summarily granted the Secretary's motion to dismiss a Direction for Review of citations. Then-Commissioner (now Chair) Jordan separately concurred writing, "The [Supreme] Court pointed out that allowing the Commission to overturn the Secretary's decision to withdraw a citation would amount to allowing the Commission 'to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend.'" *Id*. at 142 (citing *Cuyahoga Valley*, 474 U.S. at 7).

- Following *Cuyahoga*, 474 U.S. 3, this Commission in *RBK,* 15 FMSHRC at 2101, concluded that it lacked the authority to overturn a Secretarial decision to withdraw or vacate a citation.

- In *United Mine Workers of America on behalf of Local 1248, District 2 v. Maple Creek Mining*, *Inc*., 29 FMSHRC 583 (July 2007), the Commission reversed an ALJ's decision to permit litigation of a Withdrawal Order notwithstanding the Secretary's settlement. It did so even though, "[w]e are aware that vacating the judge's denial of the operator's motion for summary decision may have an adverse impact upon miners who might otherwise have been eligible for up to a week's compensation for the time they were not

[7] Oddly, the majority attempts to negate the clear holding of *Mechanicsville* by arguing it derived from the Commission's own prior dispositive decision in *RBK*. *Knight Hawk*, 46 FMSHRC ___, slip op. at 9-10, No. LAKE 2021-0160 (August 30, 2024).

permitted to work due to the withdrawal order. We are sympathetic to their position. However, the Secretary has broad authority to vacate orders she has issued." *Id.* at 596-7.

- In *North American Drillers, LLC*, 34 FMSHRC 352, 355-56 (Feb. 2012), the Commission wrote: "The Commission has acknowledged that it lacks authority to overturn a decision by the Secretary to withdraw or vacate a citation under the Mine Act. *RBK,* 15 FMSHRC at 2101, *citing Cuyahoga*, 474 U.S. at 7-8; *Mechanicsville Concrete, Inc.,* 18 FMSHRC 877, 879 (June 1996). The Commission and the courts have also recognized that under the Mine Act, Congress intended to delegate such enforcement authority to the Secretary, not the Commission. *Mechanicsville,* 18 FMSHRC at 879; *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006); *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 319 (4th Cir. 2008)."

The majority does not provide any basis for veering from the express language of the Mine Act, its legislative history, the Commission's rules, or established case law to undercut the established principle of the Secretary's right to vacate a citation—the most basic exercise of her exclusive enforcement authority. In summary, the basic principles of split enforcement agencies, the Secretary's exclusive right to exercise prosecutorial discretion, the plain language of section 110(k), the legislative history of section 110(k), and the Commission's rules demonstrate the Secretary's right to vacate citations at any point.[8]

B. S&S Designations

The standard for determining if an S&S violation has occurred is whether (1) there is an underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020).

If an S&S determination is challenged, an ALJ reviews the evidence and decides which party has made the more convincing argument. However, before and after the hearing, the Secretary has a right and duty to review the facts and decide whether to press a special S&S finding.

The Commission has understood the Secretary's enforcement power and the absence of Commission authority to interfere with the Secretary's authority:

[8] Even if those overwhelming principles were insufficient, commonsense principles of government decision-making mandate the absence of authority for the Commission to refuse to accept a decision to vacate a citation. The Commission cannot compel the Secretary to litigate a citation. If the Secretary finds a citation should be vacated, she may simply decline to prosecute it. In the absence of the presentation of a case by the Secretary, the citation must fail. It would be an unworkable and futile policy to attempt to force the Secretary to prosecute a citation once she has decided not to do so. Moreover, the Secretary recognizes that it is grossly unfair to the private citizen for a group of lawyers on the Commission to force the knowledgeable and experienced Secretary to prosecute the citizen despite her decision not to do so.

> As is true under the OSH Act, "enforcement of the [Mine] Act is the sole responsibility of the Secretary," 499 U.S. at 152, 111 S.Ct. 1171 (internal quotation marks omitted), and the Commission has no "policymaking role," *id.* at 154, 111 S.Ct. 1171. Instead, "Congress intended to delegate to the Commission the type of nonpolicy-making adjudicatory powers typically exercised by a *court* in the agency-review context." *Id.* "Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." *Id.* at 154-55, 111 S.Ct. 1171. And, like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion.

Twentymile Coal Co., 456 F.3d at 161 (emphasis in original).[9]

In *Mechanicsville*, 18 FMSHRC 877, the Commission recognized the breadth and scope of MSHA's prosecutorial discretion. The Commission explained the distinctly different roles of MSHA and the Commission under the Mine Act, finding that the Commission must adjudicate disputes under the Mine Act; the Commission does not enforce the Mine Act itself. *Id*. at 879-80.

In *Heckler v. Chaney,* 470 U.S. 821 (1985), the Supreme Court held an agency's decision not to institute enforcement proceedings to be presumptively unreviewable under 5 U.S.C. § 701(a)(2). *Id*. at 831. An agency's "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id*. Numerous other decisions reiterate this fundamental principle. *Lincoln v. Vigil,* 508 U.S. 182, 191 (1993); *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Robbins v. Reagan*, 780 F.2d 37, 44-45 (D.C. Cir. 1985).

Citing *Heckler* and *Brock v. Cathedral Bluffs Shale Oil Co.,* 796 F.2d 533, 538 (D.C. Cir. 1986), the Commission found that MSHA, as the enforcing administrative agency, has "virtually unreviewable discretion in making decisions not to take particular enforcement action relating to its statutory or regulatory authority." *Mechanicsville*, 18 FMSHRC at 879. An ALJ forcing the Secretary to continue an enforcement action that she has decided not to pursue directly contradicts this seminal principle.

In *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570 (August 2020), the Commission held that an Administrative Law Judge may "not to engage in fact finding as he

[9] A host of cases affirm these basic premises. *See, e.g., Speed Mining, Inc*. v. *FMSHRC*, 528 F.3d 310, 319 (4th Cir. 2008); *RAG Cumberland Res. LP v. FMSHRC,* 272 F.3d 590, 595-96 (D.C. Cir. 2001); *Sec'y of Labor v. Excel Mining, LLC,* 334 F.3d 1, 5-6 (D.C. Cir. 2003); *Akzo Nobel Salt, Inc. v. FMSHRC,* 212 F.3d 1301, 1303 (D.C. Cir. 2000).

would post-hearing." *Id.* at 576.[10] The Commission recognized MSHA's right to determine whether to assert with an S&S claim stating, "[w]hether a violation is S&S is a matter in the first instance of prosecutorial discretion. The Mine Act, therefore, recognizes the expertise of MSHA in judging whether a violation is S&S." *Id.*

Determination of whether a violation should be designated S&S is a fact-based inquiry requiring the exercise of prosecutorial discretion. If an S&S designation is contested at a hearing, the ALJ is presented with evidence by both parties and may decide the merits of the designation. That authority, however, does not permit an ALJ to add an S&S finding to a citation that MSHA did not designate with a special S&S finding. By parity of legal reasoning, if MSHA withdraws an S&S designation before a hearing, an ALJ could not make a post-hearing decision finding an S&S violation. Similarly, it is an impermissible abuse of discretion for an Administrative Law Judge effectively to engage *sua sponte* in a fact-based inquiry and determine that the Secretary may not remove an S&S designation before settling a case.

IV.

CONCLUSION

The controlling element of these decisions is the exclusive enforcement authority of the Secretary. Granting the Commission power to review the Secretary's policy decisions to enforce the Mine Act would place numerous such decisions in the hands of an ALJ who has heard no evidence, who has no mining experience, and to whom the parties have presented agreed-upon facts. Moreover, the Commission cannot, and should not be able, to force the Secretary to undertake prosecutions she no longer supports.

[10] A searching factual inquiry by the ALJ into the Secretary's exercise of prosecutorial discretion to vacate a violation or a special S&S finding almost certainly precludes the ALJ from continuing as the Judge at a hearing. For example, in *Knight Hawk*, Docket No. LAKE 2021-0160, the ALJ wrote, "the *operator may yet establish* by evidence that there was no violation or that any violation was not S&S." Unpublished Order Denying Motion to Approve settlement, at 5 n.4 (Sept. 30, 2021) (emphasis added). Although the Judge does not formally find S&S and disclaims finality, he places the burden of proof on the operator to establish at a hearing that the violation was not S&S. Having reached that view before the presentation of any evidence, he could not possibly continue as the trial Judge.

The express words of the Mine Act, its legislative history, Commission rules, established case law, and sound policy demonstrate the right of the Secretary of Labor to issue citations, vacate citations, issue special S&S findings, vacate special S&S findings, issue flagrant violation citations, vacate flagrant violation citations, assert unwarrantable failures, withdraw the assertion of unwarrantable failures, and engage in a host of other enforcement, policy-driven, qualified expert decisions. ALJs and Commissioners must resist the siren call to self-importance; they must stay within the boundaries of the law. The Secretary has the "uncabined" right to assert or to vacate citations, special S&S findings, and other enforcement decisions.

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

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 1, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. C&C LEASING & EXCAVATING, INC.	Docket No. WEVA 2023-0536 A.C. No. 46-06448-577602

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On September 14, 2023, the Commission received from C&C Leasing & Excavating, Inc. ("C&C") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to C&C on June 5, 2023. The assessment became a final order of the Commission on July 5, 2023. On August 21, 2023, MSHA sent the operator a delinquency notice.

C&C submits that its owner receives and sends proposed penalty assessments to its safety consultant to analyze and determine whether to contest the proposals. However, because its owner was in and out of the hospital due to sickness, he failed to send the subject proposed penalty assessment to C&C's safety consultant for processing. The operator states that C&C has incorporated a plan to designate another employee to be responsible during any absences to ensure future timely submissions. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed C&C's request and the Secretary's response, we find that the operator acted with excusable neglect due to the medical circumstances and hospitalization surrounding the operator's owner. *See Benton Cty Stone Co.*, 45 FMSHRC 485, 486 (June 2023). In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 12, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2023-0240 A.C. No. 04-00036-573596
CALPORTLAND	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On May 16, 2023, the Commission received from CalPortland a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 4, 2023, and became a final order of the Commission on May 4, 2023.

As stated, after receiving a proposed assessment, an operator must contest the proposed assessment with the Secretary of Labor within 30 days. CalPortland asserts that it misinterpreted the 30-day deadline for contests set forth above as 30 "business" days. Therefore, CalPortland failed to take action within the deadline, resulting in the proposed assessment becoming a final order. CalPortland filed a motion to reopen the final order on May 16, 2023, 30 business days after receiving the assessment. The Secretary of Labor does not oppose the request to reopen.

CalPortland filing the motion to reopen on the 30th business day after receiving the assessment is consistent with, and fully supports, its explanation that it was waiting until the 30th business day to take any action regarding the assessment. Furthermore, we note that the motion to reopen was timely filed. The Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed on May 16, 2023, 12 days after the proposed assessment became a final order. Therefore, the motion to reopen was filed within a reasonable amount of time.

Having reviewed CalPortland's request and the Secretary's response, we find that CalPortland demonstrated good cause for its failure to timely respond, and acted in good faith. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

/s/ Timothy J. Baker
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 13, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. CENT 2023-0229 A.C. No. 39-00022-573671
v.	Docket No. CENT 2023-0230 A.C. No. 39-00022-575493
GCC DACOTAH, INC.	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 18, 2023 the Commission received from GCC Dacotah, Inc. ("GCC Dacotah") a motion seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] For the limited purpose of addressing this motion to reopen, we hereby consolidate docket numbers CENT 2023-0229 and CENT 2023-0230 involving similar procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment in CENT 2023-0229 was delivered on April 6, 2023, and became a final order of the Commission on May 8, 2023. On June 21, 2023, a delinquency notice was mailed to the operator. In CENT 2023-0230, MSHA's records indicate that the proposed assessment was delivered on May 8, 2023, and became a final order of the Commission on June 7, 2023.

The operator claims that service to the Secretary was unsuccessful due to a typo in MSHA's email address for filing contests. The operator claims that it has manually entered and saved the correct MSHA email address into its Outlook system, and that it will request a read receipt for future contests filed with MSHA. The Secretary of Labor opposes the request to reopen noting that this particular error—mistyping MSHA's email address for contests—is not a unique occurrence for this operator and demonstrates a repeated failure of the operator's internal processing system. Specifically, the Secretary cites to Docket No. CENT 2023-0173 to illustrate that an identical error had resulted in the operator's failure to timely contest another recent assessment.[2] *GCC Dacotah, Inc.*, 45 FMSHRC 885 (Oct. 3, 2023).

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *E.g.*, *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res.*, LLC, 33 FMSHRC 103. 104 (Feb. 2011). Significantly, multiple repeated processing errors of the same nature can reflect an inadequate internal processing system. *Lone Mountain*, 35 FMSHRC 3342 (Nov. 2013) (emphasizing the repeated misplacement of paperwork by the operator). We have also held that a repeated instance of the same clerical error does not warrant reopening. *Marfork Coal Co., LLC,* 2023 WL 4052208 (June 7, 2023).

Here, GCC Dacotah committed the same error four times in as many months. The operator first sent an assessment contest to an incorrect email address on March 24, 2023. The operator filed a motion to reopen the assessment, which the Commission granted (CENT 2023-0173). In its motion, GCC Dacotah stated that it had circulated a memorandum to relevant safety personnel to prevent the error from recurring. Nevertheless, two more contests for a new assessment were sent to an incorrect email address in April 2023, and when the error was discovered, a fourth contest for another assessment was again sent to an incorrect email address in May 2023 (CENT 2023-0229, CENT 2023-0230). While the first case could be considered an honest mistake by the operator, the repeated nature of this error indicates a larger problem with the operator's internal processes. We note that multiple members of management were included on the April and May contest emails but did not catch the typographical errors.

As noted, GCC Dacotah stated in CENT 2023-0173 that it had circulated a memorandum to prevent further typographical errors. It appears the memorandum was ineffective. After the errors here, the operator claims that it has entered the correct MSHA email address into its email system and will be requesting read receipts from MSHA. However, the operator does not provide

[2] The contests for the assessments at issue in CENT 2023-0173, CENT 2023-0229 and CENT 2023-0230 were all erroneously emailed to "www.MSHA-PenaltyContests@dol.gov" and/or "MSHA-PentaltyContests@dol.gov" rather than "MSHA-PenaltyContests@dol.gov."

sufficient assurances that these precautions will not be similarly ineffective. In fact, it appears that the operator used read receipts when contesting CENT 2023-0230, but that did not seem to have prevented the operator from using the wrong email address yet again.

Upon reviewing the record, we find the multiple errors at issue to be the result of the operator's inadequate internal processing system. Therefore, GCC Dacotah has not demonstrated good cause for its failure to timely contest the proposed assessments. The motion is DENIED with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

/s/ Timothy J. Baker
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/s/ Moshe Z. Marvit
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August 13, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. DEATLEY CRUSHING COMPANY	Docket No. WEST 2023-0333 A.C. No. 10-01658-574025

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 26, 2023, the Commission received from DeAtley Crushing Company ("DeAtley") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 10, 2023, and became a final order of the Commission on May 10, 2023. On June 27, 2023, a delinquency notice was mailed to the operator.

DeAtley claims that on April 11, 2023, the day after receiving the assessment, it timely mailed a contest of the proposed assessment via the U.S. Postal Service's regular mail. The operator contacted MSHA upon receiving the delinquency letter, but MSHA could not find any record of the contest being filed. The operator believes that an error by the postal service resulted in the contest not being delivered to MSHA. As the contest was not sent via certified mail, the operator is unable to provide documentation of the date the contest was mailed. The Secretary of Labor does not oppose the request to reopen. The Secretary explicitly notes that DeAtley has a well-established history of filing contests in a timely manner.[1]

Having reviewed DeAtley's request and the Secretary's response, we find that DeAtley acted in good faith. DeAtley also has a history of filing contests in a timely manner.

[1] The Secretary does not claim that DeAtley mailed this assessment or any prior assessment to an incorrect address.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

/s/ Timothy J. Baker
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/s/ Moshe Z. Marvit
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August 22, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MID-STATES MATERIALS, LLC	Docket No. CENT 2023-0250 A.C. No. 14-01647-574329

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

ORDER

BY: Rajkovich, Baker, and Marvit, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 8, 2023, the Commission received from Mid-States Materials, LLC ("Mid-States") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 17, 2023, and became a final order of the Commission on May 17, 2023. On June 16, 2023, MSHA received payment for civil penalties associated with three of the ten citations listed on the proposed assessment form

(Citation Nos. 9728661, 9728663, and 9728667). On July 3, 2023, MSHA sent the operator a delinquency notice for the remaining seven penalties.

Mid-States that it paid the penalties associated with three of the citations (Citation Nos. 9728661, 9728663, and 9728667) and emailed its notice contesting the penalties associated with the remaining seven citations to an MSHA email address. Mid-States attached to its motion a copy of its email to MSHA, dated June 14, 2023, 28 days after the proposed penalties became a final order of the Commission. The Secretary opposes Mid-States' motion on the basis that the operator has failed to provide a sufficient reason justifying relief.

A party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely respond. *Revelation Energy, LLC*, 40 FMSHRC 375, 375-76 (Mar. 2018). General assertions or conclusory statements are insufficient. *Southwest Rock Prod., Inc.*, 45 FMSHRC 747, 748 (Aug. 30, 2023); *B & W Res., Inc*., 32 FMSHRC 1627, 1628 (Nov. 2010). At 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. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010). Here, Mid-States has provided no explanation for sending its contest of the seven penalties after they had become final. We find that the operator has failed to meet its burden of showing that it is entitled to relief.

Mid-States has also failed to explain the apparent delay in filing its motion to reopen. The Commission has held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009). Conversely, however, motions to reopen filed more than 30 days after such notice "should include an explanation for why the operator waited so long to file for reopening," and "[t]he lack of such an explanation is grounds for the Commission to deny the motion." *Id.* Here, it appears that Mid-States filed its motion more than two months after the assessment became final, and more than one month after the Secretary's delinquency notice. Mid-States offers no explanation for the delay.

Having reviewed Mid-States' request and the Secretary's response, we find that the operator has not provided a sufficient explanation to justify reopening the captioned proceeding. *See Pocahontas Coal Co.*, 46 FMSHRC 322, 323 (May 2024) (denying relief where operator offered insufficient reason for untimeliness in filing contest and was delayed in filing motion to reopen). Accordingly, we deny with prejudice Mid-States' motion.[1]

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

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

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

[1] Our dissenting colleagues agree that Mid-States failed to establish good cause to reopen this proceeding. However, they note that the Secretary suggested that we dismiss this case "without prejudice" to allow the party to file a second motion to reopen. Such an approach would unnecessarily prolong this matter, while resulting in the same outcome. If Mid-State was allowed an opportunity to file a second motion to reopen, it would necessarily be denied. The Commission has consistently held that a second request to reopen filed after a denial without prejudice must be made "within a reasonable time" and that, pursuant to Rule 60(b), "a reasonable time" must be within one year of the final order. *See WKJ Contractor's Inc.*, 32 FMSHRC 45 (Jan. 2010); *Rogers Group, Inc.*, 39 FMSHRC 1551 (Aug. 2017). As noted above, the instant case became final on May 17, 2023. Therefore, any motion to reopen filed after this order would necessarily be more than one year after that date. As a result, ordering a dismissal without prejudice is functionally identical to dismissal with prejudice.

Chair Jordan and Commissioner Althen dissenting,

We dissent from our colleagues' decision to deny Mid-States Material's motion to reopen the captioned proceeding *with prejudice*.

Mid-States Materials filed a short request with the Commission, seeking our reopening of a final order. The operator's *pro se* motion failed to conform with Commission guidance, lacking any explanation regarding their original failure to timely file to contest the Secretary's proposed civil penalty assessment. *See Filing a Request to Reopen a Final Commission Order,* www.fmshrc.gov/content/requests-reopen (last visit August 1, 2024).

While the Secretary opposed the operator's motion, the Secretary recommended that the Commission deny the motion *without prejudice*, which would have provided the operator with an opportunity to re-file and identify whether there was a good cause reason for their failure to timely contest the assessment. Instead, the Commission has denied the motion with prejudice, foreclosing an opportunity for the operator to rectify deficiencies in its motion.

Consistent with the Secretary's proposed resolution, we believe the Commission should have instead issued an Order to Show Cause, directing the operator to provide a reason for their failure to timely contest, with supporting documentation within 30 days. *See, e.g.*, *R.E. Pierson Materials Corp*., 45 FMSHRC 757 (Aug. 2023) (in which the Commission issued an Order to Show Cause providing the operator the opportunity to remedy a deficient motion to reopen and demonstrate good cause for its failure to timely contest the proposed penalty).

Accordingly, we dissent.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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August 22, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) O/B/O ROBERT BAUMANN	
v.	Docket No. CENT 2023-0251-DM
MOSENECAMANUFACTURER, LLC D/B/A AMERICAN TRIPOLI	

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

ORDER

BY: Jordan, Chair; Baker and Marvit, Commissioners

This proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2018) ("Mine Act" or "Act").[1] On June 26, 2024, the Commission received from MOSenecaManufacturer, LLC *d/b/a* American Tripoli ("American Tripoli") a motion to stay enforcement of the Administrative Law Judge's May 23, 2024 decision awarding backpay after finding that the operator had discriminated against miner Robert Baumann in violation of section 105(c) of the Mine Act. For the reasons that follow, we deny the operator's motion.

[1] 30 U.S.C. § 815(c)(2) provides in pertinent part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

I.

Factual and Procedural Background

At the beginning of 2023, miner Robert Baumann worked at the MOSenecaMfr LLC mine. In March 2023, he was elected miner representative. On April 11-12, 2023, Complainant Baumann walked around with MSHA during an inspection, which yielded a section 104(b) withdrawal order. On April 17, 2023, American Tripoli terminated Baumann's employment. After Baumann's termination, he was unemployed for 62 days and collected unemployment benefits. ALJ Dec. at 46, n.34. Baumann has been employed with Cherokee County Road and Bridge since July 24, 2023. Sec'y Post Hrg. Br. at 29.

On April 25, 2023, Complainant Baumann filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") and the Secretary of Labor brought a discrimination case on Baumann's behalf alleging discrimination and interference. A hearing was held by a Commission Administrative Law Judge, and on May 23, 2024, the Judge issued a decision finding that American Tripoli had discriminated against Baumann in violation of section 105(c) of the Mine Act. The Judge ordered that American Tripoli pay a civil penalty in the amount of $15,000.00 for the discrimination violation and $17,500.00 for the interference violation. ALJ Dec. at 50. He also awarded backpay and interest to Baumann in the amount of $10,552 plus interest accrued to the actual date of payment. ALJ Dec. at 51.

On June 18, 2024, the Commission ordered *sua sponte* review on whether the Judge's decision is contrary to law regarding the meanings and applications of the "discrimination" and "interference" provisions in complaints brought pursuant to section 105(c) of the Mine Act, and whether the provisions are ambiguous and deserving of deference to the Secretary's interpretation. Three days later, American Tripoli filed a petition for discretionary review challenging the Judge's findings of discrimination and interference as well as the Judge's award of backpay as arbitrary and capricious. On June 26, American Tripoli filed this motion to stay enforcement of the backpay award after MSHA notified it that if it did not pay the ordered backpay, it would issue a citation or order against the operator that could result in closure of the mine.[2] The Commission granted review of the operator's petition on June 27.

[2] American Tripoli seeks a stay of enforcement of the backpay only because the Secretary is not seeking immediate enforcement of the civil penalty. A.T. Mot. at 2; Sec'y Resp. at 2, n.2.

II.

Disposition

American Tripoli argues that under section 113(d)(1) of the Mine Act, it is not required to make payment to Mr. Baumann as ordered by the Judge because the decision is currently on appeal and has not become a final order of the Commission.[3] The Secretary responds that an operator must comply with an order issued under the Mine Act regardless of whether it is final. She asserts that: "The philosophy of review of . . . the [Mine] Act[] is that operators are to comply with administrative orders first and litigate their merits later." *Eastern Assoc. Coal Co*., 2 FMSHRC 2467, 2471 n.6 (Sept. 1980) (discussing orders issued by MSHA). The Secretary notes that section 104(a) empowers her to issue a citation for non-compliance with an order—not a "final" order only. 30 U.S.C. 814(a).

In *Secretary on behalf of Price and Vacha v. Jim Walter Res., Inc*., 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay must make an adequate showing with respect to the four factors set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958): (1) a likelihood that the moving party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *See also UMWA on behalf of Franks & Hoy v. Emerald Coal Res., LP*, 35 FMSHRC 2373, 2374 (Aug. 2013).

The Commission made clear that a stay constitutes "extraordinary relief." *Id*.; *see also W.S. Frey Co.*, 16 FMSHRC 1591 (Aug. 1994). The burden is on the movant to provide "sufficient substantiation" of the requirements for the stay. *Stillwater Mining Co*., 18 FMSHRC 1756, 1757 (Oct. 1996). Where a probability of success on the merits is established, an inadequate showing with regard to the other three factors nevertheless still prevents the grant of a stay pending review. *Virginia Petroleum*, 259 F.2d at 926; *see also Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 811, 812-13 (Apr. 2013).

As with all Commission cases considering a motion for stay, requests for a stay of a Judge's award of monetary damages pending appeal of a section 105(c) merits' decision are considered on a case-by-case basis and are also analyzed under *Virginia Petroleum*. *See UMWA on behalf of Franks & Hoy*, 35 FMSHRC at 2374 (denying motion to stay enforcement of Judge's backpay award pending appeal on the grounds that the application failed three of the four prongs of *Virginia Petroleum*);[4] *Sec'y on Behalf of McGary and Bowersox v. the Marshall*

[3] Section 113(d)(1) of the Mine Act states that: "The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2)." 30 U.S.C. §823(d)(1).

[4] In *UMWA on behalf of Franks & Hoy*, the Commission denied the operator's motion for stay, noting that immediate payment of backpay to compensate for two miners' respective seven-day suspensions would "minimi[ze] the harm to miners from actions which may have been discriminatory." 23 FMSHRC at 2374-75. Accordingly, our dissenting colleagues' suggestion (continued…)

County Coal Co., 38 FMSHRC 220, 222 (Feb. 2016) (granting stay of civil penalty award in discrimination proceeding where appeal before Commission was pending and the Secretary did not oppose and would not be prejudiced).

The legislative history of the Mine Act is clear that the anti-discrimination provisions of the Act are intended to encourage miners to "be active in matters of safety and health" and to "play an active part in the enforcement of the Act" so as to increase the effectiveness of the Act. S. Rep. No. 95-181, at 35 (1977). The remedial goal of section 105(c) is to restore the victim of illegal discrimination to the situation he would have occupied but for the discrimination." *Sec'y of Labor and UMWA v. Jim Walter Res., Inc*., 18 FMSHRC 552, 561 (Apr. 1996); *Sec'y on behalf of Dunmire and Estle v. Northern Coal Co*., 4 FMSHRC 126, 142 (Feb. 1982); *Ronald Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 618 (Apr. 1990). In determining backpay, the Commission seeks to make a miner whole and return them to their status before illegal discrimination occurred.[5] *Sec'y on behalf of Clayton Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2218 (Nov. 1994), *citing Meek v. Essroc Corp*., 15 FMSHRC 606, 617 (April 1993) (internal citations omitted).

A. Virginia Petroleum Test

We conclude that American Tripoli has failed to satisfy the four *Virginia Petroleum* factors.

1. Likelihood that American Tripoli Will Prevail on Appeal

American Tripoli argues that due to the number of errors committed in the Judge's decision and given the recent change in deference, there is a likelihood of success on the merits. A.T. Reply Br. at 3.

The number of alleged errors, if any, in the Judge's decision has yet to be determined. The operator cannot make a showing that there is a likelihood it will prevail by simply making a broad allegation that the ALJ made a number of errors. However, even if errors are found, it is not clear that said errors would necessarily be fatal to the Judge's ultimate finding of discrimination or his award of backpay. Moreover, the operator relies on a vague reference to a recent "change in deference," but fails to specifically identify the "change" referred to and provides no explanation as to how this change will affect the current stay factors under *Virginia*

[4] (…continued)
that the Commission only applies the *Virginia Petroleum Jobbers* factors to analyze motions to stay when an Order of Temporary Reinstatement is at issue is erroneous.

[5] Baumann obtained alternative employment relatively soon after his discharge and the Secretary did not seek the remedy of temporary reinstatement pursuant to section 105(c)(2). Had the Secretary sought an order of temporary reinstatement for the miner's non-frivolous filing of a discrimination complaint, the Mine Act would have required Baumann to be immediately reinstated to his former position at American Tripoli.

Petroleum, particularly in the context of the Mine Act.[6] This is insufficient to prove a likelihood of success on appeal. Therefore, American Tripoli fails to meet this factor.

2. Irreparable Harm to American Tripoli if Stay is Denied

American Tripoli argues that it would suffer irreparable harm because if payment is made to Mr. Baumann and this Commission reverses the decision, there is no procedural mechanism for it to recover its money. A.T. Reply Br. at 3.

The Commission has recognized that "[e]conomic loss does not, in and of itself, constitute irreparable harm." *Franks & Hoy.,* 35 FMSHRC at 2374 (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying application for stay of enforcement of Judge's discrimination judgment in part because it saw no irreparable harm to operator should it prevail); *see also Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough.") (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). The Commission has also noted that an operator can seek reimbursement from a complainant in the event the Commission overturns the Judge's finding of discrimination. *Franks & Hoy*, 35 FMSHRC at 2374; *see also Wisconsin Gas Co. v.*, 758 F.2d at 674, *citing Virginia Petroleum*, 259 F.2d at 925 ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm."); *In re NTE Connecticut, LLC*, 26 F.4th 980, 990 (D.C. Cir. 2022) (reasoning that "in most circumstances financial harms can be remedied through subsequent legal action.").

Courts have further held that "[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisconsin Gas Co.*, 758 F.2d at 674, *citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977); *Am. Passage Media Corp. v. Cass Commc'ns, Inc*., 750 F.2d 1470, 1474 (9th Cir. 1985) ("[t]he threat of being driven out of business is sufficient to establish irreparable harm.").

Here, the operator has been ordered to pay Baumann $10,552. However, case law dictates that economic loss alone is insufficient to establish irreparable harm. Additionally, American Tripoli has not alleged that paying Baumann the $10,522 would lead to the extinction of its business. Thus, the operator has not demonstrated irreparable harm.

[6] We believe the operator is referring to the Supreme Court's recent decision in *Loper Bright Enterprises v. Secretary of Commerce, et al*., 144 S.Ct. 2244, (June 28, 2024). This decision overturned the 40-years old *Chevron* doctrine, which has instructed courts to defer to a federal agency's reasonable interpretation of ambiguous statutory language where that agency is tasked with implementation or enforcement of said law, and which has also allowed courts to look to the legislative history of an ambiguous law. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

3. Adverse Effect on Complainant Baumann

American Tripoli implies that Baumann will suffer no adverse effect from a stay of the Judge's decision because interest will accrue on the money award while the appeal is pending, and the miner will be able to enforce his rights through MSHA-issued citations if the Judgment is not immediately satisfied once there is a final order by this Commission. A.T. Reply Br. at 4. It argues, however, that Baumann's failure to return the money and the operator's inability to recover the money through administrative remedy will adversely affect the operator. It laments that it would be forced to institute a civil suit against Baumann to attempt recovery of the money paid to him. A.T. Reply Br. at 3.

The Secretary responds that American Tripoli has not demonstrated that a stay would not adversely affect Baumann. She maintains that the miner has already been adversely affected by the operator's failure to pay him, and that it is common sense that for Baumann to continue to go unpaid is to experience an adverse effect. She asserts that the operator will suffer no lasting adverse effect without the stay, and American Tripoli can recover the money if it prevails on appeal. Sec'y Resp. Br. at 6-7.

We agree with the Secretary. The Commission has observed that "[t]he remedial goal of section 105(c) is to 'restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination.' . . . 'Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee.'" *Jim Walter Res*., 18 FMSHRC at 561, citing *Sec'y ex rel. Bailey v. Arkansas-Carbona Co*., 5 FMSHRC 2042, 2049 (Dec. 1983). Here, American Tripoli fails to put forth any substantive reason why a stay would not adversely affect Baumann at this time or why Baumann would not need his backpay award right away.

4. Public Interest

American Tripoli argues that Baumann's failure to return the money and the operator's inability to recover the money through administrative remedy is also contrary to the public's interest. A.T. Reply Br. at 3. The Secretary maintains that there is a clear public interest in protecting miners' section 105(c) rights and that Congress intended miners to play an active part in enforcement and should be encouraged to participate. She asserts that this policy is expressed, in part, by the Mine Act's remedies for discrimination, which include "back pay and interest." 30 U.S.C. 815(c)(2). The Secretary argues that deprivation of wages is sure to deter miners from exercising their rights. Sec'y Resp. Br. at 7-8.

First, American Tripoli's assertions regarding its inability to recover the backpay wages and Baumann's suspected future failure to return the money is purely speculative. Second, the operator offers no reason why a stay here would be in the public's interest. As stated by the Secretary, Congress intended miners to "play an active part in the enforcement of the Act," and recognized that "if miners are to be encouraged to be active in matters of safety and health, they must be protected against… discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977). Thus, we conclude that staying enforcement of the Judge's order would have a chilling effect on other miners at the operator's mine who are aware that Baumann lost his job after taking an active role in safety, contrary to the operator's

instructions. Such an outcome clearly runs counter to the public's interest and Congress' intent. Consequently, American Tripoli has failed to carry its burden and show that a stay is in the public's interest.

Finally, as to the operator's argument that the Judge's decision is not enforceable because it is not a final order of the Commission under section 113(d)(1) of the Mine Act, we disagree. Interpreting the Mine Act as to require a final, fully adjudicated order on the complaint, before a Judge's order of backpay can be enforced, would be inconsistent with the expressed intent of Congress. In the Senate Report that accompanied the Mine Act, Congress recognized that "complaining miners [ ] may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Cobra Nat. Res. v. FMSHRC*, 742 F.3d 82, 84 (4th Cir. 2014). Complainant Baumann lost 62 days of employment, and a Judge has ordered that he be made whole. Staying the order would prolong any financial hardship suffered by the miner.

III.

Conclusion

Upon consideration of American Tripoli's motion and the Secretary's opposition, we conclude that American Tripoli has not sufficiently substantiated the four factors required to justify staying the Judge's decision.

Accordingly, the operator's motion for a stay is denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chai

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

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

Commissioners Althen and Rajkovich, dissenting:

We would find that payment of a backpay award is not due unless and until the order requiring payment becomes a final order of the Commission. Accordingly, we dissent.

A Judge's decision on the merits of a discrimination complaint is not final upon issuance. *See Sec'y on behalf of Bernardyn v. Reading Anthracite Co*., 21 FMSHRC 947, 949 (Sept. 1999). Rather, a Judge's decision "shall become a final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission." 30 U.S.C. §823(d)(1). Here, the Judge's decision has been appealed and is currently before the Commission on review. Based on the text of the Mine Act, the Judge's order has not become final, and the Commission has yet to issue a decision. The question of whether American Tripoli engaged in discrimination—and whether the complainant is therefore entitled to a backpay award— is not yet resolved.[1]

As the Secretary notes, the Commission has held that temporary reinstatement payments may be enforced even when an order is on appeal.[2] *See Sec'y ex rel. Saldivar v. Grimes Rock, Inc.*, 44 FMSHRC 725 (Aug. 2022). However, we have also clearly established that backpay and temporary reinstatement are separate mechanisms with different underlying principles. *North Fork Coal Corp.*, 33 FMSHRC 589, 592-93 (Mar. 2011). The purpose of temporary reinstatement is to allow a miner to earn a living *while the discrimination complaint is pending*, while backpay is designed to make the miner whole *after* it has been established that discrimination occurred. *Id.* Temporary reinstatement sustains a miner *until there is a final order*, at which point any appropriate backpay comes into play. *See* 30 U.S.C. § 815(c)(2) (providing for miners to be temporarily reinstated "pending final order on the complaint").

As a practical matter, this distinction means that any concerns regarding a miner's financial status while a merits complaint is pending should be addressed through temporary reinstatement, rather than by requiring pre-payment of a final award to which the complainant

[1] Notably, the Secretary has agreed to delay payment of the civil penalties that the Judge assessed concurrently with the backpay award. The pending nature of the case is one reasonable explanation for the Secretary's decision not to pursue immediate payment of the ordered civil penalties.

[2] The Secretary also cites *Eastern Assoc. Coal Co.* for the general proposition that operators must "comply with administrative orders first and litigate their merits later." 2 FMSHRC 2467, 2471 n.6 (Sept. 1980). In that case, an operator challenged the validity of a section 103(f) withdrawal order after complying with the order, and a mootness argument was raised and rejected. A brief footnote finding that an operator's compliance with an order issued by MSHA did not deprive the Commission of jurisdiction is of limited precedential weight when determining if an operator must comply with a Judge's non-final backpay award.

More narrowly, the majority notes that the Commission has denied a motion to stay enforcement of a backpay award in a previous case. *UMWA on behalf of Franks & Hoy*, 35 FMSHRC 2373 (Aug. 2013). We note that the stay was initially granted on a temporary basis. Regardless, we maintain that the stay issue in that case was wrongly decided.

may not ultimately be entitled. Additionally, interest would accrue on the backpay award during the pendency of the appeal, so complainants who succeed on appeal are ultimately compensated for the "delay" in awaiting a final order. *See* 30 U.S.C. § 815(c)(2).

Essentially, the question before us is whether American Tripoli is required to pay the ordered backpay award prior to the Commission's resolution of the merits case on appeal. The majority concludes that payment cannot be delayed, because American Tripoli has failed to substantiate the four factors required to justify staying the Judge's decision. We dissent, not because we would find the four factors substantiated, but because the order requiring payment is not yet final.

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

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

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August 28, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. TINTIC CONSOLIDATED METALS, LLC	Docket No. WEST 2023-0406 A.C. No. 42-00147-578445

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

ORDER

BY: Rajkovich, Baker, and Marvit, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On September 12, 2023, the Commission received from Tintic Consolidated Metals, LLC ("Tintic") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 14, 2023, and became a final order of the Commission on July 14, 2023. On August 29, 2023, MSHA sent the operator a delinquency notice.

Tintic asserts that at the time it received the proposed assessment, it was undergoing major organizational changes in that its Chief Operating Officer was retiring, the Safety Superintendent took a different position, and a new General Manager was appointed. On August 18, 2023, when its new General Manager was appointed, it received "the most recent" proposed assessment on August 18, 2023. Tintic noticed that it had an outstanding balance arising from the subject proposed assessment, No. 000578445, in the amount of $83,040. Tintic states that it has been reviewing all of its safety systems and controls, and MSHA citations and the reasons for their issuance, in an effort to improve its safety performance and compliance. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

The party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely respond. *Revelation Energy, LLC*, 40 FMSHRC 375, 375-76 (Mar. 2018). General assertions or conclusory statements are insufficient. *Southwest Rock Prod., Inc.*, 45 FMSHRC 747,748 (Aug. 2023). At 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. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010). Here, Tintic provides only a cursory explanation for its failure to timely respond to the proposed penalty assessment. Although Tintic states that it was undergoing personnel changes, it fails to provide information regarding how those personnel changes caused its failure to timely file its contest of the proposed penalties. In addition, although Tintic has stated that it is reviewing its safety systems and controls, it has not identified the steps it will take to ensure timely filing in the future. Accordingly, we find that Tintic has failed to meet its burden of showing that it is entitled to relief.

Having reviewed Tintic's request and the Secretary's response, we conclude that the operator failed to establish good cause for reopening the captioned proceeding. Tintic's motion to reopen provides no explanation for its failure to timely contest the proposed penalty assessment beyond a general description of personnel changes and fails to describe actions it will take to ensure timely filing in the future. Accordingly, Tintic's request to reopen is denied. *See Coal-Mac LLC*, 46 FMSHRC 33, 34-35 (Jan. 2024) (denying relief where operator failed to provide sufficient explanation for its untimeliness).

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

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

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

Chair Jordan and Commissioner Althen, dissenting,

We dissent from the majority's decision and find that Tintic Consolidated Metals, LLC, has demonstrated good cause to reopen this final order.

Tintic filed a motion to reopen on September 12, 2023, soon after receiving a delinquency notice sent by MSHA on August 29, 2023. *Highland Mining Co*., 31 FMSHRC 1313, 1316-17 (Nov. 2009) ("[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time.").

Tintic does not have a history of filing motions to reopen with the Commission. This motion, filed *pro se* by its safety coordinator, states that at the time Tintic received the proposed civil penalty assessment it was undergoing major organizational changes. Tintic's Chief Operating Officer was retiring, the Safety Superintendent moved positions, and a new General Manager was appointed. On August 18, 2023, the new General Manager received a separate proposed assessment from MSHA which stated a prior delinquent balance of $83,040. Tintic filed the motion to reopen the delinquent penalty assessment and mantains that it has been reviewing all of its safety systems and controls, and MSHA citations and the reasons for their issuance, in an effort to improve its safety performance and compliance.

Our colleagues in the majority deny the motion, finding the operator's explanation too cursory to meet its burden for relief. To the contrary, the operator included relevant details including who, when and how it discovered its mistake. We conclude that a major organizational change and a missed filing deadline, coupled with the prompt filing of a motion to reopen, indicates that the operator's failure to timely file was the result of a mistake or excusable neglect. In so concluding, we also consider that the Secretary of Labor filed a response indicating that she did not oppose the operator's request for relief.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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August 30, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. SPECIALTY VERMICULITE, LLC	Docket No. SE 2023-0232 A.C. No. 38-00085-579929

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 8, 2023, the Commission received from Specialty Vermiculite, LLC ("Specialty Vermiculite") a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On July 5, 2023, Specialty Vermiculite received a proposed penalty assessment from the Secretary. On August 4, 2023, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days.

Specialty Vermiculite asserts that it timely contested the proposed assessment. According to the operator, the contest of four citations was filed on August 4, 2023, but the Mine Safety and Health Administration's (MSHA) Assessments Office deemed it untimely due to the U.S. Post Office's delivery receipt date of the proposed assessment as July 1, 2023. Specialty Vermiculite argues the contest was timely and there was miscommunication regarding the delivery. After careful review, MSHA corrected the date of delivery of the proposed assessment to July 5, 2023. The Secretary does not oppose the request to reopen, but argues that because the contest was timely, the Commission should deny this motion to reopen as moot and remand for further proceedings.

Having reviewed Specialty Vermiculite's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, Specialty Vermiculite notified the Secretary of

the contest. This obviates any need to invoke Rule 60(b). Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

/s/ Timothy J. Baker
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/s/ Moshe Z. Marvit
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August 30, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ROBINSON NEVADA MINING COMPANY	Docket No. WEST 2023-0382 A.C. No. 26-01916-577178

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On September 7, 2023, the Commission received from Robinson Nevada Mining Company ("Robinson") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 22, 2023, and became a final order of the Commission on June 21, 2023. Robinson asserts that it never received the proposed assessment because of a mistake from the U.S Post Office. According to the operator, it

received a delinquency notice from MSHA on August 23, 2023. On August 24, 2023, it contacted MSHA Assessments to inquire about the discrepancy of the outstanding balance due to its belief that it never received the proposed assessment. MSHA Assessments informed Robinson that the proposed assessment had been delivered and signed for on May 22, 2023, at 10:01 AM by "C SMITH" in Ely, Nevada. The operator was also informed that this case was delinquent and could not be contested. Robinson states in its motion that it does not have any "C SMITH" employee, and that the proposed assessment was not received by the mine. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

August 30, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. TIC - THE INDUSTRIAL COMPANY	Docket No. WEST 2023-0405 A.C. No. 26-01941-577560

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On September 8, 2023, the Commission received from The Industrial Company ("TIC") a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On May 30, 2023, TIC appeared to have received a proposed penalty assessment from the Secretary. On June 29, 2023, the proposed assessment was deemed a final order of the Commission, when the operator did not file a Notice of Contest within 30 days.

TIC asserts that it never received the proposed assessment because it was delivered to the wrong address by the Mine Safety and Health Administration ("MSHA"). According to the operator, it discovered in MSHA's Mine Data Retrieval System that a penalty for the citation had been issued and was delinquent. The operator's paralegal contacted MSHA to get a copy of the assessment. She was informed that the assessment was delinquent and had been returned as undeliverable. Prior to filing the contest, TIC had updated its address of record with MSHA on May 8, 2023. However, the change in address was not properly reflected in MSHA's system and the proposed assessment was mailed to the operator's old address. The Secretary does not oppose the request to reopen, and argues that the Commission should deny this motion as moot and remand for further proceedings.

Having reviewed TIC's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because it was never served on the operator. The Commission has held that when an assessment is sent to the wrong address, it does not become a final order, so a request to reopen it is moot. *See Petra Materials*, 32 FMSHRC 1113, 1116 (Sept. 2010); *American Sand Co. LLC*, 42 FMSHRC 767 (Oct. 2020) (applying this principle to an order of default when the Chief Judge's order to show

cause was sent to the wrong address). This obviates any need to invoke Rule 60(b). Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

/s/ Timothy J. Baker
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/s/ Moshe Z. Marvit
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 23, 2024

CARGILL INCORPORATED, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDING Docket No. LAKE 2022-0285 Order No. 9669536; 08/05/20222 Mine: Cargill Deicing Technology- Cleveland Mine Mine ID: 33-01994
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CARGILL DEICING TECHNOLOGY, Respondent	CIVIL PENALTY PROCEEDING Docket No. LAKE 2023-0013 A.C. No. 33-01994-564077 Mine: Cargill Deicing Technology- Cleveland Mine

DECISION AND ORDER

Before: Judge Sullivan

These two cases, involving a single citation, are before me upon a notice of contest and subsequent petition for assessment of civil penalty under sections 105(a) and (d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act"). The Secretary of Labor is alleging that Respondent in the case, Cargill,[1] violated an underground metal and nonmetal mine escape route regulation when it permitted an excessive level of nitrogen dioxide ("NO_2") in the designated secondary escapeway of its Cleveland Mine. Ex. S-1, at 1-2. The standard allegedly violated provides in pertinent part that "[e]scapeway routes shall be— (a) Inspected at regular intervals and maintained in safe, travelable condition . . . ." 30 C.F.R. § 57.11051(a) (2022). For the reasons discussed below, the citation is vacated, and the contest and civil penalty proceedings are dismissed.

