December 2025

TABLE OF CONTENTS

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE ORDERS

No review was granted or denied during the month of December 2025.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 2025

ROBERT THOMAS v. CALPORTLAND COMPANY	Docket No. WEST 2018-0402-DM WEST 2019-0205

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

ORDER

BY: THE COMMISSION

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act" or "Act"), is on remand to the Commission for the second time pursuant to a decision of the United States Court of Appeals for the Ninth Circuit. During its first review, the Court rejected the Commission's application of the *Pasula-Robinette* causation standard[1] to section 105(c) cases.[2] *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. 2021), *rev'g Thomas v. CalPortland*, 42 FMSHRC 43 (Jan. 2020) ("*CalPortland I*"). The Ninth Circuit then remanded the case to the Commission to apply a "but-for" causation standard.

The Commission subsequently remanded the case to the Administrative Law Judge to reexamine the facts of this case consistent with the Ninth Circuit's instructions. 43 FMSHRC 314 (June 2021). On remand, the Judge concluded, as she had prior to the remand, that CalPortland had discriminated against miner Robert Thomas in violation of the Mine Act. She again awarded Thomas back pay, lost benefits, interest, attorney's fees, and any additional fees incurred during the appeals process. *Thomas v. CalPortland*, 43 FMSHRC 531, 550 (Dec. 2021)

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[1] *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d.Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

[2] Section 105(c) of the Mine Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . .

30 U.S.C. § 815(c)(1).

(ALJ). CalPortland filed a petition for discretionary review with the Commission challenging the Judge's decision, which the Commission granted.

On review, the Commission reversed the Judge's remand decision and concluded that Thomas had failed to show that, but for his protected activity, he would not have been suspended or terminated. 46 FMSHRC 119, 133 (Mar. 2024). Thomas again appealed the Commission's decision to the Ninth Circuit.

In an unpublished decision, the Ninth Circuit concluded that the Commission misapplied the substantial evidence standard and that, based on the Judge's findings, the miner had succeeded in his claim. *Thomas v. FMSHRC and CalPortland Co.*, No. 24-1442, 2025 WL 2651299, at 1 (9th Cir. Sep. 16, 2025) ("*CalPortland II*"). The Court vacated the Commission's decision and remanded it stating that "[t]he matter of the ALJ's supplemental order regarding the amount of damages remains to be conclusively resolved." *Id*. at 3. On October 3, 2025, the court issued its mandate returning the case to the Commission's jurisdiction.

Accordingly, we remand this matter to the Chief Administrative Law Judge for a calculation of any damages and interest owed to the complainant Robert Thomas consistent with the Ninth Circuit's decision.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. WYO-BEN, INC.	Docket No. WEST 2023-0320[1] A.C. No. 48-00612-577272

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

ORDER

BY: Rajkovich, Chair, Jordan and Baker, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On July 20, 2023, the Commission received from Wyo-Ben, Inc., 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).

Here, the underlying citation at issue was timely contested on April 26, 2023, and the contest proceeding was docketed before the Commission (Docket No. WEST 2023-0212). Records of the Department of Labor's Mine Safety and Health Administration ("MSHA")

[1] The first issuance of this order contained an incorrect docket number in the caption (Docket No. WEST 2023-0230). This amended order corrects the clerical error.

indicate that the proposed penalty assessment for the citation was subsequently delivered to the operator on May 22, 2023, and became a final order of the Commission on June 22, 2023.

According to Wyo-Ben, proposed penalty assessments are normally received by the operator's Vice President of Operations and forwarded to outside counsel. The operator asserts that, when it appeared the penalty assessment for the contested citation had not yet arrived by mid-July, the Vice President checked MSHA's Mine Data Retrieval System ("MDRS") and learned that the assessment had already become final. The Vice President and outside counsel looked for the assessment but were unable to locate it, or to determine where or how it had been delivered. The Secretary opposes the request to reopen. She notes that the assessment was both delivered to and retrieved from the operator's address of record, and asserts that the operator's inability to explain what happened to the assessment after retrieval indicates an inadequate or unreliable internal processing system.

