August 2025

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<u>Review was granted in the following cases during the month of August 2025</u>

Secretary of Labor v. Peabody Southeast Mining, LLC, Docket Nos. SE 2023-0020, et al., Judge McCarthy (June 26, 2025)

Secretary of Labor v. Peabody Southeast Mining, LLC, Docket Nos. SE 2023-0065, et al., Judge McCarthy (June 26, 2025)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 11, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Docket No. LAKE 2025-0122 A.C. No. 12-02362-605047
v.	Docket No. LAKE 2025-0123 A.C. No. 12-02196-605043
S&G EXCAVATING, INC.	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Jordan, Chair, and Baker, Commissioner

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On October 15, 2024, the Commission received from S&G Excavating, Inc. ("S&G") 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).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were delivered on October 15, 2024, and

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate Docket No. LAKE 2025-0122 and Docket No. LAKE 2025-0123 involving similar procedural issues. 29 C.F.R. § 2700.12. S&G seeks to reopen three of the eight citations in Docket No. LAKE 2025-0122, and 18 of the 20 citations in Docket No. LAKE 2025-0123.

became final orders of the Commission on November 14, 2024. Delinquency letters for both assessments were mailed on December 30, 2024.

Contest paperwork must be mailed to MSHA's Civil Penalty Compliance Office in Washington, D.C. or emailed to MSHA-PenaltyContests@dol.gov, while payments for uncontested citations must be mailed to MSHA's Lock Box in St. Louis, Missouri. Here, S&G asserts that it mailed "all relevant information," i.e., its penalty contests and its payment for the uncontested penalties, to the St. Louis address. S&G asserts that it discovered the issue upon receiving the December delinquency letters. The operator called the Civil Penalty Compliance Office for further guidance on January 16, 2025, and moved to reopen on January 24, 2025.

The Secretary does not oppose S&G's request to reopen. She further notes that these delinquencies were the mines' first in 20 years of operation, that the operator made timely payment for the uncontested penalties, and that the operator acted promptly upon receiving the delinquency letters.

We note that S&G attempted to timely contest the proposed assessments. Records provided by the Secretary indicate that S&G mailed its paperwork to the St. Louis address on or about October 22, 2024, approximately three weeks before the assessments became final.[2] We also note that the operator proactively sought guidance from MSHA, and moved to reopen the assessments less than one month after receipt of the delinquency letters. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (motions received within 30 days of an operator's first notice from MSHA that it has failed to timely file a notice of contest have presumptively been filed within a reasonable amount of time). Finally, as the Secretary notes, the operator does not have a history of untimely contests or delinquencies.

Having reviewed S&G's request and the Secretary's response, we find that S&G's failure to timely contest the assessments was the result of inadvertence. We also note that the operator acted in good faith by timely filing its requests to reopen. In the interest of justice, we hereby

[2] S&G represents that its contest form was mailed with its payment for the uncontested penalties, and documentation provided by the Secretary reflects that the check used to pay the uncontested penalties was dated October 22 and processed by MSHA on October 29.

reopen these matter and remand them 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 petitions 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/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, dissenting:

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

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975, 977 (Dec. 2024) (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's orders became final under the language of section 105(a). The Majority, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in *Explosive Contractors*. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 11, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. DRAKE CEMENT, LLC	Docket No. WEST 2025-0144 A.C. No. 02-03243-609564

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On January 17, 2025, the Commission received from Drake Cement, LLC, 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 November 12, 2024, and became a final order of the Commission on December 12, 2024.

Drake Cement asserts that it intended to contest ten of the twenty-three citations in the proposed assessment, but mistakenly mailed the paperwork to the wrong address. Contest paperwork must be mailed to MSHA's Civil Penalty Compliance Office in Washington, D.C. or emailed to MSHA-PenaltyContests@dol.gov, while payments for uncontested citations must be mailed to MSHA's Lock Box in St. Louis, Missouri. On December 10, 2024, the operator's Health & Safety Manager mailed its contest form to the St. Louis address along with payment for the uncontested citations.[1] The Health & Safety Manager, who was new to his role and had not previously processed a penalty contest, mistakenly believed the Compliance Office would forward the contest form to the correct office. He realized the penalties had not been timely contested on January 14 when he checked MSHA's Mine Data Retrieval System and on January 16 when MSHA's field office called regarding the assessment. He forwarded the assessment to outside counsel on January 16, and counsel moved to reopen the next day. The Secretary does not oppose the operator's request to reopen.

We note that Drake Cement attempted to timely contest the proposed assessment. The contest form was mailed on December 10, 2024, before the assessment became final. While the form was mailed to the wrong address, this appears to be the Health & Safety Manager's first and only such error. We also note that the operator proactively checked the status of the citations it wished to contest, and promptly moved to reopen a few days after learning that the assessment had become final. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (motions received within 30 days of an operator's first notice from MSHA that it has failed to timely file a notice of contest have presumptively been filed within a reasonable amount of time).

Having reviewed Drake Cement's request and the Secretary's response, we find that Drake Cement's failure to timely contest the assessment was the result of inadvertence. We also note that the operator acted in good faith by timely filing its request to reopen. 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/ Timothy J. Baker
Timothy J. Baker, Commissioner

---

[1] The Secretary represents that MSHA applied part of Drake Cement's payment to Citation Nos. 9909312, 9909174 and 9909176 as an "administrative function." While three of the citations that the operator seeks to reopen have been paid, the Secretary represents that this administrative application of Drake Cement's payment should not render the motion to reopen moot. Resp. at 2 n.2.

Commissioner Marvit, dissenting:

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

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975, 977 (Dec. 2024) (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in *Explosive Contractors*. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

/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, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PROSPECT MINING & DEVELOPMENT COMPANY, LLC	Docket No. SE 2025-0075 A.C. No. 01-03419-613121

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

ORDER

BY: Chair Jordan and Commissioner Baker

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On March 17, 2025, the Commission received from Prospect Mining & Development Company, LLC, ("Prospect Mining") 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).

On January 17, 2025, Prospect Mining received the proposed assessment. Ex. A at 2. However, the operator did not file to contest the penalty within 30 days and, therefore, on February 17, 2025, the assessment became a final order of the Commission.

In its motion to reopen, Prospect Mining represents that on February 7, 2025, it sent the form to outside counsel with instructions to contest the penalties. Counsel, however, neglected to timely file to contest the assessment. Counsel represents that he neglected to timely file because he was pre-occupied with establishing a new firm and moving office locations. The Secretary does not oppose the operator's request to reopen.

We note that the operator filed the subject motion less than 30 days after it became a final order. 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).

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

Commissioner Marvit, dissenting:

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

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

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in *Explosive Contractors*. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

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

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August 12, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. OHIO COUNTY COAL RESOURCES, INC.	Docket No. WEVA 2025-0220 A.C. No. 46-01436-604839

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

ORDER

BY: Chair Jordan and Commissioner Baker

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On February 21, 2025, the Commission received from Ohio County Coal Resources, Inc., ("Ohio County") 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).

In its motion to reopen, Ohio County represents that on October 20, 2024, it received the subject proposed assessment for civil penalties from the Secretary of Labor's Mine Safety and Health Administration ("MSHA"). Ohio County neglected to timely file the contest form, and it became a final order of the Commission on November 20, 2024.

Ohio County alleges that a temporary interruption in the delivery of MSHA proposed assessments, as a result of a problem with MSHA's mail service provider, contributed to Ohio County's failure to timely file to contest the assessment at issue. Ohio County represents that proposed assessments were not delivered to the operator in July, August and September 2024. Ex. 1 at 2 (Affidavit of Safety Director Matthew Cunningham). When delivery resumed, the operator received a greater volume of proposed assessments than normal, adding to the Safety Director's workload. Upon receipt of the subject proposed assessment, Ohio County decided which penalties to pay and which to contest. Timely payment was made. However, the operator neglected to timely file the contest form. Mr. Cunningham became aware of the failure to timely file after receiving a delinquency notice from MSHA. Ohio County filed a motion to reopen soon after discovering the delinquency. The Secretary filed a response indicating that she did not oppose the operator's request.

Having reviewed Ohio County's motion and the Secretary's response, we find that the operator's failure to timely file was the result of excusable neglect. *See e.g., MDI Mining*, 47 FMSHRC __, No. WEST 2025-0154 (July 1, 2025) (where the delay in mailing of the proposed assessment contributed to the operator's confusion). 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/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, dissenting:

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

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

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in *Explosive Contractors*. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 20, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2024-0218 A.C. No. 45-03175-596374 Docket No. WEST 2024-0275 A.C. No. 45-03175-600248
v.	
IRON MOUNTAIN QUARRY LLC, Respondent	Mine: Iron Mountain Quarry

DECISION AND ORDER

Appearances: Rafael Bortnick, Simon Jacobs, and Joshua Falk, U.S. Department of Labor, Office of the Solicitor, 90 7th St, Suite 3-700, San Francisco CA 94103

Selena C. Smith, Davis Grimm Payne & Marra, 701 5th Ave, Suite 3500, Seattle, WA 98104

Before: Judge Simonton

I. INTRODUCTION

These cases are before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Iron Mountain Quarry LLC ("Iron Mountain" or "Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.[1] These dockets originally contained sixteen 104(a) citations; Citation Nos. 9688317, 9688322, and 9688323 were settled prior to hearing. The thirteen remaining citations are associated with a proposed penalty of **$4,603.00** against Iron Mountain.

The parties presented testimony and documentary evidence at a hearing held on May 6-7, 2025, in Seattle, Washington. Field Office Supervisor Andrew Aerni and Inspectors Joshua Mathisen and Devin Drobny testified for the Secretary. Iron Mountain owner James Burnett, site superintendent Cody Freeman, plant foreman Jarred Braaten, and senior operator Steven Van Proyen testified for the Respondent. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I **AFFIRM** Citation Nos. 9683849,

[1] In this decision, the transcript, exhibits, and Respondent's exhibit are abbreviated as "Tr.," "Ex. #," and "R-#" respectively.

9688120, 9688121, 9688122, 9688124, 9688125, 9688316, 9688318, 9688319, 9688320, and 9688324 as issued, and **AFFIRM** Citation Nos. 9683850 and 9688123 as modified herein.

II. STIPULATIONS

At hearing, the parties stipulated to the admission of 63 joint exhibits. Tr. I-8. No other stipulations were entered into the record. In the absence of arguments to the contrary, I assume the only contested issues are those raised by the parties during the hearing and in the post-hearing briefs.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The citations at issue were issued by Field Office Supervisor Andrew Aerni and Inspectors Joshua Mathisen and Devin Drobny during an impact inspection conducted on February 27, 2024. This was Aerni's first impact inspection as the Field Office Supervisor, where he selected the mine site and determined the standards that would comprise the impact inspection based on the mine site's history. Tr. I-47-48.

For the first time at trial, the Respondent argues that the impact inspection was improperly conducted and was not supported by the mine's citation history, injury history, or other factors used by MSHA to support an impact inspection. This argument is unavailing. The policy guidance published by MSHA is meant to provide examples of when an impact inspection may be appropriate and is not exclusive or otherwise limiting. Sam Casey, *Why We Use Impact Inspections to Protect Miners*, U. S. Dep't of Lab., https://blog.dol.gov/2023/10/04/why-we-use-impact-inspections-to-protect-miners (Oct. 4, 2023); *see also Big Ridge Inc. v. Secretary of Labor,* 36 FMSHRC 1677, 1725-1726 (2014). Further, as noted by the Secretary, the language of the Mine Act gives MSHA broad authority to enter mine sites for the purpose of conducting inspections. Field Office Supervisor Andrew Aerni testified that based on his personal experience inspecting at Respondent's mine there were specific standards he noted, conditions that seemed to be a running theme with the mine whereby he recommended to the MSHA District management that an impact inspection be conducted. Tr. I-21. Based on Inspector Aerni's personal knowledge and experience with the mine I find that the impact inspection was a valid inspection well within MSHA's authority, and I turn now to analyzing the facts and circumstances surrounding each alleged violation.