[1] The Respondent in the civil penalty proceeding is Cargill Deicing Technology, operator of the Cargill Deicing Technology-Cleveland Mine. The Contestant in the contest proceeding is Cargill Incorporated, controller of the same mine. These corporate entities are jointly represented and, with the assent of the parties, will be collectively considered as "Cargill" in this decision.

I. INTRODUCTION

The citation is based on NO_2 measurements taken on the morning of July 28, 2022, in the Cleveland Mine's return air course as part of an inspection conducted by Marty Morris, an experienced inspector with the Mine Safety and Health Administration ("MSHA"). At the time, the return also served as part of the mine's secondary escapeway. In the citation Mr. Morris issued on August 5, 2022, No. 9669536, he marked the condition as reasonably likely to cause an injury that could be expected to be permanently disabling, thus designating the alleged violation as significant and substantial under the Mine Act. He also marked Cargill's negligence as moderate. Tr. 24-26, 47-48, 52-53, 56.; Ex. S-1, at 1-2.

By the time the citation was issued the condition had abated, as the specific cited NO_2 had dissipated and exited the mine. It was recognized, however, that the condition would be a recurring one, given the continual blasting at the mine that was producing the NO_2. Tr. 170-71, 198-99. Consequently, the citation was not terminated until four days later, after Cargill had made changes to its deployment of miners on the third shift in the mine, and to its ventilation and blasting practices aimed to reduce the concentration of NO_2 in the secondary escapeway. Tr. 261-63, 719-21; Ex. S-1, at 3. To return to normal production levels, Cargill soon thereafter began work on a designated secondary escapeway that would run parallel to the primary escapeway in intake air. Tr. 725, 796, 860-61.

Cargill filed a notice of contest with the Commission on September 2, 2022, and an unopposed motion for expedited consideration five days later. I was assigned the contest case on September 30, 2022.

On October 5, 2022, MSHA proposed a penalty of $700, which Cargill contested. On October 28, 2022, the Secretary filed her Petition for Assessment of Penalty. Ex. S-2. On November 1, 2022, I was assigned the penalty proceeding, and on November 9, 2022, I ordered consolidation of the two dockets.

Eventually the parties agreed to a regularly scheduled hearing, which was held from February 28 through March 2, 2023, in Cleveland, OH. Both parties submitted well-argued post-hearing briefs.

II. FINDINGS OF FACT

A. Background

The Cleveland Mine is a large underground salt mine, developed starting in 1958, that has been driven by various mine operators and extends from a shaft entry in Cleveland, OH, under the waters of Lake Erie, to a point approximately six miles north. Tr. 104-05, Tr. 872; Ex. R-3, at 2. Cargill acquired the mine from Akzo Nobel Salt and the salt that is mined is used to produce road salt products. Tr. 858, Ex. R-3, at 2.

At the Cleveland Mine, miners work one of three shifts: morning, afternoon, and night; the latter of which is largely a maintenance shift. They often use trucks or utility task vehicles

("UTV's") to traverse the long, wide underground passageways. Tr. 703, 1139; Ex. S-7 (MSHA ventilation survey report), at 1.[2]

Cargill, using an explosive mixture of ammonium nitrate and fuel oil ("ANFO"), blasts sections of the mine's face to loosen the salt from its dense formations, leaving salt pillars in place to support the mine's roof. Tr. 36-37, 1131. Crews use heavy machinery to collect the loosened salt and feed it onto a conveyor belt. The belt carries salt to an underground mill that crushes the salt to size before sending it to the surface. Tr. 80, 281.

NO_2, a reddish-brown gas, is a common byproduct of both ANFO detonation and diesel-burning heavy machinery. Tr. 30, 36-37, 334, 1006. As a respiratory irritant, NO_2 can be harmful to human health at certain concentrations, so MSHA regulates miner exposure to NO_2 under the agency's various rules governing harmful airborne contaminants. *See, e.g.*, 30 C.F.R. § 57.5001 et seq. (2022) (underground metal and nonmetal mines). If NO_2 exceeds 5 parts per million ("ppm"), MSHA generally requires that miners be withdrawn from the affected area. 30 C.F.R. § 57.5001(c). Miners, however, may work for reasonable periods of time in elevated concentrations under certain conditions. 30 C.FR. § 57.5005.

Blasting at the face creates the greatest accumulations of NO_2 in the mine. Cargill typically conducts its blasting in the late evening, around 9:00 p.m. or 10:00 p.m., between its second and third shifts. When blasting occurs, the detonation creates a cloud (or "front" or "slug") of gas. It is common, and even expected, that NO_2 levels in such a front would quickly exceed 5 ppm after blasting. Tr. 77, 966-67, 1044.

Aware of the NO_2 generated by its blasting, Cargill has attempted to address and dilute the concentration of the gas—and other hazardous mine gases—with its ventilation system. Cargill uses mechanical means to draw roughly 440,000 cubic feet per minute of fresh air into the mine, which is channeled to the mining units. The fresh air is split so that it can reach each of the four units, to ventilate the fumes generated by blasting and machinery Tr. 1014, 1024-25, 1149; Ex. S-7, at 3; Ex. R-3, at 5.

The fumes are carried outby in the return airway along the production belt line. Tr. 41; Ex. S-3 (mine map). This is true for the front of NO_2 that is created at the faces during blasting; intake air hits the face and takes it into the return airway to be vented south. Tr. 49, 1075, 1080-81; Ex. S-7, at 3.

[2] Mining under Lake Erie poses challenges, including with respect to mine ventilation. Water can enter the mine, bringing with it a risk of creating the hazardous mine gas hydrogen sulfide. In 2017, an inundation of water into the mine's western workings caused the liberation of high levels of hydrogen sulfide. Tr. 369-70; Ex. S-4 (mine map). Cargill pumped water out of the mine as a short-term solution and implemented ventilation controls, such as running hazardous air through a scrubber before routing it out of the mine via the return airstream. MSHA personnel visited the mine "once to twice a week" during this period to monitor gas levels. Tr. 118-20. Ultimately, Cargill stemmed the inundation of water by erecting nine massive concrete bulk heads measuring 75 feet wide, 20 feet thick, and 45 feet high. Tr. 834-35.

Cargill can control the return airflow to dilute the concentration of fumes as they travel down the return airway before exiting the mine through the exhaust shaft. Tr. 45, 841. The faster that gases are flushed through the return, the longer it takes for them to dilute. Tr. 200, 424, 920, 1061. It generally takes around eight hours to move an NO_2 front out of the mine. Tr. 158, 832-36, 912-13, 1054. Cargill has operated the Cleveland Mine with this ventilation system for approximately two decades. Tr. 833-34.

The Cleveland Mine has two escapeways, as required by regulation. *See* 30 C.F.R. § 57.11050(a). The primary escapeway runs along the fresh air intake. Both escape routes are designed for vehicular exit in the event of an emergency. Tr. 59-61, 64.

At the time of the inspection, the secondary escapeway ran along the return airway, and was separated spatially from the primary intake so that damage to one escape route would not compromise the other, as required by section 57.11050(a). Tr. 39-41, 56-57; Ex. S-3, at 3. At hearing, Inspector Morris explained the many reasons that may necessitate a mine evacuation from an underground metal-nonmetal mine, such as the Cleveland Mine, including through a designated secondary escapeway. Tr. 36.

B. Miner Concerns About Elevated NO_2 Levels

At least one Cargill miner had concerns about elevated NO_2 levels before the issuance of the present citation. Christopher Jedlicka, a maintenance mechanic who predominantly worked on the third shift, testified that miners would often travel through the return on their assignments. Tr. 296-97. He stated he had encountered high levels of NO_2 on "[e]asily 50 plus" occasions while working underground—in the mining units, at the mill, and in the return air of the secondary escapeway. Tr. 269, 271, 274-75.

Jedlicka experienced throat irritation and respiratory issues that alerted him to the high NO_2 levels. Tr. 271. According to Jedlicka, there were also "[a] few times" when a supervisor withdrew him and other miners from work near the belt line because the supervisor's handheld monitor sensed NO_2 levels of 12 or 13 ppm. Tr. 332-33. Then, on June 10, 2022, a miner alerted Jedlicka that the previous night he observed the stationary sensor at the "D3" drive register a reading of NO_2 at 33 ppm. Jedlicka had personally seen it register a reading as high as 20 ppm. Tr. 272-73, 320.

Jedlicka testified that he notified MSHA personnel about the elevated NO_2 levels. He spoke first with Carl Graham about his concern regarding raised NO_2 levels. Tr. 336. According to Jedlicka, after the 33-ppm reading in June 2022, he contacted Inspector Morris with renewed concern. Tr. 317.

Steven Horne, Cargill's mining excellence director, testified that he heard other complaints from miners regarding elevated NO_2 levels near the mill in this same time frame. According to Horne, none of the complaining miners noted NO_2 measurements above 5 ppm. Tr. 889-90.

C. July 2022 Inspection and the Cited Condition

MSHA conducted its regular quarterly inspection of the Cleveland Mine in July 2022. Typical quarterly inspections of the large underground mine can last up to three weeks and involve multiple MSHA inspectors. Tr. 102-03. One of the inspectors present during the July 2022 inspection was Mr. Morris. He had previously performed roughly 20 regular inspections of the Cleveland Mine and thus was familiar with Cargill's operations. Tr. 94. During this inspection, Morris became aware of miner complaints regarding high levels of NO_2 during the third shift near the mill, which is in return air, as well as near the shop. Tr. 124-25, 134-38, 716.

Consequently, in lieu of conducting his normal day shift inspection, Morris went underground on the third shift, with the approximately 20 miners working underground the night of July 27-28, 2022. He was accompanied by Cargill's construction safety specialist, Jason Wood. Tr. 31, 62, 77, 142, 691, 740.

While MSHA inspectors at the Cleveland Mine were normally also accompanied by a representative of the union there, the International Brotherhood of Teamsters, no such representative was available that night. Tr. 79-80, 129; Ex. R-3, at 2. Instead, part of the inspection included Christopher Jedlicka, who had begun accompanying Morris on inspections a few days earlier. Tr. 129-31, 142. Earlier in the year he had been designated as a miner's representative. Tr. 312-13.

Inspector Morris's inspection included the belt line in the return, and thus the mine's secondary escapeway. He had never previously inspected the secondary escapeway on the third shift. Tr. 76-77.

To get there, Morris and the men traveled north to near the "dinner hole," which is south of units 41 and 42, where blasting had occurred earlier in the evening. Tr. 42, 44-45, 48-51, 55; Ex. S-3, at 2, Ex S-3MA at 2 (annotated mine map), Ex. S-6 (July-Sept. 2022 blasting report). Morris testified that, as he passed through a doorway to the return airway near the dinner hole, he heard the alarms from each of the gas monitors that he and Wood carried. Tr. 35; Ex S-3MA at 3. Morris's handheld monitor read 10.3 ppm NO_2, and Wood's read 8.2 ppm of NO_2. Tr. 47-48.

Morris and the men traveled south in the intake to take additional readings in the return, following the exhaust path. Tr. 57. In the return across from the belt crew "conex," Morris's monitor registered roughly 6 ppm NO_2, and Wood's monitor registered roughly 5 ppm NO_2. Tr. 51-53, 56-57; Ex. S-3MA at 4. The nearby stationary sensor at the D3 drive registered a reading of 9.39 ppm around that same time. Tr. 61-64; Ex. S-5MA.

The men then continued traveling south to take additional readings, to locate a point where NO_2 was below 5 ppm, to where it would be safe to withdraw miners. Tr. 54-56. That location was determined to be near the 8 West door. Tr. 160; Ex. S-3MA at 6.

Morris testified that three miners were working north of where the elevated NO_2 was discovered. One supervisor was setting charges at the faces, and two members of the belt line crew were working in fresh air to the north of the NO_2 front. Morris also stated that, as they

moved south, he and Wood intercepted a fourth miner, who was preparing to work on the belt line in the secondary escapeway, and asked the miner to leave the area. Tr. 65-67.[3]

According to Morris, these four miners would have been exposed to the NO_2 if an emergency required use of the secondary escapeway, though he stated that it was "not likely at all" that such a need would have arisen that night. Tr. 65-66, 89, 203; Ex. S-3, at 2. Ultimately, the miners were withdrawn that night to an area of the mine outby where the NO_2 exceeding 5 ppm was measured. Tr. 160.

D. Other Observations of NO_2 at the Cleveland Mine

At hearing, the Secretary introduced additional evidence of high NO_2 levels in the secondary escapeway. A printout of NO_2 data taken from the stationary D3 sensor near the belt crew conex reveals the NO_2 concentrations routinely exceed 5 ppm at that point in the secondary escapeway. Ex. S-5a. Sometimes readings exceed 15 ppm, and there is even a reading from June 10, 2022, where the NO_2 concentration was measured at 29.8 ppm. Ex. S-5a at 038. On cross examination, Jason Wood testified that it was "likely" that miners would have been underground at the time of these readings, and that he "would assume" that miners would have been working north of (i.e., inby) the D3 sensor when the highest measurements were made. Tr. 780-81.

The Secretary also introduced evidence of high NO_2 gathered from a post-citation air quality investigation conducted by MSHA at the Cleveland Mine. Bradley Wurl, a general engineer with MSHA's ventilation division, directed the investigation into the typical levels of NO_2 in the mine's secondary escapeway after blasting. Tr. 395. Wurl and his team installed sensors at various points in the secondary escapeway that continually measured the NO_2 levels present after ANFO charges were set off in the mining unit. Tr. 397; Ex. S-7, at 5. Cargill suspended post-blasting production activities during the investigation. *Id*. at 2.

The investigation spanned two nights. On the first night, Cargill set off explosives at 9:00 p.m. in six rooms of Unit 41. Investigators measured a peak concentration of 24.6 ppm NO_2 at 12:27 a.m. at the Unit 41 belt entry to the secondary. NO_2 levels at this sensor stayed above 5 ppm for roughly five hours. Another sensor located near the exhaust entry at the 35B crosscut peaked at 18.6 ppm NO_2 at 12:53 a.m. and stayed above 5ppm for roughly five hours. The sensor at 35B is located just north of Morris's initial readings near the dinner hole. *Id*. at 5.

On the second night, Cargill set off explosives in eight rooms in Unit 42 and three rooms in Unit 41 at 8:45 p.m. One room in each unit misfired, and Cargill shot one additional room in Unit 41 and Unit 42 at 10:45 p.m. and 11:45 p.m., respectively. Investigators measured a peak concentration of 26.5 ppm NO_2 at 10:11 p.m. near the Unit 42 belt entry. NO_2 levels at that location exceeded 5 ppm for roughly six hours. NO_2 concentrations peaked at 14.9 ppm at 11:24 p.m. near the 35A exhaust entry and stayed above 5 ppm for roughly five hours. *Id*. at 5-6.

[3] Wood does not recall seeing this miner. Tr. 718.

E. Health-Related Impacts of NO_2

The Secretary also offered testimony and evidence regarding the health impacts of NO_2. Dr. Michelle Schaper, MSHA toxicologist, submitted a report and testified about the expected physiological effects of inhaling NO_2. Ex. S-8. First, Dr. Schaper described the "sensory-type irritation"—e.g., burning of the eyes, nose, and throat or constriction of the airways—that can be triggered within minutes of exposure to NO_2. Tr. 498. Next, she described the "pulmonary-type irritation"—including fluid buildup in the lungs and pulmonary edema—that can materialize within 18 to 24 hours after exposure. Tr. 500. Pulmonary edema can cause "permanent damage" to the lungs. Tr. 502. Dr. Schaper testified that one would "start to see" both types of irritation with NO_2 concentrations over 5 ppm and that the effects would "escalate with higher concentrations." Tr. 499.

The Secretary elicited testimony regarding the "time limit value" ("TLV") for NO_2. Dr. Schaper testified that the current TLV for NO_2 is 0.2 ppm, which is "considerably lower" than the 5 ppm that MSHA follows pursuant to 30 C.F.R. § 57.5001's incorporation of 1973 TLV's. Tr. 511. She further testified that if a miner was exposed to one minute of an 8.2 ppm NO_2 environment, "it would be very hard to meet the current TLV." Tr. 515. On cross-examination, Dr. Schaper confirmed that the updated TLV is not a "consensus standard[]" and that the TLV represents the level of exposure a worker "could be exposed to . . . over the course of an entire career, repeatedly, and not suffer ill effects." Tr. 523-24.

The parties also introduced evidence regarding concentrations of NO_2 that are "immediately dangerous to life or health" ("IDLH"). The National Institute of Occupational Safety and Health ("NIOSH") determines an IDLH value for a chemical by taking the lowest-observed level of adverse effect upon chemical exposure and reducing that level by a safety factor to account for the variability of human physiology. Ex. R-3, at 13. The MSHA Health Inspection Procedures Handbook lists the IDLH value for NO_2 as 20 ppm, based on NIOSH's 1995 IDLH value. Ex. R-2, at 158. NIOSH updated its IDLH value for NO_2 to 13 ppm in 2017. Ex. R-3, at ii. Dr. Schaper relied on the updated value of 13 ppm when making her expert findings. Ex. S-8, at 7. On cross-examination, she acknowledged that the IDLH value is not the line above which adverse effects are expected. Tr. 541. Rather, she recognized that the IDLH value is a threshold set "to protect workers from those conditions that are going to be dangerous." Tr. 542.

F. Safety Measures Implemented at the Cleveland Mine

Several Cargill supervisors testified about the measures taken by the company to protect its miners against harmful mine gases. Cargill was aware that gases generated during mining, like NO_2, would leave the mine via the return airway, and thus the secondary escapeway. Accordingly, Cargill had rules in place about accessing the return. Jason Wood testified that Cargill miners were required to have a supervisor test the air before entering the return. Tr. 688-89. If a miner was uncertain as to whether the air had been recently tested, Wood said that the miner was to call his supervisor to "ask for an air check." Tr. 689. Wood testified that supervisors "constantly monitor" the air in the secondary and would "evacuate the area" if NO_2

levels exceeded 5 ppm. Tr. 689-90. All supervisors were equipped with an MX4 handheld gas monitor, according to Wood. Tr. 686, 688; Ex. R-5 (list of handheld monitors).

Multiple individuals referenced the placard system designed to warn miners about the air quality in the return airway. Jason Wood testified that, upon measuring high NO_2, supervisors would post "huge" placards on sawhorses at certain entry points to the secondary prohibiting entry. Tr. 709-10. George Campbell, maintenance general foreman, also testified about posting signage when there were high levels of NO_2 in the secondary "so that nobody would travel the returns." Tr. 958-59, 978-79. MSHA Inspector Morris confirmed the placard policy in his testimony. He said that green signs indicate clean air and red signs indicate the presence of high NO_2. Tr. 122-23. Christopher Jedlicka, however, testified that Cargill's placarding policy was not strictly followed or enforced. "It's not uncommon to have [a placard] not flipped or have a green when it is smokey" in the secondary, according to Jedlicka. Tr. 288.

Jason Wood further testified about the emergency training that Cargill miners receive. Wood said that Cargill trains its miners to evacuate the mine using the primary escapeway, which is in fresh intake air. In the event of a fire or an obstruction in the primary, Wood testified that miners are trained to utilize the secondary escapeway only to the extent necessary. Miners are alerted to the location of the fire over the Femco intercom system and are trained to cross back from the secondary to the primary at the earliest nonaffected juncture. Tr. 738-40.

Cargill also introduced testimony about the personal protective equipment ("PPE") available to miners in the case of an emergency. All miners at the Cleveland Mine are issued and required to carry when underground W65 "self-rescuer" respirators ("W65's"), which protect miners from inhaling carbon monoxide ("CO") in the event of a fire. Tr. 75-76, 379-80, 684, 925, 966.

Jason Wood testified that, to supplement the W65's, Cargill maintains several underground caches of Ocenco EBA 6.5 "self-contained self-rescuers" ("Ocencos"). Ocencos provide a limited amount of fresh oxygen to the miner and therefore protect the miner against all airborne contaminants—including NO_2—but they are only meant to be used during an emergency escape. Tr. 684, 764, 925-26, 966. Unlike the W65's, the Ocencos have goggles for eye protection. Tr. 210-11. According to Steven Horne, Cargill was motivated by the Sago, WV mine disaster 15 years earlier to begin stocking Ocencos at all its mines to protect escaping miners from mine gasses in addition to CO. Tr. 844-48.

Wood testified that, around the date of inspection, Cargill stored 88 Ocencos underground, to be used in the event of an emergency. According to Wood, Cargill trained its miners regarding the use and location of the Ocencos. Tr. 685. He further testified that, if a miner neglected to grab an Ocenco during an evacuation drill, management would instruct the miner to utilize the Ocenco in future evacuations. Tr. 758. Inspector Morris was familiar with the Ocencos and their intended use from his previous inspections. Tr. 110-11.

Ms. Christina Stalnaker, an experienced MSHA industrial hygienist, took issue with the degree of protection that the Ocencos afford from NO_2 in the Cleveland Mine's secondary escapeway. Tr. 593, 597-98; Ex. S-9. In her opinion, PPE, such as an Ocenco, is much less

preferable as a method of protecting miners compared to adopting and using controls to reduce the level of NO_2. Ms. Stalnaker also criticized Cargill's expectation that its miners would find and properly don the devices while attempting to evacuate the mine. Tr. 608, 610-11; Ex. S-9, at 4-5.

G. Post-Citation Secondary Escapeway Changes

Cargill, shortly after receiving the citation, altered its blasting schedule and positioning of its third-shift miners, so that miners would not work in locations north that could necessitate them using the secondary escapeway after blasting resulted in NO_2 levels exceeding 5 ppm in the return. Tr.720-22, 796. During this interim period, blasting only occurred once on one unit at the end of the second shift. Consequently, the activities that could take place underground during the third shift were reduced. Tr. 721-23, 857-59, 919-20; Ex. R-6, at 5.

These changes also reduced the amount of road salt the Cleveland Mine could produce for the upcoming winter season. Tr. 858-59. Cargill evaluated other abatement options, but most would have required months to implement, significant resources, and modifications to the mine's ventilation system and emergency action plan. Tr. 723-724, 859-861, 869-76, 915-16.

To return to normal production levels, Cargill's management, after weighing several options, approved the relocation of the secondary escapeway to an intake air course that would run parallel and next to the primary escapeway. Tr. 860-61, 875-76. Upon completion of the project around three months later, the return airway no longer served as the secondary escapeway, though miners are trained to use it as a third escape option in the event both others are unavailable. Tr. 731, 861.[4]

III. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

At issue in this case is whether a violation of section 57.11051(a)'s requirement that "[e]scape routes shall be . . . maintained in safe, travelable condition" has been established by the Secretary. "In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992) (citing *Jim Walter Res., Inc.*, 9 FMSRHC 903, 907 (May 1987)). To prevail, the Secretary must prove the cited violation by a "preponderance of the evidence," which simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The citation describing the alleged violation of section 57.11051(a) reads as follows:

> The designated secondary escapeway along the D5 beltline from the entry door adjacent to the dinner hole to the 8 West door was not properly maintained in a safe

[4] A new secondary required construction activities over the course of two-and-one half months, new training protocols, development of brattice, curtain, and belt lines, at a cost of approximately $750,000 for materials and labor. Tr. 725, 862-64.

> travelable condition. The secondary escapeway is located in return air and production belt lines from the working faces. The post-blast gas readings along the route indicated Nitrogen dioxide (NO[2]) levels up to 8.2 ppm along the route. Miners normally work in the area that is affected at this time, throughout the shift along the beltline performing maintenance and travel through the area while using the designated escapeway for access to and from work areas as well as escape during emergency situations and evacuation drills. Continued exposure to elevated levels of NO[2] gas would likely lead to injury from Inhalation, skin and/or eye contact resulting in burning, respiratory system damage, and tachycardia. At the time of the high gas readings there were no miners working in the areas with the elevations of NO[2]. There were 4 miners working in the mine that would be affected by using the secondary escape during an emergency situation that had elevated NO[2] gas above 6.1 ppm. Miners were removed from the portions of the mine where the gases would prevent them from working and relocated to an area closer to the mill where the gases were measured and found to be at a compliant range. The operator has two supervisors making ventilation adjustments and are taking continued air reading to assure the gases were being ventilated out of the mine. the termination time has been set to allow time for the adjustments and the venting of gases to occur.

Ex. S-1, at 1-2.

At hearing, the inspector clarified the condition and conduct that was being charged, thus reducing the citation's potential scope. He explained that the passage stating "[m]iners normally work in the area that is affected at this time, throughout the shift along the beltline performing maintenance and travel through the area while using the designated escapeway for access to and from work areas" was included merely as background. The passage refers to the fact that miners' normal work or travel *could* take them into the area of the mine cited. Tr. 189-92.

On the night of the inspection, however, no miners were observed in the area. The Secretary does not allege that any miner was actually exposed to the NO_2 that Inspector Morris found that night, as the citation goes on to explain that: "[a]t the time of the high gas readings there were no miners working in the areas with the elevations of NO[2]." Tr. 64, 222; Ex. S-1, at 1; *see also* S. Br. at 2.[5]

What the Secretary *is* alleging is that Cargill violated section 57.11051(a) on the night of the inspection when it permitted miners to work in *other* areas of the mine. Specifically, such areas where, should there have been a need for those miners to evacuate the mine in an emergency using the secondary escapeway, it would have been unsafe for them to have done so because of the levels of NO_2 the inspector measured in the escapeway that night. S. Br. at 21-23.

[5] It also became clear at the hearing that, contrary to the citation, Cargill did *not* conduct mine evacuation drills using the secondary escapeway during the times that excessive levels of NO_2 were present. Tr. 193-94, 717. Consequently, that part of the citation is also not being pursued by the Secretary.

Cargill was cited for the presence of NO_2 measuring as high as 8.2 ppm in the secondary escapeway on the night of the inspection. Cargill does not dispute that the Secretary has adequately demonstrated the presence that night in the mine's designated secondary escapeway of NO_2 at least at a level of 8.2 ppm. Tr. 47-48, 700-01.

Nor does Cargill dispute that the Secretary established that miners were working inby where that level of NO_2 was measured. Inspector Morris testified credibly on this point. Tr. 65-66, 704-05. Thus, should those miners have had to evacuate the mine in an emergency that necessitated using that part of the secondary escapeway at that time, they would have been exposed to at least that level of NO_2.

The primary remaining issue in the case is the overriding one: the circumstances in which the presence of NO_2 in an escapeway violates section 57.11051(a)'s requirement that the escapeway "be maintained in safe, travelable condition." The Secretary's theory that the levels of NO_2 found by Inspector Morris establish a violation of section 57.11051(a) relies almost entirely upon another underground metal-nonmetal regulation, 30 C.F.R. § 57.5001. It mandates the withdrawal of miners from any area of a mine where there is an airborne contaminant governed by section 57.5001(c) at a level that exceeds the limit set by the regulation for that contaminant. In the case of NO_2, the Secretary maintains that limit is 5 ppm. S. Br. at 23 & n.33. The Secretary also relies upon Dr. Schaper's testimony to contend that miners forced to evacuate through an atmosphere containing levels greater than 5 ppm NO_2 "would have their travel impeded and/or would suffer negative health effects." *Id*. at 21, 23.

While an express exception to the withdrawal requirement of section 57.5001 is found in 30 C.F.R. § 57.5005, the Secretary argues that exception is inapplicable here. She does so based on her interpretation of section 57.5005 and what she considers to be the limited protection provided by the Ocenco respiratory protection devices that Cargill expects its miners to use when they encounter excessive NO_2 in the mine, including while exiting it through the secondary escapeway. *Id*. at 24-29.

Cargill responds that it would be unlikely for a miner to encounter NO_2 over 5 ppm while escaping via the return airway, and in the event a miner does, any encounter would be short. C. Br. at 13. Cargill relies on Mr. Horne and Mr. Hartsog's testimony that after blasting, the front of NO_2 moves much slower than an escaping miner would, and the concentration dilutes as the front travels along the return. *Id.* So, behind and ahead of the front, the concentration likely will not exceed 5ppm. *Id.* Cargill also points to the findings of the American Industrial Hygiene Association's ("AIHA") that a short encounter with 5ppm of NO_2 poses no safety risk, especially when a miner wears an Ocenco SCSR. *Id.* at 14. Cargill further argues that the secondary escapeway is travelable as it is still passable, by providing miners with a functional means to escape relatively unimpeded. *Id.* at 12-13. Alternatively, Cargill contends that the Secretary's "fleeting-risk theory" interpretation of 30 C.F.R. § 57.11051(a) is erroneous, because it contravenes the regulation's text and purpose, departs from previous agency positions, and provides no fair warning to mine operators of prohibited or required conduct. *Id.* at 17, 19-20, 24-26.

A. Interpreting sections 57.11051(a), 57.5001, and 57.5005

1. Parties' Arguments

To establish that the respirable atmosphere of Cargill's secondary escapeway that night rendered it unsafe or untravellable in violation of section 57.11051(a), the Secretary primarily points to the regulation designed to govern miner exposure limits for airborne contaminants in underground metal-nonmetal mines, 30 C.F.R. § 57.5001. That standard provides in pertinent part that:

> Except as permitted by [section] 57.5005—
>
> (a) . . . the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists [ACGIH], as set forth and explained in the 1973 edition of [ACGIH]'s publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54 , which are hereby incorporated by reference and made a part hereof. . . . . Excursions above the listed thresholds shall not be of a great magnitude than is characterized as permissible by the Conference.
>
> . . . .[6]
>
> (c) Employees shall be withdrawn from areas where there is present an airborne contaminant given a "C" designation by the Conference and the concentration exceeds the threshold limit value listed for that contaminant.

30 C.F.R. § 57.5001(a) & (c) (2022).[7] As will be explained in further detail later herein, this standard is routinely read to require that miners be immediately withdrawn from any area of a mine where there is NO_2 at a level exceeding 5 ppm. The Secretary argues that, therefore, an escapeway that includes such a prohibitive level of NO_2 is not being safely maintained as required by section 57.11051(a). S. Br. at 23 & n.34.

As for the referenced exception to section 57.5001, section 57.5005 provides in part pertinent for present purposes that:

> Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into

[6] Section 57.5001(b) treats asbestos separately as an airborne contaminant for exposure limit purposes. *See* 73 Fed. Reg. 11,284, 11293-96, 11,304 (Feb. 29, 2008).

[7] Earlier this year, section 57.5001 was amended to reflect that it will eventually reference MSHA's new respirable crystalline silica regulations. *See* 89 Fed. Reg. 28,218, 28,470 (Apr. 18, 2024).

> hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment.

30 C.F.R. § 57.5005 (2022).[8]

Cargill maintains that, should miners have to exit through a segment of the secondary escapeway containing a level of NO_2 in violation of section 57.5001, those miners could protect themselves by using their Ocencos. Tr. 893-94. Cargill contends that such reliance would be consistent with the terms of section 57.5005, so even if section 57.5001 was relevant to determining a section 57.11051(a) violation (which Cargill does not concede), the section 57.5005 exception to section 57.5001 renders consideration of section 57.5001 moot in this instance. C. Br. at 14-15. The Secretary, however, disagrees that section 57.5005 can be interpreted to recognize Cargill's anticipated reliance on its Ocenco SCSR's as compliant with the regulation. S. Br. at 24-29.

As for the application of these two other standards in this case, no miners were working or otherwise present in or even near the area in which the cited level of NO_2 was discovered during the inspection, so Cargill was not cited with violating section 57.5001. Nevertheless, the Secretary requests that, in deciding whether Cargill was in violation of the "safe, travelable condition" clause of section 57.11051(a) on the night of the inspection, I look to what she argues is the applicable contaminant exposure limit, as derived from section 57.5001, and apply it to the hypothetical circumstance of the miners inby that night having to exit the mine in an emergency via the secondary escapeway. She also requests I find that, in such a scenario, the requirements of the 57.5005 exception to that section 57.5001 contaminant limit would not have been met by Cargill.

While I appreciate that section 57.5001, and thus section 57.5005, are at least arguably relevant to the circumstances here, such an interpretative approach is not easy to accommodate under Commission cases applying those standards. The Commission has previously only addressed the regulations in the fact-specific context in which it was uncontested that miners were within a mine area where there was allegedly a contaminant present at excessive levels. *See Tamasco, Inc.*, 7 FMSHRC 2006, 2010 (Dec. 1985) ("It is clear from the language of the Secretary's standard that section 57.5[00]5 establishes an exception to the general mandate of section 57.5[00]1 which requires that airborne contaminants not exceed their TLV, and that the application of section 57.5[00]5 is conditioned specifically on a determination that miners are exposed to excessive levels of airborne contaminants in violation of section 57.5[00]1."); *see also Climax Molybdenum Co.*, 2 FMSHRC 2748, 2751 (Oct. 1980) (both parties took the position that "without a violation of section 57.5[001], the issue of whether the engineering

[8] Further provisions that discuss "appropriate respiratory protective equipment" will be set forth later herein.

control requirements of section 57.5[005] are met does not arise."), *aff'd on other grounds*, 703 F.2d 447 (10th Cir. 1983).[9]

Nevertheless, because the Secretary relies upon interpretations of sections 57.5001 and 57.5005 as key components to establishing that section 57.11051(a) was violated by Cargill here, I will include in my analysis the parties' arguments on the application of the two standards to the *potential* that Cargill miners would use the secondary escapeway at a time when NO_2 exceeded 5 ppm.

2. Rules of Regulatory Interpretation

The same considerations that govern a court's evaluation of Secretarial interpretations of MSHA regulations govern the Commission's review at the administrative level. *Martin v. OSHRC,* 499 U.S. 144, 154-55 (1991); S. Rep. No. 95-181, at 49 (1977), *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978) ("*Legis. Hist.*"). The Commission, citing the most recent Supreme Court precedent on such interpretations, *Kisor v. Wilkie*, 588 U.S. 558, 574-82, 139 S. Ct. 2400, 2415-19 (2019), has summarized its approach to Secretarial interpretations of Mine Act standards as follows:

> Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010) (citations omitted). In the event that the language is ambiguous, deference to the Secretary's interpretation may be appropriate if the interpretation is reasonable, authoritative, within the Secretary's expertise, and reflects fair and considered judgment. However, questions of deference do not arise unless the regulation is determined to be genuinely ambiguous after all the traditional tools of construction are exhausted.

Richmond Sand & Stone, LLC, 41 FMSHRC 402, 403-04 (Aug. 2019); *see also GMS Mine Repair v. FMSHRC*, 72 F.4th 1314, 1320 (D.C. Cir. 2023) (applying *Kisor* to conclude that MSHA penalty regulations were ambiguous), *cert. denied* 144 S. Ct. 1095 (2024); *Cactus Canyon Quarries, Inc. v. FMSHRC*, 64 F.4th 662, 665 (5th Cir. 2023) (applying *Kisor* to affirm Commission Judge's decision that regulation had a plain meaning as applied).

The United States Court of Appeals for the District of Columbia Circuit—ironically in a case involving an interpretation of closely related 30 C.F.R. § 57.11050—stressed the importance of the Secretary forthrightly stating a position on whether she considers the regulatory language governing a case to be clear, or whether she instead views it as ambiguous

[9] Similarly, MSHA's guidance with respect to the two standards is limited to situations in which they are being applied to actual, concrete circumstances. *See* MSHA IV Program Policy Manual 32 (Release IV-21 Feb. 2003) (directing MSHA inspectors to "[i]ssue one []57.57.5001(a)/.5005 citation for each miner whose exposure to airborne contaminant(s) exceeds the contaminant's enforcement level.").

with respect to the question at hand. *See Akzo Nobel Salt v. FMSHRC*, 213 F.3d 1301, 1303-05 (D.C. Cir. 2000) (holding the phrase "properly maintained" in section 57.11050(a) to be ambiguous with respect to the issue of the point at which a planned outage of one of two hoists would constitute a violation of the two-escapeway requirement of that standard). Here, however, the Secretary's post-hearing brief does not directly state whether she views the key terms of any of the regulations at issue—sections 57.11051(a), 57.5001, and 57.5005—to be clear or ambiguous as applied in this case.

Given the absence of a Secretarial statement that there is a plain meaning application of the three regulations in this instance, it is not unreasonable to assume she views them to be ambiguous as applied to the facts of this case. However, in *Kisor*, the Supreme Court explained at length the circumstances under which deference to an agency's interpretation of a regulation is appropriate, an issue the Court previously addressed in *Auer v. Robbins*, 519 U.S. 452 (1997). In *Auer*, the Court held that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Id.* at 461.[10]

[10] In an earlier decision in a pending case, the D.C. Circuit cited with approval its holding in *Akzo Nobel* in concluding that the Secretary's interpretation of the jurisdictional language of the Mine Act was deficient because it was based upon a plain meaning interpretation of statutory language that the court found to instead be ambiguous. *See Sec'y of Labor v. KC Transport, Inc.*, 77 F.4th 1022, 1029 (D.C. Cir. 2023). That decision was subsequently vacated by the Supreme Court and remanded to the D.C. Circuit for further consideration in light of the Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U. S. ___, ___, 144 S. Ct. 2244, 2257-73 (2024). *See* ___ S. Ct. ____, 2024 WL 3259666 (Mem) (July 2, 2024).

In *Loper Bright*, the Court overruled its decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), regarding the level of deference to be accorded to an agency interpretation of a statute it is charged with administering. In *Kisor*, the Court stated that agency regulatory interpretations receive no greater deference than agency statutory interpretations. 588 U.S. at 576. Consequently, it is quite conceivable that *Loper Bright* will eventually lead to *Auer* also being overruled.

Because I find that the Secretary's interpretations at issue here do not meet the requirements for *Auer* deference, any subsequent demise of *Auer* should not impact this decision. I also note that the Court's ruling in *Loper Bright* was based on its reading of the judicial review provision that governed that case, section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. 144 S. Ct. at 2257-73. Section 507 of the Mine Act provides that "[e]xcept as otherwise provided in this Act, the provisions of sections 551-559 and sections 701-706 of title 5 of the United States Code shall not apply to the making of any order, notice, or decision made pursuant to this Act, or to any proceeding for the review thereof." 30 U.S.C. § 956.

The Mine Act does not provide that section 706 of the APA is applicable to Mine Act proceedings; instead, it includes its own judicial review provision, section 106(a)(1). *See* 30 U.S.C. § 816(a)(1). In enacting section 106, Congress stated that it expected that "weight" would be given by the Commission and the courts to the Secretary's interpretation of the Mine Act and

(continued…)

GMS helpfully summarized the preconditions that must be met under *Kisor* before it is appropriate to accord *Auer* deference to an agency regulatory interpretation:

> First, courts must determine whether the regulation is "genuinely ambiguous" by "exhaust[ing] all the 'traditional tools' of construction." These traditional tools include the "text, structure, history, and purpose of [the] regulation." Second, even if a regulation is genuinely ambiguous, "the agency's reading must fall 'within the bounds of reasonable interpretation.'" To this end, the work that courts do reviewing the text, structure, history, and purpose form the "outer bounds" of what is reasonable. Lastly, courts must take a third step and identify the existence of "important markers for ... [when] deference is ... appropriate." What should persuade a court is the "character and context" of the agency interpretation—namely, the authoritativeness of the position asserted, implication of the agency's substantive expertise, and whether the interpretation reflects the agency's "fair and considered judgment."

74 F.4th at 1420 (citations omitted and alterations in original). Consequently, in addressing the interpretation issue here, I will attempt to follow as best as possible the steps laid out in *Kisor*, not only in interpreting section 57.11051(a), but also sections 57.5001 and 57.5005 to the extent the Secretary relies on those regulations.

3. Whether the Regulations are Ambiguous in this Instance

Applying the first step of *Kisor*, a determination of whether there is genuine ambiguity with respect to the application of section 57.11051(a) in this case, begins with examining the text of section 57.11051(a). *See id.* at 1420. As noted, the key phrase is "maintained in safe, travelable condition."[11]

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[10] (…continued)
its regulations. *See* S. Rep. No. 95-181, at 49, *Legis. Hist.* at 637 ("Since the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts.").

[11] As background, what is now section 57.11051(a) was first promulgated in 1969 as a mandatory standard to take effect the following year at 30 C.F.R. § 57.11-51(a), by the Secretary of the Interior after notice-and-comment rulemaking conducted pursuant to section 6 of the Federal Metal and Nonmetallic Mine Safety Act ("Metal-NonMetal Act"). *See* 34 Fed. Reg. 12,517, 12,522 (July 31, 1969). While Mine Act section 306(a) repealed that earlier legislation, section 301(b)(1) of the Federal Mine Safety and Health Amendments Act of 1977 provided for the continued effectiveness, under the enforcement authority of the Secretary of Labor and MSHA, of the mandatory metal and nonmetal mine health and safety standards issued by the Secretary of the Interior, until such time that new or revised standards were issued. 30 U.S.C. § 961(b)(1). Other than its recodification as section 57.11051(a) (*see* 50 Fed. Reg. 4048, 4052, 4084 (Jan. 29, 1985)), the original section 57.11-51(a) has not been revised or amended. Also, as with section 57.11-51(a) having been originally placed within former section 57.11 entitled "Travelways and escapeways," so section 57.11051(a) resides in "Subpart J—Travelways and Escapeways" of Part 57.

Neither "safe" nor "travelable" are defined in 30 C.F.R. Part 57. *See* 30 C.F.R. § 57.2 (setting forth definitions of numerous other terms found in Part 57, including "safety can," "safety fuse," and "safety switch"). Given this absence, the first aid in construing the terms is their ordinary meanings, which are best found in dictionary definitions from before or around the time the standard employing the terms was adopted. *See Peabody Twentymile Mining, LLC v. Sec'y of Labor*, 931 F.3d 992, 997 (10th Cir. 2019); *see also Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1296 (11th Cir. 2014) (relying upon definitions of terms used in Mine Act from dictionaries published prior to its passage).

Around the time that section 57.11051(a) was adopted, "safe" was defined to mean "free from damage, danger, or injury; secure" (Webster's New World Dictionary of the English Language 1253 (2d College Ed.) (1972)), or "secure from liability, to harm, injury, danger, or risk: a safe place." The Random House Dictionary of the English Language 1259 (1973). As for "travel," it was defined to mean to go to from one place or point to another. Webster's at 1513; Random House at 1508.

None of these definitions establish, by themselves, that an escapeway with a respirable atmosphere containing greater than 5 ppm of NO_2 is neither safe nor travelable. Nor do the definitions foreclose considering an escapeway with such a respirable atmosphere to be safe or travelable. Thus, an examination of the text does not establish a clear meaning of "safe, travelable condition", which makes it difficult to conclude that section 57.11051(a) is unambiguous in this instance. *Cf. GMS*, 72 F.4th at 1322 (concluding standard was "genuinely ambiguous" because "[w]hile [its] structure, history, and purpose favor the Secretary's reading, the text lacks useful detail.").

Moving on to whether the purpose or history of section 57.11-51(a)/57.11051(a) points to a clear meaning of the standard, the 1969 preamble to its original adoption is entirely silent regarding what "safe, travelable condition" was intended to mean, not only with respect to the respirable atmosphere of a designated escape route, but also any other aspect of it as well. The preamble to former section 57.11-51 and the other underground metal-nonmetal regulations adopted at that time only states that the standards were ones "developed in conjunction with the Underground Mines Advisory Committee" and "about which there were no comments or objections." 34 Fed. Reg. at 12,517.[12]

Equivalent underground coal mine escapeway standards shed greater light on what is meant by requiring an escapeway to be kept in "safe, travelable condition." An escapeway

[12] Section 6 of the Metal-NonMetal Act permitted the Secretary of the Interior, in promulgating health and safety regulations, to rely upon the advice of committees that the Secretary had established pursuant to section 7 of the legislation. Those proposed regulations on which comments were received were finalized approximately six months later. They included section 57.11-51's companion standard, section 57.11-50 (later revised and recodified as section 57.11050), which mandated that underground metal and nonmetal mines "have two separate properly maintained escapeways to the surface which are so positioned that damage to one shall not lessen the effectiveness of the other, or a method of refuge shall be provided when only one opening to the surface is possible." *See* 38 Fed. Reg. 3670, 3675 (Feb. 25, 1970).

standard for underground coal mines was first established by the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"). Section 317(f)(1) of the Coal Act, which took effect in 1970 around the effective date of the first sets of Part 57 escapeway regulations, provided in pertinent part that:

> [A]t least two separate and distinct *travelable* passageways which are *maintained* to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, *and shall be maintained in safe condition* and properly marked.

30 U.S.C. 877(f)(1) (1970) (emphases added). The statutory provision was later carried over to the Mine Act without change, and it was again limited to coal mines. *See* Mine Act Title III—Interim Mandatory Standards for Underground Coal Mine; 30 U.S.C. 861(a) ("[t]he provisions of section 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines . . . .").[13]

The statutory provision would be included verbatim in MSHA's underground coal regulations until 1992. Before that, in 1988, MSHA began the first in what would be a series of rulemakings over approximately twenty years in which the coal mine escapeway regulations would be amended. *See* 30 C.F.R. § 75.380 et seq.; 53 Fed. Reg. 2382, 2407-09 (Jan. 27, 1988)

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[13] The reasoning behind section 317(f)(1)'s requirement that two separate escapeways be provided and maintained in travelable condition in underground coal mines was explained in the Coal Act's legislative history by way of examples of mine disasters occurring in both coal and metal/nonmetal mines:

> Mine fires, extensive collapse of roof, or similar occur[r]ences may completely block the regular travelway between the working section and the surface, thus cutting off escape in an emergency unless an alternate route is provided to the surface. As recently as March 1968, 21 men at a salt mine lost their lives because a second escapeway was not provided. And in 1960, 18 men died in a coal mine fire because a travelable second escapeway was not provided.