Having reviewed Wyo-Ben's request and the Secretary's response, we find that the operator has demonstrated that its failure to timely file a contest of the proposed penalty was the result of a mistake. The operator demonstrated that the mistake was made in good faith by proactively reviewing MSHA's MDRS and promptly moving to reopen upon discovery of the error.[2] The operator was also timely in its filing of a notice of contest of Citation No. 9721410, and has no history of untimely contests. In the interest of justice, we hereby reopen this matter

[2] 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 of a proposed civil penalty will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the proposed penalty assessment became a final order of the Commission on June 22, 2023, and the operator filed its motion to reopen on July 20, 2023.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Commissioner Marvit, 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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December 18, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. U.S. AGGREGATES, INC.	Docket No. LAKE 2025-0315 A.C. No. 12-00016-611533

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

ORDER

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

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On July 31, 2025, the Commission received from U.S. Aggregates, Inc., 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *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).

This proceeding concerns the proposed civil penalty for two citations issued to U.S. Aggregates by the Secretary of Labor's Mine Safety and Health Administration ("MSHA")

following an investigation into a fatal accident at the mine. The operator timely contested these two citations pursuant to section 105(d) of the Mine Act. 30 U.S.C. § 815(d).[1]

Separately, under section 105(a) of the Mine Act, the Secretary notified the mine operator of the proposed civil penalty for these two citations. 30 U.S.C. § 815(a). To contest the penalties the operator must file a contest form with the Secretary within 30 days. If the operator fails to timely contest, the proposed penalty becomes a final order of the Commission.[2] *Id*. Here U.S. Aggregates did not separately file to contest the penalty within the 30-day period. MSHA's records indicate that the proposed assessment penalty was delivered on December 18, 2024, and became final orders of the Commission on January 17, 2025.[3] MSHA sent the operator a delinquency notice on March 4, 2025.

U.S. Aggregates states that it discovered the outstanding penalties on February 14, 2025, while reviewing MSHA's Mine Data Retrieval System ("MDRS"). Thereafter, U.S. Aggregates belatedly attempted to contest the penalties through the Secretary's email filing system. R. Ex. A. U.S. Aggregates states that it became aware that its attempt to contest had not been accepted when it received the Secretary's delinquency notice weeks later (dated March 4, 2025). The operator represents that the departure of its president contributed to its failure to timely file.

The Secretary opposes the operator's motion. The Secretary states that the operator has failed to specify details to establish that its failure to timely file was the result of a mistake, excusable neglect or some other good cause reason. Furthermore, the Secretary alleges that the operator has not been able to account for the signification delay in seeking to reopen the penalties once it discovered the delinquency.[4]

When filing a motion to reopen before the Commission the operator bears the burden of showing exceptional circumstances. *Lone Mountain Processing, Inc*., 35 FMSHRC 3342, 3345 (Nov. 2013). "[T]he applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's

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[1] On November 19, 2024, the Commission docketed the contest of the citations as Docket Nos. LAKE 2025-0062 and LAKE 2025-0063.

[2] Commission Procedural Rule 21 explicitly states that the filing of a notice of contest of an underlying citation does not constitute a challenge to a subsequently issued proposed penalty assessment, which must be filed as a separate notice of contest. 29 C.F.R. § 2700.21; *see Marfork Coal Co*., 29 FMSHRC 626, 636 (Aug. 2007).

[3] United States Postal Service records provided by the Secretary demonstrate that the assessment was delivered to the operator on December 18, 2024, and was signed for by a "D. Hairston." S. Ex. B.

[4] The Secretary's opposition also relies on the seriousness of the incident; these penalties relate to citations issued after a miner was fatally electrocuted. The Secretary additionally maintains that the operator should have identified its error within its processing system with more specificity and then explained how it would remediate moving forward.

knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure…." *Lone Mountain*, 35 FMSHRC at 3345 (citing *Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010)).