A. Citation No. 9683849

i. Summary of Testimony

Andrew Aerni, in his capacity as an inspector, issued this citation for a housekeeping violation after observing the condition of the catwalk adjacent to the inline belt in the jaw area. Tr. I-23; Ex. 1. Substantial material, consisting of fines and larger rock, covered the entire length of the catwalk, which was used for maintenance. Tr. I-24-25; Ex. 3. There were no footprints or other tracks to indicate that someone accessed the area. Tr. I-56-57. Aerni could not recall if there were miners assigned to work nearby. Tr. I-57-58. There was a chain across the entrance to the walkway, with an attached sign to alert miners to keep out. Tr. I-27; Ex. 3. Aerni testified that this type of barricade is often breached because the chain is easily defeatable and the sign does not identify the specific hazard. Tr. I-61-63. After examining the amount of material, Aerni believed this condition had existed for at least one shift. Tr. I-26. To achieve compliance, passageways should be shoveled off within a reasonable time frame as soon as hazardous conditions are identified. Tr. I-58-59, I-65. Aerni believed the operator had taken too long to address the condition. Tr. I-63.

He marked the likelihood of injury as unlikely because there was no evidence that anyone had been exposed to the hazard. Tr. I-29. As slip, trip, and fall injuries would occur, the hazard would cause lost workdays or restricted duty. Tr. I-29-30. One miner would be affected. Tr. I-32. Because the operator had provided the sign and the conditions were easily visible from a distance, the inspector assigned the negligence as moderate. Tr. I-33.

Steven Van Proyen, senior operator at Iron Mountain, also viewed the cited conditions while accompanying Aerni on the inspection. Tr. II-73. He said the catwalk would be cleaned prior to access and the chain prevents people from walking on the catwalk. Tr. II-76-77. There were no miners working in the area. Tr. II-78. He could not recall any instances of slip, trip, or fall injuries at Iron Mountain. Tr. II-82-83.

ii. Fact of Violation

The Commission has long held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law and the standard applicable here, 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).

On February 27, 2024, Aerni issued 104(a) Citation No. 9683849, which alleged:

> Standard 56.20003(a) was cited 6 times in two years at mine 4503175 (6 to the operator, 0 to a contractor).
>
> The travelway adjacent to the inline belt located at the jaw was not kept clean. There was material buildup that consisted of fines to 8" rock covering the entire length (approx. 30') of the travelway. The material was approx. 1' deep at the entrance to the travelway. The travelway is accessed about once per week according to the lead and no footprints were observed in the material. Were this condition to continue and miners to access the travelway, serious slip, trip, and fall injuries could occur.

Ex. 1; Tr. I-24.

Aerni designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.20003(a) that was unlikely to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," would affect one miner, and was caused by Respondent's moderate negligence.

30 C.F.R. § 56.20003(a) states that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly."

The language of the standard is clear that passageways must be kept clean and orderly. The evidence and testimony showing the catwalk with 30 feet of material covering sufficiently demonstrates that it was not clean and orderly. The Secretary has proven a violation of 30 C.F.R. § 56.20003(a).

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury because there was no indication the catwalk had been accessed. Should an injury occur, the inspector determined that it would cause lost workdays or restricted duty consistent with slip, trip, or fall injuries such as sprains, lacerations, or broken bones. I affirm these designations.

iv. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must 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." 30 C.F.R. § 100.3(d). MSHA's regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

Aerni assessed the negligence as moderate. The condition was visible from a distance and there was a chain and a sign across the entrance to the catwalk. Given that the material most likely accumulated over several shifts and there was no evidence to suggest anyone entered the area, I affirm this designation.

B. Citation No. 9683850

i. Summary of Testimony

Aerni issued this citation for a pile of wet material three feet deep located at the top of a set of stairs in the jaw area. Tr. I-35-36; Ex. 5, 9. In addition to the pile at the top of the stairs, material also extended thirty feet down the length of the passageway. Tr. I-36. The material was covered in snow, which showed footprints and other signs of compaction, and was estimated to have existed for multiple shifts. Tr. I-37-38; Ex. 7. There was no barricade or sign to either prevent access or alert someone to the hazard. Tr. I-38.

The inspector marked the violation as reasonably likely because the material was slick and people had clearly accessed the area in a hazardous condition. Tr. I-39-40. The violation would cause slip, trip, and fall injuries resulting in lost workdays or restricted duty. Tr. I-40. He determined that the violation was significant and substantial due to greater exposure to the hazard. Tr. I-41. One miner would be affected. Tr. I-43. The negligence was determined to be moderate because the condition was readily visible. Tr. I-43-44.

Van Proyen again stated that the area would be cleaned and shoveled before miners accessed it. Tr. II-79, II-81-82. It was not a main travelway and was only used for maintenance and repair, and no one worked in the area. Tr. II-79-80. The hazard visible at the top of the stairs was because a Bobcat vehicle had been used to pile the material and the operator had not hand-shoveled the area yet. Tr. II-81; Ex. 7.

ii. Fact of Violation

On February 27, 2024, Aerni issued 104(a) Citation No. 9683850, which alleged:

> The travelway located on the East side of the feeder was not kept clean. There was mud buildup throughout the length of the travelway and a large pile of material that was located at the North end of the travelway at the top of a set of stairs. Footprints were observed in the material at the top of the stairs and through the muddy buildup. Were miners to continue to access the area in this condition, serious slip, trip, and fall injuries would likely occur.

Ex. 5; Tr. I-34-35.

The citation was designated as a significant and substantial violation of 30 C.F.R. § 56.20003(a) that was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 5.

As evidenced by the three feet of buildup, the staircase was not in a clean and orderly condition. I find there has been a violation of the cited standard.

iii. Gravity and S&S

The inspector assessed the hazard as reasonably likely because of the slickness of the material and the footprints that demonstrated that someone had entered the area. He determined that it would cause slip, trip, and fall injuries such as sprains, leading to lost workdays or restricted duty. The material at the top of the stairs was three feet high, and muddy and slick. Footprints showed that someone had been exposed to the hazards posed by this material pile. These designations are affirmed.

The citation was also designated as significant and substantial. To establish that a violation is significant and substantial, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).

The fact of violation has already been established, as the stairway is a passageway that was not kept in a clean and orderly condition. The cited standard is meant to protect against slip, trips, and falls, which the inspector testified were likely to occur from someone walking on the slippery material. An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co*., 7 FMSHRC 1125, 1130 (Aug. 1985). Presuming the hazardous conditions would continue unabated and the catwalk would remain covered with slick material, I find these conditions are reasonably likely to cause a reasonably serious injury. The S&S designation is affirmed.

iv. Negligence

The negligence was assessed as moderate. However, despite management's knowledge of the hazard, the condition had existed for multiple shifts without rope or another barricade to prevent access. Although the Respondent maintains that the area would be shoveled out and cleaned before miners accessed it, footprints in the material clearly show that someone entered the area while it was in a hazardous condition. Therefore, I am increasing the negligence designation to high.

C. Citation No. 9688120

i. Summary of Testimony

While examining the main feed belt at the lower plant, Inspector Joshua Mathisen observed carryback material along the length of the framework. Tr. I-68-69; Ex. 10, 13. The belt's wiper was ineffective, which allowed the material to accumulate. Tr. I-69-70, I-74, I-122. As the material is made of silts and clays, it can clump together when wet and remain bonded after it dries. Tr. I-124-125. Cold weather conditions, like those experienced on the morning of the inspection, can also cause it to freeze and contribute to the hazard posed by the material. Tr. I-71, I-122-123.

In addition to the material under the belt, Mathisen also observed two chunks of material, each ten inches in diameter and nine to ten inches high, falling from a height of 45 feet. Tr. I-70-72; Ex. 15. After impact with the ground, the material remained adhered together in a sizable chunk. Tr. I-71, I-123. Three miners were working in the area and tire tracks underneath the belt indicated that people were traveling through the area. Tr. I-70. No measures had been taken to prevent miners from accessing the area. Tr. I-75.

The inspector designated the violation as reasonably likely because falling clumps could injure a miner. Tr. I-70, I-75, I-77. The inspector testified regarding his personal training experience with a colleague who received a permanently disabling injury from a similar falling materials hazard. Tr. I-79. Accordingly, the inspector determined that the hazard would cause permanently disabling injuries such as loss of limb or limb function. Tr. I-78-79. The violation was also determined to be S&S. Tr. I-79-80. One miner would be affected by this violation, because while three miners were exposed, only one could be expected to be ultimately impacted. Tr. I-80. The inspector determined it was moderate negligence because it was not an area where management travels, and no one notified the superintendent of the conditions. Tr. I-80-81.

Cody Freeman, the site superintendent at Iron Mountain, observed the conditions at the lower plant while accompanying Mathisen. Tr. II-7, II-20. Because the weather was cold and wet, the material was heavier than normal and slowed the machines down. Tr. II-19. He did not think that the grit would cause permanently disabling injuries, because it is brittle and flaky, not hard or compact. Tr. II-35. Miners usually travel under the belt in a pickup or skidsteer with a covered cab, and would not be underneath the belt unprotected. Tr. II-36.

James Burnett, the owner of Iron Mountain, provided testimony regarding the characteristics and composition of the grit material at issue, describing it like beach sand. Tr. II-87, II-98, II-101; Ex. R-1. There is a miniscule amount of clay in the material. Tr. II-105. While the grit on the morning of the inspection was wet, Burnett stated that this would not impact clumping. Tr. II-103. Even in wet weather conditions, like those on the day of the impact inspection, the material would not be hazardous to miners because it would break apart on contact. Tr. II-106.

ii. Fact of Violation

On February 27, 2024, Mathisen issued 104(a) Citation No. 9688120, which alleged:

> The Screen 9 Main Feed Belt had a falling material hazard. The conveyor belt was operating with 2 inch minus rock and had moderate to large chunks of carryback material on the under framework of the conveyor and in areas around the belt take-up. The Screen 9 Main Feed belt was about 200 feet long and extended from near ground level to about 45 feet high. There was a plant road below this long conveyor that runs between much of the plant. While approaching the area, a large chunk of material was seen falling from this conveyor and while examining the conveyor belt, another large [chunk] of material was observed falling from about 45 feet high. There are three groundman that work at this mine. If material was to fall and land on a miner, permanent disabling injury could occur. Caution tape and other measures were taken after this citation was issued to keep miners and equipment from going under the Screen 9 Main Feed Belt.

Ex. 10; Tr. I-68-69.

Mathisen designated the citation as a significant and substantial violation of 30 C.F.R. § 56.14110 that was reasonably likely to cause an injury that could be expected to be permanently disabling, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 10.

30 C.F.R. § 56.14110 states that "[i]n areas where flying or falling materials generated from the operations of screens, crushers, or conveyors present a hazard, guards, shields, or other devices that provide protection against such flying or falling materials shall be provided to protect persons."