S. Rep. No. 91-411, at 83, *reprinted in* Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 209 (1975).

The first mine disaster cited occurred as the result of a fire at Cargill's Belle Isle Salt Mine, where a second escapeway was planned but not yet developed. U.S. Dep't of Interior, Bureau of Mines, Final Report on Major Mine-Fire Disaster, Belle Isle Salt Mine, Cargill, Inc., St. Mary Parish, LA 3 (undated). The second was at a coal mine, where ground conditions in the designated alternate escapeway prevented its use. U.S. Dep't of Interior, Bureau of Mine, Final Report on Major Mine Fire Disaster, No. 22 Mine, Island Creek Coal Co., Pine Creek, Logan Cty., WV 6 (undated).

(proposed rules on safety standards for underground coal mine ventilation). In the preamble to one of those later rulemakings, MSHA explained that:

> [w]hen a fire, explosion or other emergency necessitates an immediate evacuation of a mine, the designated route for miners to leave the mine is the escapeway. The escapeway should be appropriately located and designed to be free of obstructions and hazards to assure safe passage from the hazardous underground environment.

61 Fed. Reg. 9764, 9810 (Mar. 11, 1996).[14]

That series of rulemakings resulted in escapeway regulations for coal mines much more extensive than those for underground metal and nonmetal mines. S*ee Consol Pennsylvania Coal Co.*, 44 FMSHRC 691, 695 (Dec. 2022) ("[t]he Commission has noted that '[s]ection 75.380 contains extensive requirements as to the location and physical attributes of escapeways'") (quoting *Am. Coal Co.*, 29 FMSHRC 941, 948 (Dec. 2007)).[15] Nevertheless, the stated purpose of section 75.380—to provide underground coal miners with escapeways that are "free of obstructions and hazards to assure [their] safe passage from the hazardous underground environment"—would seem to explain the intent behind section 57.10151(a)'s requirement that an escapeway in an underground metal or nonmetal mine be "maintained in safe, travelable condition."

This purpose has been looked to in countless instances in which the Commission and its Judges have decided cases involving citations alleging violations of MSHA escapeway regulations. As far as I can tell, however, all those cases involved physical impediments to

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[14] The Commission had recognized as much even prior to that, when, in considering whether an underground coal mine escapeway was being maintained consistent with the requirements of section 317(f)(1) of the Mine Act, it looked to whether an area of the mine at issue could serve its intended "general function[]" as an escapeway that was "passable." *See Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

[15] For instance, MSHA's coal mine escapeway regulations, unlike its regulations governing metal and nonmetal mine escapeways, include specific separate standards for primary and alternate escapeways. *See* 30 C.F.R. §§ 75.380(f), (g) (bituminous and lignite mines), 75.381(e), (f) (anthracite mines). Moreover, MSHA moved its underground coal escapeway standards to within its ventilation regulations, including those that address the periodic submission to and approval by MSHA of ventilation plans and maps. *See* 30 C.F.R. Part 75 Subpart D—Ventilation; §§ 75.370-.372.

In contrast, after recodification of the Part 57 regulations, escapeway standards were separated out from the underground metal and nonmetal mine ventilation regulations. Presently Part 57 Subpart D addresses air quality and contaminant matters, ventilation is regulated under Subpart G, and escapeway standards appear in Subpart J, which does not include separate regulations for primary and secondary escapeways. As for underground metal and nonmetal ventilation plans, they need only be submitted to MSHA upon the District Manager's written request. *See* 30 C.F.R. § 57.8520.

miners' use of a dedicated escapeway—such as ground conditions or obstructions inherent or otherwise present in the escapeway—that negatively impacted its travelability. This is the case not only in metal and nonmetal mines,[16] but coal mines as well.[17] The issue here, of whether the respirable atmosphere of the cited escapeway could render it unsafe or negatively impact its travelability, thus appears to be one of first impression.

As noted, the Secretary relies upon the Part 57 regulation that governs the exposure limits for airborne contaminants, 30 C.F.R. § 57.5001, to argue that the respirable atmosphere of Cargill's secondary escapeway rendered the escapeway unsafe under section 57.11051(a). To do so, she relies upon the source referenced in section 57.5001(a), "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973, pages 1 through 54" (hereinafter "1973 TLV Booklet"). It defines threshold limit values as the "airborne concentrations of substances . . . under which it is believed that nearly all workers may be repeatedly exposed day after day without adverse effect." 1973 TLV Booklet at 1. It further states that these values generally "should not be used as fine lines between safe and dangerous conditions." *Id*. For most substances, fluctuations above the TLV are permissible if the time-weighted average over the course of a workday remains at or below the TLV. *Id*.

However, as section 57.5001(c) indicates, contaminants bearing the "C" designation are treated separately, because they are recognized to be "predominantly fast acting" and are "best controlled by a ceiling 'C' limit that should not be exceeded." *Id*. at 4; *see also* Proposed Rules, Air Quality, Chemical Substances, and Respiratory Protection Standards, 54 FR 35,760, 35,761 (Aug. 29, 1989) ("1989 Proposed Rules") ("Other substances are so hazardous that they require a ceiling limit that must not be exceeded at any time, even for an instant."). The 1973 TLV Booklet views the "C" limit as the "maximal allowable concentration" for a designated contaminant and notes that all measurements "should fluctuate below the listed value." 1973 TLV Booklet at 52-53.

As the Secretary points out (S. Br. at 23 & n.33), according to the 1973 TLV Booklet, the TLV for NO_2 is 5 ppm. Moreover, the 1973 ACHIH Booklet gives NO_2 a "C" designation. 1973

[16] *See, e.g., Original Sixteen to One Mine Inc.*, 40 FMSHRC 843 (June 2018) (ALJ); *Original Sixteen to One Mine Inc.*, 39 FMSHRC 590 (Mar. 2017) (ALJ); *Original Sixteen to One Mine Inc.*, 38 FMSHRC 1472 (June 2016) (ALJ); *Original Sixteen to One Mine Inc.*, 27 FMSHRC 600 (Aug. 2005) (ALJ); *Original Sixteen to One Mine Inc.*, 23 FMSHRC 1158 (Oct. 2001) (ALJ).

[17] The much more developed underground coal mine escapeway standards have resulted in many Commission cases applying those standards, some of which involved standards that have no equivalent in 30 C.F.R. Part 57, Subpart J. *See, e.g., Canyon Fuel Co. v. Sec'y of Labor*, 894 F.3d 1279 (10th Cir. 2018) (requirements of 30 C.F.R. § 75.380(d)(5))*; Consol*, 44 FMSHRC at 695-97 (lifeline requirements of 30 C.F.R. § 75.380(d)(7)(iv)); *see also American Coal Co.*, 29 FMSHRC 941, 946-52 (Dec. 2007) (requirement that escapeways be provided from "each working section").

TLV Booklet at 24.[18] Accordingly, it appears that, absent the application of the section 57.5005 exception to section 57.5001 (to be discussed below), section 57.5001(c) requires that, whenever NO_2 exceeding 5 ppm is discovered in an area of a mine, miners are to be immediately withdrawn.

I stress again that, in this instance, no violation of section 57.5001 was alleged, because there were no miners working or otherwise present in or even near the area in which the cited level of NO_2 was discovered. Rather, the Secretary looks to section 57.5001 to give meaning to the section 57.11051(a) requirement that an escapeway be "maintained in safe, travelable condition" with respect to its respirable atmosphere.

A regulation's structure is one of the "traditional tools" of construction employed to determine its clear meaning. Yet here, the Secretary has passed on taking the position that section 57.5001's incorporation by reference of the 1973 ACGIH TLV for NO_2 provides a clear, unambiguous meaning regarding the level of NO_2 that would violate the requirement of section 57.11051(a) that an escapeway be in a "safe, travelable condition."

That is likely because, by its express terms, section 57.5001 only addresses contaminants in areas in which miners "work." ("'TLV's Threshold Limit Values for Chemical Substances *in Workroom Air* . . . .'" (emphasis added). The equivalent provision in MSHA's underground coal mine regulations likewise refers to a year-earlier version of the 1973 TLV Booklet. *See* 30 C.F.R. § 75.322 ("Concentrations of noxious or poisonous gases, other than carbon dioxide, shall not exceed the [TLV] as specified and applied by the [ACGIH] in 'Threshold Limit Values for Substance in Workroom Air' (1972).").

The focus on "work" can be seen to an even greater extent throughout the exception to section 57.5001, section 57.5005. It states in pertinent part that, "[h]owever, . . . when necessary *by the nature of work involved* (for example, *while establishing controls* or occasional entry into hazardous atmospheres *to perform maintenance or investigation*), employees may *work* for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment." 30 C.F.R. § 57.5005 (emphases added).

Moreover, the "hierarchy of control" measures that section 57.5005 anticipates will be taken before even "necessary . . . work" is permissible — "by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air" — all seem to contemplate a gradualness of planning in the work process that is simply not present in any emergency mine evacuation. *Id.* Indeed, when viewed in the overall context of MSHA's

[18] The "C" designation for NO_2 predates 1973. An earlier version of section 57.5001(a) expressly used NO_2 as the example for the "C" designation exception, stating that "[t]his paragraph (a) does not apply to airborne contaminants given a "C" designation by the [ACGIH]—for example, nitrogen dioxide." *See* 35 Fed. Reg. 18,590, 18,591 (Dec. 8, 1970) (promulgating section 57.5001's precursor, 30 C.F.R. § 57.5-1, and using the TLV's "adopted by the [ACGIH] as set forth and explained in the *most recent edition* of [its] publication entitled 'Threshold Limit Values of Airborne Contaminants.'") (emphasis added).

regulations, miners, when using an area of a mine as an escapeway, are not generally considered to be at "work" in the escapeway. Inspector Morris recognized as much. Tr. 231.

Rather, when using an escape route governed by the terms of section 57.11051(a), miners have ceased working in the mine and are out of necessity "traveling," and for a very specific purpose: to escape the underground mine environment entirely. *See* MSHA IV Program Policy Manual 40 (Release IV-22 Apr. 2003) (in metal and nonmetal underground mines, "[a] 'properly maintained' escapeway is an escapeway that is functional, providing the miners with a safe means of egress to the surface during a mine evacuation."). As the inspector explained, a mine evacuation constitutes a withdrawal from the entire mine. Tr. 224.

The lack of a plain fit of the terms of section 57.5001 to escapeways can be further seen in the different contexts that sections 57.5001 and 57.11051(a) anticipate. As the inspector explained, the terms of section 57.5001(c) require that miners be "withdrawn from areas where" the applicable exposure limit for a contaminant with a "C" designation has been exceeded, and that is what Cargill ordered the morning of July 28. Tr. 30, 54, 224. From such terms, it can be reasonably inferred that it is expected that there will be an area of the mine in which the airborne contaminant is not present at an excessive level, to which miners can safely move. *Cf.* 30 U.S.C. § 817(a) (authorizing MSHA to order miners to withdraw from *an area of a mine* in which an imminent danger exists for as long as such danger persists in that area) (emphasis added). And that had been the experience at the Cleveland Mine prior to the citation. Tr. 332-33.

In contrast, an escapeway is only being used because the entire mine has already been deemed too hazardous for miners to remain anywhere underground. And use of a secondary escapeway means that the primary escapeway has also been deemed too dangerous to use.

In these circumstances, it is understandable that the Secretary is not taking the position that section 57.11051(a) is unambiguous with respect to the levels of NO_2 present in an escapeway that would render it unsafe or untravellable. Considering the foregoing application of the traditional tools of regulatory construction, as well as others,[19] I conclude that the requirement that an escapeway be "maintained in safe, travelable condition" is "genuinely

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[19] The regulatory history of section 57.5001, from the standard's earliest incarnation to its present one, is entirely silent on the scope of its coverage, or any other relevant subject. *See Inland Steel Mining Co.*, 20 FMSHRC 445, 447-48 (Apr. 1998) (ALJ) (concluding that no discussion accompanied the promulgation of any of the iterations of the regulation).

The 1989 Proposed Rules, while setting forth proposed updated contaminant exposure standards for both coal and metal-nonmetal underground mines, cited concern with conditions that posed a risk of "acute eye exposure that would prevent an escape from a hazardous atmosphere." Specifically, under proposed 30 C.F.R. § 58.300, entitled "Dangerous atmospheres" it would be required that:

> (a) The atmosphere shall be tested for suspected hazardous gases and vapors and oxygen deficiency prior to entrance into any of the following areas:

(continued…)

ambiguous" with respect to the specific levels of airborne contaminants that may be present in the escapeway, at least with respect to NO_2.

4. Whether the Secretary's Interpretation Falls Within the "Zone of Ambiguity"

Turning to *Kisor*'s second step, the application of the same tools of construction set forth above establish that the Secretary can at least look to section 57.5001 to attempt to give meaning to the section 57.11051(a) requirement that an escapeway be "maintained in safe, travelable condition." Thus, her interpretation here falls "'within the bounds of reasonable interpretation.'" Even though the text of section 57.11051(a) addresses the content of an escapeway's respirable atmosphere only in the most general of terms, at one point during the later development of the Subpart J standards, it was recognized that the respirable atmosphere of an escapeway can be hazardous to miners, both prior to and after an emergency arises. *See* 44 Fed. Reg. 31,908, 31,914 (June 1, 1979).[20] Consequently, it almost goes without saying that, at some point, one or

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[19] (…continued)

. . . .

> (2) Areas where there has been a liberation of contaminants in sufficient quantities that could result in acute respiratory exposure that poses an immediate threat of loss of life, immediate or delayed irreversible adverse health effects, or acute eye exposure that would prevent escape from a hazardous atmosphere (IDLH atmosphere).

54 Fed. Reg. at 35,817. However, many of the proposed rules, including updated contaminant exposure standards and proposed section 58.300, were not adopted and were eventually withdrawn by MSHA. *See* 69 Fed. Reg. 67,681, 67,691 (Nov. 19, 2004) ("Given the current circumstances, MSHA believes that a non-regulatory approach is the most appropriate manner to address the hazards addressed in the Air Quality proposed rule. MSHA will continue to assess the risks posed by the contaminants included in the Air Quality proposed rule, and will ascertain whether rulemaking for any individual contaminant is appropriate.").

[20] The subject of a mine's respirable atmosphere during conditions necessitating escape arose in a rulemaking initiated by the Department of the Interior's Mining Enforcement and Safety Administration and concluded by MSHA in 1979, soon after assuming authority over all federal mine safety regulation and enforcement. Among the additional standards to govern escapeways in underground metal and nonmetal mines, was one entitled "Respirable atmosphere for hoist operators underground." *See* 30 C.F.R. § 57.11059 (originally promulgated as section 57.11-59 prior to recodification); 44 Fed. Reg. at 31,919.

The new regulation was based on the recognition that, during an emergency mine evacuation, a hoist operator deployed underground would likely need to remain there longer than most other miners, to facilitate their exit from the mine. The standard thus required that specific individual respirable protection measures be taken to "permit the operator to complete [his]

(continued…)

more contaminants in the respirable atmosphere of a mine's escapeway can rise to a level that would prevent use of the escapeway for what Congress, MSHA, and the Commission has recognized is an escapeway's intended purpose: to enable miners to expeditiously withdraw from hazardous conditions that have suddenly arisen underground.

In addition, the regulations governing underground metal and nonmetal mines have been designed to ameliorate concerns that conditions preventing use of one of a mine's escapeways may also impact any of its other escapeways. Section 57.11051's companion regulation states that "[e]very mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others." 30 C.F.R. § 57.11050(a). This concern about "damage" can of course be read to include concern for damage to a mine's ventilation system that permits harmful airborne contaminants to move through the escapeway. With escapeway standards having been drafted to "lessen" the likelihood that dangerous airborne contaminants impact more than one escapeway, it is reasonable to interpret section 57.11051(a)'s requirement that escapeways be "maintained in safe, travelable condition" to include protection from airborne contaminants, such as NO_2 at excessive levels.

Moreover, given the structure of Part 57, extending section 57.5001's requirement that miners be withdrawn from areas with NO_2 concentrations exceeding 5 ppm to prohibit use of such areas as escapeways also falls within "the 'outer bounds' of what is [a] reasonable" interpretation of section 57.11051(a). *See GMS*, 74 F.4th at 1420 (quoting *Kisor*, 588 U.S at 575-76). Section 57.5001 and its concern for miner "exposure" is part of Subpart D, which governs "[a]ir [q]uality, [r]adiation, [p]hysical [a]gents, and [d]iesel [p]articulate [m]atter" in underground metal and nonmetal mines. If a regulation requires that miners be withdrawn from an area under certain conditions, it is reasonable *to at least consider* that regulation in deciding whether an area should be considered safe for a miner to pass through when those same or similar conditions are present, regardless that such entry may be necessary for escape as opposed to work or travel to and from work. It is particularly appropriate in the case of sections 57.5001(a) and (c), which include no language addressing the scope of the standard.

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[20] (…continued)
essential task." *Id*. at 31,914. In singling out the hoist operator for special respirable protection, the regulation's preamble discusses the potential respirable environment through which evacuating miners may have to travel, and which the hoist operator could be exposed for an even longer.

> This standard is promulgated to [e]nsure that mine escape and evacuation can be accomplished quickly and efficiently without exposing those participating in escape and evacuation operations to unnecessary hazards. The ventilation system in such mines is crucial to the survival of the miners, including the underground hoist operator. However, due to the nature of the mining environment, the respirable atmosphere is capable of harmful fluctuations, particularly in emergency situations.

Id. Thus, MSHA has plainly recognized that the respirable atmosphere of an underground mine during its evacuation is a factor in how expeditiously miners can exit it.

5. Whether Deference to the Secretary's Interpretation is Appropriate Here

Having found the Secretary's interpretation to fall within the outer bounds of reasonableness in this instance, the *Kisor's* third step requires an inquiry into whether there are present "important markers for . . . [when] deference is . . . appropriate." *GMS*, 74 F.4th at 1420 (quoting *Kisor*, 139 S. Ct. at 2416). Determining whether the "character and context" of the Secretary's interpretation merits deference requires an examination of "the authoritativeness of the position asserted, implication of the agency's substantive expertise, and whether the interpretation reflects the agency's 'fair and considered judgment.'" *GMS*, 74 F.4th at 1420 (quoting *Kisor*, 139 S. Ct. at 2416-17). Here, I find that, while the record reflects that the first two markers have been established, with respect to the third it does not.

The first two of these markers are easily identifiable in this instance. The citations MSHA issues, and the regulatory interpretations the Secretary advances in support of those citations before the Commission and reviewing courts, are recognized as the Secretary's authoritative position on the matter at hand. *See Martin*, 499 U.S. at 152–53; *RAG Cumberland Res. LP v. FMSHRC,* 272 F.3d 590, 596 n.9 (D.C. Cir. 2001) (quoting *Martin* and extending its rationale to Commission proceedings); *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

Similarly, there is no question that interpreting MSHA standards, such as section 57.11051(a), and particularly ones as complex as sections 57.5001 and 57.5005, implicates the Secretary's expertise. "[R]esolving genuine regulatory ambiguities often 'entail[s] the exercise of judgment grounded in policy concerns.'" *Kisor*, 139 S. Ct. at 2413 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994)); *see also id*. at 2448, 2449 (Kavanaugh, J., concurring) ("some cases involve regulations that employ broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.' Those kinds of terms afford agencies broad policy discretion, and courts allow an agency to reasonably exercise its discretion to choose among the options allowed by the text of the rule.").

Courts and the Commission have held similarly with respect to the Secretary's interpretation of Mine Act standards. "[D]eveloping rules and enforcing them endows the Secretary [of Labor] with the 'historical familiarity and policymaking expertise . . . .'" *Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996) (quoting *Martin*, 499 U.S. at 152); *see, e.g., Asarco, Inc.*, 19 FMSHRC 1097, 1031-36 (June 1997) (ALJ) (concluding "that MSHA's single-shift sampling enforcement strategy is consistent with the language in [30 C.F.R. § 57.5001(a)] and is a reasonable means for determining and preventing excessive exposure to airborne contaminants in underground metal and nonmetal mines consistent with the intent of the regulation."), *rev. vacated*, 20 FMSHRC 1001 (Sept. 1998).

The third of the "markers" enumerated by *Kisor* is whether the Secretary's interpretation reflects her "fair and considered judgment." When there is reason to suspect the Secretary's interpretation does not reflect her fair and considered judgment, deference is inappropriate. *Drilling & Blasting Sys., Inc.*, 36 FMSHRC 190, 194 (Feb. 2016) (citing *Christopher v. SmithKline Beechum Corp.*, 567 U.S. 142, 155 (2012)).

Here, the Secretary is interpreting the phrase "maintained in safe, travelable condition" found in section 57.11051(a) in large part by advancing interpretations of the other two standards she relies upon, sections 57.5001 and 57.5005. S. Br. at 2-3, 21-29. In connection with those interpretations, the Secretary points to record evidence she believes supports those interpretations.

The first of her interpretations is that the terms of section 57.5001 establishing the maximum level for each recognized contaminant in an underground metal-nonmetal mine apply to escapeways. Her position is that when a contaminant exceeds that level in an escapeway, as occurred in this case with NO_2, it follows that the escapeway was *not* in safe, travelable condition. S. Br. 2, 21-24.

The second Secretarial interpretation is that if a mine operator, in anticipation of the possibility of one or more airborne contaminants in an escapeway in excess of the level permitted by section 57.5001, provides miners with personal protective equipment, such as the Ocencos, the operator must demonstrate that *all* of the terms of the section 57.5005 exception to section 57.5001, including its prerequisites, are met before the Secretary will consider the escapeway safe for miners wearing such equipment. The Secretary argues that Cargill was unable to do so here with respect to its secondary escapeway when it contained levels of NO_2 exceeding 5 ppm. S. Br. at 3, 24-29.

I will address the two interpretations and supporting evidence in order.

a. Applying Section 57.5001 to Escapeways

As outlined earlier, the Secretary arrived at an exposure limit for NO_2 of 5 ppm by looking to section 57.5001's incorporation by reference of the 1973 ACGIH and its designation of NO_2 as a "C" contaminant. The Secretary also relies heavily upon the report of her expert witness, MSHA toxicologist Dr. Michelle Schaper.

As I previously concluded, taking the workplace exposure limits of section 57.5001 into account in determining whether an area of the mine is in safe condition for use as a designated escape route falls within the outer boundaries of a reasonable interpretation of section 57.11051(a). At the same time, however, there are ample indications that the regulatory interpretations the Secretary relies upon in citing Cargill in this case do *not* reflect her "fair and considered judgment."

For instance, the Secretary makes little effort to reconcile the language in sections 57.5001 and 57.5005, suggesting that the regulations were designed to apply only during such times miners are engaged in work-related activities, as opposed to when they are engaged in the very different activity of attempting to evacuate a mine due to what may be extremely hazardous conditions. The Secretary argues that, under Cargill's emergency escape protocols, miners should be viewed as engaged in "work," because, in the worst case, there can be up to an hour's worth of activities involved in their exit from the mine, including miner vehicular travel away from the safety of the shaft to pick up miners working in areas of the mine where there is not easy access to a vehicle. S. Br. at 26.

At hearing, it was established by witnesses from both parties that miners driving out the secondary escapeway would generally exit the mine in such circumstances in 15 to 30 minutes, depending on how far north or inby they were working when an evacuation order was issued. Tr. 60. The Secretary expended a great deal of time eliciting testimony regarding emergency circumstances in which some miners could take longer to exit the mine.

Most of the record evidence, however, supports the notion that the duration of miner exposure to NO_2 in the secondary would be limited. First, miners are trained to utilize the primary escapeway, with its fresh, intake air, whenever possible. Tr. 716. When access to the primary is limited by fire or other emergency, miners are trained to use the secondary only as necessary, and to cross over to the primary once the miner clears the hazard. Tr. 246-47, 347-48, 738. Via the mine's Femco intercom system, management notifies miners of the location of the fire, and the miners then know that they can reenter the fresh air of the primary once they are outby the fire. Tr. 738, 761. Miners also have ready access to radio communications to contact supervisors. Tr. 75. Accordingly, the time spent in the secondary escapeway is generally minimized.

Second, a miner's exposure to the NO_2 front would be brief because miners travel by vehicle underground. Trucks and UTVs are the primary modes of transportation in the Cleveland Mine. Tr. 703. Cargill has established a speed limit of 15 mph on mine roadways, but Inspector Morris admitted that miners are "going to fly" (i.e. exceed the posted speed limit) out of the mine in the case of an emergency. Tr. 204. Thus, it would take just 24 minutes to drive the full six miles of the mine traveling at the posted speed limit, and if the front of excessive NO_2 was only one and one-half miles in length that the inspector estimated that it was the morning of July 28, would miners have been exposed to it for no more than six minutes. Tr. 205, 745.

Third, even if events forced miners to exit the mine by foot, the duration of the exposure would still be limited. The NO_2 generated from blasting generally travels as a front of gas that slowly moves its way through the return airway. MSHA's ventilation study indicates that the NO_2 front moves at approximately 1 to 1.5 miles per hour. A person walking at a normal pace—much less the brisk pace one would take amid an emergency—would move 2 to 3 times as quickly as the NO_2 front and would eventually pass through the front to lower NO_2 concentrations.

Accordingly, I am not persuaded by the Secretary's argument for giving weight to the longer time frame for exit from the mine, as it largely relies upon a worst-case scenario chain of circumstances. I am not at all certain that is an appropriate consideration with respect to the Cleveland Mine, given the record evidence that the secondary escapeway has only been used once in the mine's history. Tr. 716.

In any event, Subpart J of Part 57 includes an extensive standard governing underground metal-nonmetal mine "[e]scape and evacuation plans." *See* 30 C.F.R. § 57.11053 ("A specific escape and evacuation plan and revisions thereof suitable to the conditions and mining system of the mine and showing assigned responsibilities of all key personnel in the event of an emergency shall be developed by the operator and set out in written form.").

Significantly, section 57.11053 mandates that the plan "be reviewed jointly by the operator and the Secretary or his authorized representative at least once every six months from the date of the last review." *Id*. No evidence was submitted that Cargill failed to comply with any part of this standard, or that its escape plan or any revision thereof had ever been rejected for any reason, including that it could require too much on the part of miners in emergency evacuation circumstances. In fact, the inspector testified that he had reviewed Cargill's mine evacuation and emergency response plan each of the twenty times he had inspected the mine, including as part of the inspection during which the instant citation was issued. Tr. 94, 98-100, 102-03.

Moreover, after I made a pre-hearing request for specific information, Cargill's response included a copy of a portion of the "Regular Inspection Information" form the inspector had completed in connection with his inspection. It showed he had reviewed, among other things, the mine's "Escape and evacuation plan" pursuant to section 57.11053, as well as "Self-rescuer maintenance" pursuant to 30 C.F.R. § 57.15030. Cargill's counsel letter dated Dec. 2, 2022, Ex. A (Underground Emergency Action Plan) & Ex. C (MSHA "Regular Inspection Form" from "Event No. 6897526").[21]

Then, at hearing it was confirmed that Inspector Morris inspected both the W65 and Ocenco self-rescue devices at the Cleveland Mine, as well as the mine's evacuation maps, which indicate, among other things, where the caches of the latter were stored throughout the mine. Tr. 68, 95-96, 98-99. His inspection also included a review of the mine's emergency response plan. Tr. 99-100.[22]

In addition, the Secretary makes no serious attempt to reconcile the textual scope of sections 57.5001 and 57.5005 with the circumstances in which miners would be exiting the mine in an emergency. The Secretary does little more than point to Cargill's largely undisputed policy of enforcing miner compliance with section 57.5001, which is to withdraw them from areas with NO_2 levels above 5 ppm. Tr. 75, 140, 148-49, 321-22, 892. In the case of the return airway,

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[21] MSHA requires that an inspector "review the parts of the [Electronic Mine File ("]EMF[")] pertinent to the type of inspection." In this instance, that includes the "Ventilation Plan[,] . . . Emergency Response Plans[,] and Evacuation Plans[.]" MSHA Handbook No. PH19-IV/V-1, Mine Safety and Health Enforcement General Inspection Procedures Handbook (Dec. 2019), at 2-2. In addition, MSHA imposes upon inspectors visual examination requirements for self-rescue devices such as the W65's, as well a requirement that "approximately 25 percent of []SCSRs[] worn or carried by miners, stored on the section, or stored on section transportation" be inspected, as well as "a representative number, but not less than 10 percent, of SCSCRs stored in outby areas . . . ." *Id*. at 3-6.

[22] In a similar vein, the Secretary suggests that Cargill miners, during a hypothetical escape, may fail to follow their training in exiting the mine during an emergency. *See* S. Br. at 27. But, at other times during the hearing, the Secretary states that miners will follow their training in exiting the mine. *Id*. at 19, 23 & n.34, 28. Again, the underground metal-nonmetal standards include a regulation that addresses "[m]ine emergency and self-rescuer training" (30 C.F.R. § 57.18028), Cargill was not cited for violating any training standard, and the inspector confirmed that, at the time of his inspection, Cargill had complied with the training standards, including with respect to evacuation procedures. Tr. 105-07, 164, 182, 209.

miners do so by exiting through the closest of the doors that are spaced 1000 feet apart. Tr. 801-03. From this, the Secretary argues that "[c]ommon sense dictates that if miners must withdraw for their safety from 5+ppm [of NO_2] under normal working cond[i]tions within approximately 1,000 feet, then it is not safe to travel through 5+ppm NO_2 for miles in an evacuation." S. Br. at 22-23.

In doing so, the Secretary fails to consider that the mine conditions prompting miners to evacuate a mine may constitute hazards, both respirable and otherwise, that are *qualitatively worse* than NO_2 above the 5-ppm threshold. For instance, Gary Hartsog described a mine fire as akin to "a dumpster fire. You don't know what's in that smoke. It can be any of a number of very nasty things besides CO." Tr. 1110-11. Jason Wood explained that mine fires can release other chemicals, depending on whether an equipment or belt fire is involved. Tr. 788.

This failure on the part of the Secretary runs counter to the 1979 preamble, in which MSHA acknowledged that "due to the nature of the mining environment, the respirable atmosphere is capable of harmful fluctuations, particularly in emergency situations." Moreover, in this case, because it concerns the prospective use of a secondary escapeway, it would involve an escape route of last resort.

As for the evidence provided by the Secretary's expert Dr. Schaper, she also in large part relies on the 5-ppm "ceiling limit" derived from section 57.5001. Her report reached three conclusions. Ex. S-8, at 7.

First, she states that "the MSHA PEL of 5 ppm . . . is a 'Ceiling Limit' which signifies that it should never have been exceeded, particularly when there was a potential for miner exposure." *Id*. (Conclusion A); Tr. 534 ("That's the law . . . . Don't go above five."), 561. I give little weight to this conclusion, because, like the Secretary's theory of violation, it wholly relies upon section 57.5001, the terms of which have not been established to be susceptible to a construction that apply them to not just actual exposure, but to also reach "potential . . . exposure" in an emergency evacuation.

Moreover, her conclusion reads as a legal conclusion. Legal conclusions are not within the province of an expert witness in a Commission proceeding. *See, e.g., Jones Brothers, Inc.*, 43 FMSHRC 98, 99 (Jan. 2021) (ALJ) (granting Secretary's motion to exclude expert witness testimony on the ground that "[e]xpert testimony that consists of legal conclusions" is not admissible under Rule 702 [of the Federal Rules of Evidence] because it "cannot properly assist the trier of fact" in "understand[ing] the evidence" or "determin[ing] a fact in issue." (quoting *Burkhart v. WMATA*, 112 F.3d 1207, 1212 (D.C. Cir. 1997), *aff'd on other grounds*, 64 F.4th 289 (6th Cir. 2023)).[23]

[23] The Commission has recognized that the Federal Rules of Evidence may serve as guidance in Commission proceedings. *See Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 n.8 (Dec. 2000); *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *see e.g., Jim Walter Res. Inc.*, 37 FMSHRC 1958, 1965-66 (Sept. 2015).

The expert's report also relies upon information that MSHA had obtained of instances in which NO_2 in the secondary escapeway had exceeded 13 ppm. Ex. S-8, at 7 (Conclusion B); Tr. 505-08. None of those higher levels of NO_2, however, were included in the citation MSHA issued, because, according to the inspector, the agency requires actual observation of the violative condition being cited. Tr. 385.[24] In any event, the presence of such levels of NO_2 does not establish whether an area of a mine is rendered unsafe or untravellable for use as an escapeway at the much lower level of 5 ppm.

The expert's third conclusion is more significant. Specifically, she concluded that:

> There are serious health-related effects of inhalation exposure to NO_2, at and above its Ceiling Limit of 5 ppm. These effects involve the respiratory tract and include irritation at one or more levels of the respiratory tract. With such irritation, the escape efforts of miners could be delayed or hindered. In addition, significant exposure to NO_2 in the presence of other predisposing or aggravating factors may result in serious adverse health effects, even if a miner escapes.

Ex. S-8, at 7 (Conclusion C). Again, the conclusion, by referring to the "Ceiling Limit of 5 ppm" is derived from section 57.5001. But in this instance, it is referenced in the context of the expert providing her opinion on the impact that exposure to NO_2 measured above 5 ppm may have upon a miner seeking to escape the mine environment. Tr. 498-505. The Secretary is certainly free to, independent of the terms of section 57.5001, use relevant evidence to establish that NO_2 above 5 ppm renders an escapeway unsafe for miners to travel through.

At this point, I think it is worth addressing that MSHA has recognized in the past that it needs to update its contaminant exposure limits. In the 1989 Proposed Rules, MSHA characterized materials such as the 1973 TLV Booklet as outdated and stated that the requirements of section 101(a)(6)(A) of the Mine Act, 30 U.SC. § 811(a)(6)(A), and the Mine Act's legislative history obligates the agency to develop and adopt updated standards. 54 Fed. Reg. at 35,762 (quoting S. Rep. No. 95-181, at 21, *Legis. Hist.* at 609).

Consequently, MSHA proposed updated contaminant exposure standards for both coal and metal-nonmetal underground mines, stating:

> OSHA's recent rulemaking established a nitrogen dioxide (NO_2) [permissible exposure limit (']PEL[')] for general industry of 1 ppm as a 15-minute STEL based upon studies indicating an increased airway resistance cause by exposure to NO_2 . NIOSH also has a [Recommended Exposure Limit] of 1 ppm as a 15-minute STEL. ACGIH recommends a 3-ppm TWA and a 5-ppm STEL for NO_2. . . . . [MSHA] is continuing to review medical studies and other documentation to determine whether a PEL of 1 ppm as a 15-minute STEL or a 3-ppm TWA with a 5-ppm STEL would be appropriate for mining. MSHA has included both exposure limits for comment in this rulemaking. Comments should

[24] At hearing, Cargill's Jason Wood conceded that it was likely that there were miners inby one or more times those higher readings were recorded. Tr. 780-81.

address the health basis for either limit and the feasibility and cost of meeting the limit in mining.

Id. at 35,769.[25] For metal-nonmetal mines, new contaminant exposure limits were to be part of a proposed new 30 C.F.R. § 58.100. *Id*. at 35,807-16. As with proposed section 58.300 and many other contaminant exposure limits dating from ACGIH TLV's established in the early 1970's, an updated exposure limit for NO_2 was never adopted, not only for metal-nonmetal mines, but also for coal mines as well.

Along those same lines, in the report supporting her conclusions, Ms. Schaper details what has transpired since 1973 regarding NO_2 exposure limits. Significantly, the ACGIH long ago removed the "C" or "ceiling" designation of 5 ppm for NO_2. In its place, between 1981 and 2011 ACGIH substituted a "TLV-TWA" for NO_2 of 3 ppm. "TWA" stands for "Time Weighted Average," and is based on measuring exposure "over a conventional 8-hour workday, 40-hour workweek." Then, in 2012 the ACGIH adopted a TLV-TWA of 0.2 ppm for NO_2. Ex. S-8, at 5-6; Tr. 510-11, 513.[26]

Thus, there have been numerous changes with respect to the workplace exposure limits for NO_2 since 1973, while section 57.5001 has remained unchanged in referring to the 1973 ACGIH. This includes the organization no longer recognizing the ceiling limit with respect to NO_2 exposure, though apart from that, the changes reflect a general lowering of the workplace exposure limits for NO_2 over the past 50 years. *See* S. Br. at 15; Tr. 510.

At hearing, Ms. Schaper stressed that, with respect to adverse effects from NO_2 exposure, the level of NO_2 is a much more important consideration than the duration of the exposure. Tr. 534. In fact, she testified that it made little difference whether the miners were walking out of the mine or exiting via vehicles traveling 15 mph. Tr. 562.

Nevertheless, in her report and at hearing, Ms. Schaper applied the most recent ACGIH exposure recommendations to the circumstances presented by Cargill's secondary escapeway when it was cited by the inspector. Specifically, she applied those recommendations to a scenario in which miners had to escape by going through NO_2 at levels above 5 ppm that extended through 2/3rds of a mile in the escapeway. She concluded that "[u]nder these circumstances, it is probable that an escaping miner would exceed a 15-minute TWA or 1 ppm, let alone 0.6 ppm." Ex. S-8, at 6-7; Tr. 513-15.

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[25] The reference to the ACGIH was to its 1989-90 TLV's. 54 Fed. Reg. at 35,762. According to the expert's report, the ACGIH has since lowered the TLV figure for NO_2 further. Ex. S-8, at 5-6.

[26] Between 1981and 2011, the ACGIH also recognized a "TLV-STEL" of 5 ppm for NO_2. "STEL" stands for "Short-Term Exposure Limit" and refers to a "15-minute TWA, not to be exceeded at any time during workday." Starting in 2012, ACGIH ceased publishing a STEL for NO_2. Ex. S-8, at 6.

I find that the weight to be accorded Dr. Schaper's conclusions should be discounted, for several reasons. First, if this latest ACGIH guidance was adopted and enforced by MSHA as the exposure limit for NO_2, instead of the presently applicable 5-ppm ceiling limit derived from section 57.5001, it is doubtful that *any* part of the Cargill mine would comply with the standard at any time while the mine was operating. MSHA's own witnesses admitted that NO_2 would be almost always present in a mine, such as the Cleveland Mine, at 1 or 2 ppm, if not more, particularly in a return airway. Tr. 134 (inspector noting that it would not be hard to get close to 5 ppm with mobile equipment operating near the returns), 264-65, 326, 353, 443 (MSHA ventilation specialist Wurl), 516, 532, 1047. In fact, the inspector had been measuring NO_2 between 2 and 4 ppm earlier throughout his inspection. Tr. 158-59.[27]

As for the 5-ppm limit on potential NO_2 exposure that MSHA seeks to enforce as the standard to be applied with respect to escapeways, during her testimony, Ms. Schaper justified it on the basis that that is the point at which adverse effects from actual NO_2 exposure may "start" to be seen, with "the first thing that will happen is[] that the gas may affect your eyes, nose and throat." Tr. 498-99. She described these as "sensory-type irritation[s]" which include tearing of the eyes. Tr. 498.

On cross-examination, however, Dr. Schaper conceded that NIOSH, in determining the IDLH value for NO_2, cited 30 ppm as the lowest concentration of NO_2 at which adverse health effects have been observed. Tr. 545. That observation was made after people were exposed to 30 ppm of NO_2 for 70 minutes. Ex. R-2, at 19. The same study reported no adverse effects when the subjects were exposed to 20 ppm NO_2 for two hours. *Id*. There is no evidence in the record beyond Dr. Schaper's testimony that exposure to 5 ppm NO_2, over the comparatively shorter period of a mine evacuation would impair a miner's escape or cause a miner serious health.

Moreover, Schaper made clear that the effects she described would only result with miners who were *not* wearing respiratory protective equipment. Tr. 563. The inspector as well testified that his concern with the NO_2 levels he cited was with respect to the potential exposure to miners *not* wearing appropriate respiratory protective equipment. Tr. 181-82, 209-10, 362.

This raises the second interpretation the Secretary relies upon here, of the section 57.5005 exception to section 57.5001, and whether it reflects fair and considered judgment on her part.

b. The Treatment of OCENCO's Under Section 57.5005

Having argued that section 57.5001 should be considered in determining whether the level of an individual contaminant, such as NO_2, present in an escapeway renders that escapeway potentially unsafe for use under section 57.11051(a), the Secretary had no choice but to take the further step of addressing the terms of the section 57.5005 exception to section 57.5001. Of course, if section 57.5001 is not a persuasive interpretive source for section 57.11051(a), section 57.5005 is immaterial. Nevertheless, I will address the Secretary's arguments on section

[27] It also would be nonsensical to look to the newer, lower recommendations to establish the safety of an area of a mine for its use as an escapeway, while the higher 5 ppm-ceiling limit would remain the standard for other uses of it.

57.5005, as they shed more light on whether her interpretations of the regulations at issue reflect her "fair and considered judgment."

The Secretary maintains that the record evidence establishes that any hypothetical use by Cargill miners of the secondary escapeway in an emergency evacuation does not fall under the terms of the section 57.5005 exception. At the time the citation was issued, section 57.5005 provided in pertinent part:

> Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used, its selection, fitting, maintenance, cleaning, training, supervision, and use shall meet the following minimum requirements:
>
> (a) Respirators approved by NIOSH under 42 CFR part 84 which are applicable and suitable for the purpose intended shall be furnished and miners shall use the protective equipment in accordance with training and instruction.

30 C.F.R. § 57.5005 (2022).

The Secretary, correctly, views the prefatory sentences of section 57.5005 as setting forth a "hierarchy of control" measures that a mine operator must take before it can legitimately claim that a section 57.5001 airborne contaminant exposure limit should not be enforced against it. First, the operator must try to prevent the contamination. If that is not possible, the operator must attempt to remove contaminated air by exhaust ventilation, or instead dilute the contaminant such that it no longer exceeds the exposure limit. Only if none of the foregoing measures are sufficient, may a miner don appropriate respiratory protective equipment, for a reasonable amount of time, to protect against concentrations of airborne contaminants exceeding permissible limits. S. Br. at 25; Tr. 609-10; Ex. S-9, at 4 (expert's report).

However, as discussed earlier and as can be seen, section 57.5005, even more so than section 57.5001, is couched throughout in terms of a miner's "work" in a respiratory environment recognized to be potentially harmful. The inspector agreed with the importance of the standard's emphasis on miner "work." Tr. 231.

Under the standard, each graduated step in the "hierarchy of control" measures appears to be a reasonable requirement for an operator to satisfy before permitting an *individual* miner to perform a specific task within an area where it is expected that the miner will be exposed to one or more airborne contaminants covered by section exposure limits derived from section 57.5001.

In contrast, section 57.11051(a) is concerned with *all* miners underground immediately ceasing their respective work assignments and expeditiously exiting the mine.

As with section 57.5001, the Secretary attempts to elide the import of the presence of the term "work" throughout section 57.5005 by arguing that, because there may be circumstances in which some miners may take up to an hour to exit the Cleveland Mine in an emergency, miners' exit from the mine should be viewed as the equivalent of "work." S. Br. at 26. Again, however, the bulk of the record evidence is that most if not all miners would not take nearly that long to exit the mine. The Secretary is relying on a hypothetical worst-case scenario use of a secondary escapeway that has only been used once before.

Moreover, MSHA's Part 57 underground metal and nonmetal regulations, like the corresponding parts of MSHA's regulations that address other types of mines, in large part can be read as differentiating miner "work" from their "travel." Part 57 contains multiple standards expressly applicable to areas where miners "work *or* travel" (emphasis added). *See, e.g.,* 30 C.F.R. §§ 57.2, .3200, .3360, .3430, .4363, .16015; *see also* 30 C.F.R. §§ 57.5037(a)(1), .5040 ("work, travel, or congregate"). If all "travel" by miners was necessarily considered to fall within their "work," there would be no need for so many of MSHA's health and safety standards to state its respective scope in the adjunctive form.

In addition, MSHA has continually approved the Cargill mine evacuation plan pursuant to a process designed to provide a continuous means to address any particular concern the agency may have with how escape and evacuation is effectuated at the Cleveland Mine. With respect to self-rescuer devices to be used at a mine in the event of an emergency, MSHA requires that, in each underground metal-nonmetal underground mine, "[a] 1-hour self-rescue device approved by MSHA and NIOSH under 42 CFR Part 84 shall be made available by the operator to all personnel underground. Each operator shall maintain self-rescue devices in good condition." 30 C.F.R. § 57.15030.

The record reflects that the inspection that resulted in the citation included inspection of self-rescue devices at the Cleveland Mine. While the completed inspection form indicates the inspector's approval of the devices (Cargill's counsel letter dated Dec. 2, 2022, Ex. C), the issuance of the citation implies that the approval was limited to the W65 self-rescue devices that Cargill, as required by 30 C.F.R. § 57.15031(a), provides each person who goes underground. Tr. 75-76.

As detailed at the hearing, the Ocencos—the supplementary respiratory protection device that Cargill stored at various locations underground—were viewed differently by MSHA. Cargill, which trains each of its miners to locate and take an Ocenco device when evacuating the mine, explained to the inspector that it considered the devices sufficient protection should miners encounter excessive levels of NO_2 or other harmful gases while evacuating the mine in an emergency. Tr. 702-03.

MSHA, however, eventually took the position with Cargill that such devices would *not* be considered in MSHA's evaluation of whether Cargill's designated secondary escapeway could serve in an emergency as a safe, travelable escape route under 57.11051(a). The inspector

testified that MSHA district personnel declined to credit Cargill for any protection that the Ocenco devices may have provided in an emergency, because they feared that miners escaping from the Cleveland Mine would fail to take an Ocenco while exiting the mine or, if they did take one, they would not use it properly. Tr. 228-30.[28]

At hearing, the Secretary attempted to establish a legal and evidentiary basis for MSHA's position, consistent with what the Secretary views as the applicable standard, section 57.5005. The Secretary's primary witness on the issue was her expert, MSHA Industrial Hygienist Christina D. Stalnaker. Ex. S-9. According to Ms. Stalnaker, Ocencos have been approved by MSHA and NIOSH as "escape-only" respirators. Tr. 619, 627; Ex. S-9, at 7.