We conclude that the operator has failed to establish its burden of proof. The motion fails to provide relevant dates, specify the operator's regular penalty contest procedures, the role of the president within that process, or how the operator plans to prevent similar problems in the future. Additionally, the motion completely omits mention of its employee to whom the assessment was addressed. S. Ex. A.

A general assertion that there was a personnel change at the mine is insufficient to support reopening. *See Southwest Rock Prods., Inc*., 45 FMSHRC 747, 748 (Aug. 2023) ("a grant of relief under Rule 60(b) requires more than "general assertions or conclusory statements as to why an operator failed to timely contest"'); *Tintic Consol. Metals, LLC*, 46 FMSHRC 652 (Aug. 2024) (denying the operator's motions because it "provides no explanation for its failure to timely contest the proposed penalty assessment beyond a general description of personnel changes and fails to describe actions it will take to ensure timely filing in the future.").

Moreover, the operator did not explain why it waited more than five months to file the motion to reopen once it discovered its initial error. *See, e.g., Staker & Parson Cos.*, 47 FMSHRC 271, 272 (Apr. 2025) (motions to reopen filed more than 30 days after an operator discovers that it failed to timely file a notice of contest are presumptively not filed within a reasonable amount of time). On February 14, 2025, U.S. Aggregates discovered the outstanding penalties in the Secretary's MDRS, which specified that these particular penalties became final orders of the Commission on January 17, 2025. Inexplicably, counsel for U.S. Aggregates then emailed the Secretary an untimely contest of the penalties, rather than immediately filing a motion to reopen with the Commission. On March 4, 2025, the Secretary mailed a delinquency notice to the operator. On May 5, 2025, the operator acknowledged the pending need to file a motion to reopen with the Commission in an email to the Secretary. Nevertheless, the operator waited about three additional months before filing the motion to reopen on July 31, 2025. We find the operator's delay in filing a motion with the Commission to strongly militate against reopening.

While the filing of a contest of an underlying citation is an indication of an initial intent to also contest the penalty, simply contesting the citation does not in of itself excuse a subsequent failure to contest a proposed penalty. *Lone Mountain*, 35 FMSHRC at 3346-47.

Here, when considering all the factors, we determine that the operator has not demonstrated that there was a good cause reason for its failure to timely file to contest the Secretary's proposed penalty.

Accordingly, U.S. Aggregate's motion to reopen is hereby **DENIED.**

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Commissioner Marvit, concurring,

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

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

In the instant case, as the Majority recounts, the operator received the final order. The Majority denies reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 15, 2025

RONALD LOCKHART, Complainant, v. PANTHER CREEK MINING, LLC, BLACKHAWK MINING, LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEVA 2025-0281-D MSHA No. HOPE CD-2025-02 Mine: Winchester 2 Mine ID: 46-09615

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENTS' MOTION FOR SUMMARY DECISION

This discrimination proceeding is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3). On December 3, 2024, Complainant, Ronald Lockhart, filed a section 105(c) complaint with MSHA alleging Panther Creek Mining, LLC and Blackhawk Mining, LLC ("Respondents") discriminatorily discharged him on December 2, 2024. Specifically, Lockhart states that he "received a diagnosis of complicated black lung disease, and within a matter of less than a month [Respondents] discharged [him] for no other reason than to retaliate, discriminate, and interfere with [him] due to and by reason of the fact that [he is] suffering from pneumoconiosis, and [had] applied for Part 90,[1] and for state and federal black lung benefits." (Compl. at 3; Compl. Ex. 1.)

