FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 21, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CACTUS CANYON QUARRIES INC., Respondent	Docket Nos. CENT 2023-0045 CENT 2023-0046 CENT 2023-0047 CENT 2023-0048 CENT 2023-0049 CENT 2023-0050 CENT 2023-0051 CENT 2023-0052 CENT 2023-0053 CENT 2023-0054 CENT 2023-0089

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

DECISION

BY THE COMMISSION:

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

The case involves the Fairland Plant, operated by Cactus Canyon Quarries, Inc. ("Cactus Canyon"), which is a surface facility that prepares stone for use in Terrazzo flooring.[1] During an

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

inspection of the plant, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Cactus Canyon ten citations. Cactus Canyon argued below that MSHA lacked jurisdiction to issue the citations because the plant is not a "mine" subject to the Act.

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

The Judge also ruled on the merits of all ten citations involved in the case – vacating four citations, affirming three citations as issued, modifying one citation to lower the assessed gravity, and modifying two citations to raise their negligence level and penalty amounts (and lowering the assessed gravity for one of the two). *Id.* at 736-69.

Finally, the Judge denied Cactus Canyon's motion for the Judge to withdraw from this case due to his alleged personal bias and other disqualifications. The Judge found that "the [operator's] affidavit evidence in support of the request and the statements and actions cited by Cactus Canyon do not provide sufficient evidence of antagonism, bias, or prejudice so as to warrant the [Judge's] recusal." *Id*. at 770.[2]

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

I.

Factual and Procedural Background

A. Factual Background

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

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

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

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

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

B. Procedural History

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

On January 24, 2023, Cactus Canyon filed a Motion for Summary Decision seeking dismissal of five citations issued at the Clendennen Ranch[3] on jurisdictional grounds, arguing that the intermittent mine lacked a valid mine identification number and that the Secretary failed to establish that it was part of the Fairland Plant and Quarries. In a written order dated March 13, 2023, the Judge denied summary decision, finding that the Commission lacked jurisdiction to review MSHA's mine identification practices and that genuine issues of material fact existed regarding ongoing mining activity and the validity of the citations.

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

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

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

II.

The Judge's Decision

A. Jurisdiction

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

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

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

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

B. The Citations

Having concluded that MSHA has jurisdiction over the Fairland Plant, the Judge ruled on the merits of all ten citations. He vacated four citations, affirmed three citations as issued, modified one citation to lower the assessed gravity, and modified two citations to raise the negligence level and penalty amounts for both, but lower the assessed gravity for one of the two.

As stated above, the citations were challenged solely on jurisdictional grounds; Cactus Canyon did not appeal the merits of the Judge's determinations regarding any of the citations.

C. Recusal

Finally, the Judge considered and denied the operator's Request to Withdraw. In doing so, he discussed the Commission's procedural rules governing recusal. 46 FMSHRC at 769 *citing* 29 C.F.R. § 2700.81(c).[5] The decision found that "the affidavit evidence in support of the request and the statements and actions cited by Cactus Canyon do not provide sufficient evidence of antagonism, bias, or prejudice so as to warrant the [Judge's] recusal." *Id*. at 770.

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

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

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

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

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

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

III.

Disposition

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

A. The Judge Properly Affirmed MSHA's Jurisdiction.

The first issue in this case is whether the Fairland Plant is subject to the Mine Act, such that MSHA may conduct inspections and issue citations. The issue and evidence here are almost identical to what the Commission addressed in *Cactus Canyon Quarries, Inc.*, 49 FMSHRC ___, No. CENT 2022-0010 (April 20, 2026) ("*Cactus Canyon Quarries I*"). As such, we follow the analysis in the decision issued in that case and incorporate by reference the legal analysis regarding the definition of a "mine" contained therein.

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

The second issue in this case is whether the Judge erred in denying the operator's motion for recusal.[6] Cactus Canyon's PDR on the issue raises three specific arguments. First, it

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

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

contends that the Judge's denial of its request for recusal violated Commission Procedural Rule 81(c), 29 C.F.R. § 2700.81(c). The rule requires that a judge who declines to recuse must state the grounds for the ruling on the record. Cactus Canyon argues the Judge failed to sufficiently justify his grounds for denying the recusal request.

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

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

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

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

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

We find these arguments to be completely unfounded. Rule 81(c) requires only that the Judge "[state] the grounds for such ruling" on the record. The Judge dedicated more than 16 pages to addressing the motion and its allegations, citing transcript passages, Commission rules, and precedent. *See* 46 FMSHRC at 769-86. In doing so, he addressed numerous specific examples of allegations by the operator. *Id*. He also specifically refuted the allegations of criminal activity. *Id*. at 784-85 (explaining the legally erroneous – as well as conclusory and unsubstantiated – nature of the operator's claims). The Judge thoroughly explained that the claims of alleged misconduct – interruptions, evidentiary rulings, limits on repetitive testimony –

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litigation, conducted in a two-tiered administrative arena of trial-type hearings and discretionary review, is the vehicle for dispute resolution.") (emphasis added).

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

reflected ordinary trial management, not bias. *Id*. at 769-86. He expressly found "insufficient evidence of any deep-seated antagonism, prejudice, or favoritism." *Id*. at 772.

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

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

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

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

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

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

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

As stated above, the Judge noted that, following the hearing, Cactus Canyon sent MSHA a letter denying entry, prompting the Secretary to obtain a federal injunction requiring access

with U.S. Marshals present. The Judge used this to characterize Cactus Canyon's tactics as "brazen."