The parties differ on what type of respiratory protection equipment is required while evacuating a mine through a return where excessive levels of NO_2 result from the blasting, such as it does at the Cleveland Mine. Cargill submits that the Ocencos, even as escape-only respirators, are more than sufficient under the circumstances. C. Br. at 15-16. However, the Secretary again points to section 57.5005. S. Br. at 25-26; Ex. S-9, at 4-5. Specifically, the Secretary relies upon the standard's language that "[w]henever respiratory protective equipment is used, it[] . . . shall meet the following minimum requirements: (a) Respirators approved by NIOSH under 42 CFR part 84 which are applicable and suitable for the purpose intended shall be furnished and miners shall use the protective equipment in accordance with training and instruction." 30 C.F.R. § 57.5005. S. Br. at 26; Tr. 615; Ex. S-9, at 5.

According to the Secretary and her expert, approval by NIOSH of escape-only respirators, like the Ocenco, is limited to "a single function: to allow a person working in a normally safe environment sufficient time to escape from suddenly occurring respiratory hazards." Tr. 621; Ex. S-9, at 7 (quoting NIOSH Respirator Selection Logic (DHHS (NIOSH) Publication No. 2005-100)). The Secretary takes the position that, because the respiratory hazard posed by the slug of NO_2 that moves through Cargill's designated escapeway does so on an almost daily basis, it cannot qualify as "suddenly occurring." S. Br. at 26; Tr. 620-21, 629.

Also, according to the Secretary, because the elevated levels of NO_2 are a predictable and routine result of Cargill's blasting schedule, escape-only respirators are not NIOSH-approved in this instance. The Secretary, through her expert, instead considers any exit by the Cargill miners through the secondary escapeway to hold out the potential for "entry" into the NO_2 front that will often be moving through the return, and that therefore a higher quality respirator is required, per NIOSH. Tr. 615, 620, 628-29.; Ex. S-9, at 2 ("entry into a known hazardous atmosphere"), 7, 8 (Ocencos "have not been been approved as respiratory protection for miners *entering* into

[28] A sentence in a draft version of the citation stated that "[m]iners were not equipped with appropriate respiratory protection approved for NO_2 while working in and/or travelling through the affected areas." Ex. R-1, at 1; Tr. 228-29, 853. This language was not included in the final version of the citation issued to Cargil. Tr. 856; Ex. S-1.

atmospheres" that exceed NO_2 limits."). Respirators approved for "entry" purposes provide a higher level of protection than do the Ocencos. Ex. S-9, at 7.[29]

Even if section 57.5005 with its many references to miner "work" could be reasonably interpreted to apply to use of an escapeway in an emergency, the Secretary and her expert have flatly misapplied the plain language of the NIOSH definition of "escape" that they cite, turning it on its head. Contrary to the Secretary's contention (S. Br. at 26), the "suddenly occurring respiratory hazards" from which Cargill miners would be "escap[ing]" is not the NO_2 front. During the front's daily movement through the return airway, miners located underground have no need to don *any* respiratory equipment when and while it does so. That is, because the front does not impact them, absent the extremely rare circumstance of an incident prompting a need to escape through the secondary escapeway.

Rather, during those times that the front moves through the return, most miners would be conducting their assigned tasks, "in [their] normally safe environment," because the front would have no impact upon them. The only exception would be any miners working or traveling in the return airway when the front approaches. In the case of those miners, evacuation from the mine is not necessary. Instead, as the inspector and other witnesses testified, under Cargill policy and in compliance with section 57.5001, those miners merely withdraw to a safer area of the mine. Tr. 140, 164, 277, 321-22, 689-90.

Plainly, in the context of underground mines, the "suddenly occurring respiratory hazard" to which the NIOSH guidance refers is the hazard which necessitates not just such withdrawal from that area but escape from the mine entirely. Both parties spent considerable time at hearing exploring the circumstances that would necessitate evacuation of the mine through the secondary escapeway. Overwhelmingly the discussion centered on the "respiratory hazards" to miners that may result from a mine fire. In the context of miners escaping from a mine fire, they may have to "enter" into pockets of gases that exceed the recommended limits, be it the NO_2 front resulting from blasting, NO_2 from other sources in the mine, such as diesel-powered equipment, or other contaminant gases produced from mine operations or that result from a mine fire. Tr. 788, 1110-11; Ex. S-7 (identifying and measuring CO, nitric oxide (NO), and NO_2 as contaminant mine gases produced during normal mine operations); *see also* 44 Fed. Reg. at 31,914 ("due to the nature of the mining environment, the respirable atmosphere is capable of harmful fluctuations, particularly in emergency situations.").

Consequently, to the extent that it is even reasonable to look to the language of section 57.5005 in this case, Cargill's planned reliance on the Ocenco respiratory devices is consistent with NIOSH's description of the acceptable use of an escape-only respirator. That the Secretary does not recognize that further indicates that her interpretation of section 57.11051(a) in this instance does not reflect "fair and considered judgment."

[29] Cargill stored its respirators certified for miner "entry" into suspected hazardous atmospheres on the surface. These respirators were used for work in previous years in areas in which hydrogen sulfide was present. Tr. 119-20; 853-54.

c. Whether the Secretary's Interpretations are No More than a Convenient Litigating Position

Under *Kisor*, an additional indication that *Auer* deference to an agency's regulatory interpretation is not appropriate is when the interpretation offered appears to be no more than a "'convenient litigation position.'" 588 U.S. at 579 (quoting *SmithKline Beechum*, 567 U.S. at 155 (2012)). Based on the record evidence, I reach that conclusion regarding the Secretary's interpretations underlying the citation at issue here, particularly with respect to her attempt to establish and apply a 5-ppm limit on NO_2 largely derived from the section 57.5001 ceiling limit. This further supports the conclusion that her interpretations of the involved regulations do not reflect "fair and considered judgment."

There are numerous indications in the record that the Secretary may have decided to interpret the scope of section 57.5001 to include areas of a mine being used for escape purposes only *after* MSHA's inspection of Cargill's secondary escapeway revealed lower levels of NO_2 than MSHA suspected were present in the hours immediately following Cargill's blasting. Former Cargill miner Jedlicka testified regarding the high levels of NO_2 within the post-blast front of NO_2 that he and other miners had observed move through the return, and that he had shared the information with MSHA — "[i]n the 20[-] part range" and as high as 33 ppm. Tr. 270-75, 284, 332-34. He stated that miners were concerned that, in the event of an emergency, they would have to use the return as a secondary escapeway when high levels of NO_2 were moving through it. Tr. 337. It was this information that prompted the out of the ordinary inspection by Morris on the third shift. Tr. 124-25, 385.

It appears that the inspector, based on that information, expected to discover much higher levels of NO_2 than he ended up measuring during that shift. Tr. 31-32, 125-26, 145-46. During his inspection, Morris only measured NO_2 below 10 ppm. Thereafter, it took several days for Morris to finalize the basis for the citation that eventually issued—the presence of NO_2 in excess of 5 ppm in an area of the mine that may have been used as the secondary escapeway in the event of an emergency on the third shift. Tr. 31, 187-88, 227-28, 231, 237-39; Ex. S-1, at 1-2.

At hearing, Inspector Morris testified, on both cross and redirect examination, that he would not expect the 8.2 ppm of NO_2 he measured to impede a miner exiting the miner through the secondary escapeway. Tr. 353-55. He indicated that he nevertheless cited Cargill for the presence of that level of NO_2 in the secondary escapeway at the prompting of his superiors at MSHA. Tr. 229.

Additional record evidence shows that the Secretary was not necessarily concerned about NO_2 in the Cargill secondary escapeway that exceeded 5 ppm, *except* when it was present due to the post-blast NO_2 front that moved through the return air course, in which case the level of NO_2 was often much greater than 5 ppm.

Exhibit S-5a is a printout of NO_2 data for the period between September 1, 2021, and August 5, 2022, taken from Cargill's stationary "D3" sensor in the return air course, that shows each "[h]ourly reading when NO_2 was over 5" ppm at that point in what was then the mine's secondary escapeway. Tr. 61-62; Ex. S-3 (mine map), at 4, S-5a, at 001. Ex. S-5a thus pinpointed

each hour, in the almost entire year preceding the issuance of the present citation, that the level of NO_2 at the sensor location exceeded the 5-ppm limit upon which the issuance of the citation was based. There are well over 2000 hourly readings listed on Exhibit S-5a from the 241 separate calendar days on which readings of NO_2 exceeding 5 ppm were registered.

Many of the entries support what each party acknowledges: blasting would often result in high levels of NO_2 in the area of the mine that was designated as its secondary escapeway, during late night and early morning, the working hours of the third shift. There are numerous entries showing sensor readings that exceeded 15 ppm. Ex. S-5a at 003-008, 010-019, 024, 028, 030-031, 033-034, 038-041, 043-045, 047. The highest reading was 29.8 ppm, which is consistent with miner Jedlicka's testimony regarding at least one reading of 30 ppm being witnessed at the D3 sensor. Tr. 273-74; Ex. S-5a at 038.

Just as important was the length of time that NO_2 would exceed 5 ppm. MSHA's calculation, based on the nights it conducted its post-citation ventilation survey, was that post-blast, NO_2 would exceed 5 ppm for at least 5 to 6 or so consecutive hours. S. Br. at 12, Ex. S-7, at 1. That estimate may be on the low side of the time range for the post-blast NO_2 front to move through the return, given that Cargill was blasting those days in only one unit, instead of two as it had done previously. *Id*. Ex S-5a shows many days in which NO_2 gradually rose above 5 ppm, peaked, and then gradually fell back down to 5 ppm over the course of 7 to 8 hours, roughly equivalent to the shift length at the mine. The inspector confirmed this was the normal time period for the NO_2 front to move out of the mine. Tr. 158.

Post-blast NO_2 exceeding and staying higher than 5 ppm for such a length of time is generally consistent with the factual basis for the MSHA's termination of the citation. Tr. 198. Once Cargill adjusted its miners' schedules and assignments so that, post-blast, miners on the third shift would not be inby—and thus not have a potential need to use the secondary escapeway while the NO_2 front moved through it—MSHA was no longer concerned about the amount of NO_2 moving through the return after a blast. Tr. 720-21.

However, Exhibit S-5a also establishes that NO_2 at levels above 5 ppm were routinely registered by the D3 sensor for much more than 8 hours per day. Fully 46% of the 241 days in which the sensor registered readings of NO_2 above 5 ppm registered such readings for a total time of 10 or more hours a day. Nearly a third of those 241 days had NO_2 readings above 5 ppm for more than 12 total hours. In some instances, the NO_2 remained above 5 ppm consistently throughout those time periods, which may have been on occasions when Cargill blasted the face twice, a few hours apart. Tr. 66-67, 903. However, on several of the recorded days, NO_2 dropped below 5 ppm for a few hours before again climbing slightly above 5 ppm for another few hours.[30]

If, as the Secretary contends, NO_2 at any level above 5 ppm is unsafe, then the return air course was too unsafe to use as an escapeway not only during the hours the post-blast front

[30] Blasts several hours apart should be reflected on the sensor readouts as separate instances of NO_2 rising and falling, as the testimony was that the second front would never catch up to the first. Tr. 935. Yet Exhibit S-5a generally does not reflect that.

moves through it, but also at all other times levels of NO_2 therein would exceed 5 ppm. Cargill's escapeways were subject to potential use at all times of day and night while miners were underground, not just in the immediate post-blast time-period. And yet, MSHA, in issuing the citation and terminating it upon Cargill's repositioning and rescheduling of its third-shift miners underground, was concerned about NO_2 exceeding 5 ppm *only* during the post-blast period. Similarly, MSHA's post-citation ventilation survey was limited to those hours as well. Tr. 395, 463; Ex. S-7.

In my view, evidence that NO_2 could exceed 5 ppm in the Cargill return at all times of day—because of, for instance, NO_2 being produced by underground equipment running—with no sign that MSHA considered it to be violative of section 57.11051(a) if it was not resulting from blasting, indicates that the Secretary does not actually consider that *any* level of NO_2 in excess of 5 ppm renders an area of a mine unsafe for purposes of potential escapeway use. Rather, she clearly was concerned *only* with the significantly higher levels of NO_2 that directly result from blasting at the Cleveland Mine, reports of which had led to Morris's inspection during the third shift.

One indication that an agency has adopted a statutory or regulatory interpretation merely as "a convenient litigation position" is where the evidence offered in support of the interpretation demonstrates no link between the interpretation and actual administrative practice. *See Alaniz v. OPM*, 728 F.2d 1460, 1465 (Fed. Cir. 1984); *see also Church of Scientology of California v. IRS*, 792 F.2 153, 165 (D.C. Cir. 1986) (Silberman, J., concurring); *Revak* v. *Nat'l Mines Corp.*, 808 F.2d 996, 1003 (3rd Cir. 1986). That appears to be the case regarding the Secretary's use of the 5-ppm ceiling limit on NO_2, derived from section 57.5001, to interpret the "safe, travelable condition" clause of section 57.110510(a), as well as her misinterpretation of the NIOSH description of "escape-only" respirators.

Considering all the foregoing, I cannot conclude that the Secretary's interpretations of the regulations that underly the issuance of the citation to Cargill reflect her "fair and considered judgment."

6. The Secretary's Interpretations Lacks the Necessary Power to Persuade

Where deference to an agency's interpretation under *Auer* is not warranted, courts instead apply what is known as *Skidmore* deference. *See Christopher*, 567 U.S. at 159. This is "a measure of deference proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Id.* (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)).

Even giving weight to the Secretary's interpretations of her regulations, as the legislative history of the Mine Act requires, I am not persuaded by her argument that any level of NO_2 above 5 ppm renders an escapeway unsafe or untravellable under section 57.110151(a). The foregoing problems with the Secretary's interpretations of sections 57.5001 and 57.5005 are too extensive to ignore. *Cf. Samaritan Health Serv. v. Bowen*, 811 F.2d 1524, 1528 (D.C. Cir. 1987) (refusing to stretch a term "[g]iven the internal logic of the [agency]'s own regulations").

I recognize that, throughout the hearing, the Secretary elicited testimony that called into question Cargill's commitment to complying with the requirements of the section 57.5001 exposure limits, particularly with respect to NO_2 in the return airway at the Cleveland Mine. *See* S. Br. at 29. Topics addressed were instances in which miners were working in the return when they realized that NO_2 had risen to above 5 ppm (Tr. 271, 334); supervisors who examined for NO_2 and other gases in the return at the start of a shift and considered that a sufficient measure, regardless of how much later in the shift miners were scheduled to enter the return to perform assigned tasks (Tr. 293); supervisors who were not readily available to take air readings during a shift (Tr. 282, 310); supervisors and miners who appeared to ignore indications of high NO_2 in the return (278, 280); the low number and inconvenient locations of hand-held monitors available underground to measure atmospheric gases (Tr. 276); that two different handheld monitors could indicate significantly different levels of NO_2 (Tr. 303); and how unreliable Cargill's placarding system was in warning miners to not enter the return when it contained excessive contaminants. Tr. 271, 288, 770.

This information would be relevant in the context of a citation charging a systemic violation of section 57.5001. However, it is of little assistance to deciding the primary issue in this case: determining the amount and concentration of NO_2 that renders an escapeway unsafe or untravellable under section 57.11051(a).

I am similarly unpersuaded by the Secretary's critiques of Cargill's mine evacuation procedures. S. Br. at 27-29. She argues that Cargill should not rely on the Ocenco respiratory devices for escape purposes, because the devices do not provide adequate protection in the event miners need to exit the mine through dangerous gases, such as NO_2. S. Br. at 27-28. Given that NIOSH, and thus MSHA, have certified the Ocenco SCSRs as an escape device (Tr. 609), this is little more than a collateral attack by the Secretary on her own regulation.

The Secretary also maintains that if miners had to evacuate in an emergency, there is insufficient evidence that they would avail themselves of the Ocencos. S. Br. at 27-29. While I appreciate the Secretary's concern, given the testimony of miner Jedlicka (Tr. 285),[31] again there are other standards available to the Secretary. Such standards are not only much more directly applicable than section 57.11051(a) is to the Secretary's concerns, but those standards also provide MSHA ample opportunity and leeway for input into how a mine addresses the issue of emergency evacuations. *See, e.g.,* 30 C.F.R. §§ 57.11053 ("Escape and evacuation plan"), 57.15030 ("Self-rescuer maintenance"), and 57.18028 ("Mine emergency and self-rescuer training").

There is another regulation that also went largely unaddressed throughout the case, to my surprise, even though it is quite pertinent to MSHA's regulation of ventilation and escapeways in underground metal and nonmetal mines. As mentioned previously, the companion to section 57.11051(a) provides in pertinent part that underground metal and nonmetal mines "have two

[31] The Secretary also argues that even if, during escape, a miner retrieved an Ocenco from a cache, there is insufficient evidence that the miner would properly use the device. S. Br. at 27. However, her own witness, Jedlicka, testified that he was certain he could properly don an Ocenco while escaping the mine. Tr. 284.

separate properly maintained escapeways to the surface which are so positioned that damage to one shall not lessen the effectiveness of the other . . . ." 30 C.F.R. § 57.11050(a).

Throughout the hearing, witnesses of both parties were questioned on whether Cargill's post-citation establishment of the mine's secondary escapeway in intake air posed less danger to miners underground than retaining it in the return air course. That is because the relocated secondary escapeway is now significantly closer to the primary escapeway, thus raising the issue of whether the two escapeways are no longer "positioned that damage to one shall not lessen the effectiveness of the other," as section 57.11050(a) requires.

The greatest concern was a mine fire impacting either of the escapeways in the redesigned Cleveland Mine. Almost all of the witnesses were posed questions from both sides on a wide variety of miner escape scenarios that could result in the case of a mine fire there.

Steven Horne testified that relocating the secondary was viewed skeptically throughout Cargill, because of the greater likelihood that a fire could contaminate both escapeways at once. Tr. 850; Ex. R-6, at 6. His greatest concern was at the bottom of the service intake air shaft, an area where equipment is susceptible to catching fire. Tr. 882-83. Gary Hartsog, Cargill's expert on mine ventilation and mine emergencies, confirmed that a fire in the primary could immediately smoke up both escapeways as the intakes would be in common, unseparated air. Tr. 1069-70, 1108-09.

According to Jason Wood, an MSHA inspector, Mr. Britton, questioned the relocating of the secondary escapeway, charactering it as "odd." Wood also relayed the opinion of several miners that the new arrangement held out the potential for each escapeway swiftly and easily contaminating the other. Tr. 726, 728.

Inspector Morris also feared that a fire in the primary would immediately compromise the secondary, finding it not to be the "optimal set up." Tr. 257. Bradley Wurl, who led MSHA's post-citation ventilation survey, conceded that there was a greater likelihood of the two escapeways sharing common issues, such as smoke from a fire, once the secondary was located to run parallel to the primary, whereas before there were no such issues. Tr. 465-67.

The Secretary did not offer any evidence on how this major ventilation change at the Cleveland Mine was approved by MSHA; according to Cargill, it was approved with no feedback from the agency. Tr. 945-46. Inspector Morris, not yet having returned to the mine by the time of the hearing, also was unfamiliar with the relocation of the secondary escapeway. Tr. 176.

In light of all of the foregoing and in the terms of *Skidmore*, with respect to the Secretary's interpretations of her standards underlying the citation in this case, I conclude that

there was insufficient thoroughness of consideration and validity of reasoning. Consequently, I am not persuaded by those interpretations and do not defer to them.[32]

Rejecting the Secretary's interpretations of sections 57.5001 and 57.5005 in their theoretical application to the facts in this case results in leaving the state of the law unresolved with respect to the level at which NO_2 renders an escapeway unsafe for its intended use, assuming respiratory protective equipment is not going to be used. However, sufficient evidence on a credible alternative source for an NO_2 exposure limit was introduced at hearing.

Cargill introduced evidence regarding the 2020 Emergency Response Planning Guidelines ("ERPG's"), published by the American Industrial Hygiene Association ("AIHA").[33] AIHA publishes its ERPG's "to provide guideline levels for once-in-a-lifetime, short-term (typically 1-hour) exposures to airborne concentrations of acutely toxic, high-priority chemicals." Ex. R-4, at 3. AIHA reports 15 ppm NO_2 as the "maximum airborne concentration below which nearly all individuals could be exposed for up to 1 hour without experiencing or developing irreversible or other serious health effects or symptoms that could impair an individual's ability to take protective action." *Id*. at 4, 28. Steven Horne testified that, based on this figure, miners would not be at risk evacuating the mine in the NO_2 environment observed by Inspector Morris. Tr. 878; Ex. R-6, at 7 n.5.

Given the short-term exposure to NO_2 anticipated in the case of a mine emergency, this value seems more pertinent than a TLV in this case. Moreover, its reasonableness is supported by evidence in the case as well as other relevant sources. For instance, MSHA's IDLH value for NO_2 is 20. Ex. R-2, at 158. MSHA considers IDLH values as limits which protect against threats of "acute eye exposure that would prevent escape from a hazardous atmosphere." MSHA IV Program Policy Manual 36 (Release IV-25 Nov. 2011).

[32] Even if I were to find the Secretary's interpretation of section 57.11051(a) persuasive in this case, which I do not, I would not assess a civil penalty against Cargill. The Commission recognizes that the "fair notice doctrine," which has been incorporated into administrative law, prevents validating the application of an MSHA regulation that fails to give fair warning of the conduct it prohibits or requires. *Hecla, Ltd.*, 36 FMSHRC 2116, 2115 (Aug. 2016). Here, the Secretary relies upon heretofore unknown readings or applications of sections 57.5001, 57.5005, and section 57.11051(a), few if any of which would be obvious to a person familiar with the mining industry and those regulations. *See id*. (citing *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995)); *see also Kisor*, 588 U.S. at 579 (rejecting "defer[rence] to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties.") (citing *Long Island Care at Home Ltd v. Coke*, 551 U.S. 158, 170 (2007)).

[33] Dr. Schaper recognized at hearing that the AIHA is "an organization worthy of professional respect." Tr. 579.

In addition, miner Jedlicka testified to be able to smell NO_2 at around 12 ppm. Tr. 284. During an emergency evacuation, this could serve as a signal for a miner to don an Ocenco for protection before NO_2 reaches the 15-ppm concentration in an escapeway.

IV. ORDER

It is **ORDERED** that Citation No. 9669536 is **VACATED** and that the above-captioned cases are **DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2024

CACTUS CANYON QUARRIES, INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent,	CONTEST PROCEEDINGS Docket No. CENT 2023-0045 Citation No. 9678437; 10/25/2022 Docket No. CENT 2023-0046 Citation No. 9678438; 10/25/2022 Docket No. CENT 2023-0047 Citation No. 9678439; 10/25/2022 Docket No. CENT 2023-0048 Citation No. 9678440; 10/25/2022 Docket No. CENT 2023-0049 Citation No. 9678441; 10/25/2022 Docket No. CENT 2023-0050 Citation No. 9678442; 10/25/2022 Docket No. CENT 2023-0051 Citation No. 9678443; 10/25/2022 Docket No. CENT 2023-0052 Citation No. 9678444; 10/26/2022 Docket No. CENT 2023-0053 Citation No. 9678445; 10/26/2022 Docket No. CENT 2023-0054 Citation No. 9678446; 10/26/2022
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CACTUS CANYON QUARRIES, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2023-0089 A.C. No. 000568312 Mine: Fairland Plant & Qys Mine ID: 41-00009

DECISION AND ORDER

Appearances: Felix R. Marquez, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Secretary of Labor;

Jack "Andy" Carson, Esq., Marble Falls, Texas, for Cactus Canyon Quarries, Inc.

Witnesses: Neal Davis, Mine Safety and Health Inspector, for the Secretary of Labor;

Ty Fisher, Dallas Field Office Supervisor, for the Secretary of Labor;

Andy Carson, for Cactus Canyon Quarries, Inc.

Before: Judge Thomas P. McCarthy

These cases are before the undersigned upon ten notices of contest filed pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act"), and a Petition for the Assessment of Civil Penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The cases involve ten citations issued to Cactus Canyon Quarries, Inc. ("Cactus Canyon" or "Contestant") by the Secretary of Labor on October 25 and 26, 2022. The Secretary issued the citations for violations found at sites regulated as Mine ID 41-00009 and known as the Fairland Plant and Quarries.

I. CACTUS CANYON EXHIBITS

CC Exhibit 1: Dallas Field Manager Jurisdiction Order, Nov. 2, 2022;

CC Exhibit 2: Supplement to MSHA Form 7000-51, Mine Operator Identification Request [30 CFR §56.1000], Aug. 22, 2022;

CC Exhibit 3: Cactus Canyon's Notice of Permanent Closure of Operation, 41-00009 Fairland Plant, Aug. 11, 2022;

CC Exhibit 4: Requests Pursuant to Subdivision B.8 of the MSHA and OSHA Memorandum of Interagency Agreement [Mar. 29, 1979], Sept. 21, 2022;

CC Exhibit 5: San Antonio Field Manager Response to Form 7000-51, Aug. 31, 2022;

CC Exhibit 6: Dallas District Manager Jurisdiction Order, Dec. 9, 2022;

CC Exhibit 7: Jurisdictional Correspondence with Dallas District Manager, Nov. 16, 2022;

CC Exhibit 8: Jurisdictional Correspondence with Dallas District Manager Confirming Prior Conversations and Meetings with the Dallas District Manager, the Dallas Field Manager, Authorized Representative (AR) Davis, and AR Stanley, Dec. 21, 2022;

CC Exhibit 9: Jurisdictional Order by the Dallas District Manager, Nov. 14, 2022;

CC Exhibit 10: Series of Google Earth Views, Historic Aerial Photography, and Contemporary Photography of the Fairland Plant;

CC Exhibit 11: Freedom of Information Act Request by Contestant, and Response by Dallas District Manager;

CC Exhibit 12: [Attorney Carson's] Declaration - Mine Act Facts;

CC Exhibit 13: [Attorney Carson's] Declaration - History of Fairland Plant;

CC Exhibit 14: Andy Carson Affidavit - Clendennen Ranch Mine;

CC Exhibit 15: Clendennen Ranch Mine Pictures, Bates No. 1 – 13;

CC Exhibit 16: Clendennen Ranch Mine Pictures, Bates No. 14 – 23;

CC Exhibit 17: Clendennen Ranch Mine Pictures, Bates No. 28 – 32;

CC Exhibit 18: Workplace Exams, Bates No. 33 – 38;

CC Exhibit 19: Clendennen Ranch Mine Pictures, Bates No. 39 – 47;

CC Exhibit 20: Clendennen Ranch Mine Pictures, Bates No. 48 – 59;

CC Exhibit 21: Fairland Plant Pictures, Bates No. 60 – 68;

CC Exhibit 22: Fairland Plant Pictures, Bates No. 69 – 74;

CC Exhibit 23: Neal Davis' Resume, Bates No. 75 – 84;

CC Exhibit 24: Jurisdiction Questions from Ty Fisher;

CC Exhibit 25: Pre-Inspection Notice;

CC Exhibit 26: Google Earth Views of Stalite Mine [*Carolina Stalite* 734 F.2 1547];

CC Exhibit 27: Stalite Mine Brochure, North Carolina;

CC Exhibit 28: Google Earth Views of Scotia Bag Plant, [*Cranesville Aggregate* 878 F.3d 25];

CC Exhibit 29: Google Earth Views of Thomas Hill Energy Center, [*Associated Electric Co-op,* 172 F.3d 1078];

CC Exhibit 30: Secretary's Discovery Responses;

CC Exhibit 31: Texas State Law Governing Extraction of Aggregates;

CC Exhibit 32: Contest Petition;

CC Exhibit A: Mine Act, 30 U.S.C. §801, 802, 803;

CC Exhibit B: 30 CFR §56.2;

CC Exhibit C: 30 CFR §46.2;

CC Exhibit D: MSHA and OSHA Memorandum, Mar. 29, 1979;

CC Exhibit E: MSHA Program Policy Manual I.3;

CC Exhibit F: Part 56 for Each of the Ten Citations at Issue and Program Policy Manual Provisions;

CC Exhibit G: Part 56 and Program Policy Manual Provisions;

CC Exhibit H: 30 U.S.C. §813, §814, and §815;

CC Exhibit I: *Herman v. Associated Elec. Coop.* 172 F.3d 1078 (8th Cir. 1999);

CC Exhibit J: *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984);

CC Exhibit K: *Cranesville Aggregate Companies,* 878 F3d 25 (2nd Cir. 2017);

CC Exhibit L: *Maxxim Rebuild Company, LLC v. FMSHRC*, 848 F.3d 737(6th Cir. 2017);

CC Exhibit M: *United Energy Services,* 35 F.3d 971 (4th Cir. 1994);

CC Exhibit N: *KC Transport*, 44 FMSHRC 211 (Apr. 2022);

CC Exhibit O: *The Creator's Stone*, 43 FMSHRC 241, 2021 WL 2895255, ALJ Moran, Apr. 2021 CENT 2020-0067;

CC Exhibit P: *Drillex, Inc.* 16 FMSHRC 2391 (Dec. 1994);

II. SECRETARY OF LABOR'S EXHIBITS

Sec'y Exhibit 1: Violation History Report for Mine ID 41-00009 (DOL00001-000002) Certified Violation History Report;

Sec'y Exhibit 2: Number CENT 2023-0089; and Contestant's Notice of Contest and Supplement (DOL Bates Numbers 00003–00016);

Sec'y Exhibit 3: MSHA Inspection Summary Report; and Regular Inspection Information, Closeout Conference (DOL Bates Number 00017–00019; and 00023);

Sec'y Exhibit 4: Legal Identity Report for Mine ID 41-00009 (DOL Bates Numbers 00020–00022);

Sec'y Exhibit 5: MSHA Inspection Report Checklist (DOL Bates Number 00024);

Sec'y Exhibit 6: Citation 9678437 and Citation/Order Documentation (DOL Bates Numbers 00025–00026);

Sec'y Exhibit 7: Citation 9678438 and Citation/Order Documentation (DOL Bates Numbers 00027– 00029);

Sec'y Exhibit 8: Citation 9678439 and Citation/Order Documentation (DOL Bates Numbers 00030–00033);

Sec'y Exhibit 9: Citation 9678440 and Citation/Order Documentation (DOL Bates Numbers 00034–00035);

Sec'y Exhibit 10: Citation 9678441 and Citation/Order Documentation (DOL Bates Numbers 00036–00038);

Sec'y Exhibit 11: Citation 9678442 and Citation/Order Documentation (DOL Bates Numbers 00039–00040);

Sec'y Exhibit 12: Citation 9678443 and Citation/Order Documentation (DOL Bates Numbers 00041–00042);

Sec'y Exhibit 13: Citation 9678444 and Citation/Order Documentation (DOL Bates Numbers 00043–00044);

Sec'y Exhibit 14: Citation 9678445 and Citation/Order Documentation (DOL Bates Numbers 00047–00048);

Sec'y Exhibit 15: Citation 9678446 and Citation/Order Documentation (DOL Bates Numbers 00045–00046);

Sec'y Exhibit 16: Daily Cover Sheets and General Field Notes (DOL Bates Numbers 00049–00067);

Sec'y Exhibit 17: MSHA Inspection 6890833 Photographs and Videos (DOL Bates Numbers 00068–00099; and 00100, 00101;

Sec'y Exhibit 18: Memorandum of Understanding between OSHA and MSHA; and MSHA Program Policy Manual–Vol. 1;

Sec'y Exhibit 19: MSHA/OSHA Jurisdiction Review.

III. BACKGROUND AND PROCEDURAL HISTORY

These cases come before this tribunal as part of a broader jurisdictional dispute between Cactus Canyon Quarries, Inc., and the Secretary of Labor. Jack "Andy" Carson is the President of Cactus Canyon, which runs a surface plant located at 7232 CR 120, Marble Falls, Burnet County, Texas ("Fairland Plant"), as well as a number of small, intermittent stone quarries or pits.[1] Cactus Canyon produces specialty, structural, dimensional stone for use primarily in the creation of terrazzo stone, which is "used in the industrial and construction industries for flooring, countertops, [and] walling in the building industry." Tr. at 485-86, 488.

Cactus Canyon asserts that the Fairland Plant is currently regulated by MSHA, while its quarries are regulated by OSHA as "borrow pits" under an interagency memorandum. Cactus Canyon desires for this jurisdictional arrangement to be reversed, and claims that MSHA should regulate its pits as intermittent stone mines and that OSHA should regulate the Fairland Plant, since no extraction or "milling" occurs at that alleged "finishing facility." The Secretary, in turn, asserts that the Fairland Plant is a surface mine under Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). An active surface "mine" is subject to unannounced inspections by the Mine Safety and Health Administration ("MSHA") on at least a semi-annual basis. 30 U.S.C. §§ 813(a), 820(e). Cactus Canyon contends that the Fairland Plant has ceased all mining operations and should no longer be classified as a "mine" or be subject to inspection under the Act.

On August 11, 2022, Cactus Canyon notified MSHA of the voluntary commencement of closure of operations at the Fairland Plant and Quarries (Mine ID 41-00009). CC Ex. 3. On or

[1] Mr. Carson is an attorney licensed in Texas and has appealed fines issued by MSHA on multiple occasions. In separate proceedings that commenced last year, Mr. Carson first raised the issue of whether the Fairland Plant was engaged in "milling" and thus subject to jurisdiction under the Act. On May 24, 2023, Administrative Law Judge Richard W. Manning issued an order and opinion finding that the Fairland Plant was a surface mine and upheld $375 worth of MSHA civil penalties.

about that same date, Cactus Canyon filed ten "Mine ID requests" and asked MSHA to issue mine identification numbers for ten "intermittent dimension stone mines," including the Clendennen Ranch Mine. At the time of the April 2023 hearing, only two of Cactus Canyon's pits – Clendennen Ranch and Franklin North – were active, while the others had been temporarily idled. Tr. 64-65; CC Ex. 2. At the time of the hearing, only the Clendennen Ranch location was actively operational. *Id*. The Secretary alleges that mining activity had not ceased at that mine site. *See* Sec'y Exs. 1, 4. On September 21, 2022, Cactus Canyon requested that MSHA and OSHA conduct a jurisdictional review of its regulated facilities. CC Ex. 4.

On October 25 and 26, 2022, an authorized representative of the Secretary, inspector Neal Davis, conducted an EO1 regular inspection of the Fairland Plant and Clendennen Ranch Mine. Tr. 190-191, 283. Davis was accompanied by another MSHA representative, Dallas field office supervisor Ty Fisher, and a trainee named Curt Burnett. Tr. 45. Davis met with Carson and Cactus Canyon's office manager, Cactus Canyon's plant operator Bernardo, and Cactus Canyon's lead foreman Jesse. Tr. 45-47, 194. During a two-day inspection, Davis observed and documented ten alleged violations of the Act and issued ten citations to Cactus Canyon under Mine ID 41-00009. Sec'y Exs. 6-15; 30 U.S.C. §§ 801, *et seq*. Fisher accompanied Davis as part of a jurisdictional review requested by Mr. Carson. Tr. 51-53; s*ee* Exs. 5-9. According to Cactus Canyon, the MSHA representatives proceeded with the inspection even after they were advised that the Fairland Plant and Quarries had been permanently closed. *See* Not. of Contest at 2. Days later, Cactus Canyon filed a notice of contest in another proceeding seeking to compel MSHA to issue the previously requested mine identification numbers. Judge Paez dismissed that case on summary decision because the notice of contest failed to state a claim over which the Commission had jurisdiction. *See* Order of Dismissal, *Cactus Canyon Quarries, Inc*., 45 FMSHRC 384, slip op., No. CENT 2023-0068 (Feb. 14, 2023) (ALJ).

On November 22, 2022, Cactus Canyon filed 10 notices of contest and a request for an expedited hearing on each citation issued during MSHA's October 2022 inspections. On December 12, 2022, the Secretary filed her Answer to these contests, as well as a Response in Opposition to Contestant's Motion to Expedite. Cactus Canyon filed additional Motions to Consider the Expedited Request on December 20, 2022, and January 12 and 18, 2023. The Secretary filed an Amended Response in Opposition to the Request to Expedite on January 20, 2023.

The ten contest dockets and related civil penalty proceeding were assigned to the undersigned on January 13, 2023. On January 20, 2023, the undersigned held a conference call with the parties to discuss Cactus Canyon's then-pending request to expedite, which was denied in a written order on January 23, 2023, but a hearing was set in short order for early April 2023.

On January 24, 2023, Cactus Canyon filed a Motion for Summary Decision, requesting that five of these contest dockets be dismissed for lack of jurisdiction. That motion sought partial summary decision, and requested that Citations Nos. 9678440, 9678441, 9678442, 9678443 and 9678446 – all issued October 25-26, 2022 at Clendennen Ranch – be vacated because that intermittent mine has not been issued a valid mine identification number and because the Secretary had not met her burden to prove that such mine is part of the Fairland Plant and Quarries (Mine ID 41-00009). On February 3, 2023, the Secretary filed a Response in Opposition to the Contestant's Motion.

On February 7, 2023, Cactus Canyon filed 1) a motion to consolidate, 2) a proposed order granting the motion to consolidate, and 3) a reply to the Secretary's February 3, 2023 Response.

On March 2, 2023, the Secretary filed a supplement to its Response in Opposition to the Motion for Summary Decision. The undersigned denied Cactus Canyon's motion in a written order dated March 7, 2023, holding that

> For the reasons set forth by Judge Paez in his February 14 order, this Court lacks jurisdiction to review Contestant's arguments involving MSHA's failure to issue mine identification numbers separate from Mine ID 41-00009. *See* Order of Dismissal, *Cactus Canyon Quarries, Inc*., 45 FMSHRC 384, slip op., No. CENT 2023-0068 (February 14, 2023) (ALJ). In addition, the parties' filings indicate that genuine issues of material fact exist as to whether the Fairland Plant and Quarries [were] 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. Cactus Canyon has therefore failed to make a "proper showing[] of the lack of a genuine, triable issue of material fact." *Lakeview Rock*, 33 FMSHRC at 2987. Accordingly, summary decision is inappropriate at this time. *The parties may advance their jurisdictional claims at hearing.* (italics added).

On March 7, 2023, Cactus Canyon filed a Supplemental Reply and Ruling Request. On March 14, 2023, Cactus Canyon filed a second Motion for Summary Decision. On March 16, 2023, Cactus Canyon filed a Motion to Reconsider the undersigned's denial of the first Motion for Summary Decision. Thereafter, a prehearing conference was held on March 30, 2023, during which Cactus Canyon's pending motions were denied. The parties were afforded a final opportunity to submit any pre-hearing stipulations to narrow the scope of testimony at the hearing. Ultimately, no stipulations of any kind were reached.

A hearing was held in the above matters on April 4-6, 2023. The undersigned heard testimony from Carson and MSHA representatives Davis and Fisher and admitted into evidence numerous documentary exhibits.

For the reasons that follow, the undersigned first concludes that MSHA possesses jurisdiction over both the Fairland Plant and Clendennen Ranch pit. Furthermore, the undersigned Orders that Citation Nos. 9678438, 9678439, 9678441, and 9678444 be **VACATED**, that Citation Nos. 9678437, 9678440, 9678442, 9678443, and 9678446 be **AFFIRMED**, and that Citation No. 9678445 be **AFFIRMED, AS MODIFIED**.

IV. JURISDICTION

a. Summary of Testimony Concerning Jurisdiction

On October 25 and 26, 2022, MSHA inspector Davis conducted an E01 inspection of Cactus Canyon's Fairland Plant and Clendennen Ranch "mine" or "pit" in Burnet County, Texas. Also on those dates, MSHA field supervisor Fisher conducted a parallel inspection in furtherance

of a jurisdictional review requested by Cactus Canyon. *See* CC Exs. 4-9. Mr. Fisher inspected the Clendennen Ranch site to ensure that it qualified as a "mine" rather than as a "borrow pit" under the Act. Tr. 64. Fisher took photographs during this inspection, which were compiled and submitted within a jurisdictional report. Tr. 44, 48; Sec'y Ex. 19. In part because of Fisher's investigation, MSHA ultimately affirmed its past exercise of jurisdiction and concluded that the Fairland Plant and quarries constitute an integrated "mine" facility subject to regular inspections authorized by the Act. *Id*.

Mr. Carson provided testimony in support of Cactus Canyon's position that MSHA's jurisdiction does not extend to the Fairland Plant. Carson testified about the history of Cactus Canyon's operations at the Fairland Plant. Tr. 626. At the Fairland Plant, Cactus Canyon prepares processed dimensional stone to be used in terrazzo stone flooring. Tr. 557. Terrazzo floors are installed in a variety of settings, but most of the stone processed is used for flooring in schools and airports. Tr. 557. Cactus Canyon does not sell its processed stone chips directly to these customers, but rather distributes its product indirectly through a terrazzo stone contractor or distributor. Tr. 723-24. Carson describes the market for terrazzo stone chips as a "very narrow niche." Tr. 556. Terrazzo stone chips are sold in a variety of different sizes, ranging from "zero, one, two, three, and five." Tr. 556, 562. The Fairland Plant uses crushers and screens for sizing rock to produce three primary sizes of stone for terrazzo flooring: three-eighths, one-eighth, and one-sixteenth [of an inch]. Tr. 562-64.

Cactus Canyon receives partially processed dimensional stone from Mexico by rail and from within the state of Texas. Tr. 558. Occasionally, Cactus Canyon obtained dimensional stone from other states, including Maryland and Georgia. Tr. 738. Carson estimates that approximately one percent of his current sales derive from dimensional stone extracted from the Clendennen Ranch site. Tr. 592. However, 10 to 15 percent of its sales relate to dimensional stone extracted from one of its leased pits. Ex. 13. Historically, around 75 percent of the dimensional stone extracted from the Fairland Quarries has been sold to customers outside of the terrazzo stone industry. Tr. 594-595. However, that market has steadily decreased over time. *Id*.

Dimensional stone arrives at the Fairland Plant from various locations for the purpose of being resized to produce and sell terrazzo stone chips. Tr. 558. At hearing, Cactus Canyon maintains stockpiles of dolomitic marble, granite, and basalt. Tr. 555-556. Cactus Canyon offers as many as "35 or 36" color varieties of terrazzo chips to its customers. Tr. 555. Cactus Canyon obtains different colors of dimensional stone from domestic or Mexican sources or through extraction at one of its ten intermittent pits. For example, black dimensional stone is basaltic and is obtained from Vulcan Materials. Tr. 555. Yellow stone is either shipped by rail from Mexico or extracted from one of Cactus Canyon's intermittent pits, with approximately one-third of the active stockpiles having been obtained from the latter source. Tr. 610. Cactus Canyon creates its own red terrazzo chips by heating yellow dimensional stone within a specially designed bucket, elevator-fed kiln, which changes the chemical composition of the rock so that any ferric impurities are accentuated and the rock transforms to an unnaturally attainable, red hue. Tr. 573, 576. The bucket elevator is operated approximately "15 or 20" times per year. Tr. 573. Mr. Carson explained that large stockpiles of dimensional stone are needed to ensure consistency in color, and that he maintains many different colors of dimensional stone to account for changing trends in customer

color preferences. Tr. 557. For example, although gray stone was the most desirable at the time of the hearing, cream stone was in vogue a decade ago. *Id.*

Mr. Fisher provided extensive testimony about Cactus Canyon's operations at the Fairland Plant and Clendennen Ranch site. He described the chronology of processing dimensional stone extracted from Clendennen Ranch and transported to the Fairland Plant, as follows:

> If we start at the process where it begins at the quarry, say the Clendennen pit which is 3.1 miles away from the Fairland plant and quarries, there's an air track drill that has an air compressor that is bolted on behind it that would drill holes and then the holes will be loaded with explosives and there would be a blast. Then after that you have an excavator that removes and separates rock. There's also another excavator that has a rock pit or a rock camera that breaks the rock into smaller sizes. There was a couple of bobtail dump trucks that are loaded by also a front end loader that is up to that area and materials also dump through a grizzly, which is a set of rails on an angle and then it separates larger material from smaller material. From there other bobtail trucks haul that material or sometimes through the contractor hauls the material from the quarries to the plant. There's also material that comes in by rail from other mines and from Mexico. It is unloaded either from the bobtail trucks being dumped by the respecting piles that they need to go into per color and the rail cars are also unloaded. What I observed that there's a shelf of probably approximately three to four-inch thick of rock that is excavated. Then it is broken down into smaller sizes. The sizes that usually go, I believe, around six inch, give or take.

Tr. 68-69.

> The dimensional stone is excavated by the excavator. There's one with a bucket on it that pulls it up off the ground after it's broken and blasted. It is broken down by a rock pick on another excavator, which is air percussion or hydraulic percussion, that is driven into the rock that breaks it into smaller pieces. The grizzly is just the steel structure with however wide the operator is requesting and the materials dump, the finer stuff falls through. The larger stuff slides down on the ankle into the pile on the other side [to] be scooped up and put into the pile of dimensional stone that is going to be shipped to the plant.

Tr. 71.

> Then [the dimensional stone] is dumped from the trucks with the corresponding pile per the color of the dimensional stone that it needs to be matched up to. Then the front end loader will be used to buck the pile up which is where he pushes that pile up onto the existing pile to make it match. From there, that rock when it is needed from whichever pile the color needs, and there could be piles there from 20 years ago, that's why some of those quarries do not need a mine ID is because there's still a lot of material and got 20 years' worth still sitting at the place.

Tr. 72.

According to Mr. Fisher,

> You can follow the rock to the plant and it is the plant that has specific color as Mr. Carson showed me at each one of the quarries. That's what he's mining is rock for certain colors. He does a very good job of keeping that consistent. He has to keep large piles on each quarry of the rock. He points those out to us. That's kind of how we know what the material is. And he doesn't want to ship those until he has a large enough quantity to maintain the color that he needs to keep his clientele happy so he can match up and then he ships that large quantity. There's no differentiation because if you have a smaller quantity, the color can change.

Tr. 70.