On February 27, 2025, MSHA notified Lockhart of the Secretary of Labor's decision not to file a discrimination case on his behalf under section 105(c)(2) of the Mine Act. Lockhart, on March 26, 2025, exercised his right under section 105(c)(3) to file a discrimination complaint against Respondents with the Federal Mine Safety and Health Review Commission, which was docketed April 1, 2025. Respondents submitted an answer to the complaint on April 25, 2025. On May 30, 2025, Chief Administrative Law Judge Glynn F. Voisin assigned me this case. I initially set a hearing for October 8–9, 2025. I continued this matter to December 15–17, 2025, upon the Respondents' request. I continued the case again due to a personal conflict, so the matter will now be heard on January 15–16, 2026, in Charleston, West Virginia.

On November 21, 2025, Respondents filed their Motion for Summary Decision, including a memorandum in support along with attachments, whereafter Lockhart timely filed his Opposition on November 25, 2025.

[1] The "Part 90 Miner" program, 30 C.F.R. part 90 (Coal Miners Who Have Evidence of the Development of Pneumoconiosis), is designed to prevent progression of Black Lung Disease or coal workers' pneumoconiosis ("CWP") by establishing a coal miner's right to transfer to a less dusty job in the mine. *See* 20 C.F.R. 718.201 (definition of pneumoconiosis).

I. THE PARTIES' ARGUMENTS ON SUMMARY DECISION

In their Motion for Summary Decision, Respondents argue that Lockhart did not engage in any protected activity. (Resp't Mot. at 1.) In the alternative, Respondents assert that to the extent Lockhart contends his discrimination claim is based upon his Part 90 application, he has failed to adduce any evidence that Respondents were aware of his Part 90 application or subsequent eligibility. (Resp't Mot., Mem. at 2.) Respondents attach several exhibits, including —the July 9, 2024, letter from the Department of Health and Human Services notifying Lockhart of his eligibility for Part 90 protections; the November 14, 2024, letter from the West Virginia Occupational Pneumoconiosis Board notifying Lockhart of its diagnosis; excerpts from the transcript of Lockhart's deposition; and Lockhart's November 9, 2024, letter requesting leave to attend the West Virginia black lung screening.

Lockhart, in his Response in Opposition to Respondents' Motion for Summary Decision, argues that Respondents terminated his employment because he suffers from pneumoconiosis, and he applied and was determined eligible for Part 90 protections. (Compl't Opp'n at 2.) Lockhart further argues that Respondents' assertion that they terminated him for serious employment misconduct is directly contradicted by evidence in the record. (Compl't Opp'n at 4.) Lockhart attaches several exhibits, including—Respondents' response to Lockhart's Federal Black Lung Benefits Claim; Rockwood Casualty Insurance Company's letter to Lockhart regarding his West Virginia occupational pneumoconiosis claim dated August 9, 2024; the West Virginia Occupational Pneumoconiosis Board's letter dated November 14, 2024, notifying Lockhart of the diagnosis; the Department of Health and Human Services' letter dated July 9, 2024, notifying Lockhart of his Part 90 rights; Panther Creek Mining, LLC's agreement dated December 2, 2024, confirming Lockhart's understanding of his voluntary resignation of employment; and Workforce West Virginia's decision regarding Lockhart's application for unemployment benefits.

II. PRINCIPLES OF LAW

A. Summary Decision

Commission Procedural Rule 67(b) states that a motion for summary decision shall only be granted if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court held that both the record and "inferences to be drawn from the underlying facts" are to be viewed "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

B. Discrimination under section 105(c) of the Mine Act

Section 105(c)(1) of the Mine Act states, in relevant part, that "[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . because such miner . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title." 30 U.S.C. § 815(c)(1). For discrimination claims, the Commission applies the *Pasula-Robinette* framework in which a complainant must establish a prima facie case showing the miner: (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by the protected activity. *Driessen v. Nev. Goldfields*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817–18 (Apr. 1981); *Sec'y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799–2800 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

III. ISSUES

It is undisputed that Respondents terminated Lockhart's employment on December 2, 2024, which clearly constitutes adverse action. (Resp't Mot., Mem. at 3; Compl't Opp'n at 3, 4.) Consequently, the issues before me focus on two of the three elements—the first "protected activity" and third "motivation" elements—of a prima facie discrimination case, whereby I must determine: (1) whether there is no genuine issue as to any material fact; and (2) whether Respondents are entitled to summary decision as a matter of law. Based on the discussion below, Respondents are only entitled to partial summary decision.