In their post hearing brief and through Exhibit R-1, the Respondent contends that the material is a sand-like fine grit that breaks apart on contact and does not pose a hazard. However, there were wet weather conditions on the day of the citation with temperatures at or around freezing. The inspector testified that under these types of conditions, carryback material, including fines, can bond together and form clumps. I credit the inspector's characterization of the material and assessment of the hazard, given the cold and wet weather conditions on the day of the inspection, and place little weight on Exhibit R-1. *Buck Creek Coal*, 52 F.3d 133, 135-36 (7th Cir. 1995)

The belt's wiper was ineffective on the day of the inspection, causing wet material to gather underneath the framework. The inspector witnessed two instances of large clumps falling from the belt while the inspection was ongoing. I find that this constitutes a violation of the cited standard.

iii. Gravity and S&S

The inspector assessed the hazard as reasonably likely to cause an injury that would result in permanently disabling injuries. Tire tracks were observed in the dirt underneath the belt, demonstrating that miners had traveled in the area. At hearing, the inspector testified extensively about the severity of potential injuries, even citing his own experience working with a colleague who suffered a permanently disabling injury from similar circumstances. I uphold the inspector's designations.

As a violation has occurred, I now assess whether the violation was reasonably likely to cause the occurrence of a discrete safety hazard. The hazard here is material falling onto miners working or traveling on the road underneath the belt, which the standard is meant to protect against. I find that this hazard is reasonably likely to occur, as significant material had gathered underneath the belt 45 feet above the ground, two large chunks fell, and there were three miners and tire tracks in the area. Even if miners were traveling in a skidsteer, substantial material, like that witnessed by the inspector, could strike the windshield thus, I find that it is reasonably likely to cause an injury of a reasonably serious nature. I affirm the S&S designation.

iv. Negligence

Mathisen assessed the negligence as moderate, because the operator should have known of the violative condition. I uphold the inspector's determination.

D. Citation No. 9688121

i. Summary of Testimony

Mathisen again observed a falling material hazard at the lower plant at the screen six conveyor belt. Tr. I-82; Ex. 16. The belt, which was in operation, did not have a guard or wipers. Tr. I-82-83. The moist conditions allowed the material to stick and accumulate on the framework. Tr. I-82, I-85-86. Two large chunks formed that could fall, in addition to smaller bits of material that were actively falling on the roadway. Tr. I-83-84; Ex. 16. The inspector also saw a truck driving in the area and tire tracks. Tr. I-82-83, I-86; Ex. 18, 19.

The inspector marked this citation as unlikely, because while there were two bigger clumps, most of the smaller rock was not hazardous. Tr. I-87-88. The bigger clumps were only 15 to 20 feet high and would likely only cause strains leading to lost workdays or restricted duty whereas it would cause more severe injuries if they had been higher. Tr. I-88-89. As it is unlikely for the same falling material to strike more than one person, one miner would be affected. Tr. I-90. Because there were only two clumps of concern, he assessed the negligence as moderate. Tr. I-90.

Freeman disagreed with the inspector's assessment of the severity of injury, as he did not think the material, which he described as "fines," would result in lost workdays or restricted duty. Tr. II-37. Miners travel in vehicles with enclosed cabs and do not walk underneath the belt unprotected. Tr. II-38-39. Accordingly, he did not believe there was anything hazardous. Tr. II-39

ii. Fact of Violation

On February 27, 2024, Mathisen issued 104(a) Citation No. 9688121, which alleged:

> The Screen 6 Feed Belt had a falling material hazard. This conveyor belt was operating with ¾ inch minus material and carryback material was seen on the conveyor under the framework. The carryback material ranged up to about 8 inches high and about 2 feet long on the framework. This conveyor belt was about 80 feet long and went from near ground level to about 35 feet high. During the examination of the conveyor belt, small material was seen coming down and loose wet material was covering the area below the conveyor belt. There was a plant road below this conveyor belt that was typically used by front end loaders. There are 3 groundman at this mine. If material were to fall and land on a miner, lost workdays or restricted duty injuries could occur.

Ex. 16; Tr. 100.

Mathisen designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.14110 that was unlikely to cause an injury that could result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 16.

30 C.F.R. § 56.14110 states that "[i]n areas where flying or falling materials generated from the operations of screens, crushers, or conveyors present a hazard, guards, shields, or other devices that provide protection against such flying or falling materials shall be provided to protect persons."

The conditions of this violation were similar to those of Citation No. 9688120, with wet carryback material accumulating under the belt. The belt did not have a wiper or guard at the time of the citation. The Secretary has proven there was a violation of the cited standard.

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury or illness that would result in lost workdays or restricted duty. There were only two clumps of concern that would fall from a lower height and most travel occurs in front end loaders that would protect a person from small clumps of the material. Injuries that could result from this hazard would be muscle strains that would not rise to the level of permanently disabling. The designations are affirmed.

iv. Negligence

The negligence was assessed as moderate, because the condition was not as extensive as that in Citation No. 9688120 and it was difficult to see unless a person was standing underneath the hazard and was looking at the framework. I uphold the negligence as moderate.

E. Citation No. 9688122

i. Summary of Testimony

At the screen six belt catwalk, Inspector Mathisen saw a deep buildup of material 14 to 31 inches deep and 78 inches long. Tr. I-91-92; Ex. 21, 23. While the citation's description of the condition contained different measurements for the hazard, Inspector Mathisen testified at hearing that this was a typo and confirmed the correct measurements. Tr. I-92. The catwalk had one entrance and was used for screen changes and other maintenance activities. Tr. I-92. The area was not roped off and there was no signage to indicate that entry was not permitted. Tr. I-93. The amount of buildup indicated that it existed for a few days. Tr. I-92-93. There were no footprints or other signs that demonstrated a person had accessed the area. Tr. I-128; Ex. 21.

As it was the operator's practice to clean the catwalk first, the inspector determined that the violation was unlikely to cause an injury. Tr. I-94. Slip, trip and fall injuries causing lost workdays or restricted duty were likely to result from this hazard. Tr. I-94. One miner would be affected. Tr. I-95. Because the superintendent informed the inspector that the catwalk had recently been cleaned, the inspector marked the negligence as moderate. Tr. I-95.

While the condition was a hazard, Freeman did not think the material posed an injury risk because miners were trained to shovel first and would not crawl over a pile. Tr. II-29, II-46-47; Ex. 23. He was not aware of any slip, trip, or fall injuries that occurred near this screen. Tr. II-30-31. The catwalk was only accessed occasionally for maintenance and was not used every day.

Tr. II-30, II-50. While it would take multiple hours for the material, a fine grit, to accumulate to the level visible in the photographs taken of the condition, it would take 15 minutes to shovel and clear it, which would occur prior to any maintenance activities. Tr. II-30-31, II-51.

ii. Fact of Violation

On February 27, 2024, Mathisen issued 104(a) Citation No. 9688122, which alleged:

> The Jaw Screen elevated passageway was not kept clean and orderly. There was material built up on the passageway on the north side of the Jaw Screen. The full width of the passageway was covered by material for a total length of about 64 inches. The deepest area of material ranged from about 8 to 21 inches deep, was about 19 inches long and was across the full width of the passageway. The north passageway was used to get from the ladder on the west side of the Jaw Screen to the east side of the Jaw Screen. The Jaw Screen was accessed as needed, on average about once per week. If a miner was to slip, trip, or fall, injuries could occur.

Ex. 21; Tr. I-91-92.[2]

Mathisen designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.20003(a) that was unlikely to cause an injury that could be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 10.

30 C.F.R. § 56.20003(a) states that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly."

The catwalk, covered by a substantial amount of material, was not clean and orderly at the time of the citation. I find there was a violation of C.F.R. § 56.20003(a).

iii. Gravity

The hazard was determined to be unlikely to cause an injury that would result in lost workdays or restricted duty. The inspector credited the operator's representation that the catwalk would be cleaned before permitting access. The types of injuries expected from this violation would be consistent with slip, trips, and falls. I affirm these designations.

iv. Negligence

The inspector assessed the negligence as moderate. Based on the amount of material, it would take at least a few days to accumulate, however the operator informed the inspector that

[2] As noted above, this description contains the wrong measurements for the hazard. The correct measurements, as testified to by Inspector Mathisen, are 14 to 31 inches deep and 78 inches long.

the catwalk had been recently cleaned. I uphold that the violation constitutes moderate negligence.

F. Citation No. 9688123

i. Summary of Testimony

When Inspector Mathisen examined the screen five belt, it did not have guards or a wiper and there were hardened clumps of material along the belt. Tr. I-96-97; Ex. 27, 28. The inspector believed they could fall, even though the belt was not running. Tr. I-99. Three miners were working in the area that may walk underneath the hazard. Tr. I-97.

The citation was marked as unlikely, as the larger clumps were lower to the ground and the conveyor belt was not running. Tr. I-101. This conveyor belt only operates one or two times a year. Tr. I-101. The inspector marked the severity of injury as lost workdays or restricted duty because he did not believe it would cause permanent injury. Tr. I-101. One miner would be affected because the material would only hit one miner if it fell. Tr. I-101. Finally, the inspector assessed the negligence as moderate, because the buildups were not large and the machine was not operating. Tr. I-101-102.

Freeman did not believe that the hazard could cause lost workdays or restricted duty because the buildup of material was small and there would be no further accumulation of material. Tr. II-40-41. Miners traveling underneath the hazard would be wearing hardhats and safety glasses and would be in a loader or skidsteer. Tr. II-41.

ii. Fact of Violation

On February 27, 2024, Mathisen issued 104(a) Citation No. 9688123, which alleged:

> The 1 ½ inch Feed to Screen 5 Belt has a falling material hazard. The conveyor belt had moderately sized buildups of carryback material including being up to about 12 inches high. This 1 ½ inch Feed to Screen Belt was about 10 to 25 feet high. There was a plant road below this conveyor. It was reported that this conveyor last operated about 5 months ago and typically operated a couple of times per year, each time for a day or two. There are 3 groundman at this mine. If material was to fall and land on a miner, lost workdays or restricted duty injuries could occur.

Ex. 25; Tr. I-96-97.

Mathisen designated the citation as a non- significant and substantial violation of 30 C.F.R. § 56.14110 that was unlikely to cause an injury that could be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 25.

30 C.F.R. § 56.14110 states that "[i]n areas where flying or falling materials generated from the operations of screens, crushers, or conveyors present a hazard, guards, shields, or other

devices that provide protection against such flying or falling materials shall be provided to protect persons."

I defer to the inspector, who witnessed the conditions when he cited the operator for the violation, regarding the potential of the material to fall and injure someone. Accordingly, I find that a violation has occurred.

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury or illness that would result in lost workdays or restricted duty. The larger clumps were close to the ground, and the belt was not in operation. The inspector did not think that this hazard would cause permanent injuries. I affirm these designations.

iv. Negligence

The inspector assessed the negligence as moderate, as the buildup was small and the belt was not running at the time of the citation. In addition to these considerations, the belt operates only occasionally. Accordingly, I decrease the negligence to low.

G. Citation No. 9688124

i. Summary of Testimony

Citation No. 9688124 was issued for a housekeeping violation at the crossover belt catwalk between screens two and three. Tr. I-102; Ex. 29. The catwalk provided maintenance access to the underbelt and the screens. Tr. I-103-104. Inspector Mathisen observed the width of the catwalk covered by wet material 9 to 28 inches deep for an extended distance of 20 feet. Tr. I-103; Ex. 31. The inspector estimated it would have taken several weeks to build up. Tr. I-106. It was not barricaded or roped off and did not have signage to warn of the hazard. Tr. I-105-106.

As the catwalk would be cleaned before miners could access it, Inspector Mathisen determined that it would be unlikely for a miner to be injured, and if an injury occurred, it would result in lost workdays or restricted duty from a slip, trip, or fall. Tr. I-107-108. One miner, the person using the catwalk, would be affected. Tr. I-108. The operator's negligence was assessed as moderate, because the catwalk is only accessed infrequently. Tr. I-109.