The dimensional stone that is extracted or imported is brought to the Fairland Plant, "sized," "crushed," and some of it "heated up to change the physical appearance and it is sold in commerce as a product." Tr 63. The Fairland Plant complex consists of multiple buildings, including "one building where they bag the larger bags, there's also an elevator next to it, bucket elevator, that brings product in, dumps it into the hopper to be dumped into bags." Tr. 55. The "Plant" consists of two plant buildings, designated as Plant Number 1 and Plant Number 2. Tr. 56. Both plants contain a series of "jaw crushers" and "gyro crushers." *Id.* After first passing through the jaw crusher,

> the material goes into some gyro crushers. There's two twin gyro crushers on each. And then from the gyro crushers, the material is taken up to a set of screens. And if the material, if it can be a long splinter or something that keeps recirculating back through the gyro crushers until it finally meets correct shape, cubicle shape that Mr. Carson is looking for. Then they continue on up to another set of screens and then, once again, that same process which recirculates until the product gets down to where Mr. Carson can use it.
>
> Then it goes into a bag house on number 1 or bagging area where there's machines where it dumps it in the bags are sealed and sewed up. On plant number 2 there's just a hopper at the end where the material is dumped into a dump truck, which is then the truck hauls it to wherever it needs to go.

Tr. 56.

If Cactus Canyon wishes to upgrade yellow dimensional stone into red terrazzo stone chips, it utilizes an on-site "kiln or cooker or roaster. There is a lot of names for it." Tr. 507. Fisher testified, as follows:

> [The] plant is used to turn yellow dimensional stone to red. I believe Andy said that he only does that for about a week once a year. (". . .") It was my understanding very few people inspect it, but it is in use so we did inspect it. And it feeds the baghouse where the bigger totes are filled with dimensional stone turned into

> terrazzo stone ready for shipment. Some of the totes I was told by Mr. Carson are up to 3,000 pounds. (". . .") [There is] a small hopper where a front end loader can dump material to feed that cooker, kiln, roaster, dryer that we spoke of where the yellow stone has turned red.

Tr. 508.

Following its jurisdictional review, MSHA takes the position that all ten of the intermittent extraction sites that Mr. Carson has previously requested a mine ID for represent one continuous mining operation integrated with the Fairland Plant. Tr. 62 ("The Fairland Plant [and quarries] is not a borrow pit. There is some quarries associated with it that I did not feel that meet the criteria of a borrow pit. They meet the criteria of a mine under the Mine Act"); CC Ex. 4. Mr. Carson agrees that the ten intermittent quarries operated by Cactus Canyon should be regulated by MSHA. Tr. 614 ("Well, I fully agree that they should be under mine safety jurisdiction. MSHA jurisdiction and transported to the mine. Based – the information that last existed and the information gathered from was provided all indications that these are under MSHA's jurisdiction and [MSHA] will regulate accordingly.") However, Cactus Canyon contests MSHA's ongoing exercise of jurisdiction over the Fairland Plant.

b. Findings of Fact and Conclusions of Law

i. The Fairland Plant is a Mine

An initial issue in this case is whether MSHA possessed jurisdiction to enter and inspect the Fairland Plant and Clendennen Ranch site on October 25 and 26, 2022.[2] The Secretary argues that the Fairland Plant is subject to Mine Act jurisdiction because mineral milling takes place at the facility.[3] Cactus Canyon agrees that the Clendennen Ranch Mine is subject to MSHA's jurisdiction, but argues that that the nature of its operations at the Fairland Plant have changed

[2] In its brief, Cactus Canyon asserts, in barebones fashion, that inspector Davis' EO1 inspection and Fisher's inspection in furtherance of the jurisdictional review *requested by Carson* constitute unreasonable searches under the Fourth Amendment to the U.S. Constitution. As a general matter, searches in the exercise of MSHA's statutory mandate have been upheld under the Fourth Amendment. *See e.g., W. Oilfields Supply Co. v. Sec'y of Labor*, 946 F.3d 584, 590-91 (D.C. Cir. 2020) (holding that inspection of truck did not violate Fourth Amendment), cert. denied, 141 S. Ct. 552 (2020); *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317 (June 2016), aff'd, 875 F.3d 279 (6th Cir. 2017); *Donovan v. Dewey*, 452 U.S. 594 (1981). I find no reason to depart from this precedent here. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214-15 (1994) (holding that administrative agencies may pass on constitutional claims that arise from an issue within the agency's statutory grant of authority).

[3] Throughout the history of its operations, Cactus Canyon has acquiesced to MSHA's jurisdiction over the Fairland Plant and, as recently as last year, Cactus Canyon stipulated to MSHA's jurisdiction over the same. *See Cactus Canyon Quarries*, 44 FMSHRC 289 (April 2022) (ALJ). As noted, Cactus Canyon maintains in the instant proceeding that its historical operations have changed to such a degree that the facility should now be inspected by OSHA and not MSHA.

such that the Fairland Plant no longer fits within the definition of "coal or other mine" under Section 3(h)(1) of the Act. 30 U.S.C. § 802(h)(1).[4] For the reasons that follow, the undersigned finds that Cactus Canyon engages in "milling" at the Fairland Plant and that MSHA properly asserted its jurisdiction by inspecting Cactus Canyon's Fairland Plant and Clendennen Ranch Mine and issuing the citations at issue. As explained below, the Fairland Plant "mills" dimensional stone and therefore meets the statutory definition of a "mine" pursuant to 30 U.S.C. § 802(h)(1)(C).

The Mine Act defines "mine" to include, in relevant part, "structures [and] facilities . . . used in . . . the milling of such minerals [extracted in nonliquid form]." 30 U.S.C. § 802(h)(1)(C). The Mine Act defines "coal or other mine" as

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground,
> (B) private ways and roads appurtenant to such area, and
> (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1).

The Mine Act does not define the term "milling". When a statutory term is not expressly defined it should be accorded its commonly understood definition. *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994).[5] The question of whether certain facts satisfy the definition of "milling" for

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[4] The Secretary seeks to establish Mine Act jurisdiction over the Fairland Plant via subsection (C) of section 3(h)(1) of the Act, which, in pertinent part, defines a "coal or other mine" to include "structures, facilities, equipment, machines, [and] tools . . . used in … the milling of … minerals." 30 U.S.C. § 802(h)(1). Much of the Secretary's brief argues that the Fairland Plant is not a "borrow pit" and, as a result, does not qualify for the "borrow pit exception" to Mine Act jurisdiction in the MSHA-OSHA Interagency Agreement. Sec'y Br. 5-10. However, Cactus Canyon has not argued at any point in these proceedings that its intermittent pits qualify as borrow pits under the Act. Why the Secretary spent six pages and the majority of the analysis section of its brief discussing borrow pit-related case law is not clear, especially when Cactus Canyon has conceded that its pits should be regulated by MSHA. Tr. 615, Exs. 8, 14.

[5] In a recently issued, nonprecedential decision, another Commission Judge considered an analogous jurisdictional argument raised by Cactus Canyon. Based on Commission precedent, that judge conducted a detailed textual analysis of the word "milling" and found as follows:

(continued…)

jurisdictional purposes is a question of law. *See, e.g.*, *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 676 (July 2002); *Drillex, Inc.*, 16 FMSHRC at 2395.

Although the Act does not define the term "milling," it does empower the Secretary to determine what constitutes mineral milling.[6] The Secretary first exercised this discretion in 1979 when it promulgated an interagency agreement between MSHA and the Occupational Safety and Health Administration ("OSHA"). MSHA and OSHA published this Agreement with the intention of delineating the agencies' respective responsibilities at mine sites and within certain mine-adjacent areas. *See* 44 Fed. Reg. 22827–28 (Apr. 17, 1979). Courts and tribunals have often referenced and, at times, deferred to this Interagency Agreement in determining the scope of MSHA's jurisdiction. *See e.g.* CC Ex. J; *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552–53 (D.C. Cir. 1984) (finding the list of milling processes in the Agreement to be "relevant" to defining a "mine" for jurisdictional purposes, but "every company whose business brings it into

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[5] (…continued)

When a statutory term is not expressly defined it should be accorded its commonly understood definition. *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). In *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 674-675 (July 2002) the Commission, when analyzing the commonly understood definition of "milling" and related terms, stated the following:

> Within the industry, milling is defined as: "The grinding or crushing of ore. The term *may* include the operation of removing valueless or harmful constituents … while mill is defined as a "mineral treatment plant in which crushing, wet grinding, and further treatment of ore is conducted." . . . [*Dictionary of Mining, Mineral, and Related Terms* 344 (2d ed. 1997) ("*DMMRT*")] (emphasis added); *see also Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914 (Sept. 2001) (using *DMMRT* to determine usage in mining industry). The ordinary meaning of "to mill" is "to crush or grind (ore) in a mill," and the term "a mill" is defined as "a machine for crushing or comminuting some substance." *Webster's Third New Int'l Dictionary (Unabridged)* 1434 (1993); *see also Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1060 (Sept. 2000) ("Commission … look[s] to the ordinary meaning of terms not defined by statute").

See Cactus Canyon Quarries, Inc., 45 FMSHRC 384, No. CENT 2023-0010, 2023 WL 3790763, at *4 (May 24, 2023) (ALJ).

[6] The Commission has explained that "milling" "independently qualifies . . . [an] operation as a 'mine' within the meaning of the Act." *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). Moreover, the legislative history of the Act makes clear Congress intended "that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and . . . that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." 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).

contact with minerals is not to be classified as a mine within the meaning of section 3(h). The jurisdictional line drawn by the statute rests upon the distinction, which is somewhat elusive, to say the least, between milling and preparation, on the one hand, and manufacturing, on the other. Classification as the former carries with it Mine Act coverage; classification as the latter results in Occupational Safety and Health Act regulation."); *see also In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 592 (5th Cir. 2000) (accepting as reasonable MSHA's interpretation of "milling" as laid out in the Interagency Agreement); *Jones Bros., Inc. v. Sec'y of Lab.*, 68 F.4th 289, 296–97 (6th Cir. 2023) (relying on definitions in the Interagency Agreement to distinguish between mines and borrow pits).

Appendix A to the Agreement identifies "milling" as a practice subject to MSHA's regulatory authority. 44 Fed. Reg. at 22829. Appendix A describes "milling" as a process "to effect a separation of the valuable minerals from the gangue constituents of the material mined" as well "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." 44 Fed. Reg. at 22829. Appendix A contains a list of "general definitions of milling processes for which MSHA has authority to regulate." This list includes the terms "crushing," "sizing," and "roasting." "Crushing" is defined as "the process used to reduce the size of mined materials into smaller, relatively coarse particles[,]" and "may be done in one or more stages, usually preparatory for the sequential stage of grinding, when concentration of ore is involved." 44 Fed. Reg. at 22829. "Sizing" is defined as "[t]he process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." 44 Fed. Reg. at 22829-22830. "Roasting" is defined as "the process of applying heat to mineral products to change their physical or chemical qualities for the purpose of improving their amenability to other milling processes." 44 Fed. Reg. at 22830

Only two pieces of documentary evidence introduced by Cactus Canyon speak directly to the classification of the Fairland Plant: 1) a request that MSHA confirm the closure of the Fairland Plant, and 2) an affidavit from Carson stating that the Fairland Plant no longer engages in mining. CC Exs. 3, 14. Both submissions are self-serving, and speak only to the fact that Carson *believes* that the Fairland Plant does not engage in mining, rather than providing any corroborative support for such opinion. Carson also testified that the Fairland Plant does not engage in "mining" or "milling" and stated that:

> separation of minerals from [gangue], or crude or ore. I think we've testified to that. There is no separation at the -- at the Fairland plant. We don't grind it. We're not looking for powder. We don't concentrate it. We don't wash it or dry it. We do -- the definition of roasting isn't -- isn't what we're doing -- we're applying the heat to change their physical or chemical qualities for purposes of proving -- improving their amenability to other milling processes.

Tr. 601.

Despite his vehement opposition to MSHA's attempted exercise of jurisdiction pursuant to the Act, Carson's descriptions of the work done at the Fairland Plant repeatedly referenced

crushing and sizing, two terms used to define "milling" for purposes of MSHA jurisdiction. *See e.g.*, Tr. 81, 19-25. Carson's testimony makes clear that the Fairland Plant engages in both crushing and sizing. Carson described how Cactus Canyon remarkets material it has "crushed" that is too fine in diameter to be used in the terrazzo stone industry. Tr. 574. Further, although Mr. Carson frames the process as not actually constituting "crushing," he describes in detail a process by which stone is circulated through a closed circuit of machines and conveyor belts, screened by size, and, as needed, fed through a pair of "cone crushers" to reduce the stone to the appropriate size for use in terrazzo flooring. Tr. 565-566. He also described how this process is used to produce three sizes of stone as the rock passes a three-eighth screen, retained on a quarter, and a quarter to an eighth and an eighth to a sixteenth. Tr. 563, 570-571 ("The system is to produce as much material as you can that passes -- that's cubicle in shape and passes three-eighths of an inch and is retained on a quarter. That's our number two, or passes the quarter and is retained on one-eighth."). Finally, although Carson submits that the Fairland Plant does not engage in "roasting" when it upgrades yellow marble dimensional stone into red terrazzo stone chips, he nonetheless describes in detail how Cactus Canyon utilizes the strategic application of heat to accentuate the ferric impurities within the yellow marble to create a red-colored stone whose naturally occurring analog is too unstable and unworkable to be used in the production of terrazzo stone chips. Tr. 601-603.

The Secretary has presented extensive testimonial evidence that establishes that Cactus Canyon is engaged in milling. Fisher referenced the evidence collected in support of MSHA's jurisdictional review, and testified that dimensional stone is passed through a conveyer system where "the material goes into some gyro crushers (". . .") [and] keeps recirculating back through the gyro crushers until it finally meets correct shape, cubicle shape that Mr. Carson is looking for. Then they continue on up to another set of screens and then, once again, that same process which recirculates until the product gets down to where Mr. Carson can use it." Tr. 56. Further, Fisher testified that Cactus Canyon uses a "kiln" or "roaster" to upgrade yellow dimensional stone into red terrazzo stone chips "about a week once a year." Tr. 507-508.

The plain language of the Mine Act, especially when contextualized by the MSHA/OSHA Interagency Agreement, supports the conclusion that the Fairland Plant engages in milling and therefore falls squarely within the statutory definition of a mine.

First, I find that Cactus Canyon engages in milling through "crushing" at the Fairland Plant. As described in detail in *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 676 (July 2002), the mining industry's understanding of the terms "milling" and "mill," as well as the common dictionary definitions of "a mill" and "to mill" all contemplate the crushing of material. The Dictionary of Mining, Mineral, and Related Terms defines "crushing" as "size reduction into relatively course particles by stamps, crushers, or rolls." *See* DMMRT 135 (2d ed. 1997). The Interagency Agreement's definition of "crushing," *supra*, is almost identical to that of the DMMRT, but also includes a supplemental statement that "[c]rushing *may* be done in one or more stages, *usually* preparatory for the sequential stage of grinding, when concentration of ore is involved." Through his testimony, Carson asserted that Cactus Canyon's use of a series of industrial crushers for the purpose of reducing the size of its dimensional stone does not actually amount to "crushing" as the term is used in the Interagency Agreement. Tr. 565-66. This assertion does not comport with a good-faith review of Commission case law and the definition of "crushing" found within the Interagency Agreement. Moreover, Cactus Canyon submits that the

supplemental statement found within the Interagency Agreement modifies the definition of "crushing" to *require* that the act be preparatory to the sequential stage of grinding and concentration of ore. CC Br. 28-29. However, the supplemental statement says only that crushing "may" be done in one or more states and "usually" is preparatory for grinding when concentration of ore is involved.

Second, I find that Cactus Canyon engages in milling by "sizing" the material it processes at the Fairland Plant. In *State of AK Dept.of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014), the Commission cited the Interagency Agreement's inclusion of "sizing" in its list of milling processes and found that the operator "clearly engag[ed] in 'milling' under section (h)(1)" where it used a screen to separate material "based on size, with oversized rock separated out entirely." Here, like the operation at issue in *State of AK Dept.of Transp.,* the Fairland Plant screened material to separate that which was correctly sized from that which was still oversized. As opposed to the operation at issue in *State of AK Dept. of Transp*., which screened out oversized rock, wood and trash from the material it was extracting, Cactus Canyon passes its oversized dimensional stone

> into some gyro crushers. There's two twin gyro crushers on each. And then from the gyro crushers, the material is taken up to a set of screens. And if the material, if it can be a long splinter or something that keeps recirculating back through the gyro crushers until it finally meets correct shape, cubicle shape that Mr. Carson is looking for. Then they continue on up to another set of screens and then, once again, that same process which recirculates until the product gets down to where Mr. Carson can use it.

Tr. 56. As discussed *supra*, Cactus Canyon subjected oversized material to further "milling" by screening and crushing the material to produce a product that is less than 3/8 of an inch, but greater than 1/16 of an inch, and "cubicle in shape." Tr. 571. Given that Cactus Canyon crushed and screened rocks of various size to produce a product within prescribed size parameters, I find that it engaged in "sizing" material as that term is defined in the Interagency Agreement and Commission precedent.

Third, I find that Cactus Canyon engages in milling through "roasting" at the Fairland Plant. "Roasting" is "the process of applying heat to mineral products to change their physical or chemical qualities for the purpose of improving their amenability to other milling processes." 44 Fed. Reg. at 22830. Carson testified that Cactus Canyon creates a red variety of terrazzo chip by chemically modifying yellow marble dimensional stone. Tr. 573 ("This kiln in the small bucket elevator that -- he had that right, what you're doing is most yellow rock has fair -- if you have any chemistry background you have ferrous and ferric. It's how much oxygenated the iron is. And by heating it you change the iron component turns redder"; Tr. 575 ("At roughly 1,000 degrees you add -- I think you're either stripping an oxygen or adding an oxygen to an iron molecule."). While Carson attempted to walk back that testimony (Tr. 575-76), the record makes clear that Cactus Canyon would not be able to sell red terrazzo chips without the utilization of heat to chemically modify the iron impurities found within his collection of yellow dimensional stone.

Finally, I find that the processes described above and utilized at the Fairland Plant fit within the Interagency Agreement's description of "milling" and Commission precedent that has found

milling. Cactus Canyon has developed a unique production facility for the primary purpose of reducing dimensional stone to a certain specified size and shape so it can be sold, through a distributor, for use in terrazzo stone flooring. Carson testified that Cactus Canyon removes fines – material smaller than one sixteenth of an inch and thus unusable in terrazzo floors – for use either in the construction of Cactus Canyon's roadways or for sale in a secondary, less profitable market. Tr. 574, 663-664. The separation of valuable terrazzo stone material from fines generated during crushing and sizing is the type of process contemplated by the Interagency Agreement's definition of milling, i.e., a separation of the valuable minerals from materials that cannot be used in terrazzo flooring.[7]

In its brief, Cactus Canyon argues that the Fairland Plant is simply a "stone finishing" facility. CC Brief at 4. However, neither Carson's nor Fisher's testimony support this characterization. Stone finishing is expressly excluded from MSHA's jurisdiction, and is defined by the Agreement as occurring 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. Cactus Canyon offered no evidence that it polishes or engraves stone, and Carson testified that finishing occurs *after* it sells the stone and it is made into terrazzo flooring. Tr. 604 ("we're not further polishing or finishing that product. We're just getting it down to marketable size.").

Cactus Canyon next attempts to distinguish its activities at the Fairland Plant from the umbrella definition of "milling." More specifically, Cactus Canyon cites language referring to the "separation" of "valuable desired constituents" from "undesired contaminants," 44 Fed. Reg. at 22829, and asserts that the Fairland Plant does not engage in this activity. In his testimony, however, Carson described how dimensional stone is washed[8] and sorted when it arrives at the Fairland Plant to remove any contaminants or fragments of stone of an undesirable color. Tr. 568. In any event, as noted, the Commission has rejected the idea that the Mine Act "impose[s] upon the Secretary a technical definition of milling based on the separation of valuable from valueless materials" or that "such separation [i]s critical to the determination that 'milling' took place." *Watkins Eng'rs & Constructors*, 24 FMSHRC at 674. The processes at the Fairland Plant fall within the definitions of crushing and sizing, which are both identified by the Agreement and Commission precedent as processes that constitute milling. This is sufficient to establish MSHA's jurisdiction.

Cactus Canyon further argues that its quarries cannot represent one integrated facility with the Fairland Plant as the quarries are not immediately adjacent to the plant facilities. CC Br. at 12 ("The ALJ and Fisher were unconcerned that there was no physical proximity and operational integration of the quarry and the separation of desired from undesired quarried materials. The

[7] *Cf. Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 675 (July 2002), where the Commission stated that "[i]n enacting the Mine Act, Congress did not impose upon the Secretary a technical definition of milling based on the separation of valuable from valueless materials, nor in the Act's legislative history did it intimate that separation was critical to the determination that 'milling' took place."

[8] Compare Carson's unreliable testimony at Tr. 601 where he stated that Cactus Canyon does not wash the stone.

settled law is to the contrary."). However, the Commission has long recognized that a plain reading of the Mine Act does not require that the milling location be on or adjacent to an extraction area. *See Drillex, Inc.*, 16 FMSHRC at 2395 ("We conclude that Drillex engaged in both mineral extraction and milling, either of which independently qualifies its operation as a 'mine' within the meaning of the Act."). *See Sec'y of Labor v. National Cement Co. of Cal. Inc.*, 573 F.3d 788, 795 (D.C. Cir 2009) (Subsection (C) of the Act's definition of "mine" can reach facilities "not located within an extraction area."); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551-1552 (D.C. Cir. 1984) (The Act "does not require that . . . [structures and facilities used in milling] be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property where such extraction occurs."). The fact that the minerals were not extracted from the site where milling occurs is not relevant to the scope of MSHA's jurisdiction. Section 3(h)(1)'s statutory definition of the term "mine" includes both the "area of land from which minerals are extracted" and the facilities used in the milling of such minerals. The phrase "such minerals" used in section 3(h)(1)(C) refers back to the limitation placed on "minerals" in section 3(h)(1)(A): The term encompasses only those minerals "extracted in nonliquid form or, if in liquid form, . . . extracted with workers underground." Contrary to Cactus Canyon's assertion, *see* Resp. Br. 60, the use of the term "such minerals" cannot reasonably be read to impose a requirement that the minerals be milled in the same area of land where extraction occurred.

Cactus Canyon further points to MSHA standards defining other statutory terms to support its contention that milling must occur in the same area as extraction for the Mine Act to apply. First, Cactus Canyon highlights the definition of "mining operations" in 30 C.F.R. § 46.2, which encompasses certain activities occurring "at a mine." CC Ex. C. The definitions contained in that section, however, apply specifically to Part 46 training standards and are not relevant to the statutory definition of a mine.

Cactus Canyon also cites 30 C.F.R. § 56.2 in support of its argument that MSHA cannot possess jurisdiction over a "mill" unless that "mill" is located on an extraction site. CC Ex. B; CC Br. at 9. 30 C.F.R. § 56.2 states that a "[m]ill includes any ore mill, sampling works, concentrator, and any crushing, grinding, or screening plant used at, and in connection with, an excavation or mine." But this definition does not limit jurisdiction to extraction sites; it does not even limit a "mill" to "an excavation or mine." It defines a mill as "includ[ing]" a number of things used "at, and in connection with, an excavation or mine." The use of "includes" indicates that what follows is illustrative, not exhaustive. *See Am. Coal. Co. v. FMSHRC*, 796 F.3d 18, 25 (D.C. Cir. 2015) (interpreting the Mine Act's definition of "accident" and noting that "[t]he word 'includes' is usually a term of enlargement, and not of limitation") (*citing Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008)). The definition lists some things that are mills, but not all things that are mills—and does not bar determinations that a facility, *e.g.*, "used in . . . milling" is a mine under section 3(h)(1)(C). Additionally, the definition uses the disjunctive "or" in referring to "an excavation *or* mine," 30 C.F.R. § 56.2 (emphasis added), demonstrating that "mines" are not coextensive with excavations. In other words, 30 C.F.R. § 56.2 does not limit mills to extraction sites and acknowledges that the term "mine" covers more than extraction sites alone. Based on the preceding analysis, I find that the lack of an extraction site, on, adjacent to, or appurtenant to the Fairland Plant does not limit or preclude MHSA's exercise of jurisdiction over the facility.

Cactus Canyon has also submitted a number of cases in support of its argument that the Fairland Plant is not a "mine," nor is it adjacent to, appurtenant to, or connected to an area of land where minerals are extracted from their natural deposits. *See* CC Exs. I to P; 30 U.S.C. § 802(h)(1)-(2). Cactus Canyon references most of these cases in its brief. CC Br. at 13, 34.

Cactus Canyon cites the Commission's decision in *KC Transport, Inc.*, 44 FMSHRC 211 (Apr. 2022) as representing a dispositive legal authority, but that decision does not support Cactus Canyon's position here. *See* CC Ex. N. In *KC Transport*, the Commission majority assessed whether a mine transport company's parking and repair facility fit within the statutory definition of a "mine" under the Act and held that such a facility was not included in the statutory definition of a mine unless it was located on or adjacent to the extraction site. *See id.* at 225. However, the Commission explicitly chose not to extend this holding to facilities that engage in "milling." *Id.* ("Our holding is that an independent repair, maintenance, or parking 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 within the meaning of section 3(h) of the Mine Act.") (emphasis added). The Commission made repeated reference to the Sixth Circuit's decision in *Maxxim Rebuild Co., LLC v. FMSHRC*, 848 F.3d 737 (6th Cir. 2017), especially its holding that MSHA's jurisdiction under section 3(h)(1) extends to "locations and equipment that are part of or adjacent to extraction, *milling*, and preparation sites." 848 F.3d at 744 (emphasis added); CC Ex. L; *see* 44 FMSHRC at 225. Thus, the Fairland Plant and similar facilities engaged in milling stand in sharp contrast to the Commission's holding in *KC Transport.*[9]

Next, Cactus Canyon cites the Second Circuit's decision in *Sec'y of Lab. v. Cranesville Aggregate Companies, Inc.*, 878 F.3d 25 (2d Cir. 2017) in support of its position that Cactus Canyon's activities at the Fairland Plant should be overseen by OSHA, rather than MSHA. In that case, the Court stated the following:

> Cranesville also contends that, because the maintenance shop was located in Building 2 of the Bag Plant, in which mining equipment was repaired and stored, the entire Bag Plant is subject to MSHA jurisdiction. The ALJ agreed, concluding that the presence of the maintenance shop, in and of itself, was sufficient to bring the entire Bag Plant under MSHA authority. Both Cranesville and the ALJ give short shrift to the fact that the Secretary is authorized to consider the overall nature and characteristics of the Bag Plant in determining whether the Mine Act applies. Indeed, the Secretary does not dispute that MSHA, and not OSHA, has authority over the maintenance shop. Rather, the Secretary asserts that he is authorized to distinguish between mining and non-mining activities. In fact, none of the alleged OSHA violations dealt with working conditions in the maintenance shop.

[9] Furthermore, on August 1, 2023, the U.S. Court of Appeals for the D.C. Circuit vacated the Commission's decision in *KC Transport*. *See Sec'y of Lab. v. KC Transport, Inc.*, 77 F.4th 1022 (D.C. Cir. 2023). The D.C. Circuit rejected the Commission's interpretation of the statutory definition of a mine because it conflicted with Circuit precedent establishing that the Mine Act "extends beyond structures on extraction sites." *Id.* at 1031.

> The fact that one portion of the Bag Plant may be subject to MSHA does not defeat the reasonableness of the Secretary's determination as to the cited workplace conditions. As explicated above, because the Secretary has authority to distinguish between mining and non-mining activities for the purposes of enforcement, when the Secretary reasonably applies a functional analysis, the Secretary's determination as to which act governs is entitled to substantial deference.

878 F.3d at 35–36 (2d Cir. 2017) (internal citations omitted); CC Ex. K.

At the hearing, Mr. Carson opined that the *Cranesville* case "holds that if the bagging, even though [the Bag Plant] is located on the same facility, it came under OSHA jurisdiction, not mine safety because it was different and distinct, geographically and functionally distinct, from the milling operation which is another facility on this picture. It's another building." Tr. 608. Carson thus appears to be under the impression that *Cranesville* established a bright line rule for evaluating the delimitations of MSHA's jurisdiction at a facility with operations facially similar to Cactus Canyon's operations.

The undersigned disagrees with this interpretation. The *Cranesville* Court clearly held that the Mine Act does not "unambiguously speak to the issue of what is and is not included in mining operations," and thus deferred to the Secretary's reasonable interpretation that Cranesville's bag plant was subject to OSHA's jurisdiction, while the remainder of Cranesville's operations were subject to MSHA jurisdiction.[10] *Cranesville*, 878 F.3d at 34; *see* CC Ex. 28. The holding in *Cranesville* thus runs contrary to Cactus Canyon's position because the Secretary's interpretation that the Fairland Plant's operations are subject to MSHA's jurisdiction is similarly reasonable. *Id.* In any event, the Secretary's jurisdiction over Cactus Canyon's bag plant is not at issue in the

[10] Carson also suggested that the Fourth Circuit's holding in *United Energy Servs., Inc. v. Fed. Mine Safety & Health Admin.*, 35 F.3d 971, 977 (4th Cir. 1994) supports his jurisdiction-related arguments. CC Ex. M. In that case, the Court held that

> Section 4(b)(1) of the OSH Act provides that the "working conditions of employees" are not subject to its provisions if another federal agency has "exercise[d][its] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). We have interpreted "working conditions," as that term is used in section 4(b)(1), to mean "the environmental area in which an employee customarily goes about his daily tasks." *Southern Ry. v. Occupational Safety & Health Review Comm'n,* 539 F.2d 335, 339 (4th Cir.), *cert. denied,* 429 U.S. 999 (1976). Because MSHA has prescribed regulations addressing the area on mine property in which United Energy's employees work, MSHA has preempted OSHA's jurisdiction.

Carson's reliance on this case is perplexing, as it represents an instance where MSHA preempted OSHA's jurisdiction through the exercise of its regulatory authority.

instant case, and the undersigned need not consider MSHA's past exercise of jurisdiction over that facility here.[11]

Having fully considered Cactus Canyon's arguments to the contrary, I find that the Secretary has met her burden to establish MSHA's jurisdiction over the Fairland Plant and Quarries. For the foregoing reasons, the undersigned concludes that "milling" occurred at the Fairland Plant, and further finds that the Fairland Plant's operations engage in "crushing", "sizing", and "roasting." The undersigned further concludes that the Fairland Plant is a "mine" under the Mine Act. *See* 30 U.S.C. § 802(h)(1). For the reasons set forth below, the undersigned also finds that the products produced at the Fairland Plant affect commerce and, as such, are subject to regulation by MSHA pursuant to the Mine Act.

ii. The Products of the Fairland Plant Affect Commerce

Section 4 of the Mine Act states that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. Accordingly, for MSHA to possess the requisite jurisdiction to inspect the Fairland Plant, it must be established not only that the Fairland Plant was a "coal or other mine" under the Act, but also that the products of the Fairland Plant enter commerce or the operation or products of the Fairland Plant affect commerce. The Secretary contends that the products produced at the Fairland Plant affect interstate commerce. Sec'y Br. 3. Cactus Canyon argues that, although its products are sold "across North America, and occasionally the Middle East and Far East," because the dimensional stone delivered to and processed at the Fairland Plant has already entered commerce, the facility cannot be subject to Mine Act jurisdiction. CC Ex. 14; CC Br. 3.

[11] Another Commission Administrative Law Judge has found that MSHA's exercise of jurisdiction over Cactus Canyon's bag plant is proper, finding that

> Carson argues that the citations were issued in areas that have "no relationship in time, in function, or in location to any 'Working Place' or 'Mill.'" However, both the Mine Act and Interagency Agreement state that the Secretary "shall give due consideration to the convenience of administration resulting from the delegation to on Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." Here, the bagging and maintenance structures where the citations were issued were at the same physical establishment as the crushing plants and screens that were used for milling, i.e., the Fairland Plant. The Fairland Plant is located on one integrated piece of property.

Cactus Canyon Quarries, Inc., 45 FMSHRC 384, No. CENT 2023-0010, 2023 WL 3790763, at *8, n. 25 (May 24, 2023) (ALJ).

The requirements of the Mine Act apply to every mine "the products of which enter commerce, or the operations or products of which affect commerce."[12] 30 U.S.C. § 803. The Mine Act defines "commerce" to include trade "between a place in a State and any place outside thereof." 30 U.S.C. § 802(b). The Commission has recognized that "[b]ecause Congress, in the Mine Act, intended to exercise the full reach of its authority under the Commerce Clause, the Secretary has a minimal burden to show that . . . [a mine's] operations or products affect interstate commerce." *Jerry Ike Harless Towing, Inc. and Harless Inc.*, 16 FMSHRC 683 (Apr. 1994); *State of AK Dept.of Transp.*, 36 FMSHRC 2642, 2645 (Oct. 2014). Section 3(b) of the Mine Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof[.]" 30 U.S.C. § 802(b).

I find that the Fairland Plant's products affect "commerce" under the Act. Cactus Canyon purchases dimensional stone from multiple sources, including Mexico and throughout the United States, crushes and sizes that stone, and sells it "across North America and occasionally to the Middle East and Far East" to be made into terrazzo flooring. CC Ex. 14; Tr. 737. When testifying concerning the process of fielding and fulfilling customer orders, Carson stated that "we have everybody email us what it is they want." Tr. 738. In response to the undersigned's inquiry, Carson testified that some of the customers who email orders come from various states throughout the United States. Tr. 739. Thus, Cactus Canyon's terrazzo chips affect commerce, and Cactus Canyon is subject to the provisions of the Mine Act.

Cactus Canyon's argument that the Fairland Plant cannot be subject to Mine Act jurisdiction because the dimensional stone has already entered commerce is without merit. No provision in the Mine Act limits the statute's jurisdictional reach at the point where a product first enters the stream of commerce. Rather, section 4 provides that the Mine Act's reach is applicable to any mine "the operations or products of which affect commerce," language that the Commission has previously construed broadly. *See, e.g., Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 685–86 (Apr. 1994) ("Congress intended to exercise its authority to regulate interstate commerce to the maximum extent feasible when it enacted section 4 of the Mine Act." (internal quotations omitted)). Cactus Canyon's sale of the stone it mills to other states therefore affects commerce irrespective of whether that stone had ever affected commerce previously.

Cactus Canyon cites *Herman v. Associated Elec. Coop., Inc.,* 172 F.3d 1078 (8th Cir. 1998) for an apparent "bright line" jurisdictional rule "based upon where the output of the mine was processed into a marketable form." CC Br. 39; CC Exhibit I. In that case, the Eighth Circuit held that MSHA did not possess jurisdiction over an electric utility plant that bought crushed coal, then further crushed the coal and removed debris before burning it in its generator. Unlike Cactus Canyon's Fairland Plant, however, the utility plant in Herman was not "in the business of selling a raw or processed mineral product. An electric utility sells electricity. The coal was used as an end product at the plant, and hence the utility was the final consumer of the coal." *In re Kaiser*

[12] "Any mining or milling that an entity engages in for its own use constitutes 'commerce' under section 4 of the Mine Act." *State of AK Dep't of Transp., supra*, 36 FMSHRC at 2645.

Aluminum & Chem. Co., 214 F.3d 586, 592–93 (5th Cir. 2000). In the instant case by contrast, Cactus Canyon is in the business of milling terrazzo stone chips that are in turn shipped to and sold through a distributor for use in the construction of terrazzo stone floorings, primarily in schools and airports.

I conclude that Cactus Canyon engaged in milling and sold its milled products in interstate commerce. CC Ex. 14. The Act's definition of "commerce" includes "trade . . . between a place in a State and any place outside thereof[.]" 30 U.S.C. § 802(b). I therefore find that Cactus Canyon's sale of terrazzo stone produced at the Fairland Plant "affected commerce" under the Act.

Having determined that the Fairland Plant's products affect commerce, I find that the Secretary possessed and properly asserted its jurisdiction when it issued the ten citations evaluated below. I next evaluate whether the Secretary of Labor has carried her burden of proof, by a preponderance of the evidence, to establish a violation of each citation at issue.

V. PRINCIPLES OF LAW

a. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden to prove, by a preponderance of the evidence, that a violation of the Mine Act occurred. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is generally held strictly liable for violations that occur at its mine. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Nally & Hamilton Enters., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011). An operator may avoid liability by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge an operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

b. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g.*, *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially affected. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

c. Significant and Substantial Designation

A violation is properly designated as significant and substantial ("S&S") if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)); *see also Buck Creek Coal, Inc. v. MSHA,* 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498, 500 (Apr. 1988); *Youghiogheny & Ohio Coal Co*., 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The four elements required for an S&S finding are expressed as follows:

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

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

An S&S determination must be based on the assumed continuation of normal mining operations. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease."). The Commission has held that the S&S inquiry considers "the violative conditions as they existed both prior to and at the time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016), *citing Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (Aug. 2014).

d. Negligence

Negligence is not defined in the Mine Act. The Commission has found "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (internal citations omitted). In determining whether an operator meets its duty of care under the cited standard, the

Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co*., 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), MSHA defines negligence by regulation in the civil penalty context as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices . . .

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id*. The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id*.

Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and may find "high negligence," in spite of mitigating circumstances, or moderate

negligence, without identifying mitigating circumstances. *Brody*, 37 FMSHRC at 1701; *Mach Mining*, 809 F.3d at 1263-64. In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody*, 37 FMSHRC at 1701, (citing *Topper Coal Co.*, 20 FMSHRC 344, 350) (Apr. 1998). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances and may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

e. Penalty Assessment

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each criterion, but must provide an explanation for any substantial divergence from the proposed penalty from MSHA based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

VI. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

a. Initial Findings of Fact

The parties did not agree to any stipulation of facts in this case despite repeated suggestions by the undersigned during the prehearing process. Despite the absence of stipulations, Cactus Canyon has not meaningfully disputed the following assertions by the Secretary, and the undersigned thus incorporates them as fact for the purposes of these proceedings:

i. On October 25 and 26, 2022, Inspector Davis conducted a routine inspection at Cactus Canyon's Fairland Plant and Clendennen Ranch mine facilities, located at 7232 County Road 120, Marble Falls, Burnet County, Texas (Tr. 190, Sec'y Ex. 4);
ii. Davis joined MSHA in August 2019, and completed twenty-one months of training at the National Mine Health and Safety Academy in Beckley, Virginia (Tr. 187);
iii. Davis conducts approximately seventy-five to eighty inspections per year in his capacity as a MSHA inspector (Tr. 188);
iv. The majority of inspections conducted by Davis and other inspectors based in MSHA's Dallas Field Office occurred at dimensional stone mining operations (Tr. 188);
v. Prior to joining MSHA, Davis worked for twelve years at cement company Martin Marietta in Midlothian, Texas (Tr. 189);
vi. Davis served in various roles at Martin Marietta, including as a mill operator, "assistant safety," and as storeroom coordinator (Tr. 189);
vii. Davis also served twenty years in the U.S. Army (Tr. 189, CC. Ex. 23);
viii. During his inspections, Davis was at times accompanied by MSHA employees Ty Fisher and Curt Burnett (Tr. 190, 192);

ix. Davis, Fisher, and Burnett arrived at the entrance to the Fairland Plant operated by Cactus Canyon Quarries, Inc. in separate, government-issued vehicles (Tr. 191-92);
x. Davis and colleagues first met with a "Ms. Katelyn" who worked in the front office of the Fairland Plant facility, and then with Cactus Canyon foreman Jesse (Tr. 193-94);
xi. After fifteen or twenty minutes, Cactus Canyon president Carson arrived, and accompanied Davis for most of the two-day routine inspection (Tr. 194-96);
xii. Davis issued ten total citations in relation to the routine inspection of the Fairland Plant and Clendennen Ranch mine (Sec'y Exs. 6-15);
xiii. On October 25, 2022, Davis issued three citations for violations found at the Fairland Plant;
xiv. On October 25, 2022, Carson led Davis and colleagues to the Clendennen Ranch mine, where Davis issued four additional citations;
xv. Davis returned to the Fairland Plant on October 26, 2022, where he issued three final citations and concluded his investigation;
xvi. Approximately one month later, Davis delivered modifications for Citations 9678438 and 9678439 to "Ms. Katelyn," but these modifications were apparently not received by Carson.

b. Dismissed Citations

i. Citation No. 967844: The Secretary Did Not Establish That Cactus Canyon Violated 30 C.F.R. § 46.7(a)

In the instant case, Davis issued ten citations during the course of the regular inspection conducted on October 25 and 26, 2022. Sec'y Exs. 6-15. As an initial matter, the undersigned dismissed Citation No. 9678444 from the bench because it cited an incorrect legal standard at Section 9(C) of the Mine Citation/Order. Sec'y Ex. 13. Davis testified that he had intended to issue a citation related to record keeping under 30 C.F.R. § 46.9. Tr. 466.

However, Davis instead issued a citation pursuant to 30 C.F.R. § 46.7(a). Tr. 466-67. 30 C.F.R. 46.7(a) provides:

> (a) You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. This training must be provided before the miner performs the new task.

The undersigned vacated Citation 9678444 after Davis testified that the wrong legal standard was cited for Citation 9678444. Tr. 679. The Secretary did not move to amend the citation or oppose the undersigned's *sua sponte* dismissal of this citation during the hearing and acknowledged that she is not opposed to said dismissal in her post-hearing brief. Sec'y Br. at 19. Therefore, Citation No. 9678444 is **VACATED**.

ii. Citation Nos. 9678438 and 9678439: The Secretary Has Not Established That Cactus Canyon Violated 30 C.F.R. § 56.14101(a)(2)

Citation Nos. 9678438 and 9678439 are dismissed because the Secretary failed to carry her burden to prove, by a preponderance of the evidence, that the violations occurred, as cited. After issuing an initial citation relating to a damaged ladder (discussed below), Davis continued his inspection of the Fairland Plant facility. Davis next inspected various pieces of "mobile equipment" that were parked and ready for use in an outdoor parking area immediately south of the Fairland Plant, and ultimately issued two citations under 30 C.F.R. § 56.14101 for malfunctioning vehicle parking brakes or service brakes. Tr. 215-217. 30 C.F.R. § 56.14101 promulgates minimum operational capacity requirements for mobile equipment service and parking brakes, and states that

> (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.
>
> (2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

30 C.F.R. § 56.14101(a)(1)-(2).

Davis' testimony concerning whether each citation was issued for a malfunctioning service brake **or** a malfunctioning parking brake was internally inconsistent, and that testimony conflicts with the documentary evidence provided by the Secretary. The undersigned therefore **VACATES** Citation Nos. 9678438 and 9678439 for the reasons that follow.

The first of the two citations for "malfunctioning brakes," Citation No. 9678438, allegedly involved a faulty brake on an International S1700 dump haulage truck. Sec'y Ex. 7. Despite the undersigned's best attempts to seek clarification, the record is ultimately unclear as to whether it was the dump truck's service brake or parking brake that had allegedly malfunctioned.

Davis testified that he had requested that the equipment operator demonstrate the capabilities of the dump truck's service and parking brakes while the truck was under its typical workload. Tr. 215-16. Davis further testified that the equipment operator attempted three separate times to engage the dump truck's *service brake* while the vehicle was stationary on an incline. Tr. 216. Finally, Davis testified that, on all three occasions, the dump truck's *service* brake was unable to hold grade and slid down the incline. Tr. 216-217; Ex. 7. Davis found this malfunctioning brake to represent a safety hazard given that the dump truck is routinely used on inclined grades while hauling dimensional stone from on-site stockpiles to processing hoppers within the plant. *Id*.

Citation 9678438 was initially issued as a violation of 56.14101(a)(1), stating that "the *service brake* would not hold the International S1700 dump haulage truck #24 with a typical load." Ex. 7. When Davis terminated the citation at 12:39 on October 25, 2022, he reported that the

service brake was repaired and held on the grade. However, after final review, Davis modified the cited standard to 56.14101(a)(2), suggesting a violative condition related to a failure of the dump truck's *parking brake*, rather than its service brake. *Id.;* Tr. 218, 231-32. Davis acknowledged this change at the hearing, testifying that

> After reviewing the -- I kept reviewing the situation, (a)(2) talk about parking brakes holding on an incline. It fits that scenario better than -- that's talking about the service brake, which is the entire system. But the -- this situation was relying on the parking brake which was 56.14101(a)(2). It better fits that situation.

Tr. 231-32.

Counsel for the Secretary provides little clarity toward resolving the discrepancy. In her brief, the Secretary states that "Citation 9678438 was initially issued to CCQI as a violation of 56.14101(a)(2)[sic]. However, Davis testified that after final review, the cited standard was modified to 56.14101(a)(2)[sic] as better suited to match the violative condition since it was the parking brake that failed, not the service brake." Sec'y Post-hearing Brief at 14. This statement contradicted Davis' extensive testimony that it was the service brake of the dump truck that had malfunctioned. *See* Tr. 218-32.

Similarly, the undersigned cannot resolve whether Citation 9678439 was issued because a parking brake or a service brake allegedly malfunctioned. Davis first testified that, after inspecting the dump truck, he next inspected several other pieces of mobile equipment, including a Case 621B front-end loader. Tr. 232-34; Sec'y Ex. 8. Davis next testified that he requested that the equipment operator demonstrate the braking capabilities of this front-end loader while the vehicle was under a typical load. Tr. 234. Finally, Davis testified that the equipment operator navigated the loader down a two percent grade and attempted thrice to come to a complete stop using the vehicle's service brakes. Tr. 234-35. On each occasion, the vehicle rolled down the incline and could not come to a complete stop. *Id.* Davis issued a citation under 30 C.F.R § 56.14101(a)(1) for an inoperable service brake. Ex. 8. However, after Davis' final review in late November 2022, the citation was modified to represent a violation of 30 C.F.R. § 56.14101(a)(2) because it was apparently the parking brake that was out of service on this vehicle rather than the service brake. Ex. 8.