IV. DISCUSSION AND ANALYSIS

A. Protected Activity

1. Pneumoconiosis Diagnosis and Black Lung Benefits

Respondents assert that Lockhart's allegations in his discrimination complaint "exclusively relate to his [pneumoconiosis] diagnosis in connection with his claim for state and/or federal benefits, which is not protected activity under section 105(c)(1)" of the Mine Act. (Resp't Mot., Mem. at 6.) In his opposition, Lockhart asserts that "[s]ection 105(c)(1) prohibits discrimination against miners for exercising their right to receive black lung benefits." (Compl't Opp'n at 2.) Lockhart adds that his complaint "alleges a violation of 30 U.S.C. § 938, which specifically prohibits discrimination against a person because they are suffering from pneumoconiosis." (Compl't Opp'n at 2.)

Section 428 of the Black Lung Benefits Act ("BLBA"), 30 U.S.C. § 938, provides that, "[n]o operator shall discharge or in any other way discriminate against any miner employed by him by reason of the fact that such miner is suffering from *pneumoconiosis*." 30 U.S.C. § 938(a) (emphasis added). Furthermore, "[a]ny miner who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section . . .

may, within ninety days after such violation occurs, apply to the *Secretary* for a review of such alleged discharge or discrimination." 30 U.S.C. § 938(b) (emphasis added).

The Commission in one of its earliest cases—*Matala v. Consolidation Coal Co.*, which arose under the anti-discrimination provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801–964 ("1969 Coal Act")—decided whether it had jurisdiction to review discrimination claims related to pneumoconiosis. *See Matala v. Consolidation Coal Co.*, 1 FMSHRC 1 (April 1979). The Commission held that discrimination complaints based on allegations that the miner suffers from pneumoconiosis were to be resolved by the Secretary of Labor under section 428 of the BLBA, which specifically covers discrimination based on pneumoconiosis, rather than under the more general discrimination provisions of the 1969 Coal Act, the precursor to the 1977 Mine Act. *Matala*, 1 FMSHRC at 3.

Later, in *Goff v. Youghiogheny & Ohio Coal Co.*, the Commission pointed out that the discrimination provisions of the 1969 Coal Act "protected miners from certain specified forms of discrimination but contained no language shielding them from retaliation based on their medical evaluation or transfer." *Goff v. Youghiogheny & Ohio Coal Co*., 7 FMSHRC 1776, 1780 (Nov. 1985). The Commission highlighted that "[i]n comparison, section 105(c) of the [1977] Mine Act granted miners broader protection and relief[,]" including "specific protection from discrimination for miners who were the subject of medical evaluation and potential transfer" under a standard published pursuant to section 101. *Goff*, 7 FMSHRC 1776, 1780–81 (Nov. 1985). Thus, the Commission limited *Matala*, holding that "a miner may state a cause of action under section 105(c)(1) of the Mine Act by alleging discrimination based on the miner's being 'the subject of medical evaluations and potential transfer' under 30 C.F.R. Part 90." *Id.* at 1781.

Just prior to *Goff*, Judge Koutras echoed the Commission's rationale when he wrote that the extent of any such protection under section 105(c) of the Mine Act "is specifically tied to the regulations promulgated pursuant to section 101 of the Mine Act," such as the Part 90 standards. *Janoski v. R & F Coal Co.*, 7 FMSHRC 402, 408 (Mar. 1985) (ALJ). No such protections under section 105(c) of the Mine Act are extended to miners pursuant to section 428 of the BLBA. Lockhart's allegations of discrimination under section 428 of the BLBA based solely on his pneumoconiosis diagnosis and his applications for federal and state black lung benefits, consequently, cannot be the basis for any discrimination claim under the Mine Act.