Freeman testified that the risk of injury is low and this hazard does not constitute moderate negligence. Tr. II-32-33. The catwalk is only accessible via ladder and is used only when planned maintenance activities occur. Tr. II-33, II-50. It would be shoveled before conducting maintenance. Tr. II-51.

ii. Fact of Violation

On February 27, 2024, Mathisen issued 104(a) Citation No. 9688124, which alleged:

> Standard 56.20003(a) was cited 7 times in two years at mine 4503175 (7 to the operator, 0 to a contractor).
>
> At the 2 and 3 Screen Tower, the Screen 2 and 3 Crossover Belt passageway was not kept clean and orderly. The passageway was covered with material for its full length of about 20 feet and across its full width. Material was particularly built up on the passageway south of the ladder access over a distance of about 56 inches. This material generally ranged from about 9 inches to about 28 inches deep. The 2 and 3 Screen Crossover Belt passageway provided access to the Screen 2 Under Belt and to the Screen 3 Under Belt. It was reported that the Screen 2 and 3 Crossover Belt passageway was rarely accessed, typically during break downs, about once every month and a half to two months. If a miner was to slip, trip, or fall, injuries could occur.

Ex. 29; Tr. I-102-103.

Mathisen designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.20003(a) that was unlikely to cause an injury that could be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 29.

30 C.F.R. § 56.20003(a) states that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly."

It is obvious that the catwalk was not clean or orderly as its entire width and a substantial amount of its length was covered in material. I affirm that there was a violation of the cited standard.

iii. Gravity

The violation was assessed as unlikely to cause an injury or illness that would result in lost workdays or restricted duty. Access to the area was limited only to maintenance activities. Injuries from slips, trips, or falls would cause lost workdays or restricted duty. I uphold these designations.

iv. Negligence

The inspector determined that the negligence was moderate, considering the catwalk's occasional use and the amount of material. Additionally, there was no sign or barricade to show the presence of hazardous conditions. I affirm the negligence designation.

H. Citation No. 9688125

i. Summary of Testimony

The same catwalk at issue in Citation No. 9688124 was also cited for violating a safe access standard. Tr. I-110-111; Ex. 33. Inspector Mathisen determined that the catwalk did not have structural support aside from a single unattached piece of angle iron. Tr. I-111, I-113, I-138-139; Ex. 37. Without a support beam, the weight of the material on the catwalk caused it to bow in the middle. Tr. I-110-111; Ex. 35. Using an inclinometer, the inspector measured that the catwalk flexed down five and a half inches. Tr. I-111-113, I-117; Ex. 34. If someone walked on the catwalk, it could collapse, causing that person to fall 16 and a half to 17 feet onto concrete or water. Tr. I-111, I-114.

While the catwalk could collapse, the inspector did not think this likelihood rose to the level of reasonably likely and designated it as unlikely. Tr. I-115. If a person fell, they would hit the ground causing permanently disabling injuries such as paralysis or severe leg injuries. Tr. I-115. One miner would be affected. Tr. I-116. Because the area is not accessed regularly and it would be cleaned prior to accessing it, the negligence was designated as moderate. Tr. 116

Freeman disagreed with the inspector's assessment of the hazard, testifying that the passageway had bracing, including an I-beam, and the severity of injuries would not be permanently disabling. Tr. II-42, II-47; Ex. 37. This area is used to address maintenance and breakdown issues, which are planned events, and shoveling would occur before maintenance work commenced. Tr. II-42, II-44. If there was concern about the passageway falling, it would have been identified. Tr. II-42.

ii. Fact of Violation

On February 27, 2024, Mathisen issued 104(a) Citation No. 9688125, which alleged:

> A safe means of access was not being maintained or provided along the Screen 2 and 3 Crossover Belt passageway. This passageway provided access along the Screen 2 and 3 Crossover Belt, the Screen 2 Under Belt and the Screen 3 Under Belt. South of the ladder access, the travelway had about an 11 foot section that was concave downward. The lowest point was in the middle between pieces of angle iron and sections of the walkway and the lowest point in the middle was on the east side. The drop off was about 17 feet. It was reported that the Screen 2 and 3 Crossover Belt passageway was rarely accessed, typically during break downs, about once every month and a half to two months. If the passageway was to fail and a miner fall, serious injuries could result.

Ex. 33; Tr. I-110-111.

Mathisen designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.11001 that was unlikely to cause an injury that could be expected to be permanently disabling, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 10.

30 C.F.R. § 56.11001 states that "[s]afe means of access shall be provided and maintained to all working places."

The condition was first identified visually by the inspector and measured using an inclinometer to confirm that the passageway was sagging. Even if there was support from an I-beam, as Freeman testified, the catwalk did not provide a safe means of access in that condition. I defer to the inspector, and find that there has been a violation of the cited standard.

iii. Gravity

The inspector determined that the violation was unlikely to cause permanently disabling injuries. As noted in Citation No. 9688124, the catwalk was only accessed infrequently. So, while the catwalk could fall, the inspector did not believe the violation rose to the level of reasonably likely. In the event that someone did fall from the catwalk, impact with the ground would cause permanently disabling injuries. The designations are upheld.

iv. Negligence

The negligence was assessed as moderate. Miners used the catwalk every month and a half to two months and the operator represented that the catwalk is cleaned each time it was accessed. I affirm the negligence as moderate.

I. Citation No. 9688316

i. Summary of Testimony

Inspector Devin Drobny observed material gathering below the lower plant's main feed belt, forming clumps 20 feet above the ground. Tr. I-147-148, I-150; Ex. 39. Smaller pieces of material, which the inspector determined came from the belt, were already on the ground. Tr. I-152; Ex. 42. While he was inspecting the belt, one six-inch chunk fell and broke apart upon hitting the ground. Tr. I-149. While these clumps were wet and broke apart on impact with the ground, the inspector testified that changing conditions could cause the clumps to freeze and lead to more severe injuries. Tr. I-150. The hazard was not taped off, and there were tire marks and boot prints under the belt. Tr. I-151.

As there were multiple clumps spanning across the framework and people traveled through the area, the inspector determined it was reasonably likely to cause an injury that would affect one person. Tr. I-153, I-156. Impact injuries including bruising and minor concussion can result from a clump striking a person. Tr. I-154. The violation was also marked significant and substantial due to its reasonable likelihood of occurrence. Tr. I-156. Wet clumps, like those present during the inspection, could cause lost workdays or restricted duty from injuries such as concussion or bruising, but frozen clumps could cause more severe injuries. Tr. I-154. The negligence was determined to be high, because the operator should have known about the hazard. Tr. I-156-157.

Plant foreman Jarred Braaten did not think that the material could be described as clumps, because it is a fine material and not rock. Tr. II-61. The material is not hazardous, because it consists of sand. Tr. II-61. Further, while there is a road under the belt, it is not used when it is wet. Tr. II-62. Miners do not work under the belt and will only travel in a piece of equipment. Tr. II-61-62.

ii. Fact of Violation

On February 27, 2024, Drobny issued 104(a) Citation No. 9688316, which alleged:

> The main feed belt had several clumps of material that had built up on multiple sections of the truss structure under the belt from the carry back, creating a fall of the material hazard. Miners walk under the belt daily to get to and from the building of the tunnel belt and travel in multiple pieces of mobile equipment including light duty pickups and an open front cab skid steer. Continued vibration would likely make the bonded material continue to fall as approximately 6" clumps were observed falling. Due to the size of the bonded material and the distance of the fall, the impact could exceed the intended protection provided by the hardhats. However, the material was observed breaking apart easily upon impact with the ground, weather conditions may [a]ffect this. The wipers on the belt were not currently maintained and were no longer effective in preventing buildup of material that created this hazard. This conveyor belt was cited in past inspections for the same issues and a falling rock hazard.

Ex. 39; Tr. I-147-148.

Drobny designated the citation as a significant and substantial violation of 30 C.F.R. § 56.14110 that was reasonably likely to cause an injury that could be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's high negligence. Ex. 39.

30 C.F.R. § 56.14110 states that "[i]n areas where flying or falling materials generated from the operations of screens, crushers, or conveyors present a hazard, guards, shields, or other devices that provide protection against such flying or falling materials shall be provided to protect persons."

I credit the inspector's testimony regarding his observations of clumps underneath the belt framework 20 feet above the ground and falling material and the impact cold weather conditions may have on the hazard. A violation of the cited standard has occurred.

iii. Gravity

The inspector determined that it was reasonably likely for an injury to occur that would cause a worker to either miss work or perform alternative duties. The inspector also noted that the carryback material extended down a large section of the belt, which was in a busy area people traveled through multiple times per day. I affirm the inspector's designations that the hazard was reasonably likely to cause an injury leading to lost workdays or restricted duty.

The violation was also designated as S&S. I have already found that a violation of a mandatory safety standard has occurred. The standard is meant to protect against the hazard of falling material falling onto a person. Tire tracks and footprints were in the area and the area was a main travel way in the mine. During the inspection, the inspector witnessed a chunk of material fall. These conditions are reasonably likely to cause an injury of a reasonably serious nature. The S&S designation is affirmed.

iv. Negligence

The negligence was assessed as high because management knew or should have known of the material accumulation, the condition was obvious, and this conveyor belt had been cited previously for the same violation. Tr. I-156-157. I affirm the operator's negligence was high, as this was a main roadway and the condition was allowed to persist.

J. Citation No. 9688318

i. Summary of Testimony

Inspector Drobny issued Citation No. 9688318 for built up wet carryback material 15 feet above the ground at the Cone No. 2 feed belt. Tr. I-157-158; Ex. 47. Two clumps one-foot by two-foot in size were identified higher up on the belt. Tr. I-160; Ex. 49. The material was resting on the columns and was not attached to the conveyor belt. Tr. I-161. The belt's vibrations or the freezing and thawing process, which causes contraction and expansion, could cause this material to fall. Tr. I-161. The area was not taped off. Tr. I-164.

The inspector marked the violation as unlikely because the area was infrequently accessed. Tr. I-162. The types of injuries would be impact injuries, bruising, and concussion causing lost workdays or restricted duty. Tr. I-163. As it would be unlikely for the same falling material to strike two people, one person would be affected. Tr. I-163. Because travel in the area was low and it was difficult to see the material on the conveyor belts, the negligence was moderate. Tr. I-164.

Braaten disagreed that the material could injure someone because it was small, fine, and like sand. Tr. II-62-64. Nothing was located under the belt and miners only travel underneath it in a piece of equipment or skidsteer. Tr. II-63.

ii. Fact of Violation

On February 27, 2024, Drobny issued 104(a) Citation No. 9688318, which alleged:

> The #2 cone feed belt had accumulated material that had built up on the truss structure under the belt, creating a fall of material hazard. The accumulated materials was about 2'x1' in size and about 15' high. Other sections of the framework had smaller accumulations and were not as high. The belt did not have a wiper installed to prevent carry back. Foot traffic and tire tracks were observed around the belt. Miners typically travel this area in light duty pickups and an open front cab skid steer. Were this chunk of material to vibrate off the framework and strike a miner[,] serious impact injuries may result in lost work days or restricted duty.

Ex. 47; Tr. I-157-158.

Drobny designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.14110 that was unlikely to cause an injury that could be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 47.

30 C.F.R. § 56.14110 states that "[i]n areas where flying or falling materials generated from the operations of screens, crushers, or conveyors present a hazard, guards, shields, or other devices that provide protection against such flying or falling materials shall be provided to protect persons."