The modification of Citation No. 9678439 is perplexing, as Davis initially testified that it was the service brake of the front-end loader, rather than the parking brake, that had malfunctioned. Tr. 239 ("The hazard that's involved, Your Honor, was that if the service brakes failed on the incline, it can seriously injury [sic] personnel in front of it."). Davis later contradicted this testimony by testifying that this citation was terminated after "the truck was taken to the maintenance shop and basically they just tightened up on the parking brakes." Tr. 240.

The undersigned sought clarification as to whether the citation was issued for a malfunctioning service brake or parking brake, and Davis affirmed his initial testimony that Citation No. 968349 related to a malfunctioning service brake on the inspected front-end loader, while Citation No. 9678438 related to a malfunctioning parking brake on the inspected dump truck. Tr. 245. Yet, despite Davis' testimony concerning Citation Nos. 9678438 and 9678439 being

replete with references to the alleged deficiencies in the *service brakes* of the dump truck and front-end loader, **both** citations have now been modified into 30 C.F.R. § 56.14101(2) violations, suggesting that **both** vehicles were found, upon inspection, to have malfunctioning parking brakes. *See generally*, Tr. 219-45. Such is not supported by Davis' testimony, nor is the dearth of testimony concerning alleged violations for malfunctioning parking brakes ameliorated by any other evidence currently before me. In fact, the Secretary's non-testimonial evidence suggests that **both** citations concerned service brake violations. The Location/Photo Description for Citation No. 9678438 states that "International S1700 dump truck *service brake* would not hold on typical grade which it travels (Sec'y Ex. 17, DOL 00071) and the Location/Photo Description for Citation No. 9678439 states that "Case 621B front end loader *service brake* would not hold on to typical grade which it travels." Sec'y Ex. 17, DOL 00073 (emphasis added).

Confusingly, the Secretary specifically references the modification made to Citation No. 9678438 within her post-hearing brief, but her brief is silent as to the nearly contemporaneous modification made to Citation No. 9678438. The two citations were modified within twelve minutes of each other in late November 2022, and yet the Secretary has acted as if only one of these citations were ever modified. As an aside, the Secretary also argues in her brief that

> Davis correctly designated the gravity [of Citation No. 9678439] as significant and substantial based on the reasonable likelihood that the discreate [sic] hazard contributed created by the violative condition will result in an injury or illness of a reasonably serious nature. Davis considered the proximity of the front-end loader operating on inclines, near equipment and working miners could lead to serious injuries or a fatality.

Sec'y Br. at 15. The Secretary presents this argument concerning the assessed gravity level despite Davis' testimony that Citation No. 9678438 is not a significant and substantial violation because the citation has been modified to reduce the likelihood of injury or illness from 'reasonably unlikely' to 'unlikely.' Tr. 251 ("This one here is unlikely and this is non S and S. This is not an S&S"). In any event, the fact that the Secretary presented her case in chief without sufficient explanation or justification for the modification made to Citation No. 9678439.

It is not the undersigned's responsibility to rectify the aforementioned inconsistencies within the Secretary's case as it pertains to these two citations. The undersigned concludes that the Secretary has not met her burden to establish a violation of 30 C.F.R. § 56.14101(a) for either Citation No. 9678438 or 9678439. *See Doe Run Co*., 42 FMSHRC 521, 526 (2020); *Jim Walter Res., Inc*., 28 FMSHRC 983, 992 (Dec. 2006). Thus, Citation Nos. 9678438 and 9678439 are **VACATED**.

iii. *Citation No. 9678441: The Secretary Has Not Established That Cactus Canyon Violated 30 C.F.R. § 56.9300(a)*

As Davis continued his inspection on October 25, 2022, he left the Fairland Plant and visited the Clendennen Ranch pit where he observed that there was no berm located above an approximately twenty-five-foot section of the pit wall. Tr. 303-304. Davis testified that dump trucks were active and had routinely been active in that area. Tr. 303. Davis observed tire tracks

within ten feet of an unprotected area, where the drop-off was around ten feet in height.[13] Davis testified that Carson did not provide an explanation for the presence of tire tracks in that area other than that "[the dump trucks] shouldn't be going up there." Tr. 756. Carson countered that Davis only discovered one set of tire tracks, and believes that this set of tracks was created prior to the blast that opened the currently active pit at Clendennen Ranch. Tr. 654-56. Davis found that the absence of a berm exposed the dump truck operators and other equipment operators to potential injuries if a vehicle overturned. Ex. 17. Davis testified that, were a dump truck to overturn, it could cause injuries such as broken bones or injury to the head or back of the vehicle operator. Tr. 304-305. Cactus Canyon abated this alleged violation by constructing a berm using multiple on-site boulders. Tr. 753-54.

Davis ultimately issued a citation for the missing berm as a violation of 30 C.F.R. § 59.9300(a).[14] Ex. 10. Davis listed the likelihood of injury or illness as being 'reasonably likely,' and found that the injury or illness that could reasonably be expected was 'permanently disabling. Sec'y Ex. 10. In so finding, Davis considered the recent proximity of dump trucks to the un-bermed pit wall section, as evinced by tire tracks observed in the area. Tr. 420-21. Davis also found this violation to be significant and substantial, and assessed the negligence level as 'moderate' because the absence of the berm was apparently not reported to Carson. Tr. 305-06.

30 C.F.R. § 56.9300(a) requires that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." A "berm" is defined as "a pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway." 30 C.F.R. § 56.2. The Commission's decision in *Lakeview Rock Products*, 33 FMSHRC 2985 (Dec. 2011), identified three relevant inquiries for alleged violations of section 56.9300(a): (1) whether there was an established roadway, (2) whether "a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment," and (3) whether any berms or guardrails exist. *See Lakeview Rock Products, Inc*., 33 FMSHRC at 2988.

Cactus Canyon contests this citation under a theory that the area in proximity to the edge of the Clendennen Ranch pit does not qualify as a roadway pursuant to 30 C.F.R. § 56.9300(a). The Secretary disagrees, and contends that this path does, in fact, qualify as a roadway. Sec'y Br. at 16-17; Sec'y Ex. 10. The undersigned thus narrows his analysis primarily to the first *Lakeview* element, s*ee* FMSHRC at 2988, although it is undisputed here that the cited area did not have a

[13] Davis testified that he initially issued a citation noting a drop of twenty-five-feet into the pit, but issued a modification the next day finding that the drop off was ten feet. Tr. 303-05. In fact, the citation originally stated that "the drop-off was approximately 20 feet." Sec'y Ex. 10. For reasons unknown, the Secretary referenced only the text of the unmodified citation in her post-hearing brief, rather than the modification issued on October 26, 2022 – the day after the citation was originally issued – or Davis' actual testimony at the hearing. CC Br. at 15.

[14] Section 56.9300(a) requires that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a).

berm at the time of inspection. *See* Sec'y Ex. 10; CC Br. at 22. Furthermore, although the Secretary and Cactus Canyon initially disagreed as to the height of the drop off into the Clendennen Ranch pit, both parties have now agreed to that height being approximately ten feet.[15] Tr. 303-05. Cactus Canyon has not disputed that this ten-foot "drop-off exists," or is "of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment," and the undersigned credits Davis' testimony that such a drop-off presents an overturn risk that could result in broken bones or injury to the head or back of the vehicle operator. 30 C.F.R. § 56.9300(a); Tr. 304-305.

The Secretary and Cactus Canyon disagree as to whether the area in proximity to the edge of the pit constituted a "roadway" as set forth in Section 59.9300. Carson testified that the path observed by Davis was simply a cow path rather than a roadway. Tr. 651. By contrast, Davis testified that he observed tire tracks along this path, which led him to conclude that the path had been subjected to vehicle traffic and is thus a 'roadway' for the purposes of this citation. Tr. 754. Davis did not witness any dump trucks active along the purported roadway, but concluded that the tracks were from one or multiple dump trucks having driven through that area on more than one occasion. Tr. 756-57.

While the term "roadway" is not defined in Part 56 of the Secretary's regulations, the Commission has looked to the "common usage" and "a common-sense application of the standard to the facts" to determine whether a roadway exists. *Capitol Aggregates, Inc*., 4 FMSHRC 846, 846-47 (May 1982) (upholding the ALJ's determination that an elevated ramp used by a front-end loader to dump petroleum coke into a loading hopper is an "elevated roadway"). The Commission has generally found roadways to exist "where a vehicle commonly travels over a surface during the normal mining routine." *Black Beauty Coal Co.*, 34 FMSHRC at 1735; *see, e.g.*, *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 36 (Jan. 1981) (finding that an elevated bench used for haulage is a roadway); *Peabody Midwest Mining, LLC*, 762 F.3d at 615 (finding that a bench regularly used by service trucks during regular mining operations constitutes a roadway).

The undersigned has reviewed the photographs Inspector Davis took of the "roadway" at issue in Citation No. 9678441. Sec'y Ex. 17, DOL 00077-78, 00090-93. According to Davis, DOL 00090 depicts as follows:

> At that point right there he is correcting the berm situation. Immediately in front of him is the road that we traveled down. The front is the boneyard and the government vehicle and Mr. Carson's vehicle and the other down equipment was there. And direct to our rear is just a road -- travel road that continues on up to the pit.

Tr. 309. DOL 00091 and DOL 00092 show the drop off into the pit. Sec'y Ex. 17. The same single tire track is visible in each image, which Davis testified was from a dump truck backing up to the pit to be loaded by an excavator. *Id.*; Tr. 311-12. DOL 00093 portrays the berm constructed by Cactus Canyon after the issuance of Citation No. 9678441. Sec'y Ex. 17.

[15] After being questioned during the hearing, Carson clarified that the pit is structured with a four-foot drop off, a six-foot shelf, and then another four-foot drop off. Tr. 664-665. Carson claimed that Davis initially overestimated the depth of this drop off due to measuring at a diagonal. *Id*.

Cactus Canyon argued at the hearing and in its brief that the alleged roadway was a mere cow path and represents a travel way not used with sufficient frequency to constitute a roadway within the meaning of section 56.9300(a). Tr. 655-56; CC. Br. at 20. After hearing Davis' testimony and reviewing the photographs filed by the Secretary in support of that testimony, I find Cactus Canyon's argument persuasive. *See* Tr. 311-12; Sec'y Ex. 17. Although Davis testified to his belief that dump trucks had been active in the area, he did not actually witness these trucks operating in proximity to the twenty-five-foot long area above the "rim" of the pit. *See* Tr. 303-304. The only direct evidence that Davis pointed to in support of his conclusion that this section qualified as a 'roadway' is the single tire track for which photographs are provided at DOL 00091 and DOL 00092. Sec'y Ex. 17. Carson submits that the ribbed pattern of this tire track indicates that the track is from an excavator rather than a dump truck. CC Br. at 20. The Secretary's own photographs of Cactus Canyon's dump trucks reveal that these trucks are equipped with tires that are more similar in general appearance to those used in a personal vehicle rather than the ribbed tread equipped to the drive train of an excavator. Sec'y Ex. 17 at DOL 00084, 87. Thus, Davis' inference that the presence of a single ribbed tire track provides evidence that Cactus Canyon's dump trucks – which do not have ribbed tires – are routinely active in the twenty-five-foot stretch above the Clendennen Ranch pit is not supported by the record currently before me. Carson's evaluation that this track existed before the pit was blasted may or may not be accurate, but a single tire track, without more, is not sufficient evidence that vehicles commonly travel over this surface during the normal mining routine." *See Black Beauty Coal Co.*, 34 FMSHRC at 1735.

The undersigned finds that, given the inconclusive photographic evidence provided by the Secretary and the speculative nature of Davis' testimony about traffic patterns of dump trucks travelling to and from Clendennen Ranch, the Secretary has not established that the travel way at issue here constitutes a 'roadway' within the meaning of section 56.9300(a). *See Doe Run Co*., 42 FMSHRC 521, 526 (2020); *Jim Walter Res., Inc*., 28 FMSHRC 983, 992 (Dec. 2006). As the Secretary has not met her burden to prove the elements for a violation of 30 C.F.R. § 56.9300(a), Citation No. 9678441 is **VACATED**.

c. Affirmed Citations

iv. Citation Number 9678437: The Secretary Has Established that Cactus Canyon Violated 30 C.F.R. § 56.11003

Findings of Fact

During the inspection conducted at the Fairland Plant on October 25, 2022, Davis issued an initial citation – Citation No. 9678437 – after discovering and photographing a 6-foot, portable fiberglass ladder that was allegedly not maintained in good working condition. *See* Sec'y Exs. 6, 17. Davis testified that "[t]he first issue that I observed issuing the citation after we ran into a ladder, a fiberglass ladder that was cracked and busted. It was unserviceable leaning against the wall (". . ."). It was not used during that time frame, but it was – it has potential to be used." Tr. 199. According to Davis, the ladder had visible cracks on its side base panel and the bottom of one leg was also cracked, which could present a fall-related injury risk should the ladder collapse if a miner were to attempt to use the ladder. Tr. 202, 205. Several of the upper rungs of the ladder were also bent. Tr. 768. Although the ladder was not actively in use, the ladder was not tagged as 'out

of service' and was available for use, and Cactus Canyon employee "Jesse" was unsure when the ladder had last been used. Tr. 202, 209. The citation was terminated after the ladder was discarded in a trash bin.[16]

When issuing Citation Number 9678437, Davis determined the negligence level to be moderate given Carson's and Jesse's apparent lack of knowledge that the ladder had been damaged. Tr. 206-07. Concerning gravity, Davis found the likelihood of injury or illness as 'unlikely', and the injury or illness that could reasonably be expected as 'lost workdays or restricted duty.' Sec'y Ex. 6.

Violation

The Mine Act is a strict liability statute. So long as a regulation is sufficiently specific that a reasonably prudent person would have fair warning of what the regulation requires, then the due process requirements for notice are satisfied. *See Doe Run Co*., 42 FMSHRC 521, 527 (Aug. 2020) (applying reasonably prudent person test for broadly worded standards to determine whether violations occurred); *See also Cactus Canyon Quarries, Inc. v. Sec'y of Labor*, 953 F.3d 790, 792-94 (D.C. Cir. 2020); *Mach Mining*, LLC, 40 FMSHRC 1, 11-13 (Jan. 2018), aff'd, 748 Fed.Appx. 357, 2019 WL 275718 (D.C. Cir. 2019).

30 C.F.R. § 56.11003, which concerns the construction and maintenance of ladders, states that "[L]adders shall be of substantial construction and maintained in good condition." While the terms "substantial construction" and "good condition" are inherently subjective, the obvious crack in the right leg of the ladder, along with visibly bent upper rungs, would put a reasonably prudent person on notice that this ladder violated this safety standard. Indeed, Cactus Canyon concedes that the ladder at issue was damaged, and the only justification provided for not having taken the ladder out of service was a vague suggestion that the ladder was not in "that bad of shape," and was not located in a mine area. Tr. 689; CC Br. at 48.

Contrary to Catus Canyon's position, photographs taken during the course of the investigation corroborate the 'condition or practice' recorded in Citation No. 9678437, which states that "the side base panel and one of the bottom legs [of the ladder] was cracked." Sec'y Ex. 6. Certainly, the photographs collected by Davis in support of this citation corroborate his testimony that the ladder had been bent and cracked significantly, and Davis was justified in ordering that the ladder be taken out of service. Sec'y Ex. 17 at DOL 00068-70; Tr. 199. Based on the photographic evidence and Davis' testimony in support thereof, I agree that the ladder at issue here was not of substantial construction and had not been maintained in good condition. I therefore conclude that Cactus Canyon violated 30 C.F.R. § 56.11003 as alleged in Citation No. 9678437.

[16] The parties have provided conflicting accounts of the manner by which the ladder was discarded. Carson states that Davis instructed Cactus Canyon employees to destroy and discard the ladder (Tr. 689; CC. Brief at 48 (blank footnote omitted)), whereas Davis testified that the ladder was discarded in a nearby dumpster at Carson's direction (Tr. 770). The undersigned need not resolve the comparative credibility of each account, as a determination of who issued the directive to throw out the ladder is immaterial in determining whether the Secretary has carried her burden to establish that the ladder was defective pursuant to the cited legal standard.

Gravity

Davis found the likelihood of injury or illness as 'unlikely', and the injury or illness that could reasonably be expected as 'lost workdays or restricted duty.' Sec'y Ex. 6. If the 6-foot ladder was used and a miner were to fall, Davis testified that the injury that could reasonably be expected was broken bones, a head injury, or a neck injury. Tr. 201.

There is no evidence that this ladder was used frequently or regularly. Indeed, the ladder was found in a little-travelled corner of the Fairland plant, was not actively in use, and foreman Jesse did not know when the ladder was last used. Tr. 201-02. Thus, I find it unlikely that an injury would occur from use of the ladder, even though it was not tagged out of service.

In these circumstances, given the relatively remote likelihood of an injury from a fall from the ladder should a miner happen to be in the area and have a need to use the ladder, I find that Davis' assessment of gravity as unlikely to result in an injury that could reasonably be expected as being 'lost workdays or restricted duty' is justified. *See* Sec'y Ex. 6. Accordingly, MSHA's gravity findings are AFFIRMED.

Negligence

The Secretary asserts that Cactus Canyon's conduct involved moderate negligence. Sec'y Ex. 6. The Secretary's post-hearing brief provides little discussion of gravity and negligence, but the limited discussion that is provided largely recapitulates Davis' testimony at the hearing.

Although placed in a low traffic area of the Fairland Plant, the structural damage to the ladder is obvious and would be immediately detected after a cursory visual inspection. Sec'y Ex. 17, DOL 00068-70. However, Davis determined the negligence level to be moderate given Carson and Jesse's apparent lack of knowledge that the ladder had been damaged. Tr. 206-07.

Cactus Canyon held a specific duty of care under 30 C.F.R. § 56.11003 to maintain any ladders at the Fairland Plant in good working condition. *See generally, U.S. Steel Corp.*, 6 FMSHRC at 1910. The Fairland Plant was constructed in the late 1960s, has been subject to MSHA jurisdiction since the promulgation of the Mine Act in 1977, and has operated under the same organizational president for a period exceeding thirty years. CC Ex. 13. Thus, Cactus Canyon and Carson should be intimately familiar with the Mine Act and the protective purposes of the myriad regulations requiring that working equipment – including ladders – be maintained in good working condition. *U.S. Steel Corp.*, 6 FMSHRC at 1910. Though Carson argued that the ladder at issue here was not in an area of the Fairland Plant where milling of dimensional stone actively takes place (Tr. 689), it was not hidden or otherwise difficult to detect, and was visibly damaged at the time of Davis' inspection. Sec'y Ex. 17 at DOL 00068-70. A reasonably prudent person familiar with the mining industry would readily understand that ladders must be properly maintained to lower the potential of injury to any miner using that equipment and would have taken action to either repair or replace the ladder, which had visible cracks on its side base panel and a crack on the bottom of one leg. Tr. 205; *U.S. Steel Corp.*, 6 FMSHRC at 1910.

Although I have found that a reasonable person would have concluded that the damage to this ladder represented a violation of 30 C.F.R. § 56.11003, I also credit Davis' conclusion that neither Carson nor Jesse knew of the state of this ladder prior to Davis' October 25, 2022 inspection, and agree that Carson's lack of knowledge of the ladder's condition is a factor mitigating Cactus Canyon's level of negligence. Tr. 206-07. Considering the totality of the circumstances, the undersigned concludes that Cactus Canyon's conduct involved moderate negligence.

Penalty

For Citation No. 9678437, the Secretary proposed a regularly assessed penalty of $133.00, calculated from total points of $148.00 with a ten percent reduction for good faith. Sec'y Exs. 3, 6. It is well established that Com,mission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *See e.g. Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983). When assessing civil monetary penalties, a Commission ALJ must consider the following statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The undersigned has considered Cactus Canyon's history of previous violations, the size of its business, the operator's moderate negligence, the relatively minor gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notice of the violation. As discussed above, this violation is non-significant and substantial, is 'unlikely' to result in an injury causing 'lost workdays or restricted duty, and was the result of Cactus Canyon's moderate negligence. Additionally, Cactus Canyon has a minimal violation history, with no recorded violations of 30 C.F.R. § 56.11003 within the twelve months[17] preceding the issuance of Citation No. 9678437 and only one citation in total was issued by MSHA during the twelve months preceding Davis' inspection. Sec'y Exs. 1, 6. Cactus Canyon is a relatively small operation and employs 17 total employees, with as many as six of those employees working in the intermittent quarries at a given time. CC Ex. 13 at 4. Neither party presented evidence specifically relating to whether payment of the proposed penalty would affect Cactus Canyon's ability to stay in business and successfully continue its business operations, and it is generally presumed that a civil penalty *will not* impact an operator's capacity to stay in business absent that operator submitting financial documents leading to a contrary interpretation. *John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (recognizing presumption of no adverse effect absent

[17] Cactus Canyon was cited for two separate alleged violations of 30 C.F.R. § 56.11003(c) in November 2020, but both citations were subsequently vacated during proceedings before another Commission ALJ. Tr. 701-02. The undersigned will disregard those two vacated citations in my calculation of the appropriate penalty for the citation at issue here.

proof that imposition of penalties would adversely affect operator's ability to continue in business) In light of these factors, the undersigned finds that an assessed penalty of $133.00 penalty is appropriate, will not affect Cactus Canyon's ability to continue in business, and is therefore AFFIRMED.

v. *Citation Number 9678440: The Secretary Has Established that The Secretary Violated 30 C.F.R. § 56.14100(b)*

Findings of Fact

As noted, on October 25, 2022, following the conclusion of the initial inspection at the Fairland Plant, Carson led Davis and colleagues approximately three miles away to the Clendennen Ranch pit. Tr. 284. After arriving at Clendennen Ranch, Davis noticed "that workers were working at the pit. They had several things going on. They had the two excavators running, a dump truck going, and had a person walking on the -- on the pit floor, basically. Had individual foot traffic walking." Tr. 288-87. Davis first inspected a Komatsu PC200 Excavator, which he observed to have a missing driver-side mirror. Tr. 288-90; Sec'y Ex. 9. Davis explained that a missing driver-side mirror could obscure the operator's view to the rear of the excavator if he were to pivot the excavator arm to the left (counterclockwise). Tr. 760-62. The excavator was located at a fixed location within the quarry pit so that the operator could remove overburden for placement into loading trucks. Tr. 759. Davis estimated that the "boom" of the excavator arm is capable of pivoting on a 360-degree swivel, with a reach radius of fifteen to twenty-five feet. Tr. 761-63. The excavator was not tagged out of service and was actively in use at the time of the investigation. Tr. 288. Davis observed the excavator pivoting both clockwise and counterclockwise while preparing to load overburden. Tr. 763.

After inspecting the excavator, Davis issued a citation for a violation of 30 C.F.R. § 56.14100(b). Sec'y Ex. 9. Davis opined that the absence of a driver-side mirror exposes miners to injuries from a collision or "crushing" hazard by reducing the operator's field of vision to the rear of the equipment. Tr. 291. As Davis put it,

> without having a driver's side mirror the operator don't know -- would not know who's come up from this rear. Could be personnel or equipment. He needed -- need to observe his rearview mirror before he moved anything to -- need to be in operation . . .") the rearview mirror -- it protects people behind him. And also what he can observe movement from this rear. He has a -- the dump truck proceeds down there. If he come down, you know, to -- if he knows the dump truck is too far he won't -- I mean, that way he can control his equipment.

Tr. 759-60.

Davis designated the risk of injury or illness as 'unlikely' and the injury or illness that could reasonably be expected as 'lost workdays or restricted duty'. Tr. 292; Ex. 9. Davis testified that his evaluation of gravity was because the equipment being in a standalone position, with a single operator, and in use only during daylight hours. (Tr. 292). Davis assessed the negligence level as 'moderate' given that Carson and the foreman had no apparent knowledge of the missing

mirror, which was not reported by the employee operating the equipment at the time of the inspection. Tr. 292, 297. Cactus Canyon corrected this violation on the same date as Davis' inspection by affixing a replacement mirror acquired from an on-site "boneyard" to the driver's side door assembly of the excavator. Tr. 300.

Violation

The Secretary alleges that a violation of 30 C.F.R. § 56.14100(b), which provides that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The language of section 56.14100(b) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Palmer Coking Coal Co.*, 22 FMSHRC 887, 891 (July 2000) (ALJ). A violation of the standard requires a finding that (1) there was a defect in the equipment, (2) the cited defect affected safety and (3) the defect was not corrected in a timely manner to prevent the creation of a hazard. *Meyer Aggregate LLC*, 38 FMSHRC 2596, 2605 (Oct. 2016) (ALJ). Whether a defect is repaired in a timely manner depends on "when the defect occurred and when the operator knew or should have known of its existence." *Northern Ill. Serv. Co.*, 37 FMSHRC 1514, 1538 (July 2015) (citing *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001)).

The undersigned finds that the lack of a driver-side mirror affected the potential safe use of the excavator in use at the Clendennen Ranch pit. The undersigned credits Carson's testimony that this excavator remained in the pit while preparing to load a dump truck, and that an approaching dump truck might not be visible even if both side mirrors were present, as the layout of Clendennen Ranch requires that the dump truck approach the "passenger" side of the excavator at a perpendicular angle. Tr. 660-61. However, I also credit Davis' testimony that the excavator could be operated in reverse, and that side mirrors could be used to check a rear blind spot, which would aid in safely operating the machine in motion. *See* Tr. 759-60. While the Secretary did not address the "timely" element of the standard, the excavator was being operated at the time of inspection, and the absence of a mirror was a violation of Section 56.14100 and should have been discovered and corrected during pre-operational checks.

In addition, I find that adequate notice was provided to Cactus Canyon about the requirements of the standard because 30 C.F.R. § 56.14100 contains sufficiently specific language such that a reasonably prudent person familiar with the conditions the standard intends to address would have recognized that a broken or missing side mirror on an excavator actively in use contravenes the standard. Side mirrors are a nearly universal safety feature on both personal and commercial vehicles and serve to prevent the obvious safety hazard created by a risk of collisions with vehicles, persons, or stationary objects due to a decreased field of vision.

Carson suggests that the citation should be vacated and argues as follows:

> There was no possible exposure to a collision hazard situation. This excavator is not a "loader" as cited.[18] The excavator never operates in a pit with other mobile equipment except the boulder truck can be safely staged and protected

[18] The undersigned notes that Citation 9678440 specifically identifies the equipment in question as being a "Komatsu PC200 Excavator". Sec'y Ex. 9.

> by a berm from being in a hazardous situation. There is nothing around the excavator when it is moving. It is slow and makes a lot of noise and has a motion alarm in both directions. There was no likelihood of the outcome set forth in the citation. This citation should be vacated. These events could never happen and the mirror is useless to the operator because the cab is always turned to the direction of travel before traveling.

CC. Br. at 52 (blank footnote omitted).

Despite Carson's suggestion, nothing in 30 C.F.R. § 56.14100(b) or the Mine Act obviates an operator's responsibility to comport with mandatory safety standards simply because the operator subjectively believes that compliance with that standard is unnecessary. I find that a reasonably prudent person familiar with the standard would realize that a side mirror should be in place to ensure safe vehicle travel and operation around the mine and the lack of a side mirror represents a defect that affects clear vision and safe travel and operation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014). Missing or damaged side mirrors thus must be repaired in a timely matter to prevent accidents, and Cactus Canyon violated 30 C.F.R. § 56.14100(b) when it chose not to do so. Thus, the Secretary has met her burden to establish a violation of the legal standard delineated in this citation.

Gravity

The undersigned further finds that Davis' gravity-related findings are appropriate under these facts. Davis designated Citation No. 9678440 as non-significant and substantial (non-S&S). Sec'y Ex. 9. Further, Davis concluded that the likelihood of injury or illness was 'unlikely,' and the injury or illness that could reasonably be expected was 'lost workdays or restricted duty.' *Id*. The undersigned has credited Carson's testimony that the equipment operator is not generally required to utilize the excavator's left-side mirror because of the approach angle of dump trucks waiting to be loaded by the excavator. *See* Tr. 660-61. The specific nature of Cactus Canyon's operations at Clendennen Ranch, including its small-scale, three-man crew, and the fact that this excavator is used only by a single operator, from a standalone position, during daylight hours, leads the undersigned to conclude that the risk of a collision exacerbated by a missing mirror is relatively 'unlikely.' *See* Tr. 676. Given the limited foot traffic in the area, the undersigned also is persuaded that Davis' assessment that the injury or illness that could reasonably be expected is 'lost workdays or restricted duty' was reasonable and appropriate under the circumstances. Therefore, the undersigned affirms MSHA's gravity designation.

Negligence

The lack of a driver-side mirror is a readily identifiable defect that should have been corrected by Cactus Canyon prior to Davis' inspection, and a reasonably prudent person would have corrected this deficiency. The language of section 56.14100(b) does not specifically describe a mine operator's obligation to replace an excavator's missing side mirror should that mirror "go missing." *See* 30 C.F.R. § 56.14100(b). However, as stated above, a reasonably prudent person familiar with the breadth of this standard would realize that a side mirror should be in place to

ensure safe vehicle travel and operation around the mine and the lack of a side mirror represents a defect that affects clear vision and safe travel and operation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014).

Although a reasonably prudent miner would have replaced the mirror, the undersigned credits Carson's assertion that he was not aware that the mirror was missing given that the employee who operates this equipment had not reported the deficiency. Tr. 292, 297. Carson's apparent lack of awareness represents a factor mitigating Cactus Canyon's level of negligence, and the undersigned therefore affirms MSHA's moderate negligence designation. *See* Sec'y Ex. 9.

Penalty

The Secretary proposes a $133.00 penalty amount calculated from total points of $148.00, with a ten percent reduction for good faith. Sec'y Exs. 3, 9. As stated above, a Commission ALJ must consider the following statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Here, the undersigned has again considered Cactus Canyon's history of previous violations, the size of its business, the operator's moderate negligence, the relatively minor gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notice of the violation. As discussed above, this violation is non-significant and substantial, is 'unlikely' to result in an injury causing 'lost workdays or restricted duty,' and was the result of Cactus Canyon's moderate negligence. Additionally, Cactus Canyon has a minimal violation history, with no recorded violations of 30 C.F.R. § 56.14100 within the twelve months preceding the issuance of Citation No. 9678440 and only one citation in total was issued by MSHA during the twelve months preceding Davis' inspection. Sec'y Exs. 1, 9.

As with the preceding citation, the Secretary proposed the minimum statutory penalty amount available for this citation and, in accordance with my above analysis, I conclude that this assessed penalty will not affect Cactus Canyon's ability to continue in business. *See John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (recognizing presumption of no adverse effect absent proof that imposition of penalties would adversely affect operator's ability to continue in business) In light of the aforementioned factors, the undersigned finds that a penalty of the $133.00 penalty is appropriate and is therefore assessed.

vi. *Citation Number 9678442: The Secretary Established That Cactus Canyon Violated 30 C.F.R. § 56.14100(c)*

Findings of Fact

On October 25, 2022, Davis inspected a John Deere 544E front-end loader located at the Clendennen Ranch pit. Ex. 11. Davis testified as follows:

> I conducted an inspection on the John Deere front-end loader. Upon inspecting the front-end loader, I observed the brake lights [were] not working. And this condition violated a pattern in the 30 CFR. Therefore, I [wrote]a citation on this. As we'll see in the other picture [DOL 00094] that you see other mobile equipment that travel the same area failed to warn the equipment that he's braking could expose others to collision hazards.

Tr. 319. Davis concluded that the malfunctioning brake lights presented a collision hazard. Tr. 319-20. Accordingly, Davis issued Citation No. 9678442 for a violation of 30 C.F.R. § 56.14100, which concerns examination, correction, and record keeping related to safety defects. Sec'y Ex. 11.

Davis concluded that the likelihood of a collision was low because the front-end loader was only operated during daylight hours, but he testified that "[the equipment operator] should still be able to warn others of his braking." *Id*. Davis found there to be a low likelihood of a collision ultimately occurring due to the limited human and vehicle traffic in the area and assessed the risk of injury or illness as being 'unlikely.' Tr. 320. Given the risk of injury to a miner in the event of a vehicle collision caused by the front-end loader's inability to give a visible braking warning to other mobile equipment traffic, Davis assessed the injury or illness that could reasonably be expected as 'lost workdays or restricted duty.' *Id*. Davis assessed the negligence level as 'moderate' because the vehicle operator did not report the faulty brake lights to either Carson or the site foreman. Tr. 320-21.

Violation

Carson conceded that the brake lights on this front-end loader were not operational, testifying that

> We talked about the brake, the use of the loader up at the Clendennen mine and I had testimony that we don't load trucks with it. So with respect to the brake light citation ending in 42, it's just, that is not how it's used. I explained it was used to move the Grizzly around and when it's being used there's no other vehicle to be running into it from behind. Nevertheless, I acknowledged the brake light didn't work. I just think I would argue that it's no likelihood versus unlikely, because it -- it wasn't working and I don't think there's any chance anybody ever had that happen, being overtaken by an excavator is not going to happen. And there's only one truck out there so I'm not sure what would hit it, but if the mere fact that a brake light isn't -- isn't working, if that's enough to be a citation, then I guess that's the case.

Tr. 700-01.

Carson's acknowledgement that the loader's brake lights were defective, and his further acknowledgement that this defect had not yet been corrected at the time of inspection, is in itself an admission that Cactus Canyon violated 30 C.F.R. § 56.14100(b).[19] 30 C.F.R. § 56.14100(b) requires that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The malfunctioning brake lights would have been readily apparent to any employee or other observer at Clendennen Ranch and yet had not been repaired at the time of inspection, nor had this defect been brought to the attention of Carson or the site foreman so that the repair process could be initiated. Tr. 320-21.

Davis, however, did not issue a citation for a violation of 30 C.F.R. § 56.14100(b), but rather for a violation of 30 C.F.R. § 56.14100(c). *See* Ex. 11. 30 C.F.R. § 56.14100(c) provides:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

30 C.F.R. § 56.14100(c).

The above makes clear that comparatively more is required to establish a violation of section 30 C.F.R. § 56.14100(c) than that of 56.14100(b). Section 56.14100(b) requires that the Secretary merely establish that the "equipment, machinery, [or] tools" in question were in some way defective, and that the defect in some way affects safety, while Section 56.14100(c) requires two additional showings: (1) that the defective equipment was not taken out of or tagged out of service, and (2) that the defect(s) "make continued operation hazardous to persons." After careful review, the undersigned finds that the Secretary has met her burden to make this additional showing.

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[19] The language of section 56.14100(b) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Palmer Coking Coal Co.*, 22 FMSHRC 887, 891 (July 2000) (ALJ). Because of this inherent pliability, Commission ALJs have frequently affirmed citations issued under 30 C.F.R. § 56.14100(b) for operating vehicles with defective brake lights or headlights. For example, one ALJ concluded that "inoperable brake lights clearly affect the safety of the truck, as any vehicle traveling behind the large truck would not realize that it was coming to a stop and would easily hit the back of the truck." *Boart Longyear Co.*, 34 FMSHRC 2715, 2718–19 (2012)(ALJ). ALJs have also affirmed the Secretary's interpretation that broken brake lights are a defect affecting safety that must be timely repaired to prevent a hazard. *See e.g., Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 355 (Feb. 2011) (ALJ); *Palmer Coking Coal Co.*, 22 FMSHRC 887, 892 (July 2000) (ALJ); *Barrett Paving Materials, Inc.*, 15 FMSHRC 1999, 2007-08 (Sept. 1993) (ALJ). Commission ALJs has also consistently affirmed the Secretary's interpretation that broken headlights are a defect affecting safety and must be timely repaired under the standard. *Apex Quarry, LLC*, 36 FMSHRC 211, 220-21 (Jan. 2014) (ALJ); *Florida Rock Industries, Inc.*, 34 FMSHRC 745, 761-62 (Mar. 2012) (ALJ); *Freeman Rock, Inc.*, 28 FMSHRC 354 (May 2006) (ALJ); *Walker Stone Co.*, 20 FMSHRC 1225, 1226 (Oct. 1998) (ALJ); *Bob Bak Construction*, 19 FMSHRC 582, 604-05 (Mar. 1997) (ALJ).

Here, Citation No. 9678442 alleges that

> the brake lights of the John Deere 544E front-end loader unit 6535 did not function. The loader is used as needed to load trucks. The loader is exposed to other mobile equipment traffic. Using the loader in this condition exposed the loader operator to collision injuries by not being able to give a visible braking warning.

Sec'y Ex. 11. In support of this assessment, Davis testified that "upon inspecting the front-end loader I observed the brake lights was not working. And this condition violated a pattern in the 30 CFR. Therefore, I written a citation on this." Tr. 319. I credit this testimony, as well as Davis' subsequent testimony that, at the time that Davis issued this citation, the loader was located in an active work area at Clendennen Ranch and had not yet been tagged out of service. Tr. 380-81. Davis' testimony is corroborated by the Secretary's photographic evidence that shows that the loader in question was not relocated to an out of service area, nor had it been tagged out of service in anticipation of repairs. Tr. 394-96; Sec'y Ex. 17 at DOL 00094. I thus find that the Secretary has thus met her initial burden to establish that the defective front-end loader had not been removed from service. *See* 30 C.F.R. § 56.14100(c).

Regarding whether continued operation of this front-end loader without first repairing its defective brake lights would be "hazardous to persons," Davis testified that any vehicle present at Clendennen Ranch – including another piece of mobile equipment or a vehicle visiting the site from the Fairland Plant – could present a collision risk if that equipment or vehicle were to follow or attempt to overtake a front-end loader lacking operational rear brake lights. *See* Tr. 396-97. Davis specifically identified that two excavators and a dump truck were actively in use when he inspected Clendennen Ranch, and that a dump truck can be operated at a sufficient speed to overtake the front-end loader while both vehicles are in motion. Tr. 397-98. The undersigned credits this portion of Davis' testimony as well. *Id*. Carson testified that the front-end loader is not used in proximity to the dump truck, but the Secretary's photographic evidence rebuts this assertion, with one image showing the front-end loader in the foreground and a dump truck in the background located, at most, a few yards away. Sec'y Ex. 17 at DOL 00094.

Davis' testimony establishes that the continued operation of the loader would be hazardous to the limited number of people working in the vicinity of the Clendennen Ranch pit, and the Secretary has thus met her evidentiary burden to make this additional showing required to establish a violation of Section 56.14100(c).

Gravity

Davis testified that the loader's malfunctioning brake lights were 'unlikely' to cause an injury to a miner, and further acknowledged that there was a limited likelihood that a collision – and a consequent collision-related injury – would be caused as a result of the loader's defective brake lights. Tr. 319-20. Davis thus found the likelihood of injury or illness as being 'unlikely', and the injury or illness that could reasonably be expected as being 'lost workdays or restricted duty.' Sec'y Ex. 11.

The understand affirms MSHA's gravity finding given (1) Davis' assertion that the risk of a collision occurring as a result of these defective brake light is relatively low, and (2) that mining operations at Clendennen Ranch only occur in daylight conditions. *See* Tr. 292. I further find that Davis' assessment of gravity as unlikely to result in an injury that could reasonably be expected as being 'lost workdays or restricted duty' is justified on this record. *See* Sec'y Ex. 11. Accordingly, MSHA's gravity finding is AFFIRMED.

Negligence

Under 30 C.F.R. § 56.14100(c), a mine operation bears the burden of maintaining equipment in good working order, and a reasonable person familiar with the mining industry would have either repaired these defective brake light immediately or tagged the loader out of service until repair efforts could be undertaken. *See U.S. Steel Corp.*, 6 FMSHRC at 1910. Cactus Canyon breached its duty of care to correct this hazardous condition when it neither repaired the defective brake lights nor tagged the loader out of service until repairs were completed. *See* 30 C.F.R. § 100.3(d). Davis assessed the injury or illness that could reasonably be expected as 'lost workdays or restricted duty.' *Id*. Davis assessed the negligence level as 'moderate' because the vehicle operator did not report the faulty brake lights to either Carson or the site foreman. Tr. 320-21. Carson and the site foreman's lack of awareness of the violative condition represents a factor mitigating Cactus Canyon's level of negligence, and the undersigned affirms the Secretary's moderate negligence finding.

Penalty

For Citation No. 9678442, the Secretary proposed a regularly assessed penalty of $133.00, calculated from total points of $148.00 with a ten percent reduction for good faith. Sec'y Exs. 3, 11. The undersigned has considered Cactus Canyon's history of previous violations, the size of its business, the operator's moderate negligence, the relatively minor gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notice of the violation. As discussed above, this violation is non-significant and substantial, is 'unlikely' to result in an injury causing 'lost workdays or restricted duty,' and was the result of Cactus Canyon's moderate negligence. Additionally, Cactus Canyon has a minimal violation history, with no recorded violations of 30 C.F.R. § 56.14100(c) within the twelve months preceding the issuance of Citation No. 9678442 and only one citation in total was issued by MSHA during the twelve months preceding Davis' inspection. Sec'y Exs. 1, 11. Based on these factors and under the totality of the circumstances, the undersigned assesses a $133.00 penalty.

vii. Citation No. 9678443: The Secretary Has Established That Cactus Canyon Violated 30 C.F.R. § 56.14103(b), And That This Violation Was Significant and Substantial

Findings of Fact

On October 25, 2022, while still at the Clendennen Ranch pit, Davis continued inspecting the John Deere front-end loader ("unit 6535") and observed that the glass in the front and side windshield was cracked. Sec'y Exs. 12, 17 at DOL 00095-96. Davis testified that the damaged windshield had a "starburst effect" from the sunlight angles, and described the damaged

windshield as having sharp, raised edges that ran across its center in the direct line of the equipment operator's vision. Tr. 328. Davis further found that the damaged windshield exposed the loader operator to cuts, bruises, and other bodily injury. Tr. 328-29. Davis specifically testified as follows:

> The gravity I took -- I went reasonable I can due to observe windshield has starburst effect had several different -- the windshield, like, is getting ready to pop out. And due to if it pop out the cuts and bruises would happen and it could be a possibility could have permanent disabling. If the -- if the windshield hit the right piece at the right time. So therefore, I went with designation substantial due to the defective glass position was in.

Tr. 328.

Davis issued a citation for a violation of 30 C.F.R. 56.14103(b). Sec'y Ex. 12. Before terminating the citation, Davis ordered that the damaged windshield be replaced because of his concern that, if the windshield was not totally replaced, the equipment operator would not be protected from airborne rock fragments. Tr. 773.

Davis listed the risk of injury or illness as 'reasonably likely' and found the injury or illness that could reasonably be expected to be permanently disabling. Sec'y Ex. 12. Regarding his decision to designate this alleged violation of 56.14103(b) as significant and substantial, Davis testified that "[t]he consideration I took, based on the window and the glass itself, and the window's position, what would -- what would happen if that glass was to fall out? And that determine me why I went with S&S." Tr. 329. When asked why he designated the injury or illness that could reasonably be expected as 'permanently disabling,' Davis first testified that "severe cuts, broken bones, laceration, or permanent loss of a finger or something" could occur if a miner were to come into contact with broken glass. Tr. 329. Then Davis elaborated that:

> I chose permanent disablement due to the condition of the windshield. It was ready the pop, Your Honor. Then -- by then pop and thinking about all that heavy glass falling on a person as he's driving, his hands and arm right there by that windshield. And I went permanent disabled that -- that it could permanently disable his hand while he's driving the vehicle if he got hit." Tr. 330. Davis found a negligence level of 'moderate' because of "Mr. Carson saying he wasn't aware of it. But looking at it, I don't think I got the whole truth, the whole situation about how long that the windshield was damaged.

Tr. 329.

Davis assessed the negligence level as moderate given Carson's representation that he was unaware of the condition of the windshield prior to its discovery during Davis' inspection. Sec'y Ex. 12; Tr. 330.

Violation

For Citation No. 9678443, the Secretary charges Cactus Canyon with a violation of 30 C.F.R. § 56.14103. Section 56.14103 sets requirement for "operators' stations," as follows:

> a) If windows are provided on operators' stations of self-propelled mobile equipment, the windows shall be made of safety glass or material with equivalent safety characteristics. The windows shall be maintained to provide visibility for safe operation.
>
> b) If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.
>
> c) The operator's stations of self-propelled mobile equipment shall—
>
> 1. Be free of materials that could create a hazard to persons by impairing the safe operation of the equipment; and
> 2. Not be modified, in a manner that obscures visibility necessary for safe operation.

30 C.F.R. § 56.14103(a)-(c).

The Secretary alleges that the damaged front and side windshield discovered during Davis' investigation was a violation of 30 C.F.R. § 56.14103(b) because the glass was damaged to a sufficient degree to both obscure the equipment operator's vision and present a risk of cut-related injuries to the equipment operator. Sec'y Ex. 12; Tr. 328-330.

Carson, both on brief and during the hearing, asserted that this citation should be vacated because Davis refused to terminate the citation until Cactus Canyon had attempted to replace the front and side windshields of the front-end loader. CC Br. at 56-57; Tr. 666-68. However, the citation was not issued for the absence of windshields that Davis ordered removed, but for hazardous conditions in the existing windshields at the time of inspection. *See* Sec'y Ex. 12. Thus, the arguments for vacating this citation are unavailing.

The Secretary submitted multiple photographs of the broken front and side windshield glass of the front-end loader. Sec'y Ex. 12, DOL 00095-96. These photographs, and Davis' testimony in support thereof, carry the Secretary's burden of proof by a preponderance of the evidence to establish that the damaged windshield with a starburst effect obscured visibility necessary for safe operation and created a collision hazard and a hazard that the broken glass with ragged edges would pop out and injure the operator. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001); *Sec'y of Labor v. Small Mine Development, LLC*, 36 FMSHRC 246, 264 (January 2014)(ALJ).

Gravity and Significant and Substantial Finding

A violation is significant and substantial if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981)). The Commission has long implemented a four-step analysis in evaluating whether a violation qualifies as significant and substantial. In *Mathies*, the Commission enumerated the four steps required for a finding of S&S
as follows:

> (1) the underlying violation of a mandatory safety standard;
> (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation;
> (3) a reasonable likelihood that the hazard contributed to will result in an injury; and
> (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC at 3-4.