Accordingly, I **GRANT** Respondents' request for summary decision, **IN PART**, based on jurisdictional grounds because section 105(c) protections only extend to allegations of discrimination related to pneumoconiosis under standards, such as Part 90, promulgated pursuant to section 101 of the Mine Act.

2. Application for Part 90 Protections

Respondents assert that Lockhart fails to allege in his complaint that the discrimination he suffered "was the result of a 'medical evaluation and potential transfer' under Part 90, the only recognized form of protected activity under section 105(c)(1) related to a pneumoconiosis diagnosis." (Resp't Mot., Mem. at 6.) In his opposition, Lockhart argues that he "engaged in

protected activity by initiating action related to his right to transfer to a low-dust environment under Part 90 of Title 30 of the Code of the Federal Regulations." (Compl't Opp'n at 3.)

As noted above in *Goff,* the Commission determined that "[t]he Part 90 standards, promulgated pursuant to section 101(a)(7) of the Act, are clearly the kind of standards to which" the medical evaluation and transfer clause of section 105(c) of the Mine Act applies. *Goff*, 7 FMSHRC at 1781. The Commission further noted that "a miner is protected from adverse personnel actions based on his medical evaluation or potential transfer pursuant to Part 90 at least as early as the date on which he files his application for Part 90 status." *Id.* at 1782–83; *see also McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1263 (June 2015) (ALJ) ("[t]he plain language of section 105(c)(1) protects the rights of protective Part 90 miners whose [X]-ray findings are subject to medical evaluation by NIOSH during the period required to determine whether such miners are eligible for Part 90 status.").

Lockhart states in his initial discrimination complaint to MSHA, that Respondents discharged him because he had "applied for Part 90." (Compl. Ex. A.) Indeed, it is this complaint that MSHA investigated and referenced in its letter on February 27, 2025, notifying Lockhart that the Secretary would not file a case on his behalf. (Compl. Ex. B.) Additionally, in his opposition to Respondents' motion for summary decision Lockhart includes a letter from the Department of Health and Human Services, dated July 9, 2024, informing him that the results of his chest X-ray taken on March 21, 2024, indicate coal workers' pneumoconiosis and therefore establish his eligibility for Part 90 protections. (Compl't Opp'n, Ex. 5; Resp't Mot., Mem. at 2–3; Resp't Ex. 1.)

The unrefuted evidence establishes that Lockhart engaged in protected activity when he underwent a chest X-ray on March 21, 2024, under the auspices of HHS/NIOSH as part of applying for Part 90 status. Lockhart's allegations regarding his Part 90 application would, therefore, satisfy the first element of the *Pasula-Robinette* test for a discrimination claim under section 105(c)(1). This would also qualify as an exercise of a protected activity under the interference tests articulated by the Commission. *See Greathouse*, 40 FMSHRC at 686 (Comm'rs Cohen & Jordan, separate op.) (quoting *UMWA ex rel. Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Chairman Jordan & Comm'r Nakamura, separate op.)); *Sec'y of Labor ex rel. Pepin v. Empire Iron Mining P'ship*, 38 FMSHRC 1435, 1453–54 (June 2016) (ALJ).

B. Motivational Nexus

Respondents also argue that Lockhart "has failed to adduce any evidence that Respondents were ever even aware that he applied for Part 90." (Resp't Mot., Mem. at 7.) Specifically, Respondents assert that "Panther Creek[] was never notified by MSHA, pursuant to 30 C.F.R. § 90.102, that Mr. Lockhart applied and was eligible for Part 90 transfer." (Resp't Mot., Mem. at 7.) Additionally, Respondents point out that Lockhart "testified only that he 'assumed' that Part 90 papers were sent to Panther Creek." (Resp't Mot., Mem. at 7; Resp't Ex. 2: Lockhart Dep. 137:14–24.) Thus, Respondents argue that Lockhart has failed to produce "a single shred of evidence that Panther Creek had any knowledge whatsoever that Mr. Lockhart had applied for Part 90." (Resp't Mot., Mem. at 7.)