The inspector in an unequivocal, consistent and compelling fashion credibly testified regarding the hazard posed by the column of material. The belt did not have a guard or wiper and material accumulated that could possibly fall on someone underneath. I find there was a violation of 30 C.F.R. § 56.14110.

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury or illness that would result in lost workdays or restricted duty because of the exposure to the hazard was limited and the material was only 15 feet high which would cause less severe injuries. The inspector determined this was likely to cause impact injuries such as bruising. I affirm these designations.

iv. Negligence

The negligence was assessed as moderate because of the low travel and the hazard was difficult to see. I affirm the negligence as moderate.

K. Citation No. 9688319

i. Summary of Testimony

At two of the feeding screens at the lower plant, accumulated material under the framework of the belt presented a falling materials hazard. Tr. I-164-165; Ex. 53. Inspector Drobny saw approximately one by two-foot chunks of material could fall due to the vibration of the belt. Tr. I-165-166; Ex. 55. The inspector also witnessed small fragments of material falling. Tr. I-165-166. There were no guards on the belt, however the wipers were working. Tr. I-171; Ex. 54. Areas under the belt were blocked off by piles of cleaned-up material, which demonstrated to the inspector that material may fall on a miner working in the area. Tr. I-167.

He marked the violation as unlikely because while there was a slight chance the material could fall onto a miner, the exposure to the hazard was low. Tr. I-167-168. The hazard would lead to permanently disabling injuries like serious impact injuries, concussions or shoulder injuries. Tr. I-168-169. If the material is frozen, it is less likely to break apart and can cause more serious injuries. Tr. I-169. One person would be affected because the same falling material is unlikely to hit two people. Tr. I-169. Finally, he assigned the negligence as moderate because access to the area was low and the hazard was not readily apparent. Tr. I-169-170.

Braaten did not think the material was a hazard because it is fine and miners do not work or travel under the belt unless they are in protected vehicles. Tr. II-64-65. Wipers were cleaning the material off. Tr. II-65. When the material is dry, the wiper is not necessary and there are times when installation of a wiper is infeasible. Tr. II-66.

ii. Fact of Violation

On February 27, 2024, Drobny issued 104(a) Citation No. 9688319, which alleged:

> The screen 2&3 feed belts had several clumps of material that had built up on multiple sections of the truss structure under the belt from carry back, creating a fall of material hazard. The large accumulations of material were about 2'x1' in size. Miners travel this area in multiple pieces of mobile equipment including light duty pickups, an open front cab skid steer and occasionally by foot. Continued vibration and weather changes would likely make the bonded material fall. Due to the size of the bonded material and the distance of the fall ranged between 15'-30', the impact could exceed the intended protection provided by hardhats. However, the material was observed breaking apart easily upon impact with the ground.

Ex. 53; Tr. I-164-165.

Drobny designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.14110 that was unlikely to cause an injury that could be expected to result in permanently disabling injuries, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 53.

30 C.F.R. § 56.14110 states that "[i]n areas where flying or falling materials generated from the operations of screens, crushers, or conveyors present a hazard, guards, shields, or other devices that provide protection against such flying or falling materials shall be provided to protect persons."

There were no guards on the belt and there were chunks of material 15 to 30 feet above the ground. The Secretary has proven that a violation has occurred.

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury or illness that would result in permanently disabling injuries, including concussions and should injuries. I affirm.

iv. Negligence

The inspector assigned the negligence as moderate because access to the area was low and the hazard was hardly visible. The wiper was not effective at preventing the accumulation of material. I affirm the negligence designation.

L. Citation No. 9688320

i. Summary of Testimony

Inspector Drobny issued Citation No. 9688320 after observing a catwalk providing access to the main feed belt covered with silted materials and rocks greater than 18 inches deep. Tr. I-172, I-175; Ex. 57. There was a chain with a sign across the entrance, however the area was easily accessible by unclipping the chain. Tr. I-174; Ex. 59. The operator informed the inspector that the catwalk was rarely used and there were no footprints or other tracks that would show the area had been accessed. Tr. I-186

The inspector determined that likelihood was unlikely, but the catwalk could still be accessed to repair conveyor belts that wear out regularly. Tr. I-175-176. It would likely cause lost workdays or restricted duty from slip-trip-fall type injuries like strains and sprains. Tr. I-178. One person would be affected, because it was unlikely for multiple people to experience an injury in the same catwalk. Tr. I-178. The inspector did not testify regarding the violation's negligence.

Braaten testified that the catwalk would be cleaned as necessary and miners do not access it unless maintenance was needed. Tr. II-59. There was a sign and chain placed across the entrance. Tr. II-59. He did not think this comprised a hazard because it had not been cleaned as it was not necessary to access the travelway. Tr. II-70, 60.

ii. Fact of Violation

On February 27, 2024, Drobny issued 104(a) Citation No. 9688320, which alleged:

> The main feed belt catwalk entrance was not kept clean and orderly in that material ranging from 18" rocks to fine material had spilled into the travelway. Miners access the catwalk on an as needed basis to access one side of the tunnel belt head pully or the main feed belt tail pully for maintenance and cleaning. This was said to occur during shut down days. Were miners were to access the travelway in this condition they would be exposed to a slip trip and fall hazard that may result in lost work days or restricted duties.

Ex. 57; Tr. I-172.

Drobny designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.23000(a) that was unlikely to cause an injury that could be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 57.

30 C.F.R. § 56.20003(a) states that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly."

The passageway at issue was covered with rocks and silted material and was not clean and orderly as required by the standard. A violation has occurred.

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury or illness that would result in lost workdays or restricted duty because the area was infrequently accessed and would cause slip, trip, and fall injuries. The unlikely and lost workdays or restricted duty designations are affirmed.

iv. Negligence

The violation's negligence was assessed as moderate, because, as noted in the citation's description of condition, it was not reported to management and was not a common travel area. Ex. 58. I credit the inspector's notes on the negligence determination and affirm the negligence as moderate.

M. Citation No. 9688324

i. Summary of Testimony

In the MCC, Inspector Drobny issued Citation No. 9688324 for a missing cover plate on an electrical compartment. Tr. I-178-179; Ex. 71, 73. At the time of the citation, there was no indication of the compartment was undergoing testing or repairs, and no one was working in the room. Tr. I-180. According to the cited standard, the cover plate must be in place at all times. Tr. I-180.

The citation was marked as unlikely because there was no indication of damage to electrical components. Tr. I-180-181. The most likely type of injuries to occur would be fire and smoke exposure, shocks, and burns leading to lost workdays or restricted duty for one miner. Tr. I-181. Because the location is commonly used and the condition did not appear to have existed for long, the negligence was assessed as moderate. Tr. I-182.

Braaten testified that the panel is two feet above the ground in the back corner of the MCC. Tr. II-67. It is not easily accessible, as someone would have to get on their hands and knees to access it. Tr. II-67-68. It is also difficult to get a finger inside, and if they did, they would not be able to contact any electrical components. Tr. II-68.

ii. Fact of Violation

On February 27, 2024, Drobny issued 104(a) Citation No. 9688324, which alleged:

> Located in the #3MCC room a[n] electrical panel labeled "cone 5 feed holding relay additional control wires from booth" had an open knockout on the bottom side. No exposed wire nuts or inner conductors were observed through the opening. The #3 CC is accessed monthly for fire extinguisher inspection and for occasional lockout. Missing cover plates can expose wires to damage and could expose miners to the possibility of shock and burn injuries that can result in lost work days or restricted duty.

Ex. 71; Tr. I-178-179.

Drobny designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.12032 that was unlikely to cause an injury that could be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. 71.

30 C.F.R. § 56.12032 states that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

The language of the standard is clear. At the time of the citation, an electrical panel in the MCC was missing a cover plate. There were no signs of repairs or testing on the panel at issue. Accordingly, I find there has been a violation of the cited standard.

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury or illness that would result in lost workdays or restricted duty. The inspector noted that there were no signs of damage to the panel. I uphold the inspector's assessment of the hazard.

iv. Negligence

The inspector assessed the negligence as moderate because the area is commonly used, the condition was close to the ground, and it had only existed for a short time. I affirm the negligence designation.

IV. PENALTY

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

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

30 U.S.C. § 820(i).

For Citation No. 9683849, the Secretary proposed a regularly assessed penalty of $147.00. The citation description states that this violation has been cited six times in two years. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in lost workdays or restricted duty and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. In light of these considerations, I find that the proposed penalty of **$147.00** is appropriate.

For Citation No. 9683850, the Secretary proposed a regularly assessed penalty of $535.00. This standard has been cited six times in two years. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a S&S violation that is reasonably likely to cause permanently disabling injuries and was caused by the operator's high negligence. The operator acted in good faith in abating the violation. In light of these considerations, I increase the penalty to **$1,500.00**.

For Citation No. 9688120, the Secretary proposed a regularly assessed penalty of $797.00. The Secretary did not provide evidence of the violation history of the cited standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a S&S violation that is reasonably likely to cause permanently disabling injuries and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. As there is no evidence of the operator's violation history, I lower the penalty to **$717.30**.

For Citation No. 9688121, the Secretary proposed a regularly assessed penalty of $147.00. The Secretary did not provide evidence of the violation history of the cited standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to cause lost workdays or restricted duty and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. As there is no evidence of the operator's violation history, I lower the penalty to **$132.30**.

For Citation No. 9688122, the Secretary proposed a regularly assessed penalty of $147.00. This standard has been cited six times in two years. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to cause lost workdays or restricted duty and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. In light of these considerations, I find that the proposed penalty of **$147.00** is appropriate.

For Citation No. 9688123, the Secretary proposed a regularly assessed penalty of $147.00. The Secretary did not provide evidence of the violation history of the cited standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to cause lost workdays or restricted duty and was caused by the operator's low negligence. The operator acted in good faith in abating the violation. As there is no evidence of the operator's violation history and a low negligence level, I lower the penalty to **$125.00**.

For Citation No. 9688124, the Secretary proposed a regularly assessed penalty of $147.00. This standard has been cited six times in two years. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in lost workdays or restricted duty and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. In light of these considerations, I find that the proposed penalty of **$147.00** is appropriate.

For Citation No. 9688125, the Secretary proposed a regularly assessed penalty of $161.00. The Secretary did not provide evidence of the violation history of the cited standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to cause permanently disabling and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. As there is no evidence of the operator's violation history, I lower the penalty to **$144.90**.

For Citation No. 9688316, the Secretary proposed a regularly assessed penalty of $1,773.00. While the citation's description of the condition states that this condition had been cited in the past, no other evidence regarding the timing of frequency was provided. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a S&S violation that is reasonably likely to cause lost workdays or restricted duty and was caused by the operator's high negligence. The operator acted in good faith in abating the violation. As there is limited evidence of the operator's violation history, I lower the penalty to **$1,595.70**.

For Citation No. 9688318, the Secretary proposed a regularly assessed penalty of $147.00. The Secretary did not provide evidence of the violation history of the cited standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to cause lost workdays or restricted duty and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. As there is no evidence of the operator's violation history, I lower the penalty to **$132.30**.

For Citation No. 9688319, the Secretary proposed a regularly assessed penalty of $161.00. The Secretary did not provide evidence of the violation history of the cited standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to cause permanently disabling and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. As there is no evidence of the operator's violation history, I lower the penalty to **$144.90**.

For Citation No. 9688320, the Secretary proposed a regularly assessed penalty of $147.00. This standard has been cited six times in two years. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in lost workdays or restricted duty and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. In light of these considerations, I find that the proposed penalty of **$147.00** is appropriate.