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

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

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

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

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

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

The Secretary argues that the Commission should limit its consideration of the recusal issues solely to the three assignments of error raised in the operator's PDR. She stresses that the Commission's jurisdiction is confined to issues properly raised in a PDR. The Secretary argues that the 24 examples of bias identified in the operator's "Request to Withdraw," appended to its opening brief, are outside the Commission's jurisdiction. According to the Secretary, attachments cannot cure a PDR that fails to "separately number[] and plainly and concisely

[8] In fact, in a separate *Cactus Canyon* case, *Cactus Canyon Quarries, Inc.*, 49 FMSHRC ___, No. CENT 2022-0010 (April 20, 2026) ("*Cactus Canyon Quarries I*"), the operator requested the Commission to accept a brief that it had filed here.

state[]" issues, as required by section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii) and Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d).

Section 113(d)(2)(A)(iii) of the Mine Act states: "review shall be limited to the questions raised by the petition." 30 U.S.C. § 823(d)(2)(A)(iii). Our caselaw shows that we have sometimes invoked this limitation when a party seeks to raise wholly new issues after the Direction for Review ("DFR") is issued. *See Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1432 (D.C. Cir. 1989) (Commission barred from considering issues not in PDR); *Sunbelt Rentals, Inc*., 42 FMSHRC 16, 22-23 (Jan. 2020); *see also Sec'y of Labor v. KC Transp., Inc.*, 77 F.4th 1022, 1034 (D.C. Cir. 2023), *cert. granted, vacated on other grounds sub nom. KC Transp. Inc. v. Su*, 144 S. Ct. 2708, 219 L. Ed. 2d 1314 (2024) ("The Commission's jurisdiction is limited to questions that were reviewed by the ALJ, and then included in the petition for discretionary relief on appeal. *See* 30 U.S.C. § 823(d)(2)").

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

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

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

1. Category I Allegations: Procedural and Evidentiary Rulings

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

The record does not support this allegation. The Judge made no finding that any evidence was "compelling,"[9] nor did he admit or rely upon undisclosed evidence. Rather, the Judge merely observed, based on the parties' prior interactions, that MSHA's jurisdiction would likely be at issue at trial and noted that – apart from materials withheld on privilege grounds – the Secretary had produced evidence concerning its jurisdictional review conducted at the operator's request. Tr. 13-18. The Judge's comments reflected case-management observations regarding the anticipated scope of the hearing, not a ruling on the admissibility, weight, or sufficiency of any evidence.

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

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

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

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

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

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

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

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

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

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

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

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

The operator cited the Judge's questioning regarding whether the Clendennen Ranch constituted a mine, as evidence of bias. Req. Withdraw at 11; Tr. 102. The Judge explained that this inquiry was necessary to clarify Carson's jurisdictional theory and the relationship between the Clendennen Ranch and the Fairland Plant. 46 FMSHRC at 780-81. We find this clarification was intended to assist the Judge's understanding of the issues and not to benefit the Secretary.

Similarly, the Judge intervened to clarify testimony regarding MSHA's inspection history and cited equipment. Tr. 403-05. Such clarifying questions fall squarely within a judge's discretion. *Medusa Cement*, 20 FMSHRC at 150 ("[W]e note that a judge has wide discretion to interject questions in order to clarify testimony."); *see Deary v. City of Gloucester*, 9 F.3d 191, 194-95 (1st Cir.1993) ("mere active participation by the judge does not create prejudice"); *see also U. S. v. Webb*, 83 F.3d 913, 917 (7th Cir. 1996) (stating that a judge is not prohibited from asking questions to clarify an important issue in the case); *U. S. v. Olmstead*, 832 F.2d 642, 648 (1st Cir. 1987) (stating that comments and questions remedied leading questions, clarified lines of inquiry, or developed witness' answers and were within court's discretion), *cert. denied*, 486 U.S. 1009 (1988)").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Judge here admonished both parties. His rulings also showed no signs of bias. As noted above, he vacated four citations, reduced the gravity on two others, and pressed the Secretary's counsel on their weaknesses. Transcript examples include him criticizing the Secretary, questioning both sides, and granting fairness accommodations to the operator (e.g., granting breaks, precluding the Secretary from discussing notes that had not been disclosed). *See, e.g.*, Tr. 490.[10] The Judge also had many cordial interactions with Cactus Canyon's counsel.[11] Furthermore, even though the Judge denied counsel's request for an expedited hearing on the ten citations in a written order on January 23, 2023, he set a hearing in short order for early April 2023. These all serve as examples of evenhanded treatment by the Judge.

We hold that the Judge's conduct fell within the scope of "ordinary trial management," reflecting evenhanded behavior within his discretion and consistent with Commission precedent. *Rock of Ages Corp*., 20 FMSHRC at 125. Furthermore, the Judge's decision can be "defended as a rational conclusion supported by reasonable reading of the record." *In re United States*, 666

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

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

F.2d 690, 695 (1st Cir. 1981). Accordingly, his conduct is not grounds for recusal. *In re City of Milwaukee*, 788 F.3d at 721-22.[12]

IV.

Conclusion

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

Marco M. Rajkovich, Jr., Chair

Mary Lu Jordan, Commissioner

Timothy J. Baker, Commissioner

Moshe Z. Marvit, Commissioner

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

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