More recently, the Commission restated *Mathies* Step 2 in terms of finding that "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). More recently still, the Commission proposed a refined S&S analysis, holding that the four elements required for an S&S finding are as follows:

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

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)). Notably, an S&S determination is based on the facts existing at the time of citation issuance and assumes normal mining operations will continue. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012) ("[t]he [S&S] evaluation is made in consideration of the length of time that the violative [berm] condition existed prior to the citation and the time it would have existed if normal mining operations had continued.").

Additionally – though not argued in significant fashion here – redundant safety measures are not to be considered in determining whether a violation is S&S. *See Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *Secretary of Labor v. Acha*

Construction, LLC, 38 FMSHRC 3025, 3032 (Dec. 28, 2016)(ALJ)(determining berm standard violation to be S&S after refusing to consider equipment's rollover protection and seatbelts because they were redundant safety measures).

In the instant matter, Step 1 of the Commission's significant and substantial analysis is satisfied based on my finding that the damaged windshield glass constituted a violation of 30 C.F.R. § 56.14103(b).

As to Step 2 of the modified *Mathies* test, the discrete safety hazard contributed to by the violation of 30 C.F.R. § 56.14103(b) is straightforward. *See Newtown Energy*, 38 FMSHRC at 2038. As held by the Commission, "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id*. The purpose of 56.14103(b) is to protect miners from collisions while operating equipment with an obscured field of vision caused by damaged glass, and to protect miners from other hazards because of the damaged glass that has not been removed. The presence of damaged glass with a starburst effect impeding vision for the front-end loader operator stood at odds with these purposes and contributed to the foregoing discrete safety hazards. *See Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383. Thus, step 2 of the modified *Mathies* test is met here.

Turning to the third and fourth modified *Mathies* steps, the final inquiry in the S&S analysis is whether the discrete hazard(s) identified in Step 2 would be reasonably likely to result in an injury and whether there is a reasonable likelihood that the injury would be of a reasonably serious nature. *See Newtown Energy*, 38 FMSHRC at 2038. In the context of Citation No. 9678443, the question becomes whether (1) the damaged front and side windshield of the front-end loader presented a reasonable risk of collision or other injury to the equipment operator, and (2) whether any resulting injury would be reasonably serious in nature. *Id.*

I consider first whether the Secretary has established that it is reasonably likely that the front-end loader operator would suffer an injury from a collision because of obscured vision due the damaged windshield. Carson submits on brief that such an injury is unlikely, arguing that:

> Vision was not alleged to be obscured. Starburst affects are not the same as obscuring vision (". . .") When questioned about the hazard, AR Davis testified that there were large rocks falling off the back of the bucket when the loader was being used to load trucks. When confronted with the actual use, of the hazard became small rocks falling off the back of the bucket when removing fines from beneath the grizzly. Moving the grizzly is a 5 minute job that occurs at most twice a week. The absence of a windshield creates no exposure to rocks jumping out of the bucket. Any magically flying rocks would be deflected by the grizzly. There would be no other equipment moving when the grizzly was being moved. No other mining work is conducted by the loader. This order and the citation should be vacated because

> the windshield was not obscured and not dangerous. When it was removed to came out in one piece without breaking as he feared.

CC Br. at 56-57.

As an initial matter, Carson's assertion that "vision was not alleged to be obscured" is incorrect. The citation specifically alleges that "[t]here were raised sharp edges that ran from the right side across to the left side and up the center of the windshield *in the direct line of the operator's vision*. Sunlight from angles could create a starburst effect *momentarily impairing the operator's vision*." Sec'y Ex. 12 (emphasis added). However, I credit Carson's reasoning that the actual use of the front-end loader presents a low likelihood of laceration injuries resulting from any prospective further damage to the loader's front or side windshield. CC Br. 56, Tr. 667. Davis testified concerning the risk of further damage to the front-end loader, stating:

> the gravity I took -- I went reasonable I can due to observe windshield has starburst effect had several different -- the windshield, like, is getting ready to pop out. And due to if it pop out the cuts and bruises would happen and it could be a possibility could have permanent disabling. If the -- if the windshield hit the right piece at the right time. So therefore, I went with designation substantial due to the defective glass position was in.

Tr. 328. While Davis was evidently concerned that airborne rocks at Clendennen Ranch could further damage either windshield and increase the risk of injury to the equipment operator, the Secretary has presented insufficient evidence that any small rocks or fines encountered while relocating the grizzly might become airborne and strike either windshield with sufficient force to result in further cracking or offset within that windshield. *See* Tr. 328. The Secretary has also not established that, at the time of Davis' inspection, the windshield was damaged in such a manner as to create a reasonable risk of laceration injuries to the loader operator. While Citation No. 9678443 describes the cracks in the windshield as being "sharp" and "raised", this description is not supported by the photographic evidence provided by the Secretary, which show extensive cracking in both the front and side windshields, but no visible transverse offset of any portion of either windshield, nor any surface visibly sharp enough to cause a laceration injury. Sec'y Ex. 17, DOL 00095-96, *see Peabody Midwest Mining,* 42 FMSHRC at 383.

Davis testified that any employee operating the front-end loader would be exposed to a heightened risk of serious injury or lacerations if the front or side windshield were to "pop out", and that these raised, jagged edges placed the equipment operator at a heightened level of experiencing a laceration or other cut-related injury. Tr. 328. However, prior to terminating this citation, both the front and side windshields were each removed in one single piece without shattering or experiencing any further cracking, suggesting that neither windshield was actually "ready to pop out" at the time of Davis' inspection. Tr. 667. Given this record, the undersigned concludes that the Secretary has not proven a reasonable likelihood of the equipment operation experiencing a laceration, or that any resulting laceration would constitute an injury of a reasonably serious nature. *Newtown Energy*, 38 FMSHRC at 2038.

The Secretary has established a reasonable likelihood of injury to the front-end loader operator as a result of an obscured field of vision caused by a "starburst effect" in the cracked windshield. After evaluating the respective positions of both parties, the undersigned finds that Davis' testimony – although difficult to follow at times – is persuasive. *See* Tr. 326-33. Davis testified that he noticed a starburst effect in each windshield, and further testified that he took the reduced field of vision into consideration when issuing this citation. Tr. 328, 391. Davis' testimony is corroborated by the photographs provided by the Secretary, which make plain that the operator's visibility through the front and side windshields would have been significantly obscured during operation of the front-end loader. Sec'y Ex. 17, DOL 00095-96. The undersigned finds that this obscured field of vision would significantly heighten the likelihood of the equipment operator experiencing a collision with equipment, other vehicles, or debris, either through a resulting decrease in the level of visibility of nearby vehicles or persons when loading larger materials into dump trucks at Clendennen Ranch, or through reduced visibility when moving the grizzly to different areas of the active pit. Had Davis not intervened on the date of inspection, the equipment operator would have faced an ongoing, significant risk of injury as a consequence of this reduced field of vision, and any such injury resulting from a vehicular collision would likely require medical evaluation or treatment and be "reasonably serious [in] nature." *Peabody Midwest Mining,* 42 FMSHRC at 383. In consideration of the foregoing, the undersigned finds that the Secretary has met her burden under steps 3 and 4 of the refined *Mathies* test.

Although I have upheld the Secretary's significant and substantial finding, I conclude that it is more appropriate to designate the injury or illness that could reasonably be expected as 'lost workdays or restricted duty' rather than 'permanently disabling'. *See* Sec'y Ex. 12. It is certainly possible that a collision at an open pit site such as Clendennen Ranch could result in substantial injury, as even low speed vehicular collisions can result in persistent, life-altering injuries to those involved. However, the Secretary has not presented sufficient evidence that one could reasonably expect a permanently disabling injury to occur under these facts. The Secretary has not submitted documentary or testimonial evidence concerning the expected severity of any injury that a front-end loader operator might experience in the event of vehicular collision with other mobile equipment, and Davis' testimony in support of his gravity assessment focused on potential injuries resulting from a laceration, rather than the injuries that might result in the event resulting from obscured vision. Tr. 329; Sec'y Ex. 12.

In sum, I find that the violation of section 56.9300(a) occurred as alleged by the Secretary. I further conclude that that the collision-related hazards created by the violation were reasonably likely to result in an injury of a reasonably serious nature. I therefore find that the violation of Section 30 C.F.R. § 56.14103(b) was properly designated as significant and substantial, but reduce the injury or illness that can reasonably be expected to 'lost workdays or restricted duty'.

Negligence

Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. 30 C.F.R. § 100.3(d). The two broken windshields described above represented an obvious defect that presented a discrete safety

hazard from collision-related injuries. A reasonably prudent miner would recognize that damaged windows on mobile equipment are likely to "obscure visibility necessary for safe operation, or create a hazard to the equipment operator", and would have ordered that the windows be replaced or removed before continuing to operate this front-end loader. 30 C.F.R. § 56.14103(b); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910. Cactus Canyon violated its duty of care when it failed to remove or replace the two damaged windshield that presented visible, obvious hazards to the equipment operator. *Id.* However, I credit Carson's testimony that he was unaware that the front-end loader was damaged prior to Davis' inspection on October 25, 2022. Tr. 666-68; 30 C.F.R. § 100.3(d). Carson's apparent lack of awareness of the violative condition represents a factor mitigating Cactus Canyon's level of negligence, and the undersigned therefore affirms the Secretary's moderate negligence finding.

Penalty

For Citation No. 9678443, MSHA has proposed a penalty amount of $204.00 in accordance with single penalty assessment criteria at 30 § C.F.R. 100.3, with a proposed ten percent good faith reduction to $183.00. The Act requires that, when assessing civil monetary penalties, a Commission ALJ must consider the following statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

In contrast to the preceding two citations, MSHA found Citation No. 9678443 to be a significant and substantial violation, a finding upheld by the undersigned *supra*. Despite the heightened severity of this offense, several factors represent mitigating considerations that weigh in Cactus Canyon's favor. The undersigned credits Carson's representation that he was unaware that the windshields were broken prior to Davis' inspection of the Clendennen Ranch pit and has found moderate negligence. *See* Tr. 330. Further, Cactus Canyon's minimal history of previous violations and modest scale of options weigh against increasing the penalty amount that has already been proposed by the Secretary. 30 U.S.C. § 820(i); *see* Sec'y Ex. 12.

Having considered these factors, the undersigned finds the $183.00 penalty proposed by the Secretary is appropriate and is therefore AFFIRMED.

viii. *Citation No. 9678445: The Secretary Has Established that Cactus Canyon Violated 30 C.F.R. § 50.30-1(g)(3)*

Findings of Fact

On October 26, 2022, Davis returned to the Fairland Plant to conclude his investigation. He reviewed myriad paper records, including a Quarterly Employment Report, MSHA Form 7000-2. Sec'y Ex. 14. Davis discovered that the number of employees and employee hours submitted in the quarterly report were incorrect. Tr. 268; Ex. 16. More specifically, Davis found that the hours submitted in Code 03 for strip, open pit, or quarry miners, who had worked in Quarter 3 of 2022, were not reported accurately. Ex. 14. Davis testified that:

> He reported for the third quarter 2022, a strip 3,718 hours. Then it turned around and quarter 2, he reported 1459, cut in half. And the quarter previously before that was 1,349. And the fourth quarter was 1,238. So he based it with the same number of personnel that it just went down tremendously in an hour, it was just not reported right.

Tr. 268.

Davis issued a citation alleging a violation of 30 C.F.R. § 50.30-1(g)(3).[20] Considering that this citation relates only to the correct completion of paperwork, Davis listed the risk of injury or illness as 'no likelihood,' and the injury or illness that could reasonably be expected as 'no lost workdays.' Sec'y Ex. 14. Davis listed the negligence level as 'low' because the records were filed timely and readily provided at Davis' request. Tr. 270.

Davis credibly testified that Carson later informed him that he misreported quarterly work hours because he was "trying to reflect the Fairland plant [is] not with the quarries." Tr. 272. Davis further credibly testified as follows:

> You got citation 9678445, which is on the quarterly report violation. Based on this condition and practice, the normal employee and employee hours didn't -- wasn't correct. And based on the – for the third quarter 2022. The hours submitted on the code 3 was not reported with accuracy. And how I determined it wasn't reported with accuracy, based on the number of personnel Mr. Carson said he had at the plant and based on the number of personnel that's working for the Fairland plant wasn't matching. And when I asked him, he said he did it on purpose. So I said, why would you do that, you know, you did on purpose? He said, Well, see, it got us some attention. Well, it got us attention. So based on this one, I cited -- I cited him on the standard of 50.30-1(g)(3) for accuracy.

Tr. 264-65.

[20] The Secretary states the incorrect legal standard in her brief. Davis issued a citation for an alleged violation of 30 C.F.R. 50.30-1(g)(3), not "56.30-1(g)(3)". Sec'y Br. at 19-20; Sec'y Ex. 13.

Davis further testified as follows:

> [A]s soon as I saw those hours and I questioned Mr. Carson about it. And I asked Mr. Carson, I said, these look like these are not reported accurate. He said, They're not. Straight from his mouth he said, They're not. And he said, the reason being, he wanted to explain how he conclude to these hours. And I said, no, you're going to have to update those hours according to the number of hours worked for this mine site. So basically, he did submit it on time, but it's just not -- he did not report it with accuracy.

Tr. 270. Carson acknowledged as much during the hearing and in his post-hearing brief by stating that he intentionally recorded quarterly work hours in an inaccurate manner because he did not believe that the Fairland Plant should be classified as a mine. Tr. 677-78; CC Br. at 58.

Violation

30 C.F.R. § 50.30-1 requires, in part, that

> (3) Total employee-hours worked during the quarter: Show the total hours worked by all employees during the quarter covered. Include all time where the employee was actually on duty, but exclude vacation, holiday, sick leave, and all other off-duty time, even though paid for. Make certain that each overtime hour is reported as one hour, and not as the overtime pay multiple for an hour of work. The hours reported should be obtained from payroll or other time records. If actual hours are not available, they may be estimated on the basis of scheduled hours. Make certain not to include hours paid but not worked.

30 C.F.R. § 50.30-1(g)(3). As set forth above, section 50.30-1(g)(3) requires each employer under the Mine Act to report total hours worked by all employees. *Id*. Carson admitted that he intentionally violated this standard because of his position that MSHA did not have jurisdiction over the Fairland Plant. Tr. 677-78. This admission, along with Davis' extensive testimony, carry the Secretary's burden of proof by a preponderance of the evidence. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

Gravity

Given that a violation of 30 C.F.R. § 50.30-1 represents a "paperwork violation", the undersigned affirms Davis' finding that the risk of injury or illness applicable under these facts is 'no likelihood,' and the injury or illness that could reasonably be expected is 'no lost workdays.'

Negligence

As noted, Carson admitted to misreporting quarterly paperwork required under the Act. Tr. 677-78. The requirements for compliance with 30 C.F.R. § 50.30-1(g)(3) are both straightforward and easily achieved, requiring nothing more than accurately reporting total employee work hours,

save for certain enumerated exclusions. A reasonably prudent person familiar with the mining industry would endeavor to comply with this regulation by accurately recording employee work and leave hours and maintaining these records for MSHA's potential review. *See FMC Wyoming Corp.,* 11 FMSHRC 1622, 1629. Cactus Canyon breached its duty of care under 30 C.F.R. § 50.30-1(g)(3) when Carson intentionally recorded inaccurate employee work hours in a dishonest attempt to "make a point" to MSHA concerning his dissatisfaction with MSHA's proper exercise of its jurisdiction over the Fairland Plant. *See id.*

Carson suggests that this intentional misfiling of paperwork was justified because he had previously told MSHA that the Fairland Plant had ceased operation, despite the fact that the Fairland Plant was actively in operation as of the date of Davis' routine inspection. *See id.* Carson's brazenness in intentionally misrepresenting work hours for Cactus Canyon's employees, as well as his cavalier acknowledgement that he intends to continue misfiling quarterly work reports in the future (Tr. 272), leads the undersigned to conclude that a finding of 'high negligence' is appropriate under these circumstances. *See Brody*, 37 FMSHRC at 1701. The undersigned therefore modifies the assessed negligence level for Citation No. 9678445 to 'high negligence.'

Penalty

For this citation, MSHA proposed a $133.00 penalty. As with Citation Nos. 9678437 and 9678440, the Secretary proposes the minimum statutory penalty amount available for this citation, and the minimum statutory amount available in 2022 more generally. See 30 C.F.R. § 100.3(g), Table XIV (2022) (Considering the 10% good faith abatement reduction). In contrast to those two citations, however, Cactus Canyon's conduct in relation to this citation was highly negligent in nature. Given my finding of high negligence based on Carson's admission that he intentionally misreported mine employee work hours and that he intended to continue to do so in the future, and in order to effectively deter such misconduct, I find a penalty of $325.00 to be more appropriate in these circumstances. I find that this increased penalty is appropriate even in light of Cactus Canyon's relatively modest scale of operations, and that it will not affect Cactus Canyon's ability to remain in business.

Accordingly, the undersigned MODIFIES this citation to reflect a 'high' level of negligence, and to raise the proposed penalty amount to $325.00. The citation is otherwise AFFIRMED, as issued.

ix. Citation Number 9678446: The Secretary Has Established that Cactus Canyon Violated 30 C.F.R. § 56.18002(a), And That This Violation Was Significant and Substantial

Findings of Fact

Davis issued another paperwork-related citation for inadequate workplace examinations at the end of his return visit to the Fairland Plant on October 26, 2022. Sec'y Ex. 15. More specifically, Davis issued a citation for a violation of 30 C.F.R. § 56.18002(a), which provides:

a) A competent person designated by the operator shall examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health.

1) The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.

2) Conditions noted by the person conducting the examination that may present an imminent danger shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

In the condition or practice section of Citation 9678446, Davis alleged:

> A competent person designated by the mine operator was not examining the quarry pit at least once every shift for conditions which could adversely affect safety or health. This was evident from the obvious safety violations found during this inspection. Some of the hazards were for failure to install and maintain berms, correct serious mobile defects, and other visible conditions. On shift examination is necessary to identify safety and health problems so repaired [sic] and/or corrections can be started without delay.

Sec'y Ex. 15.

During his inspection, Davis discovered that the requisite workplace examinations had not been conducted at the Clendennen Ranch pit during the seven-day period prior to October 26, 2022, and that there was not documentation of the examinations having been completed on multiple other dates prior to that seven-day period. Tr. 339. Davis found the likelihood of injury or illness to be 'reasonably likely' and found the injury or illness that could reasonably be expected to be 'permanently disabling.' Sec'y Ex. 15. Davis assessed the negligence level as 'moderate' given Carson's representation that he was unaware the workplace examinations were not being documented for the Clendennen Ranch. Tr. 339-40. In support of this assessment, Davis testified that

> the lead man of the Clendennen Ranch pit supposed to conduct those things daily. And supposed to turn them in daily, but he wasn't doing it. (". . .") Mr. Carson was upset. He said that, you know, those guys supposed to be turning those in. And then at the Fairland pit [plant] they was doing it. But at the Clendennen pit they was not.

Tr. 339.

Violation

30 C.F.R. § 56.18002(a) provides that "a competent person designated by the operator shall examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health." In 2017, MSHA adopted new safety standards requiring that mine operators examine and record conditions that may adversely affect safety or health. *See Examinations of Working Places in Metal and Nonmetal Mines*, 82 Fed. Reg. 7680, 7682 (Jan. 23, 2017). The following year, MSHA amended these requirements to allow examinations to occur before or as miners begin work. *Examinations of Working Places in Metal and Nonmetal Mines*, 83 Fed. Reg. 15,055 (Apr. 9, 2018)(codified at 30 C.F.R. §§ 56.18002(a)–(c), 57.18002(a)–(c)). The Commission has specified that "the term 'competent person' must contemplate a person capable of recognizing hazards that are known by the operator to be present in a work area or the presence of which is predictable in the view of a reasonably prudent person familiar with the mining industry." *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1629 (Sept. 1989).

To prove a violation of 30 C.F.R. § 56.18002(a), the Secretary must show that a designated competent person did not conduct any such examinations either on the shift during which the inspection was conducted or did not perform any such examinations during a specifically identified prior shift. *Cemex Construction Materials, Atlantic, LLC,* 38 FMSHRC 827 (Apr. 2016). The Commission has determined that a mine operator must conduct "adequate" exams of any working place pursuant to 30 C.F.R. § 56.18002(a). 38 FMSHRC at 1625-29. The Commission further defined such adequate exams as those which would identify all hazards which a reasonably prudent examiner would recognize. *Id.* The Commission has also held that section 56.18002(a) contains not only a "competent person" requirement, but also requires that a workplace examination be conducted "adequately," i.e. conducted "to the level of a meaningful examination" as opposed to "only examining] the workplace to standard of care slightly surpassing not conducting the examination at all." *Sec'y of Labor v. Sunbelt Rentals, Inc.; Lvr, Inc.; and Roanoke Cement Co., LLC*, 38 FMSHRC 1619, 1625-26 (July 2016).

The undersigned specifically inquired whether any records existed to challenge Davis' testimony that Cactus Canyon had been out of compliance with 30 C.F.R. § 56.18002(a) for at least seven days preceding October 26, 2022. Carson provided the following response:

> ALJ McCarthy: Yeah, it's a timesheet. It's a timesheet. Where is a workplace examination that says there are safety hazards here?
>
> Carson: Well, right above, if you go down to where the guys do it, E, meant that he was working with an excavator and above it it says, "guards, pollution controls, walkways," it has all the stuff you're supposed to look at. I have -- I think I have a better form now. But this was our -- this is -- they're all responsible for it and we check them and say, are you paying attention?

Tr. 673.

Thus, Carson expects his employees to "all [be] responsible for [pre-shift examinations]." Tr. 673. While Carson did not designate an individual competent person to examine the Clendennen Ranch pit "at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health," each of the three employees assigned to that location *could have* qualified as a 'competent person' had the examinations actually been conducted. *See* 30 C.F.R. § 56.18002(a). However, Cactus Canyon itself does not claim that the requisite pre-shift examinations were conducted during the seven days preceding October 26, 2022, but merely that Carson expects his employees to be generally attuned to safety conditions after a work shift has already commenced. *See* Tr. 673.

Even if Cactus Canyon had claimed to have conducted the required examinations, the only paperwork that Carson provided to Davis concerning the Clendennen Ranch site were timesheets for two of his employees, and Carson readily admitted that he did not have documentation of completed workplace examinations for the time period at issue here. Therefore, it is clear that Cactus Canyon was not in compliance with the requirements of 30 C.F.R. § 56.18002(a), and the Secretary has carried her burden to establish a violation of the legal standard cited for Citation No. 9678446.

Gravity and Significant and Substantial Finding

As stated above, the Secretary has carried her burden to establish that Cactus Canyon violated 30 C.F.R. § 56.18002(a). For the reasons that follow, the Secretary has also met her burden to establish that this violation was appropriately cited as significant and substantial violation. As fully set forth above, the Commission's refined S&S analysis framework requires a showing that:

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

Peabody Midwest Mining, LLC, 42 FMSHRC at 383.

Step 1 of this refined test has been resolved through my finding that Cactus Canyon did not conduct and subsequently document any pre-shift examinations at the Clendennen Ranch pit during the seven-day period preceding October 26, 2022. *See* C.F.R. § 56.18002(a). The text of Section 56.18002(a) is not permissive in nature and represents a mandatory safety standard. *See Signal Peak Energy, LLC*, 37 FMSHRC 470, 479 (Mar. 2015). Since I have found a violation, Step 1 of the *Mathies/Peabody* test resolves itself in the Secretary's favor. *See Peabody Midwest Mining, LLC*, 42 FMSHRC at 382-83.

Step 2 of the refined *Mathies* analysis focuses on the extent to which the violation contributes to a particular hazard, and the Commission has found that this step is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 (Aug. 2016) (citing *Knox Creek Coal Corp*., 811 F.3d at 163). Thus, step two of the *Mathies* test involves a two-part analysis:

1) identification of the hazard created by the violation of the safety standard; and 2) "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC at 2038.

"[T]he pertinent requirements of 30 C.F.R. § 57.18002 are three-fold: (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator. *FMC Wyoming Corp.,* 11 FMSHRC 1622, 1628 (Sept. 1989). The Commission has instructed that "the starting point for determining the hazard is the actual cited section" and is found "in terms of the prospective danger the cited safety standard is intended to prevent." *Newtown*, 38 FMSHRC at 2038. 30 C.F.R. § 57.18002 was promulgated with the aspiration that requiring regular inspections for health or safety hazards prior to the beginning of a work shift would allow a mine operator to discover and address those hazards, and thereby mitigate the risks to miners that could potentially flow from exposure to those hazards. Unlike most safety standards, section 56.18002 does not have one particular hazard associated with it. Rather, the purpose of section 56.18002 is to detect and prevent "conditions which may adversely affect safety or health." 30 C.F.R. § 56.18002. Section 56.18002(a) creates inspection requirements in the hope that mine examiners will discover any and all safety or health hazards present at a mine site before miners are exposed to those hazards.

Cactus Canyon's failure to conduct adequate workplace examinations of the Clendennen Ranch site placed its employees at risk in innumerable ways, as did its failure to initiate prompt corrective action of readily visible conditions that might affect a miner's safety, including the conditions described within Citation Nos. 9678441 and 9678443, which increased the risk of harm to Cactus Canyon miners. *See* Sec'y Exs. 10, 12. The undersigned finds that Cactus Canyon's failure to conduct the required work site examinations directly contributed to the perpetuation of multiple discrete safety hazards at the Clendennen Ranch pit. *See Peabody Midwest Mining, LLC*, 42 FMSHRC at 383. Among these discrete hazards was the heightened risk of collision related injuries created by the damaged front and side windshields in a Komatsu front-end loader, which the undersigned has already found sufficient to support a significant and substantial finding for Citation No. 9678443. Accordingly, the undersigned finds that the second refined *Mathies* factor is satisfied.

Turning to the third and fourth modified *Mathies* steps, the final inquiry in the S&S analysis is whether the discrete hazards identified in Step 2 would be reasonably likely to result in an injury of a reasonably serious nature. *See Newtown Energy*, 38 FMSHRC at 2038. The third step of the Mathies analysis is "primarily concerned with gravity," and whether the hazard identified in step two "would be reasonably likely to result in injury." *Newtown Energy*, 38 FMSHRC 2037. As noted, the fourth Mathies factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. Thus, the relevant inquiry "is not whether it is likely that the hazard … would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest Mining, LLC v. Fed Mine Safety & Health Rev. Comm'n*, 762 F.3d 611, 616 (7th Cir. 2014).

At the time that Davis conducted his inspection of Clendennen Ranch on October 25, 2022, multiple readily identifiable safety hazards were present that could have and should have been documented and addressed during a daily workplace examination. *See FMC Wyoming Corp.,* 11 FMSHRC at 1628. Given Cactus Canyon's failure to conduct a daily workplace examination on October 25, 2022 – or any daily workplace examination for a period of at least seven days prior to October 25, 2022 – multiple cited hazards went undocumented, including the damaged windshield glass on the unit 6535 front end loader that was reasonable likely to result in a collision, as well as hazards resulting from damaged brake lights on that same front-end loader and a missing driver side window on an on-site excavator. As described in detail in the analysis pertaining to Citation No. 9678443, Cactus Canyon's failure to repair or replace the damaged glass windshields presented a risk of permanently disabling injury from collision with persons, vehicles, or other objects because of obscured vision, and also the risk of injury from bodily contact with broken glass. The undersigned has concluded above that Cactus Canyon's failure to address the collision hazard supported an S&S finding for that citation. Had Cactus Canyon conducted and documented the required workplace examinations, it is likely that it would have discovered and could have corrected the violative condition described in Citation No. 9678443. Consistent with my reasoning in upholding Citation No. 9678443, the undersigned similarly finds here that Cactus Canyon's failure to conduct the required daily workplace examinations contributed to the ongoing presence of a collision "hazard that would be reasonably likely to cause an injury of a reasonable serious nature." *Peabody Midwest Mining, LLC*, 42 FMSHRC at 383. The undersigned therefore finds that the Secretary has carried her burden to establish that Cactus Canyon's violation of 30 C.F.R. § 56.18002(a) was appropriately assessed as significant and substantial in nature.

Davis listed the risk of injury or illness as being 'reasonably likely,' and the injury or illness that could reasonably be expected as being 'permanently disabling.' Sec'y Ex. 15. Davis based his findings on, among other things, the presence of multiple alleged safety violations that could have been discovered upon a proper inspection of the Clendennen Ranch. Tr. 338-39. Davis' testimony that the alleged violations discovered at Clendennen Ranch could have been addressed had Cactus Canyon abided by its inspection obligations was particularly persuasive. *See* Tr. 339. However, as with Citation No. 9678443, the undersigned finds that the injury or illness that could reasonably be expected should be reduced to 'lost workdays or restricted duty'.

Negligence

Mine operators owe a general duty of care under 30 C.F.R. § 56.18002(a) to ensure that daily workplace examinations are conducted so that hazardous workplace conditions can be identified and addressed. A reasonably prudent person familiar with the mining industry would ensure that this duty is met by properly designating a competent person or persons to conduct daily workplace examinations to ensure the documentation of conditions that adversely affect safety and health prior to sending miners into danger before each working shift. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. Cactus Canyon violated this duty when a competent person failed to, for at least seven days preceding October 26, 2022, conduct or document the workplace examinations mandated by 30 C.F.R. § 56.18002(a). Had a competent person conducted these workplace examinations, it is likely that the hazards cited by Davis at Clendennen Ranch would have already been identified and addressed, perhaps eliminating Davis' need to issue any citations during his inspection of that facility. *See* 30 C.F.R. § 100.3(d). As to Cactus Canyon's negligence

level as it pertains to this citation, Davis assessed the negligence level as 'moderate' given Carson's representation that he was unaware that the workplace examinations were not being documented for the Clendennen Ranch. Tr. 339-40. The undersigned disagrees. Carson was a hands-on operator, who claims to have designated all employees as competent persons under the standard. He should have known, particularly after 7 days, that workplace examinations were not being conducted at the Clennenden Ranch. Accordingly, I find Cactus Canyon's negligence level to be high under the totality of the circumstances.

Penalty

As it did with Citation No. 9678443, MSHA determined Citation No. 9678446 to be a significant and substantial violation. Both findings have been upheld by the undersigned. The undersigned has also upheld MSHA's comparatively higher gravity assessment, which determined Cactus Canyon's violative conduct to create a reasonable likelihood of a permanently disabling injury. *See* Sec'y Ex. 15. In addition, I have found Cactus Canyon's negligence level to be high, not moderate, because Carson should have known, after 7 days, that workplace examinations were not being conducted by competent persons. Although Cactus Canyon has a minimal history of previous violations and modest scale of operations, I find that a $335 penalty instead of the $183 dollar penalty proposed by the Secretary, will not affect Respondent's ability to remain in business and should be assessed against Respondent for the S&S, high negligence violation. weigh against increasing the penalty amount proposed by the Secretary.

Total Penalty

In sum, the undersigned has affirmed Citation Nos. 9678437, 9678440, and 9678442 as issued, and Citation Nos. 9678443, 967844, and 9678446, as modified. Cactus Canyon is thus ordered to pay a total penalty amount of $1,242.00, consistent with the terms of the order provided at the conclusion of this written decision.

As a final matter, the undersigned now turns to Cactus Canyon's pending "request to withdraw," which is denied for the reasons set forth below.

VII. Denial of Motion for Recusal

Cactus Canyon requests that the undersigned withdraw from further consideration of this matter on grounds of personal bias or other disqualification under Rule 81(b). See 29 C.F.R. §2700.81(b). The initial decision of withdrawal lies with the judge. A judge who declines to withdraw is required to make a ruling on the record regarding the request, stating the grounds for his denial, and if the hearing has been completed, the judge shall proceed with issuance of his decision, unless the Commission stays further proceedings upon the granting of a petition for interlocutory review. 29 C.F.R. §2700.81(c). If the Commission does grant a petition for interlocutory review, it will evaluate the decision of the judge not to withdraw on an abuse of discretion standard. *Big Horn Calcium Co.*, 12 FMSHRC 1493 (Aug. 1990).

Cactus Canyon's Request to Withdraw is denied. After careful consideration of precedent, the undersigned finds 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 undersigned's recusal. As further explained below, rulings adverse to Cactus Canyon cannot serve as sufficient evidence of bias or prejudice, absent additional showing of deep-seated favoritism or antagonism that would make fair judgment impossible. Additionally, it is the role of a judge to be an active participant in the proceedings, not merely a neutral arbiter. Asking questions that clarify a witness's testimony, restricting counsel from pursuing duplicative or wasteful lines of questioning or testimony, and demonstrating sternness in maintaining efficiency and control during adjudication are duties within the authority and discretion of the judge presiding over just and orderly proceedings. Such actions alone do not suffice as showings of bias or prejudice that would "lead[] a detached observer to conclude that a fair and impartial hearing is unlikely[.]" *Liteky v. United States*, 510 U.S. 540, 564 (1994).

The general principle set forth by the United States Supreme Court governing recusal on grounds of prejudice or bias is whether "a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely[.]". *Liteky v. United States*, 510 U.S. 540, 564 (1994). This principle, while broadly underpinning analyses of whether a judge has shown bias or prejudice sufficient to warrant recusal, is opaque and can be clarified by more specific principles governing the kind of evidence typically sufficient to support a showing of judicial bias or prejudice.

The administrative law judge, as central trier of fact in an administrative proceeding, "is an active participant in the adjudicatory process and has a duty to conduct proceedings in an orderly manner so as to elicit the truth and obtain a just result." *Medusa Cement Co.*, 20 FMSHRC 144, 148 (Feb. 1998) (quoting *Secretary of Labor o/b/o Clarke v. T.P. Mining, Inc.*, 7 FMSHRC 989, 993 (July 1985). The Commission has found that a wide range of actions taken by a judge in an administrative proceeding are insufficient to warrant recusal on the basis of bias or prejudice. For example, actions taken to actively and efficiently manage the proceeding do not suffice and fall within the discretion of the judge. *See Medusa Cement*, 20 FMSHRC at 150 ("[M]ere active participation by the judge does not create prejudice[.]") (quoting *Deary v. City of Gloucester*, 9 F.3d 191, 194-95 (1st Cir. 1993)).

It is expected that judges engage with case materials and ask questions to clarify issues being litigated to promote the understanding of the parties involved. It is also expected that "judges listen closely, read carefully and research thoroughly, before issuing a reasoned, well-thought-out and impartial decision." *See e.g.*, *Pocahontas Coal*, 36 FMSHRC, 3322, 3324 (Dec. 2014) (ALJ). Asking a party to produce evidence for comment by the opposing party may narrow the issues, promote understanding of them, and streamline proceedings. *Id.* Active participation may extend to admonishing counsel, reframing leading questions, or posing questions to witnesses to create a more comprehensive record. *Medusa Cement*, 20 FMSHRC at 150 (citing *Liteky*, 510 U.S. at 556; *United States v. Olmstead*, 832 F.2d 642, 648 (1st Cir. 1987)). Evidence presented that a judge performed actions such as these are not sufficient alone for disqualifying a judge.

The duty to promote clarity and efficiency extends to record testimony and evidence presented during the hearing. Thus, it is not an abuse of discretion to request that counsel stop repetitive, irrelevant, or hypothetical questioning of witnesses at trial. *Medusa Cement*, 20 FMSHRC at 150 (citing *Desjardins v. Van Buren Comm. Hops.,* 969 1280, 1282 (1st Cir. 1992)).

"[E]ncouraging counsel to move forward, forbidding counsel from eliciting duplicative testimony, or halting what the court perceive[s] to be a waste of time, [are] firmly within the discretion of the trial judge." *Deary*, 9 F.3d at 195, citing *United States v. Paz Uribe*, 891 F.2d 396, 400 (1st Cir. 1989).

A central limiting principle circumscribing a judge's discretion is that judicial participation should not prevent parties from fully developing their case. Judges must adjudicate, but not litigate cases. *Lonnie Jones v. D&R Contractors*, 8 FMSHRC 1045, 1053 (July 1986); *see also Pocahontas Coal v. Secretary of Labor, MSHA*, 36 FMSHRC 3322, 3323 (Dec. 2014) (ALJ). While Commission judges are afforded "considerable leeway . . . in regulating the course of a hearing and in developing a complete and adequate record," a judge's participation should not "substantially hinder the parties in the presentation of their evidence and deny them their right to a fair and impartial hearing." *Secretary of Labor v. Canterbury Coal Co.*, 1 FMSHRC 1311-12, 1314 (Sept. 1979). This evaluation often requires an ad hoc, birds-eye assessment of the case to determine whether "in intent or appearance . . . [a party has] been slighted or somehow been put at a disadvantage" by a judge's active interventions in the case, sufficient to deny due process. *Pocahontas Coal*, 36 FMSHRC at 3324 (ALJ).

Not every intervention by a judge that slights a party or places them at a disadvantage can serve as grounds for arguing bias or prejudice sufficient to disqualify a judge. "Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky*, 510 U.S. at 555, citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Just because a judge—informed by observations made while observing proceedings and engaging with case materials—rules upon a motion or issues an order or decision adverse to a party does not make a judge biased or prejudiced against that party. To disqualify a judge for bias or prejudice allegedly evidenced through a judicial ruling or opinion, there must be a showing of "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555-56.

The *Liteky* standard sets an extremely high bar to establish that a judge is prejudiced or biased, absent additional, plain remarks to that effect. While temperate language is laudatory, there is no rule preventing a judge from admonishing counsel when necessary; in fact, when done in the service of the efficient and fair conduct of proceedings, the judge may have a specific obligation to admonish counsel. *T.P. Mining*, 7 FMSHRC at 993, citing *Cromling v. Pittsburg & Lake Erie R.R. Co.*, 327 F.2d 142, 152 (3d. Cir. 1963).

General expressions of frustration or irritation during trial proceedings also are generally insufficient to show bias or prejudice warranting disqualification. Justice Scalia explained this in *Liteky,* as follows:

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible …. *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what

> imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

510 U.S. at 555-56.

Adversarial administrative proceedings are innately processes of tension that judges are meant to manage and exert control over. *Deary*, 9 F.3d at 195-96. Admonishments of counsel and general friction between judge and counsel are insufficient evidence of prejudice by themselves. "Although any display by the judge of unwarranted irritation or displeasure directed towards counsel ought to be avoided, friction between the court and counsel does not constitute pervasive bias." *Id*., citing *Arthur Pierson & Co. v. Provimi Veal Corp.*, 887 F.2d 837, 839 (7th Cir. 1989). *See also Medusa Cement*, 20 FMSHRC at 150 (quoting same concept regarding friction between court and counsel from *Arthur Pierson & Co.*, 887 F.2d at 839). The expectations in litigation contemplate civility and respect—not necessarily benevolence.

Applying these principles to the allegations of bias at issue, there is no basis for concluding that Cactus Canyon was denied due process or prevented from presenting a full case before this tribunal during the April 2023 hearing. In fact, just the opposite conclusion is warranted, as the undersigned gave Cactus Canyon every opportunity to try its case as it wished. Cactus Canyon, represented pro se by attorney Carson, was given a full and fair opportunity to present its case. Carson was allowed to testify, ad nauseum, in narrative fashion. For example, the undersigned allowed Carson to explore lines of questioning concerning MSHA's decision not to issue a separate mine identification number for Clendennen Ranch, a decision that is not subject to administrative review by this tribunal. Tr. 156-61. The undersigned further allowed Carson to provide, with limited interruption for clarifying questions, a testimonial narrative that spanned almost the entirety of the third day of these proceedings. Indeed, a full 163 of the 782 pages of the transcript for this case document Carson's presentation of his case in chief on his own accord, without being constrained by the traditional direct examination format wherein an attorney questions a witness (or witnesses) with a series of nonleading questions. *See generally*, Tr. 554-717.

The allegations raised by Cactus Canyon as purported evidence of personal bias or prejudice largely concern judicial rulings on evidence, testimony, or jurisdiction, or involve active participation and management of the proceedings by interrupting counsel or witnesses to ask clarifying questions, limit repetitive testimony or questioning, or admonish counsel, where appropriate. Even when the ability of Cactus Canyon to pursue lines of questioning was limited, these redirections were followed by statements encouraging counsel to either move on, explain the relevance of a line of questioning, or focus on a new issue rather than one already asked and answered.

In sum, based on a thorough review of the allegations made by Cactus Canyon in its Request to Withdraw, there is insufficient evidence of any deep-seated antagonism, prejudice, or favoritism sufficient to warrant recusal of the undersigned. Furthermore, Cactus Canyon had a full opportunity to present and develop its case within the normal evidentiary and procedural confines of an adversarial proceeding. The Request to Withdraw is **DENIED.**

Counsel for Cactus Canyon's allegations regarding the undersigned's character and integrity are discussed below. They cross the line into unethical, unprofessional conduct by a member of the Commission bar and merit a recommendation for sanctions before the Commission and the Texas bar where counsel is licensed to practice law.

VIII. Recommendation for Attorney Discipline and Sanctions

Attorney Carson's allegations seeking to impugn the undersigned's qualifications and integrity are sanctionable and are hereby referred for disciplinary action within the Commission under Commission Procedural Rule 80, and with the Office of the General Counsel of the State Bar of Texas for conduct violative of Texas Disciplinary Rule of Professional Conduct 8.02.

Carson has made repeated claims about the integrity of a judge of the Commission with apparent reckless disregard for the truth. There is a lack of evidence providing support for the veracity of these claims beyond Carson's own suspicions or his dissatisfaction with the outcome of these proceedings. Although the line between strong, zealous language used to advocate for one's claims and language that is unprofessional and in violation of ethical rules of attorney conduct is not the most defined or exact in federal case law, both the scope of Texas's relevant Disciplinary Rule of Professional Conduct (Rule 8.02) and federal case law examining such conduct demonstrate that the accusations made by Carson as to the undersigned's integrity transcend the identification of perceived errors in or disagreements with judicial rulings and warrant a recommendation for sanctions. Upon this recommendation, Carson may be compelled to produce evidence substantiating the egregious claims he has made, and an inability to produce probative evidence in support will establish that such claims were made with reckless disregard for the truth and violate Texas Disciplinary Rule of Professional Conduct 8.02.

Procedures for recommending disciplinary proceedings for individuals practicing before the Commission are governed by Commission Procedural Rule 80. All "[i]ndividuals practicing before the Commission or before Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States." 29 C.F.R. §2700.80(a). According to this standard, Rule 8.02 of the Texas Disciplinary Rules of Professional Conduct is binding on Carson, a pro se litigant barred in Texas, during his time practicing before Commission judges. Rule 8.02 provides:

> A lawyer [barred in Texas] shall not make a statement that the lawyer knows to be false *or with reckless disregard as to its truth or falsity* concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Texas Disciplinary Rules of Professional Conduct Rule 8.02 (emphasis added). Black's Law Dictionary defines "reckless disregard" as "conscious indifference to the consequences of an act." *See* Definition for the word '*Disregard*', BLACK'S LAW DICTIONARY (11th ed. 2019). When specifically discussing reckless disregard in the context of statements made about another (e.g., a defamation claim), the defendant's intent for harm is judged against a standard of "reckless disregard for truth." *Id.*

The decision to impose sanctions for accusations made within court proceedings about a judge straddles a varied line between the adversarial, but permissible, and the sanctionable. On the one hand, language can be strong and provocative without crossing the line "separat[ing] permissible zealous advocacy from impermissible and sanctionable personal opinion." *In re Brizinova*, 565 B.R. 488, 509 (Bankr. E.D.N.Y. 2017). Statements regarding contentious subjects may feature rhetorical flourishes which, while impassioned and forceful, may not necessarily cross the line of frivolity, recklessness, or sanctionable conduct. *Id.* As a result of the myriad ways that language can be subjectively perceived, courts typically reserve "[t]he imposition of sanctions or other harsh consequences based on the use of strong and offensive language by counsel . . . for the most extreme situations." *Id.* at 507.

Forceful language almost certainly crosses the line from contentiously offensive to sanctionable when the inflammatory remarks are made in bad faith. Statements evince bad faith when recklessly used to make frivolous arguments, stoke personal animosity, or disparage judicial conduct when devoid of substance or merit. *See In re Brizinova*, 565 B.R. at 507-08 (citing *In re 60 East 80th Street Equities*, *Inc. v. Sapir*, 218 F.3d 109 (2d Cir. 2000); *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2005). Such bad faith statements, made with little or no evidence to substantiate them, are treated as more clearly sanctionable. Their frivolity underscores the uselessness that such inflammatory language has in a formal administrative proceeding, contrary to judicial norms of professionalism and civility.

As emphasized by the specific Disciplinary Rule of Professional Conduct in the Texas bar and several other state bars, the frivolous use of provocative language which aims to impugn the integrity and character of a judge typically provides a one-way ticket to Sanction-Town. Judges are agents of the courts or tribunals for which they serve. Thus, courts or tribunals are sensitive to accusations attacking judicial character because they inherently attack the dignity and character of the court or tribunal by implication. *See United States v. Nolen*, 472 F.3d 362, 374 (5th Cir. 2006) (equating frivolous attacks on the character of a judge for an official ruling to be a direct attack on the institution of the court [tribunal] by implication).