For Citation No. 9688324, the Secretary proposed a regularly assessed penalty of $147.00. The Secretary did not provide evidence of the violation history of the cited standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to cause lost workdays or restricted duty and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. As there is no evidence of the operator's violation history, I lower the penalty to **$132.30**.

V. PARTIAL SETTLEMENT

The parties filed a Joint Stipulation after the hearing, containing the resolution of the three citations settled prior to hearing. The originally assessed amount for these three actions was $843.00 and the settlement amount is $696.00. The settlement includes:

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9688317	$161.00	$161.00	Affirm as Issued
9688322	$147.00	$0.00	Vacate
9688323	$535.00	$535.00	Affirm as Issued
TOTAL	**$843.00**	**$696.00**	

It is the Secretary's position that the decision to vacate Citation No. 9688322 is an unreviewable exercise of prosecutorial discretion. While the Commission has held 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" when it is part of a settlement, that decision is currently on appeal. *Crimson Oak Grove Resources LLC,* 46 FMSHRC 593, 605 (August 30, 2024). Until such time that the appeals process has been resolved, I defer requiring the parties to support vacatur with an explanation containing facts and circumstances that justify the decision to vacate.

The parties have submitted facts in support of the proposed changes. I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve partial settlement is **GRANTED**, the citations contained in this docket are **MODIFIED** as set forth above.

VI. ORDER

It is hereby **ORDERED** that Citation Nos. 9683849, 9688120, 9688121, 9688122, 9688124, 9688125, 9688316, 9688318, 9688319, 9688320, and 9688324 are **AFFIRMED** as issued, Citation No. 9683850 is modified to increase the negligence to high, and Citation No. 9688123 is modified to decrease the negligence to low. Iron Mountain is **ORDERED** to pay the Secretary the total sum of **$5,908.70** within 40 days of this order.[3]

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

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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WASHINGTON, D.C. 20004-1710

August 1, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. WEVA 2024-0231 A.C. No. 46-09569-594789
v.	
CONSOL MINING COMPANY, LLC, Respondent.	Mine: Itmann No. 5

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This case is before me upon the filing of the Petition for Assessment of Civil Penalty by the Secretary of Labor ("Secretary") against CONSOL Mining Company, LLC ("CONSOL") located in Wyoming, West Virginia, before the Federal Mine Safety and Health Review Commission (hereinafter "FMSHRC" or "the Commission") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 815. On July 17, 2024, Chief Administrative Law Judge Glynn F. Voisin assigned me this docket and attached a copy of my Prehearing Order. Counsel for the parties have complied with my Prehearing Order and filed their initial prehearing reports. This matter is set for a hearing to be held on September 24–25, 2025, in Beckley, West Virginia.

CONSOL filed a Motion to Dismiss on January 6, 2025. Thereafter, on January 10, 2025, the Secretary filed an Unopposed Motion to Extend Time to Respond to Motion Dismiss, which I granted, extending the deadline to file a response to January 31, 2025. On January 29, 2025, the Secretary filed a Second Unopposed Motion to Extend Time to Respond to Motion to Dismiss, which I granted, extending the deadline to file a response to February 21, 2025. On February 6, 2025, the Secretary filed her Opposition to Motion to Dismiss. I chose to wait until after the Supreme Court's recent term ended in late June, given the various constitutional issues raised in CONSOL's motion.

I. PARTIES' CONSTITUTIONAL ARGUMENTS

CONSOL argues that it has a constitutional right to a jury trial in the present case. (Resp't Mot. at 3–7.) Specifically, CONSOL asserts that like the securities penalties addressed in the recent Supreme Court decision *SEC v. Jarkesy*,[1] the civil penalties the Secretary seeks under the Mine Act are intended to punish and deter and not to compensate the injured miner. (Resp't Mot. at 3–4.) Therefore, CONSOL contends that the remedies sought under the Mine Act are "legal in nature" and accordingly trigger the Seventh Amendment right to a jury trial. (Resp't Mot. at 3–4.) CONSOL adds that, similar to *Jarkesy*, the cause of action in this case mirrors the elements of a common law tort claim which confirms that this proceeding implicates the Seventh

[1] *SEC v. Jarkesy*, 603 U.S. 109 (2024).

Amendment. (Resp't Mot. at 4.) In conclusion, CONSOL argues that because it has a constitutional right to a jury trial and the Commission has no statutory authority to impanel a jury, this matter must be dismissed. (Resp't Mot. 6–7.)

CONSOL also argues that the removal restrictions for FMSHRC Administrative Law Judges ("ALJs") violate the "take Care" clause of the Constitution. (Resp't Mot. at 7–9.) Specifically, CONSOL asserts that FMSHRC ALJs are inferior officers who can only be removed by FMSHRC Commissioners if the Merits System Protection Board ("MSPB") finds there is good cause; FMSHRC Commissioners may only be removed by the President for inefficiency, neglect of duty, or malfeasance in office. (Resp't Mot. at 9.) Accordingly, CONSOL contends that the Supreme Court decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[2] dictates that this multi-layered protection against removal violates the Constitution. (Resp't Mot. at 8–9.) CONSOL concludes that dismissal of this case is necessary to avoid further constitutional and jurisdictional violations. (Resp't Mot. at 9.)

In response, the Secretary argues that I lack the authority to hear the constitutional issues CONSOL raises in its motion to dismiss, and thus I should deny the motion. (Sec'y Mot. at 1.) Specifically, the Secretary argues that CONSOL's Seventh Amendment challenge is a facial constitutional challenge and therefore the Commission cannot decide it. (Sec'y Mot. at 2.) In support, the Secretary cites the following language from a Sixth Circuit decision: "[t]his administrative agency [FMSHRC], like all administrative agencies, has no authority to entertain a facial constitutional challenge to the validity of a law. An administrative agency may not invalidate the statute from which it derives its existence and that it is charged with implementing." (Sec'y Mot. at 2 (citing *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 673 (6th Cir. 2018)).)

II. PRINCIPLES OF LAW

FMSHRC's procedural rules do not specifically address motions to dismiss. However, FMSHRC Procedural Rule 1(b) directs FMSHRC Judges to follow the Federal Rules of Civil Procedure for matters not addressed by the Commission's Procedural Rules. 29 C.F.R. § 2700.1(b). Here, CONSOL's arguments focus on the alleged constitutional defects of the Mine Act's failure to provide a jury trial and the removal restrictions for FMSHRC ALJs. Federal Rule of Civil Procedure 12(b)(1) allows dismissal for "lack of subject-matter jurisdiction over the subject matter" of claims asserted in the complaint. Fed. R. Civ. P. 12(b)(1). Thus, under FMSHRC Procedural Rule 1(b) it is appropriate to look to Rule 12(b)(1) for guidance. Under Rule 12(b)(1), a claim is "properly dismissed for lack of subject-matter jurisdiction . . . when the court lacks the statutory or constitutional power to adjudicate" the claim. *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996).

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[2] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

III. ANALYSIS

A. <u>Whether the Constitutionality of the Mine Act is Within the Jurisdiction of FMSHRC</u>

The United States Court of Appeals for the Sixth Circuit held in *Jones Brothers, Inc. v. Secretary of Labor* that FMSHRC, "like all administrative agencies, has no authority to entertain a facial constitutional challenge to the validity of a law. An administrative agency may not invalidate the statute from which it derives its existence and that it is charged with implementing." *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 673 (6th Cir. 2018); *see also Carr v. Saul*, 593 U.S. 83, 92 (2021) (holding that "agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise"); *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 544 (D.C. Cir. 1988) (holding that administrative agencies are entitled to pass on constitutional claims); *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1115 (D.C. Cir. 1979) (holding that generally, "the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies"); *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (holding that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Matthews v. Diaz*, 426 U.S. 67, 76 (1976) (holding that the constitutionality of the Social Security Act is beyond the Secretary of Health, Education, and Welfare's competence); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (holding that the constitutionality of a statutory requirement of the Social Security Act is beyond the jurisdiction of the Secretary of Health, Education, and Welfare to determine); *Johnson v. Robinson*, 415 U.S. 361, 368 (1974) (quoting *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J. concurring in result)) (holding that the "'[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies'"). The Sixth Circuit further held in *Jones Brothers* that while each of the three branches of the federal government has an independent obligation to interpret the Constitution, "only the Judiciary enjoys the power to invalidate statutes inconsistent with the Constitution." *Jones Bros., Inc.*, 898 F.3d at 674.

However, the Supreme Court has held that the general rule disfavoring constitutional adjudication by agencies "is not mandatory . . . and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate Mine Act disputes." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994). The Supreme Court also noted that FMSHRC "has addressed constitutional questions in previous enforcement proceedings." *Id.*; *see KenAmerican Res., Inc.*, 42 FMSHRC 1, 7 (2020), *aff'd on other grounds*, 33 F.4th 884 (6th Cir. 2022) (resolving constitutional challenges raised against the enforcement of the Mine Act); *Ala. By–Pro. Corp.,* 4 FMSHRC 2128, 2129–2130 (1982) (concluding that FMSHRC has the authority to decide the operator's constitutional challenge to the validity of the cited standard); *Richardson,* 3 FMSHRC 8, 18–21 (1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982) (holding that "the judicial role of the Commission . . . appropriately permits the Commission to entertain constitutional objections to the underlying statute"); *Rain for Rent*, 40 FMSHRC 1267, 1247–77 (2018) (ALJ), *aff'd on other grounds sub nom. W. Oilfields Supply Co. v. Sec'y of Labor*, 946 F.3d 584 (D.C. Cir. 2020) (FMSHRC ALJ addressing operator's argument that MSHA inspector violated its Fourth Amendment rights).

The Sixth Circuit also noted in *Jones Brothers* that:

> [a]gency actors must continually interpret and apply their statutory duties in light of constitutional boundaries . . . That ongoing duty to conform its behavior with our highest law is inherent in and inseparable from the Executive's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II § 3. And it is re-enforced by the oath each executive officer must stake to "to support this Constitution." U.S. Const. art. VI.

Jones Bros., Inc., 898 F.3d at 674–75. *See also* Louis L. Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239, 274–75 (1955) (noting that "the statute under which an agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law,' and the ultimate guarantees associated with the Constitution").

The Mine Act broadly directs FMSHRC ALJs to "hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such" ALJ, and to "make a decision which constitutes his final disposition of the proceedings." 30 U.S.C. § 823(d)(1). Additionally, since FMSHRC Judges swear to uphold the Constitution, they must make determinations and decisions in accordance with the Constitution. As FMSHRC aptly stated, it "cannot properly fulfill [its] duty to interpret the law and to apply it constitutionally, without at the same time deciding whether the law or a portion of it conforms to the Constitution." *Richardson,* 3 FMSHRC at 19. I therefore reject the Secretary's assertion that I lack the authority to decide CONSOL's Seventh Amendment challenge.

B. Whether Respondent Is Entitled to a Jury Trial

1. The Supreme Court's decision in *SEC v. Jarkesy*

CONSOL relies on the recent Supreme Court decision *SEC v. Jarkesy* to argue that because the civil penalties sought by the Secretary under the Mine Act are "legal in nature," the Seventh Amendment right to a jury trial is triggered. (Resp't Mot. at 4.) In *Jarkesy*, the Supreme Court determined the issue of "whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud." *SEC v. Jarkesy*, 603 U.S. 109, 120 (2024). The Supreme Court affirmed that the Seventh Amendment right to a jury trial "extends to a particular statutory claim if the claim is 'legal in nature.'" *Jarkesy*, 603 U.S. at 122 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). The Court held that the civil penalties sought by the SEC "are designed to punish and deter, not to compensate" and "are therefore 'a type of remedy at common law that could only be enforced in courts of law.'" *Jarkesy*, 603 U.S. at 125 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)). The Court added that "[t]he close relationship between the causes of action in this case and common law fraud confirms" the conclusion that actions brought by the SEC are "'legal in nature.'" *Jarkesy*, 603 U.S. at 125–26 (quoting *Granfinanciera*, 492 U.S. at 53).

Accordingly, the Court concluded that because the claims at issue in *Jarkesy* implicate the Seventh Amendment, a jury trial is required unless the "public rights" exception applies. *Jarkesy*, 603 U.S. at 127. Under the "public rights" exception, "Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment." *Id.* The Court ultimately concluded that the public rights exception did not apply in *Jarkesy* but distinguished and affirmed its holding in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*.[3] *Jarkesy*, 603 U.S. at 136–40.

2. "Public Rights" Exception in *Atlas Roofing*

The initial litigation in *Atlas Roofing* arose under the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651–678, a federal regulatory regime created to promote safe working conditions. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 444–45 (1977). The OSH Act authorizes the Secretary to promulgate safety regulations, and if a party violates the regulations, the Secretary can impose civil penalties. *Atlas Roofing Co.*, 430 U.S. at 444–46. The OSH Act also empowers the Occupational Safety and Health Review Commission ("OSHRC") to adjudicate alleged violations. *Id*.

In *Atlas Roofing*, the Supreme Court rejected two employers' argument that the adjudicatory authority of OSHRC violated the Seventh Amendment. *Atlas Roofing Co.*, 430 U.S. at 461. The Court explained that "Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefor, unknown to the common law," and thus the Seventh Amendment was "no bar to . . . enforcement outside the regular courts of law." *Atlas Roofing Co.*, 430 U.S. at 461. Accordingly, the Court held that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment." *Atlas Roofing Co.*, 430 U.S. at 455.

3. Treatment of *Atlas Roofing* in *Jarkesy*

In *Jarkesy*, the Supreme Court affirmed its holding in *Atlas Roofing*, that "Congress could assign the OSH Act adjudications to an agency because the claims were 'unknown to the common law,'" but held that the case did not control because the pertinent "statutory claim is 'in the nature of' a common law suit." *Jarkesy*, 603 U.S. at 138 (quoting *Atlas Roofing Co.*, 430 U.S. at 453, 461). The Court explained that, unlike the antifraud provisions the SEC enforces, the OSH Act does "not borrow its cause of action from the common law." *Jarkesy*, 603 U.S. at 136. Instead, the OSH Act simply commands that "'[e]ach employer . . . shall comply with occupational safety and health standards promulgated under this chapter.'" *Jarkesy*, 603 U.S. at 137 (quoting 29 U.S.C. § 654(a)(2)). The Court noted that rather than reiterate common law terms of art, the occupational safety and health standards resemble "a detailed building code." *Jarkesy*, 603 U.S. at 137.

[3] *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

The Court in *Jarkesy* explained that the purpose of the OSH Act "was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law," but rather to "'develop[] innovative methods, techniques, and approaches for dealing with occupational safety and health problems.' In both concept and execution, the Act was self-consciously novel." *Jarkesy*, 603 U.S. at 137 (quoting 29 U.S.C. § 651(b)(5)). The Court further emphasized that the "novel claims in *Atlas Roofing* had never been brought in an Article III court. By contrast, law courts have dealt with fraud actions since before the founding, and Congress had authorized the SEC to bring such actions in Article III courts and still authorizes the SEC to do so today." *Jarkesy*, 603 U.S. at 140.

CONSOL argues that while the Supreme Court did not expressly overrule *Atlas Roofing* in *Jarkesy*, the Court indicated that it may already have been overruled by the Court's decision in *Granfinanciera*. (Resp't Mot. at 5.) CONSOL therefore asserts that continued reliance upon *Atlas Roofing* is misplaced and the "public rights" exception cannot stand in the present case. (Resp't Mot. at 6.) However, the Supreme Court explicitly stated in *Jarkesy* that because *Atlas Roofing* did not control, "we need not reach the suggestion made by Jarkesy and Patriot28 that *Tull* and *Granfinanciera* effectively overruled *Atlas Roofing* to the extent that case construed the public rights exception to allow the adjudication of civil penalty suits in administrative tribunals." *Jarkesy*, 603 U.S. at 136. Nevertheless, the Court affirmed that the "public rights" exception applied in *Atlas Roofing* because actions under the OSH Act "bring no common law soil with them." *Jarkesy*, 603 U.S. at 137. Accordingly, I give no credence to CONSOL's argument that *Atlas Roofing* may have been overruled, because the Court specifically held in *Jarkesy* that "*Atlas Roofing* does not conflict with our conclusion." *Jarkesy*, 603 U.S. at 140.

4. Whether the "Public Rights" Exception Applies to FMSHRC

The Mine Act is very similar to the OSH Act. *See generally Petersen*, 2 FMSHRC 3404, 3407 (Nov. 1980) (ALJ) (holding that the Occupational Safety and Health Act "is similar to the Federal Mine Safety and Health Act of 1977"); *Mellot Trucking & Supply, Inc.*, 10 FMSHRC 409, 411 (Mar. 1988) (ALJ) (noting that the civil penalty proceeding before FMSHRC "is similar to the penalty proceeding at issue in the *Atlas* case before the Occupational Safety and Health Review Commission"). The Mine Act establishes a federal regulatory regime, like the OSH Act, "to protect the health and safety of the Nation's coal or other miners." 30 U.S.C. § 801(g); *compare* 29 U.S.C. § 651(b) (stating purpose of OSH Act is "to assure so far as possible every working man or woman in the Nation [has] safe and healthful working conditions"). The Mine Act also directs the Secretary to promulgate "improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines," and to impose civil penalties if a party violates the regulations. 30 U.S.C. §§ 811(a), 815(a), 820. Moreover, the Mine Act empowers FMSHRC to adjudicate alleged violations, similar to OSHRC. 30 U.S.C. § 815(d); *compare* 29 U.S.C. § 661(e), (j). In fact, because the Secretary administers both the Mine Act and the OSH Act, she "determines initially whether a workplace falls under the jurisdiction of MSHA, rather than OSHA." *Power Fuels, LLC v. Fed. Mine Safety & Health Review Comm'n*, 777 F.3d 214, 217 (4th Cir. 2015).

In the Mine Act's legislative history, Congress explained that "[t]he hazards involved with the mining of coal and other materials and the need to provide for the health and safety of the nation's miners have long been a matter of Federal law." S. REP. NO. 95–181, at 3401 (1977). Likewise, Congress found that common-law remedies for work injuries, diseases, and deaths resulting from unsafe working conditions in mines to be inadequate to protect miners—the mining industry's "most precious resource"—and instead "created a new cause of action, and remedies therefore, unknown to the common law." S. REP. NO. 95–181, at 3401–405 (1977); 30 U.S.C. § 801; *see Atlas Roofing Co.*, 430 U.S. at 461. The Mine Act, like the OSH Act, does "not borrow its cause of action from the common law," *see Jarkesy*, 603 U.S. at 136; rather, the Mine Act requires mine operators to comply with "any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to" the Mine Act. 30 U.S.C. § 814(a).

Upon consideration of the relevant case law, I reject CONSOL's argument that civil penalty proceedings under the Mine Act mirror the elements of a common law tort claim. Rather, I determine that the Mine Act, like the OSH Act, created "a new cause of action, and remedies therefor, unknown to the common law." *Atlas Roofing Co.*, 430 U.S. at 461. As such, I conclude that actions brought under the Mine Act fall under the "public rights" exception. Accordingly, the "Seventh Amendment is no bar" to FMSHRC, an administrative agency, adjudicating the "public rights" created by the Mine Act. *Atlas Roofing Co.*, 430 U.S. at 461. Hence, the remedy sought by CONSOL—i.e., the dismissal of this proceeding to avoid further constitutional and jurisdictional violations pursuant to *Jarkesy*—is therefore unnecessary.

C. Removal Restrictions for FMSHRC ALJs

CONSOL next relies on the Supreme Court decision *Free Enterprise Fund v. Public Co. Accounting Oversight Board* to argue that the statutory restrictions on the removal of FMSHRC ALJs are sufficiently onerous such that they violate the "take Care" clause of the Constitution. (Resp't Mot. at 9.) CONSOL argues that dismissal of this case is therefore necessary to avoid further constitutional and jurisdictional violations. (Resp't Mot. at 9.)

1. The Supreme Court's decision in *Free Enterprise Fund*

In *Free Enterprise Fund*, the Court considered whether "the President [may] be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483–84 (2010). Specifically, the Court addressed whether the removal structure of the Public Company Accounting Oversight Board ("PCAOB" or "Board") is constitutional. *Free Enter. Fund*, 561 U.S. at 484–87.

The PCAOB is composed of five members, who are executive "'Officers of the United States,'" and who are appointed by the SEC. *Free Enter. Fund*, 561 U.S. at 484, 486 (citation omitted). The Sarbanes-Oxley Act of 2002 "places the Board under the SEC's oversight." *Free Enter. Fund*, 561 U.S. at 486. However, the SEC "cannot remove Board members at will, but only 'for good cause shown,' 'in accordance with' certain procedures," and SEC "Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office.'" *Free Enter. Fund*, 561 U.S. at 486, 487 (citations omitted).

The Court held that "the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers." *Free Enter. Fund*, 561 U.S. at 492. Specifically, the Court determined that the President cannot hold the SEC fully accountable for the PCAOB's conduct since the SEC cannot remove a PCAOB member at will. *Free Enter. Fund*, 561 U.S. at 496. The Court held that under this removal structure—

> [n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

Free Enter. Fund, 561 U.S. at 496. Therefore, "[w]ithout the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct." *Id.* The Court concluded that "[b]y granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers." *Free Enter. Fund*, 561 U.S. at 498.

However, the Court also limited its holding to the specific facts of the case. The Court distinguished the PCAOB from other agencies, noting that—

> Congress enacted an unusually high standard that must be met before Board members may be removed. A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing.

Free Enter. Fund, 561 U.S. at 503. The Court also noted that "the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal—including at one level a sharply circumscribed definition of what constitutes 'good cause,' and rigorous procedures that must be followed prior to removal." *Free Enter. Fund*, 561 U.S. at 505.

Thus, the Court explicitly stated that it was not deciding the "status of other Government employees." *Free Enter. Fund*, 561 U.S. at 506. In fact, in a footnote the Court clarified that—

> our holding [] does not address that subset of independent agency employees who serve as administrative law judges . . . Whether administrative law judges are necessarily "Officers of the United States" is disputed . . . And unlike members of

> the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, [] or possess purely recommendatory powers.

Free Enter. Fund, 561 U.S. at 507 n.10.[4] Hence, the Court specifically left open the question of whether two-levels of removal protections for ALJs is constitutionally permissible. Eight years later in *Lucia v. SEC*, the Supreme Court again declined to address the constitutionality of removal protection for ALJs. *See Lucia v. SEC*, 585 U.S. 237, 244 n.1 (2018).

2. Circuit Courts Split on Constitutionality of ALJs' Removal Restrictions

The federal courts of appeals are divided on the constitutionality of removal provisions applicable to ALJs. The Fifth Circuit struck down the removal restrictions for SEC ALJs, while the Ninth, Tenth, and Sixth Circuit have upheld the constitutionality of the removal restrictions for Department of Labor ("DOL"), Drug Enforcement Agency ("DEA"), Consumer Product Safety Commission ("CPSC"), and Federal Deposit Insurance Corporation ("FDIC") ALJs.