While claims as to the correctness of a judge's rulings can fall within permissible bounds of advocacy, allegations made by counsel against a judge's character or ethical standards have been found presumptively false or made with reckless disregard for the truth. *Nolen*, 472 F.3d at 372 (affirming district judge's position that "*any* accusation that a judge lied about his reasons for a ruling would be regarded as presumptively false or made with reckless disregard for the truth"). According to *Nolen*, a Fifth Circuit case invoking Rule 8.02 of the Texas Disciplinary Rules of Professional Conduct, "[a]llegations that a judge has mishandled a trial are beyond the reach of Rule 8.02, but allegations of judicial 'dishonesty' are not." *Id.* at 374. Making claims that a judge has lied, provided false reasoning for a judicial ruling, or acted with unethical or inappropriate motives, without the evidence or support necessary to substantiate those claims, impugns the

integrity of both the judge and tribunal and are found to be frivolous, made in bad faith, and contrary to Texas Disciplinary Rules of Professional Conduct 8.02. *Id.*[21]

Frivolous attacks directed against a judge's integrity have typically fit into the category of sanctionable conduct under professional rules analogous to Texas Disciplinary Rule of Professional Conduct 8.02, with sanctions that include revocation of an attorney's *pro hac vice* privileges to practice in a certain jurisdiction. For example, sanctions for an attorney practicing in Texas were upheld in *Nolen* for statements that a federal judge had given false justifications for temporarily appointing additional counsel for a defendant thought to be originally aided by ineffective counsel. 472 F.3d at 372-73. Despite the court's recognition that the complainant's belief about the judge's alleged lack of honesty may have been in good faith, the lack of any "compelling indicia of any mendacity" in the comments cited from the judge led the court to uphold sanctions for impugning the integrity of a judge with at least "reckless disregard for the truth." *Id.* at 373.

As noted, *Nolen* placed the burden on the moving party to prove that provocative allegations regarding a judge's integrity, or lack thereof, were non-frivolous. *Id.* That burden was not met, and sanctions were imposed for frivolous accusations pertaining to the judge's character. *Id.* Impugning the integrity of a judge, thereby implicating the integrity of the court, is indeed a risky business, which federal tribunals treat seriously and impose a high standard of substantiation when evaluating evidence presented that a judge has acted with personal bias or prejudice. In *United States v. Cooper*, a case from the District of Rhode Island, a lawyer suffered suspension of *pro hac vice* privileges when an affidavit submitted alleging personal bias and prejudice, although claimed to be in good faith, "contain[ed] little more than a series of misstatements of fact and unsubstantiated, false and conclusory allegations, made under oath, which constitute a scurrilous, personal attack upon the integrity of this Court." 669 F. Supp. 38, 39 (D.R.I. 1987).

In addition to failing to present sufficient evidence to support accusations and avoid a conclusion of sanctionable frivolity, relying upon misrepresentations of the record to support

[21] By contrast, sanctions against an attorney were reversed by the Fifth Circuit in *United States v. Brown,* 72 F.3d 25 (5th Cir. 1995), a jury trial. The court found that the attorney's claims alleging a judge's personal bias and prejudice were inferences of bias based on the judge's actions in trial, rather than claims attacking the judge's integrity or honesty. The attorney in *Brown* relied upon in-court observations of the trial judge to make his arguments, claiming the judge "appeared not to be interested in anything that the defendant testified to," "seemed to have a mission of belittling, castigating, and otherwise discrediting defense counsel," and "gave—by gesture—by facial expression—and by oral comments—the impression that he favored the government and disfavored the defendant[.]" *Id.* at 27. While these claims certainly use strong language to argue judicial prejudice, the Fifth Circuit held such claims to be more similar to "complaints about how judicial conduct may have affected the decision of the jury in the context of an adverse proceeding." *Id.* at 28. The court found that sanctions under professional responsibility standards for claims impugning the integrity of the court, are meant to address "false or reckless statements questioning judicial qualifications or integrity (usually allegations of dishonesty or corruption)" as opposed to an attorney's typical freedom to challenge perceptions of court partiality when just and substantiated. *Id.* at 29.

claims impugning the character of the judge will also warrant sanctions. In *In re Liotti*, the Fourth Circuit publicly admonished an attorney who made misrepresentations about the record, including allegations without factual support in the record, the presentation of unrelated portions of the transcript as a related conversation, and the failure to disclose certain admissions of witnesses, to claim that a district judge had suppressed a relevant piece of evidence. 667 F.3d 419 (4th Cir. 2011). While the court acknowledged the ability of attorneys to zealously argue facts in the record to support their claims, clear misrepresentations of the record, even if created through "a troublesome pattern of carelessness" as opposed to intentional fabrication, warrant at least some form of discipline. *Id.* at 430.

Courts have also foregone lenity for parties representing themselves pro se, particularly a licensed attorney, who is already subject to professional responsibility obligations. In *Fleming v. United States*, the Fifth Circuit cautioned a licensed attorney as pro se litigant to cease use of "intemperate and abusive language . . . [and] ad hominem attacks on federal judges "to avoid future sanctions from the court under the professional standards of conduct. 162 Fed. Appx. 383, 386 (5th Cir. 2006).

The pro se claims by attorney Carson in the Request to Withdraw generally fall into two categories. On the one hand, Carson points to several rulings, questions, and decisions made by the undersigned as evidence of personal bias or disqualification. These claims essentially aim to relitigate various decisions made on procedural and evidentiary issues and witness testimony, and more appropriately belong in a petition for discretionary review under an abuse of discretion standard, rather than a request to withdraw.

Category 1 - Less egregious allegations on procedural rulings motions or evidentiary issues

Cactus Canyon's counsel has shown impudence and strident lack of respect and professionalism for Commission procedure and decorum. For example, he calls the obligation to file a motion to compel "nonsense," when a motion to compel is the precise mechanism afforded by regulation in instances where a dispute arises following one party's request for production during the discovery period. Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 6; 29 C.F.R. §§ 2700.58(c), 59.

The following, non-exhaustive collection of examples serves to highlight Carson's attempts to relitigate, often in a frivolous or nonsensical fashion, procedural matters already resolved before this tribunal:

Example 1(A)

> *"Only personal bias or other disqualifications explains* Judge McCarthy's disregard of this mandatory sanction under [FRCP 37(c)(1)] and under the common law and embrace of this tainted evidence to unearth the very first explanation of the Secretary's Mine Act jurisdiction case, which the Court then announces as compelling."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 6. In actuality, the Court made no proclamation as to whether any yet to be entered evidence was compelling, and simply highlighted (Tr. 14-18) that the parties' prior interactions made plain that the issue of MSHA's jurisdiction was likely to arise at trial and, with the exception of evidence withheld under claim of privilege, that the Secretary had produced evidence related to its jurisdictional review conducted *at the request of Carson.*

Example 1(B)

> "The Judge admitted a complete lack of experience when jurisdictional facts not stipulated (P.9, L.22-23) and at the 2nd prehearing conference *displayed an obvious desire to please the Secretary.* Whatever the reason, personal bias or other disqualification resulted in Judge McCarthy building the Secretary's entire case for jurisdiction at trial on the basis of unqualified and undisclosed opinions about why OSHAct did not apply."

Cactus Canyon 29 C.F.R. § 2700.81(b) Req. Withdraw, 7 n. 6. It should go without saying that the actions referred to during the second prehearing conference, during which the undersigned asked District Manager O'Dell "to convey his regards to the Sec./Asst. Sec. of Labor that the DM was to meet the first day of trial instead of participating as the Secretary's representative," represent an extension of pleasantries on the part of the undersigned, and are not evidence of favoritism or personal bias. Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 7 n. 6. Yet, this cannot go without saying, as Attorney Carson has suggested that the undersigned's expression of well wishes to a public servant not involved in these proceedings is inherently biased in nature and to Cactus Canyon's detriment.

Example 1(C)

> "[T]he ALJ showed personal bias by delaying rulings, then ruling the Secretary could make a case by pleadings alone and denied the motions on this procedural ground."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 8. First, Carson's suggestion that the undersigned delayed rulings in these matters is without merit. The ten contest dockets captioned above were assigned to the undersigned on January 13, 2023, while Penalty Docket CENT 2023-0089 was assigned on March 13, 2023. The undersigned issued an order denying Cactus Canyon's Motion for Summary Decision on March 13, 2023, and a separate order denying Cactus Canyon's Motion to Reconsider and scheduling a hearing date on March 23, 2023. The hearings in these matters then commenced on April 4, 2023. A total timespan of less than four months from ALJ assignment to the conclusion of a hearing on the merits is not an undue delay. *See generally, Telecommunications Research Action v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984).

Second, at no no point during the prehearing process did the undersigned rule that the Secretary could carry her burden of proof "by pleadings alone, and Carson's assertion to the contrary is a misapprehension of the procedural history of this case. What the undersigned did rule, in denying Cactus Canyon's motion for summary decision, is that the parties' filings presented

genuine issues of material fact exist as to whether 'mining' occurred at the Fairland Plant and Quarries after its purported permanent closure on August 11, 2022. Order Denying Mot. for Sum. Dec. at 3. In denying Cactus Canyon's motion for summary decision, the undersigned did not make any finding in favor of the Secretary, nor did I find that the Secretary could proceed to hearing under a less burdensome standard of proof. *Id*. Indeed, the undersigned reiterated in the early stages of the hearing that it is the Secretary who carries the burden of proof in these proceedings. *See e.g.,* Tr. 143 ("Mr. Marquez, you have the burden to prove that this material entered or affected commerce.").

Example 1(D)

> "Judge McCarthy *abrogated his duty* to reduce the issues when they [motions for summary decision] were denied. However the very same time Judge McCarthy chastised Cactus Canyon pursuing issue reduction by motions and filings in this case. *This hypocrisy demonstrates personal bias or other disqualification.*"

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 8-9. Carson makes no reference to the specific duty that the undersigned allegedly failed to undertake, nor does he point to any instance in the record where the undersigned failed to abide by his duties as an Administrative Law Judge. Granting a meritless motion for summary decision is not a form of mandatory relief in Commission proceedings, but Carson appears to argue as if it were. *See* 29 C.F.R. §§ 2700.55, 67. Contrary to Carson's position, it is not an ALJ's duty to grant a motion for summary decision in furtherance of some nebulously defined duty to "narrow the issues," and motions for summary decision may be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

Example 1(E)

> "Demonstrating *incredible personal bias or other disqualification*, at the hearing, Judge McCarthy *sua sponte* reversed the Orders and transformed the denials to be on the merits of Cactus' case."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 9. The Court made no such reversal, and instead reminded Carson (Tr. 117, 133-34) that the issues before the Court at hearing are restricted 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." Order Denying Mot. for Sum. Dec. at 3.

Example 1(F)

> "Judge McCarthy is shown above to have displayed time and again *his personal bias or other disqualification in this matter*: from the prehearing conferences to the Orders of 3/13 and 3/23; from the one-sided limitation of Mine Act cross

> examination (that was reversed for Judge McCarthy's examination). *Judge McCarthy repeatedly changed positions on relevancy and irrelevancy to suit his prejudice that any MSHA theory will work to keep jurisdiction from OSHA*. Trial testimony that should not have been admitted, was given credence as if pled from the beginning of the case and explored in Discovery and utilized for the summary decision motions."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 19-20. Though couched as presenting evidence of bias, Carson simply rehashes procedural arguments previously raised by Cactus Canyon in its Motion for Summary Decision and subsequent Motion for Reconsideration, arguments that Carson was free to, but ultimately did not, submit in a motion for discretionary review. In any event, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky, 510 U.S. at 555.

Category 2 – Sanctionable, bad-faith allegations concerning the character and integrity of the Administrative Law Judge

While the foregoing Category 1 claims toss the label of "personal bias" around freely and risk frivolity without direct support, a second category of more egregious claims regarding the character of the undersigned clearly trigger eligibility for sanctions under Commission Procedural Rule 80 and Fifth Circuit precedent applying Texas Disciplinary Rules of Professional Conduct 8.02. This second category of allegations extends beyond an attempt to circumstantially build an argument for inferring personal bias that would warrant recusal. Instead, these claims play carelessly with fire, lobbing allegations about the integrity and ethical character of a Commission judge in a bad-faith effort to see if any will catch alight.

Below is a selection of the most egregious character-based allegations which Carson sets forth in his Request to Withdraw. Italic emphasis has been added to highlight particularly relevant, strident, or sanctionable language.

Cactus Canyon makes specific claims regarding interruption of witness testimony, specific rulings on evidence or procedure, or other events proffered to support allegations of prejudice or bias. Listed below are allegations that expressly allege that the undersigned has, inter alia, shown favoritism; abrogated his duty to reduce issues for litigation; acted in pure bad-faith; pre-decided the merits of the case; coached witnesses and revised testimony; interrupted to fabricate facts, fabricate false recollection, or aid and abet false testimony; made false statements or actively sabotaged Cactus Canyon's case; actively created the Secretary's claims of jurisdiction; and repeatedly failed to enforce the rules against the Secretary. These unsubstantiated allegations extend well beyond support for an argument of personal bias or prejudice and directly and spuriously attack the undersigned's reputation, integrity, and competence as a federal adjudicator.

The cumulative audacity of such unsupported aspersions as to the undersigned's integrity or competence as a federal adjudicator warrant an appropriate and deterrent sanction from the Commission and the Texas bar under Texas Disciplinary Rule of Professional Conduct 8.02. Consider the following:

Example 2(A)

> "Over 24 years of FMSFRC [sic] trials and 42 years of trying cases to judges in state and federal court, not once in counsel's experience has a Judge repeatedly interrupted cross-examination of the proponent with the burden of proof *with bad faith inquiries* and demands that the cross-examining party identify and provide evidence of the [sic] substance of the cross examiner's theories and defenses. Likewise, never has a Judge interrupted to change a witness answer, or to restate the witness answer *in a light more favorable to the position of the party* with the burden of proof."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 10. As a frequent practitioner before the Commission with "over 24 years" of experience in hearings before Commission Administrative Law Judges, Carson should be aware that among the many core functions of Commission ALJs are the "regulat[ion] of the course of the hearing and dispos[ition] of procedural requests or similar matters." 29 C.F.R. § 2700.55(e), (g). The undersigned considers the dutiful effectuation of these core responsibilities to be of paramount importance and, when and where appropriate, will interject to either ask questions to clarify a witness's testimony or restrict counsel from pursuing duplicative or wasteful lines of questioning or testimony. Such actions do not amount to bias, nor do they evince "[d]ishonesty of belief, purpose, or motive." *Liteky v. United States*, 510 U.S. at 564; *See* Definition for the phrase '*Bad Faith*', BLACK'S LAW DICTIONARY (12th ed. 2024). In the 24 total "examples" provided by Cactus Canyon in its request to withdraw, no attempt is made to identify the actual, regulatorily defined role of a Commission ALJ. *See* Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 10-19; 29 C.F.R. § 2700.55. Nor does Cactus Canyon identify where or how the undersigned "demand[ed] that the cross-examining party identify and provide evidence of the substance of the cross examiner's theories and defenses" or "restate[d] the witness answer in a light more favorable to the position of the party with the burden of proof." Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 10. Indeed, Cactus Canyon makes almost no citations to regulation, statute, or controlling case law in the entirety of its 24-page submission. *See generally*, Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw. Instead, Cactus Canyon throws around vague references of "bad faith" without any attempt to define the appropriate standard of judicial conduct, or how the undersigned allegedly derogated from that duty.

Example 2(B)

> "Under the circumstances, Judge McCarthy's interruption to ask if Cactus contended that the Clendennen Ranch Mine was a mine [sic] is *unquestionably malicious and intentional, with no justification what-so-ever*[sic]. This disrupted[sic] of the cross examination of critical Mine Act jurisdiction issue previously briefed in Cactus' Prehearing Report (copy attached). *This was not Judge McCarthy's mistake or inadvertence, it was intentional and bad faith*. *Only personal bias or some other disqualification due to a personal trait like bias* would explain this critical interruption to bring up as unsettled Cactus' position on the Clendennen Ranch Mine."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 11. In actuality, the undersigned's "interruption" was entirely justified and an appropriate exercise of discretion in regulating the course of the hearing. *See* 29 C.F.R. § 2700.55(e). It is perplexing that Carson believes that this interruption was at all to the detriment of Cactus Canyon, because asking Carson to confirm whether Cactus Canyon views Clendennen Ranch to be a mine rather than a borrow pit aided the undersigned in fully understanding and thoughtfully considering Carson's jurisdiction-related line of questioning. *See* Tr. 102.

Example 2(C)

With regard to the foregoing, Carson also alleges:

> "*This biased behavior and bullying made the Secretary's witnesses comfortable to continue the numerous intensional* [sic] *or reckless misrepresentations about jurisdiction that was alleged* in subdivisions 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 28, and 29 of the Notice of Contest (record and Ex. 32). These jurisdictional misrepresentations were announced by the ALJ as conclusive. Judge MCCarthy [sic] should withdraw and allow an unbiased set of eyes review a very complete record."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 20. Carson thus accuses the undersigned of acting in bad faith in the interest of the Secretary and bullying Cactus Canyon (and Carson) on the Secretary's behalf. *Id*. at 20. Putting the temerity of this allegation aside, Cactus Canyon does not cite anywhere in the almost 800-page transcript where "these jurisdictional misrepresentations were announced by the ALJ as conclusive." Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 20. The absence of a citation is telling, as the undersigned *did not* at any point announce that the Secretary can carry its burden concerning the issue of jurisdiction solely by referencing the allegations contained in the citations themselves. *See* Sec'y Exs. 6-15. Rather, the undersigned specifically identified that the Secretary carries the burden to establish that MSHA's attempted exercise of jurisdiction over the Fairland Plant and Quarries was proper. *See e.g.,* Tr. 143 ("Mr. Marquez, you have the burden to prove that this material entered or affected commerce.").

Example 2(D)

Carson goes even further, claiming that the undersigned intentionally sought to buttress the Secretary's case-in-chief.

> "Judge McCarthy interrupted *to fabricate false recollection* about 2 different mirror citations."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 17. In fact, the undersigned intervened on Cactus Canyon's behalf to clarify Davis' confusing testimony concerning whether he had inspected and subsequently cited one or multiple front-end loaders. Tr. 405.

Example 2(E)

Carson also makes multiple allegations that the undersigned spoke for or coached the Secretary's witnesses, including:

> "The secretary did not ask for a trial amendment, instead the *ALJ put words in Fisher's mouth* p.135, l.7-15 in order to assume away the jurisdictional conclusion."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 7 n. 7. The undersigned did not "put words in Fisher's mouth," and instead merely restated Fisher's prior testimony on the issue of whether MSHA views the Fairland Plant and Quarries as being an integrated operation ("the Clendennen Ranch was already tied to the 41009 mine ID through violations that Mr. Davis cited" Tr. 110), and requested that Carson narrow his questioning to the citations actually at issue in these matters and not to a hypothetical future violation that might be issued to Cactus Canyon. Tr. 135.

Example 2(F)

"*Repeated speaking for Secretary* at [Tr] 140, l.19-21." Again, contrary to Carson's allegation, the undersigned did not "speak for the Secretary," but rather directed Carson to refrain from reiterating testimony provided by Fisher mere seconds earlier. Indeed, Fisher's testimony on the same page of the transcript cited by Carson states that "the Clendennen Ranch, we believe, is part of the plant, the quarries. It's not adjacent as if you could throw a rock and hit it, but we consider it part of it." Tr. 140.

Example 2(G)

> "Interruptions *and coaching of witness* on the only jurisdictional regulation, §56.1000."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 14. Rather than coaching Fisher, the undersigned assisted Carson by requesting that Fisher clarify potential inconsistencies in his testimony concerning the proximity of Clendennen Ranch to the Fairland Plant. Tr. 136-37.

Example 2(H)

> "There is no excuse for *active sabotage of Cactus' case and actively creating the Secretary's claims of jurisdiction* based on Judge McCarthy's best presentation of the previously undisclosed jurisdictional testimony of Mr. Fischer (sic) and on/off reliance on §56.1000."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 13. Neither Fisher nor any other representative for the Secretary has claimed that 30 CFR § 561000 creates a regulatory vehicle for MSHA to exercise jurisdiction over Cactus Canyon, and all references to that regulation came from Carson during his cross-examination of Fisher. Tr. 131-35. Carson's claim that the

undersigned attempted to rely on this regulation to 'engineer' MSHA's jurisdiction is, at best, confusing.

Example 2(I)

Worse still, Carson explicitly accuses the undersigned of actively pre-determining the result of the hearing in favor of the Secretary.

> "Similarly, Judge McCarthy *pre-decided merits of the case*, and changed his Orders on Summary Disposition from Denied based on genuine issues of material facts into a substantive Denial of the merits of Cactus' Motion involving Mine Act Jurisdiction and the Clendennen ranch Mine (. . .) At the hearing, Judge McCarthy converted the Denial into a substantive one on the merits of Cactus' case. P. 117, l. 2 – 11, and p. 133, l 25 – p.134, l.1. Based on that substantive reversal *he is pre-judged mining without reference to the statute, regulations, and case law* (. . .) "When Fisher re-confirms no extraction at Fairland, Judge McCarthy contradicts Fisher *and seeks to revise testimony to support McCarthy's prejudgment*."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 11. The undersigned made no such reversal, and instead restated the holding in the Order Denying Summary Decision, wherein the undersigned found that a Commission ALJ "lacks jurisdiction to review Contestant's arguments involving MSHA's failure to issue mine identification numbers separate from Mine ID 41-00009." Order Denying Mot. for Sum. Dec. at 3; Tr. 117-18, 133-34.

Example 2(J)

Carson again accuses the undersigned of prejudging these matters in stating the following:

> "Judge McCarthy dismisses the FOIA response by Fisher's boss, the District Manager. 'I know all this,' p. 157, 121-122 (sic). Fisher's testimony supersedes and *the ALJ has made up his mind before cross exam of the first witness is concluded.*"

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 15. The undersigned did not "make up his mind" prematurely, nor did he express that he had resolved the competing arguments presented by the parties concerning whether MSHA's exercise of its jurisdiction over the Fairland Plant was proper. Rather, the undersigned directed Carson to "go ahead" and move on from a duplicative line of questioning relating to the jurisdictional review requested by Cactus Canyon. Tr. 157; *see Medusa Cement*, 20 FMSHRC at 150 (holding that it is not an abuse of discretion to request that counsel stop repetitive, irrelevant, or hypothetical questioning of witnesses at trial). By that point, Carson's line of questioning on that issue had eclipsed nearly 50 pages within the transcript of these proceedings. *See* Tr. 109-157.

Example 2(K)

Perhaps most disrespectfully and outrageously of all, Carson accuses the undersigned of participating in criminal activity in concert with the representatives for the Secretary of Labor.

> "Judge McCarthy *interrupts to aid and abet false testimony,* this time by the AR Davis. P. 361, l.17 – p. 368, l.25."
>
> "Extended critical interruptions *in order to aid and abet false testimony* by the AR Davis. P. 361, l. 17 – p.368, l. 25."

Cactus Canyon Req. Withdraw, 15-16. "Aiding and abetting" is defined as assist[ing] or facilitate[ing] the commission of a crime or tort, or to promote its accomplishment. AID AND ABET, Black's Law Dictionary (12th ed. 2024). In the federal context, the elements necessary to uphold a conviction for "aiding and abetting" a crime are

> 1. That the accused had specific intent to facilitate the commission of a crime by another;
> 2. That the accused had the requisite intent of the underlying substantive offense;
> 3. That the accused assisted or participated in the commission of the underlying substantive offense; and
> 4. That someone committed the underlying offense.

See United States v. DePace, 120 F.3d 233 (11th Cir. 1997); *United States v. Chavez*, 119 F.3d 342 (5th Cir. 1997); *United States v. Powell*, 113 F.3d 464 (3d Cir. 1997); *United States v. Sayetsitty*, 107 F.3d 1405 (9th Cir. 1997); *United States v. Leos-Quijada*, 107 F.3d 786 (10th Cir. 1997); *United States v. Stands*, 105 F.3d 1565 (8th Cir.), *cert. denied* (October 6, 1997) (No. 96-9541); *United States v. Pipola*, 83 F.3d 556 (2d Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 183, 136 L.Ed.2d 122 (1996); *United States v. Chin*, 83 F.3d 83 (4th Cir. 1996); *United States v. Lucas*, 67 F.3d 956, 959 (D.C. Cir. 1995); *United States v. Spinney*, 65 F.3d 231 (1st Cir. 1995); *United States v. Spears*, 49 F.3d 1136 (6th Cir. 1995). To convict as a principal of aiding and abetting the commission of a crime in the 5th Circuit – the circuit in which Carson is licensed to practice – a jury must find beyond a reasonable doubt that the defendant "associated with the criminal venture, purposefully participated in the criminal activity, and sought by his actions to make the venture successful." *United States v. Landerman*, 109 F.3d 1053, 1068 n.22 (5th Cir. 1997); A defendant associates with a criminal venture if he "shares in the criminal intent of the principal, and the defendant participates in criminal activity if he has acted in some affirmative manner designed to aid the venture." *Landerman*, 109 F.3d at 1068 n.22.

As an attorney who "has practiced law for over 40 years," Carson should know that certain words can be especially impactful or damaging depending on the context in which they are used. CC. Ex 13 at 2. Accusing a U.S. Administrative Law Judge of committing criminal or tortious conduct without concomitantly presenting substantial (or any) evidence to that effect is beyond the pale and is well-nigh unprecedented in the undersigned's executive branch judicial experience. As an initial matter, Carson has not alleged that any MSHA inspector or other representative of the Secretary has participated in any illegal activity and, without a predicate showing of criminal

activity, this tribunal could not have aided or abetted any purported criminal venture. *Landerman*, 109 F.3d at 1068. Further, other than a conclusory statement that Davis' testimony was false, Carson has not pointed to any inaccuracies or misrepresentations on the behalf of MSHA that the undersigned supposedly "aid[ed] and abet[ted]." Cactus Canyon Req. Withdraw, 15-16, Tr. 361-68. In his allegedly "false testimony," Davis describes, with limited interruptions by the undersigned in the interest of clarification, his review of MSHA's four prior inspections of the Fairland Plant and Quarries and his knowledge of MSHA's jurisdictional review concluding that the Fairland Plant and Quarries fall within the auspices of MSHA's jurisdiction under Mine Identification Number 41-00009. Tr. 361-68. Carson and Cactus Canyon's vehement objection to MSHA's proper exercise of its jurisdiction is well documented within this record, but Cactus Canyon's opposition to MSHA's exercise of its jurisdiction does not in itself provide support to Carson's implicit suggestion that Davis provided false testimony at hearing, nor does it support in any manner Carson's direct allegation that MSHA and this tribunal possessed a shared "criminal intent or acted in concert to effectuate a "criminal venture." *Landerman*, 109 F.3d at 1068.

Most of the foregoing allegations are meant to impugn the character and integrity of the undersigned in service of securing my withdrawal from these proceedings and further delaying MSHA's appropriate exercise of its jurisdiction over Respondent.[22] They clearly cross the line for acceptable advocacy in Commission proceedings. Carson offers insufficient record support to substantiate his spurious ad hominem attacks and he attempts to paint a false picture of judicial dishonesty and conspiracy against Respondent. Even if Carson believes in good faith that bias exists, given the paucity of evidence cited in support when properly read in context, the undersigned concludes that the allegations reek of frivolity and bad-faith and merit a Commission recommendation for unprofessional conduct sanctions under Commission Procedural Rule 80 and Texas Disciplinary Rule of Professional Conduct 8.02.

It is the role of the Commission to determine appropriate sanctions. 29 CFR § 2700.80. After extensive research, it is my recommendation that Attorney Carson be restricted be suspended

[22] The undersigned takes judicial notice of the fact that since the hearing, Carson's brazen efforts to restrict MSHA's appropriate exercise of its jurisdiction has escalated. On September 7, 2023, following the hearing in these matters and following the issuance of ALJ Manning's decision finding MSHA jurisdiction over the Fairland Plant, Carson allegedly sent a letter to MSHA threatening to deny entry of any MSHA inspectors to the Fairland Plant. The letter states "MSHA Treated as Trespasser" and closes with the line, "Please do not harass and threaten employees of the [Fairland] Plant by sending an inspector to test our resolve in treating the inspector as a trespasser." *Su v. Cactus Canyon Quarries, Inc*., No. 1:23-CV-1147-RP, 2023 WL 8041009, at *1 (W.D. Tex. Nov. 20, 2023). In a proceeding granting the Secretary's application for a preliminary injunction, the U.S. District Court for the Western District of Texas ordered that MSHA inspectors be accompanied by representatives from the U.S. Marshall service, at Cactus Canyon's expense, during future inspections of the Fairland Plant and Quarries. *Id*. at 12.

from practicing before the Commission for one year, and this matter be referred to the Texas bar for any additional or reciprocal discipline under Texas Disciplinary Rule of Professional Conduct 8.02.[23]

[23] The ability of administrative tribunals to sanction or otherwise discipline attorneys practicing within their respective jurisdiction is well documented. For example, by statute, the Secretary of the Treasury is authorized by federal statute to regulate and potentially sanction tax attorneys. 31 U.S.C. §330 (2006). The Security and Exchange Commission is authorized to censure, temporarily suspend, or permanently disbar professionals from practicing before the SEC. Pursuant to SEC Rule 102(e) an attorney may be disciplined for (1) failing "to possess the requisite qualifications to represent others," (2) "lacking ... character or integrity or [engaging] in unethical or improper professional conduct," or (3) "willfully violat[ing] ... any provision of the Federal securities laws." 17 C.F.R. § 201.102(e)(1). The governing regulations of the Department of Justice's Executive Office for Immigration Review allow "adjudicating officials" or the Board of Immigration Appeals to sanction any practitioner, if it finds it to be in the public interest to do so. 8 C.F.R. §1003.101(a) (2010). The Patent and Trademark Office has a well-developed system to both investigate and bring action against patent practitioners who violate the USPTO Code of Professional Conduct. *See* Patent and Trademark Office Code of Professional Responsibility, 37 C.F.R. §§ 10.20-10.112 (2009). The National Labor Relations Board ("NLRB") regulations state that "[a]ny attorney or other representative appearing or practicing before the Agency shall conform to the standards of ethical and professional conduct required of practitioners before the courts." 29 C.F.R. § 102.177(a) (2010). In disciplinary proceedings before the NLRB, the Board has suspended an attorney for a period of one year for (1) ad hominem comments and scurrilous characterizations of counsel for the General Counsel, and (2) Misrepresentations to the judge and obstruction and delay of the hearing. *Joel I. Keiler*, 316 NLRB 763, 770 (1995). The NLRB imposed a six-month suspension of an attorney found to have engaged in conduct (1) involving dishonesty, fraud, deceit or misrepresentation during his testimony, and (2) that was disrespectful towards witnesses, the interpreter and the Board's counsel. *David M. Kelsey*, 349 NLRB 327 (2007). An attorney who (1) failed to apprise the NLRB of a material change of fact, and (2) used profanity directed towards opposing counsel and witnesses was suspended for a period of one year, with six months of the suspension being stayed. *In the Matter of an Attorney,* 307 NLRB 913 (1992).

The Commission has imposed, in the context of formal disciplinary proceedings, a 60-day suspension of a practitioner for unprofessional conduct in deliberately failing to appear at a hearing before a Commission ALJ. *Disciplinary Proceeding*, 8 FMSHRC 410, 415 (1986). Carson's conduct here is, in the undersigned's view, far more egregious than an isolated failure to appear at a hearing and thus warrants a longer period of suspension.

IX. ORDER

For the reasons set forth above, the undersigned finds that milling occurs at the Fairland Plant and, thus, both the Fairland Plant and Clendennen Ranch mine operated by Cactus Canyon are subject to Mine Act jurisdiction;

IT IS ORDERED THAT, consistent with my reasoning above, Citation Nos. 9678438, 9678439, 9678441, and 9678444 be **VACATED**;

IT IS FURTHER ORDERED THAT Citation Nos. 9678437, 9678440, 9678442, and 9678446 be **AFFIRMED**, as issued;

IT IS FURTHER ORDERED THAT Citation No. 9678443 be modified to lower the assessed gravity level from 'permanently disabling' to 'lost workdays or restricted duty', but otherwise **AFFIRMED**, as issued;

IT IS FURTHER ORDERED THAT Citation Nos. 9678445 and 9678446 be **MODIFIED** to raise the negligence level from 'low' to 'high', raise the respective penalty amounts from $183.00 to $335.00 and from $133.00 to $325.00, and lower the assessed gravity level for Citation No. 9678446 from 'permanently disabling' to 'lost workdays or restricted duty', but otherwise be **AFFIRMED,** as issued;

The total proposed penalties have been reduced from $1,754.00 to $1,242.00. Cactus Canyon is **ORDERED TO PAY** the Secretary of Labor the sum of $1,242.00 within thirty (30) days of the date of this decision;[24]

Finally, **IT IS FURTHER ORDERED THAT** Attorney Carson be referred for disciplinary action within the Commission under Commission Procedural Rule 80, and with the Office of the General Counsel of the State Bar of Texas for conduct violative of Texas Disciplinary Rule of Professional Conduct 8.02.

SO ORDERED.

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

[24] Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508 or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 8, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. PEABODY SOUTHEAST MINING, LLC, Respondent	CIVIL PENALTY PROCEEDINGS Docket No. SE 2024-0018 A.C. No. 01-02901-585006 Docket No. SE 2024-0125 A.C. No. 01-02901-594067 Mine: Shoal Creek Mine

ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY'S MOTION TO COMPEL

Before: Judge Bulluck

This matter is before me upon a Motion to Compel filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against Peabody Southeast Mining, LLC ("Peabody"). The Secretary moves for Peabody to produce its Summary of Investigation ("Haney Report") regarding the March 29, 2023 mine fire at Shoal Creek. Peabody contends that the document is protected from discovery by the work product doctrine and the attorney-client privilege.[1]

I. Factual and Procedural Background

The following chronology of events is according to Max Haney, by signed Declaration of July 16, 2024. Following the fire at Shoal Creek on March 29, 2023, outside counsel for Peabody, Arthur Wolfson, sent an email directing Haney, Peabody's Director of Health and Safety for U.S. Operations, to conduct an investigation and report his findings to him. According to Haney, "the purpose of the investigation was to report facts, theories, and impressions for the purposes of potential future litigation," related to both potential MSHA citations as well as other civil litigation. On April 4, Haney emailed a summary of his investigation to Wolfson and, on August 3, he sent Wolfson the final Report. Haney contends that the Report was not intended for the purpose of complying with 30 C.F.R. §50.11(b). See Peabody Resp. Ex. 1.

[1] The Secretary's Motion to Compel (with Exs. A through D) and Reply (with Exs. A and B); and Peabody's Response in Opposition to Motion to Compel (with Exs. 1 through 4) and Surreply have been carefully considered in resolving this discovery dispute.

Peabody also filed a signed Declaration of William Davis, dated July 8, 2024, providing a summary of his involvement. According to Davis, the on-site Safety and Compliance Manager, he was responsible for completing MSHA's reporting requirements pursuant to section 50.11(b). In the aftermath of the fire, Davis interacted with MSHA personnel investigating the incident. Following the issuance of MSHA's citations and order on August 2, Davis began preparing a report ("Davis Report"), as required by section 50.11(b) and, due to an inadvertent oversight, he did not complete this report until July 3, 2024. See Peabody Resp. Ex. 2.

On March 25, 2024, the Secretary sent Peabody a Request for Production of Documents, including Request No. 12, requesting that Peabody "provide any documents, including but not limited to witness statements, created or gathered by the Respondent during its investigation of the mine fire that occurred on or about March 29, 2023." Sec'y Mot., Ex. A at 7. Peabody's Response on April 26, produced no documents in response to Request No. 12, claiming that "there are no such non-privileged documents in this matter." Sec'y Mot., Ex. B at 17. Peabody's Privilege Log identified two related documents: a Request for Investigation at Counsel's Direction and a Summary of Investigation prepared by Haney. Sec'y Mot., Ex. C. Peabody claims attorney-client and work product privileges over both documents.

The Secretary filed the instant Motion to Compel on June 26, 2024, after conferring with Peabody in an attempt to resolve this dispute. In Peabody's July 16 Response in Opposition to Motion to Compel, Peabody attached a copy of the Davis Report, which it had produced for the Secretary on July 10. The Secretary then filed a Reply to Peabody's Response on July 23, and Peabody filed a Surreply in Support of its Response on July 31. Subsequently, on August 5, Peabody was directed by the undersigned to submit a copy of the Haney Report for the judge's *in camera* review.

II. Discussion

The issue for resolution is whether the work product and attorney-client privileges protect Peabody from disclosing the Haney Report to the Secretary.

A. Work Product Privilege

The work product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3), protects materials prepared in anticipation of litigation from being produced in discovery to the adverse party.[2] In order to be protected by this privilege, the party invoking it must prove that the materials sought in discovery are documents and tangible things, prepared in anticipation of litigation, and by or for another party or by or for that party's representative. Fed.R.Civ.P. 26(b)(3).

[2] The Commission is guided, "so far as practicable," by the Federal Rules of Civil Procedure on procedural questions not regulated by the Mine Act or its Rules. 29 C.F.R. §2700.1(b).

If the invoking party establishes that the documents qualify as work product, the burden shifts to the moving party to justify why the documents should be produced. *Id*. The threshold for overcoming the work product privilege depends on whether the materials are "core" or "ordinary" work product. Production of core work product, consisting of "mental impressions, conclusions, opinions, or legal theories concerning the litigation," may be compelled only in the rarest of circumstances. *BHP Copper, Inc.,* 38 FMSHRC 893, 895 (Apr. 2016) (ALJ); see *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.,* 967 F.2d 980, 984 (4th Cir. 1992). On the other hand, ordinary work product consists of facts, and may be ordered produced upon the moving party's demonstration of "substantial need" for the materials, and "undue hardship" in obtaining substantially equivalent documents. Fed.R.Civ.P. 26(b)(3)(A)(ii). "If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed.R.Civ.P. 26(b)(3)(B).

1. The Haney Report was Prepared in Anticipation of Litigation

The key issue here regarding the work product privilege is whether the Haney Report was prepared in anticipation of litigation.[3] The Secretary argues that the factual material derived from the investigation is not privileged because Peabody was obligated to conduct an investigation pursuant to section 50.11(b) and, since there was only one investigation, Haney's Report should not be considered to have been created only in anticipation of litigation. Sec'y Mot. at 5-6. Peabody takes the position that Haney's investigation was separate from the mandated section 50.11(b) investigation, and that the Haney Report includes both core and ordinary work product, and was prepared in anticipation of MSHA and civil litigation. Peabody Resp. at 5-6.

Section 50.11(b) provides that "each operator of a mine shall investigate each accident and each occupational injury at the mine . . . [and] shall develop a report of each investigation." 30 C.F.R §50.11(b). In preparing its report "no operator may use an investigation, or an investigation report conducted or prepared by MSHA . . . ." *Id.* Additionally, the section details nine requirements that the operator must include in its report. *Id.*

I agree with the Secretary's position that Peabody fails to provide evidence that Davis conducted an investigation pursuant to section 50.11(b), and that the resulting Davis Report does even not comply with the regulation. First, neither the Davis nor Haney Declarations attest to any investigation actually being conducted by Davis. Davis's Declaration states only that he prepared a report, and that he "interacted with MSHA personnel in the aftermath of the fire." Peabody Resp. Ex. 2. Absent is any mention of Davis conducting an investigation independent of MSHA, and Davis's Report does not include or reference any supporting material that one would expect as a result of an investigation. Haney's Declaration makes no mention of any Davis investigation, but only attributes to him the responsibility to draft a section 50.11(b) report. Peabody Resp. Ex.

[3] The Secretary concedes that the material sought is "a document and was prepared by or for another party or by or for that [party's] representative." The only element in dispute is the "in anticipation of litigation" element. Sec'y Mot. at 5, fn. 1.

1. These statement undercut Peabody's mere assertion that preparing a report necessarily includes conducting an investigation. See Peabody Surreply at 6. Second, the Davis Report is deficient as a section 50.11(b) report, consisting only of a single page Incident Investigation Report form, with a terse summary lacking specific information required by the regulation. See Peabody Resp. Ex. 4. Moreover, the Report form fails to include an explanation of the cause of the accident, the names of individuals participating in the investigation, and information on any miner involved. See 30 C.F.R. §50.11(b)(1)-(9). Section 50.11(b) places the responsibility on the operator to conduct a thorough investigation. As contended by the Secretary, the filings only establish that one investigation into the fire was conducted by Peabody, through Haney. I find that Peabody has failed to demonstrate that the Davis Report fulfilled its obligation to investigate the mine fire and provide its factual findings to MSHA upon request.

The Secretary also contends that because Peabody conducted only one investigation, and an investigation was compulsory by regulation, the Haney Report was prepared in the ordinary course of business, rather than in anticipation of litigation. Sec'y Mot. at 5. However, when there is more than one reason why a document could have been created, courts consider the totality of the circumstances to determine whether "it can fairly be said that the document was created because of anticipated litigation . . . ." *In re Grand Jury Subpoena, Mark Torf/Torf Envt'l Mgmt*., 357 F.3d 900, 908 (9th Cir. 2004), citing *United States v. Adlman*, 134 F.3d 1194, 1195 (2nd Cir. 1998). A document is privileged if it "would not have been created in substantially similar form but for the prospect of that litigation." *Id.* On the other hand, if litigation was contemplated but the document would have been prepared anyway in the ordinary course of business, it is not protected. *BHP Copper,* 38 FMSHRC at 896, citing *ASARCO, Inc.*, 12 FMSHRC 2548, 2558 (Dec. 1990).

In *BHP Copper*, the judge found that a report prepared in the ordinary course of business was not protected by the work product privilege, despite the operator contemplating its use in litigation. 38 FMSHRC at 896. The operator claimed that it had investigated an accident and prepared a report, because it anticipated a wrongful death action. *Id*. However, the supporting deposition testimony showed that the company had an internal policy requiring an investigation of any accident, detailed procedures for how to conduct it, and also a duty under section 50.11(b) to investigate. *Id*. The judge concluded that the report would have been created in essentially similar form irrespective of the litigation and, therefore, was not protected by the work product privilege. *Id*.

In contrast, the facts here establish that the Haney Report was not created in the ordinary course of business, nor would it have been created in essentially similar form irrespective of anticipated litigation. A significant driver of conducting the Haney investigation was to report facts, theories, and impressions for the purposes of future litigation, including civil litigation involving "breach of contract, libel, defamation, manufacturer's liability, as well as others," which has little, if any, overlap with section 50.11(b) compliance. Peabody Resp. Ex. 1. Haney was also not the usual employee responsible for performing section 50.11(b) investigations at Shoal Creek, and in-house counsel participated in the investigation. Peabody Resp. Ex. 1. Thus, I

find that the Haney Report was not prepared in the ordinary course of business, but rather in anticipation of civil litigation, and is protected work product.

2. The Secretary has Demonstrated Substantial Need and Undue Hardship

The inquiry does not end there, however. Factual material contained in the Report, absent legal opinions and mental impressions, may be ordered produced if the Secretary demonstrates a substantial need for the materials, and undue hardship in obtaining their substantial equivalent. See Fed.R.Civ.P. 26(b)(3).

The Secretary asserts that the factual information obtained by Haney's investigation is likely highly relevant to this case, involving allegations regarding the reporting of the fire to MSHA, and Peabody's compliance with its approved ventilation, firefighting, and emergency evacuation plans. Sec'y Mot. at 7. This makes the timing of the fire and the miners' immediate responses to it of particular relevance. To determine the truth as to these facts, it is critical that fact gathering be conducted in the immediate aftermath of the fire. As pointed out by the Secretary, while MSHA often sends its own investigators, the operator is in the best position in the immediate aftermath to gather such facts, interview its employees, and inspect the site to understand the cause, timing, and effects of the fire. Sec'y Mot. at 7. This is chiefly why section 50.11(b) places a duty on the operator to perform a thorough investigation and provide a report of its findings to MSHA. The very reason for section 50.11(b) reports is the Secretary's substantial need for accurate information to ensure compliance with mine safety, and the operator is usually in the best position to provide it. Sec'y Mot. at 7.

The factual information that the Secretary is seeking to obtain should have been provided by the operator through a section 50.11(b) report. Had Peabody complied with this regulation, and conducted an independent investigation, the Secretary would not have any substantial need for equivalent factual materials. Furthermore, the ordinary facts that the Secretary is seeking cannot be obtained without undue hardship. The immediacy of the investigation is unrecoverable, as witness memory is less reliable as well as their availability a year and a half later, and tangible evidence may no longer exist. Peabody contends that MSHA's investigation provides the Secretary with a substantial equivalent to the Haney Report, alleviating any substantial need for production. However, the intent of section 50.11(b), that an operator conduct a separate investigation and report to MSHA, supports that the Secretary is justified in relying on the operator's internal investigation in addition to its own. Accordingly, the Secretary has demonstrated undue hardship and a substantial need for the contemporaneous factual material contained in the Haney Report, that overcomes the protection of the work product privilege.

B. Attorney-Client Privilege

Peabody also contends that the Haney Report includes privileged attorney-client communications. According to Peabody, these communications had been made in confidence between the company and its attorneys for purposes of seeking legal advice. Peabody Resp. at 6-7. The attorney-client privilege applies to communications between company employees and the

company's counsel acting in a legal capacity, in order to secure legal advice, and only if employees are aware of that purpose. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). However, the attorney-client privilege only protects disclosure of communications, and not the underlying facts by those who communicated with the attorney. *Upjohn*, 449 U.S at 395; *United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009). "A party cannot conceal a fact merely by revealing it to his lawyer." *Upjohn*, 449 U.S. at 395, citing *State ex rel. Dudek v. Cir. Ct.*, 34 Wis.2d 559, 580 (1967). Moreover, because the attorney-client privilege can impede the full discovery of the truth, it must be strictly construed. *Ruehle*, 583 F.3d at 607, citing *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002).

The Secretary alleges that Peabody is attempting to withhold factual information that it is required by regulation to produce. Furthermore, the Secretary is not interested in any legal advice or conclusions that the Haney Report may contain, but seeks only the Report's factual materials. Sec'y Mot. at 8. The attorney-client privilege does not protect the underlying facts that Haney collected in the course of his investigation, and Peabody cannot conceal facts or shield documents merely by giving them to its attorney. In this vein, including factual material in a report that also contains privileged communications does not shield those facts from discovery. Therefore, the factual material, gathered as the result of Peabody's ordinary work product, is discoverable.

III. Order

Pursuant to the *in camera* review by the undersigned, Peabody is **ORDERED** to produce a copy of the Haney Report to the Secretary, **redacted to remove only mental impressions, conclusions, opinions, and legal theories of Peabody's representatives** protected by the work product and attorney-client privileges **(highlighted by Peabody in green and blue)**, no later than **August 9, 2024**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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