In *Decker Coal Co. v. Pehringer*, a coal operator petitioned for review of a Benefits Review Board ("BRB") order affirming the decision of a DOL ALJ awarding benefits under the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901–944, and argued that the removal process for DOL ALJs is unconstitutional. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1126 (9th Cir. 2021). The Ninth Circuit ultimately held that "the President has sufficient control over DOL ALJs to satisfy the Constitution." *Decker Coal Co.*, 8 F.4th at 1133. In reaching its holding, the court distinguished DOL ALJs from the PCAOB members in *Free Enterprise Fund* on four grounds. *Decker Coal Co.*, 8 F.4th at 1133–36. First, the court noted that "[u]nlike the PCAOB members, who exercise policymaking and enforcement functions," DOL ALJs perform a purely adjudicatory function. *Decker Coal Co.*, 8 F.4th at 1133. Second, the court determined that Congress did not trammel on the President's executive power, as "[n]o statute mandates that the DOL employ ALJs in adjudicating BLBA benefit claims." *Id.* Third, the Court noted that the BRB, the body that "hears appeals from the decisions of ALJs in BLBA compensation cases," provides the President with meaningful control over DOL ALJs. *Decker Coal Co.*, 8 F.4th at 1134. The court explained that "all BRB members serve at the pleasure of the Secretary of Labor

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[4] Similarly, then-Judge Kavanaugh explained the differences between ALJs and PCAOB members in his dissent when *Free Enterprise Fund* was before the D.C. Circuit—

> First, an agency has the choice whether to use ALJs for hearings, *see* 5 U.S.C. § 556(b); Congress has not imposed ALJs on the Executive Branch. Second, many ALJs are employees, not officers . . . Third, ALJs perform only adjudicatory functions that are subject to review by agency officials, *see* 5 U.S.C. § 557(b), and that arguably would not be considered "central to the functioning of the Executive Branch" for purposes of the Article II removal precedents.

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citation omitted), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010).

[a]nd because the Secretary of Labor is subject to at-will removal by the President . . . the President has direct control over BRB members through the Secretary—his 'alter ego.'" *Decker Coal Co.*, 8 F.4th at 1135 (citation omitted). Lastly, the court noted that the "good-cause" standard for ALJ removal "suggests a lesser impingement on presidential authority than was present in *Free Enterprise Fund*." *Decker Coal Co.*, 8 F.4th at 1135; 5 U.S.C. § 7521.

In *Rabadi v. U.S. Drug Enforcement Administration*, the Ninth Circuit also held that the removal protections for DEA ALJs are constitutional based on its reasoning in *Decker Coal. Rabadi v. U.S. Drug Enf't Admin.*, 122 F.4th 371, 376 (9th Cir. 2024). In support, the court first noted that "DEA ALJs perform purely adjudicatory functions." *Rabadi*, 122 F.4th at 375. Second, the court determined that "Congress does not mandate that the DEA use ALJs as presiding officers for administrative hearings." *Id.* Third, the court emphasized that "DEA ALJ decisions are reviewed de novo by the DEA Administrator" and the President may remove the DEA Administrator at will. *Id.* Additionally, the court highlighted that "the decisions of DEA ALJs are subject to mandatory review by the DEA Administrator." *Rabadi*, 122 F.4th at 376. Thus, the Ninth Circuit concluded that "the President can control DEA ALJs through the DEA Administrator." *Id.*

In *Leachco, Inc. v. Consumer Product Safety Commission*, the Tenth Circuit held that the removal protections for CPSC ALJs are constitutional. *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748, 763 (10th Cir. 2024). The Tenth Circuit found the Ninth Circuit's analysis in *Decker Coal* persuasive, as the CPSC ALJ at issue also "performed 'a purely adjudicatory function,' Congress did not statutorily require that the CPSC use ALJs for administrative adjudications, and the 'good cause' standard in the provision restricting—but not precluding—ALJs' removal is a 'lesser impingement' than the standard at issue in *Free Enterprise Fund*." *Leachco, Inc.*, 103 F.4th at 764.

Additionally, in *Calcutt v. Federal Deposit Insurance Corp.*, the Sixth Circuit held that the removal restrictions for FDIC ALJs do not violate constitutional separation of powers. *Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 320 (6th Cir. 2022), *rev'd on other grounds*, 598 U.S. 623 (2023)). In support, the court noted that "the FDIC ALJs perform adjudicatory functions, and they file a recommended decision that is subject to review by the FDIC Board." *Calcutt*, 37 F.4th at 319. The court also pointed out that "the FDIC must conduct hearings 'in accordance with the provisions of [the APA],' . . . and the APA permits an agency to choose whether to preside over an adjudication itself, allow one or more members to be presiding officers, or use an ALJ." *Id.*

In contrast, the Fifth Circuit in *Jarkesy v. SEC* held that "the statutory removal restrictions for SEC ALJs are unconstitutional." *Jarkesy v. SEC*, 34 F.4th 446, 463 (5th Cir. 2022), *aff'd on other grounds*, 603 U.S. 109 (2024) (addressing only petitioners' argument regarding Seventh Amendment right to jury trial). In support, the Fifth Circuit noted that the Supreme Court "said in *Myers* that 'quasi[-]judicial' executive officers must nonetheless be removable by the President 'on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised.'" *Jarkesy*, 34 F.4th at 464 (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)). The court concluded that "SEC ALJs are sufficiently insulated from removal that the President cannot take care that the laws are faithfully executed." *Jarkesy*, 34 F.4th at 465.

3. Removal Scheme for FMSHRC ALJs

Section 113(b)(2) of the Mine Act provides that the "[a]ssignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362, and 7521 of Title 5." 30 U.S.C. § 823(b)(2). Section 7521 of Title 5 states that the agency which employs the ALJ may remove the ALJ "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521. Thus, FMSHRC Commissioners can only remove FMSHRC ALJs after the MSPB has determined that there is good cause. Section 113(b)(1) of the Mine Act provides, in relevant part, that "[a]ny member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 30 U.S.C. § 823(b)(1). Similarly, members of the MSPB "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

4. Whether FMSHRC ALJs are Officers of the United States

CONSOL argues that FMSHRC ALJs serve sufficiently important executive functions such that they constitute "inferior officers" of the United States. (Resp't Mot. at 8.) Applying the reasoning of *Lucia v. SEC*, the Sixth Circuit in *Jones Brothers* held that FMSHRC ALJs are "inferior officers." *Jones Bros., Inc.*, 898, F.3d at 679. While the Sixth Circuit decision is not binding in this case, I determine that the Sixth Circuit's reasoning is persuasive and accordingly concur. Since FMSHRC ALJs are "inferior officers," the restrictions surrounding their removal must not unconstitutionally impair the President's ability to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

5. Whether the Removal Restrictions for FMSHRC ALJs are Constitutional

CONSOL argues that the restrictions on the removal of FMSHRC ALJs are sufficiently onerous such that they violate the "take Care clause" of the Constitution under *Free Enterprise Fund*. (Resp't Mot. at 8–9.) However, as previously discussed, *see* discussion *supra* Part III.C.1, the Supreme Court explicitly stated in *Free Enterprise Fund* that "our holding [] does *not* address that subset of independent agency employees who serve as *administrative law judges*." *Free Enter. Fund*, 561 U.S. at 507 n.10 (emphasis added). Contrary to CONSOL's assertion, *Free Enterprise Fund* does not dictate that the removal restrictions for FMSHRC ALJs are unconstitutional.

In fact, more recently in *Lucia v. SEC*, the Supreme Court again declined to address the constitutionality of removal restrictions for ALJs. *See Lucia*, 585 U.S. at 244 n.1 (citation omitted); *see also Jarkesy*, 603 U.S. at 121. The Court noted that it "ordinarily await[s] 'thorough lower court opinions to guide our analysis on the merits,'" but at the time of the decision no circuit court had addressed whether the statutory restrictions on removing SEC ALJs are constitutional. *Id.* As discussed above, *see* discussion *supra* Part III.C.2, a circuit split regarding the constitutionality of removal restrictions for ALJs has arisen since the Court decided *Lucia*.

However, neither the Fourth Circuit, where CONSOL's Itmann No. 5 mine is located, nor the D.C. Circuit[5] have weighed in on whether the statutory removal restrictions for ALJs is constitutional. Additionally, the Supreme Court has repeatedly told the courts of appeals to follow extant Supreme Court precedent unless and until the Court itself changes it or overturns it. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (quoting *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)) (holding that if a precedent of the Supreme Court "'has direct application in a case,'" lower courts "'should follow the case which directly controls," leaving to the Supreme Court "'the prerogative of overruling its own decisions" and noting that "[t]his is true even if the lower court thinks the precedent is in tension with 'some other line of decisions'"); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent").

To date, the Supreme Court has not held that the statutory removal scheme for ALJs under the Administrative Procedures Act, 5 U.S.C. § 551, et seq. ("APA") is unconstitutional; rather, it has explicitly stated that its holding in *Free Enterprise Fund* "does not address . . . administrative law judges." *Free Enter. Fund*, 561 U.S. at 507 n.10. Thus, in accordance with the longstanding law under the APA and current Supreme Court precedent, I conclude that the removal restrictions for FMSHRC ALJs are constitutional.

6. Remedy

Even if the removal scheme for FMSHRC ALJs is unconstitutional, the remedy CONSOL requests—i.e. dismissal of its case before me—is inappropriate. The Supreme Court's decision in *Collins v. Yellen* established that succeeding in a constitutional separation of powers challenge to a removal provision does not by itself entitle a party to relief. *Collins v. Yellen*, 594 U.S. 220, 257–60 (2021). Specifically, the plaintiffs in *Collins* sought a judicial declaration invalidating prior actions by the Directors of the Federal Housing Finance Agency ("FHFA"), whose removal restrictions the Court determined violated the Constitution. *Collins*, 594 U.S. at 257. However, the Court held that while the Act at issue unconstitutionally limited the President's authority to remove the FHFA Directors, "there was no constitutional defect in the statutorily prescribed method of appointment to that office" and "[a]s a result, there is no reason to regard any of the actions taken by the FHFA . . . as void." *Collins*, 594 U.S. at 257–58.

The Supreme Court in *Collins* explained that to invalidate an agency action a plaintiff must demonstrate an unconstitutional removal provision caused the plaintiff compensable harm—in other words, the plaintiff must demonstrate that the unconstitutional removal provision actually affected the agency's decision or conduct against the plaintiff. *Collins*, 594 U.S. at 259.

[5] In *Fleming v. U.S. Department of Agriculture*, 987 F.3d 1093, 1097–98 (D.C. Cir. 2021), the D.C. Circuit declined to address the petitioners' argument that the USDA ALJs' dual layers of protection against removal is unconstitutional, because the petitioners failed to raise the issue before the ALJ or the Judicial Officer and, therefore, forfeited their argument.

For example, the Court suggested that the removal provision might harm a plaintiff if the President attempted to remove a FHFA Director "but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal." *Id.* Here, CONSOL simply alleges that "[d]ismissal of this case is necessary to avoid further constitutional and jurisdictional violations." (Resp't Mot. at 9.) Accordingly, I determine that CONSOL has failed to demonstrate that the statutory protections against my removal as a FMSHRC ALJ have caused CONSOL compensable harm.

I therefore conclude that under *Collins* no relief is available to CONSOL based on its lack of showing any compensable harm.

IV. ORDER

Accordingly, for the reasons discussed above CONSOL's Motion to Dismiss is hereby **DENIED.**

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

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