The operator in *McGlothlin v. Dominion Coal Corp.* similarly sought to escape liability under section 105(c) of the Mine Act by asserting it had no knowledge that the complainant miner was undergoing NIOSH evaluation when it reduced the complainant miner's pay. *McGlothlin*, 37 FMSHRC at 1264. However, Judge Feldman noted that that "direct evidence of a discriminatory motive is rare." *Id.* (citing *Sec'y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983)). Although not binding, I find Judge Feldman's reasoning persuasive. Indeed, knowledge of the protected activity is only one of the four common circumstantial indicia for determining whether a motivational nexus exists. *Sec'y of Labor ex rel. Hargis v. Vulcan Constr. Materials, LLC*, 46 FMSHRC 523, 530 (Aug. 2024) (citation omitted). A complainant need not demonstrate all four of these factors to establish a motivational nexus. *See Chacon*, 3 FMSHRC 2508, 2511.

When faced with a similar case involving a Part 90 miner with claims of discrimination and interference, I opined the following:

> Looking at the entire record . . . *in the light most favorable to* [the complainant miner], it is quite possible that [respondents] not only believed [the complainant miner] would apply for Part 90 status because [respondent] agreed to pay for free x-rays . . . but that [the complainant miner] would eventually qualify as a Part 90 miner because of his pneumoconiosis diagnosis years earlier. . . Both [respondents] knew of, and accepted, [the complainant miner's] complicated pneumoconiosis diagnosis several years before [the complainant miner] ever applied for Part 90 status under the Mine Act. . . Indeed, [respondent] knew of [the complainant miner's] complicated pneumoconiosis diagnosis at least as early as 2015, so if [the complainant miner] applied for Part 90 protections it would not have taken a leap in logic to conclude he would qualify.

Addington v. XMV, Inc., 44 FMSHRC 657, 666–67 (Nov. 2022) (ALJ).

Here, Lockhart argues, and Respondents acknowledge, that on July 10, 2024, Respondents received a notice of Lockhart's claim for federal black lung benefits at the Respondents' corporate offices. (Compl't Opp'n at 2; Compl't Opp'n, Ex. 1; Resp't Mot., Mem. at 3; Compl. at 2; Answer at 2.) On July 18, 2024, a Claims Manager for Rockwood Casualty Insurance Company, on behalf of Respondents, sent a letter to the Department of Labor, confirming receipt of the Department of Labor's Notice of Claim concerning Lockhart. (Compl't Opp'n, Ex. 1.)

Subsequently, "[o]n August 9, 2024, the claims administrator for Panther Creek Mining LLC acknowledged the filing of Mr. Lockhart's West Virginia Occupational Pneumoconiosis (WVOP) claim" and "[o]n August 16, 2024, the registered agent for service of process for Panther Creek Mining LLC signed for the receipt of Mr. Lockhart's WVOP claim." (Compl't Opp'n at 2; Compl't Opp'n, Exs. 2; 3.) Then on October 18, 2024, the West Virginia Office of the Insurance Commissioner sent a letter to Lockhart scheduling him for an examination on November 14, 2024, in connection with his WVOP claim. (Resp't Mot., Mem. at 3; Resp't Ex. 4.) On November 9, 2024, Lockhart submitted a request for leave to attend that scheduled black

lung screening, attaching the letter; and Respondents granted the request. (Resp't Mot., Mem. at 3; Resp't Ex. 4.)

Thereafter, "[o]n November 14, 2024, formal findings were issued by the [West Virginia] Occupational Pneumoconiosis Board, confirming that Mr. Lockhart suffered from 15% whole-body impairment due to coal workers' pneumoconiosis, and these findings were concurrently communicated to Respondents."[2] (Compl't Opp'n at 2–3; Compl't Opp'n, Ex. 4; Resp't Mot., Mem. at 3; Resp't Mot., Ex. 1 at 000062; Compl. at 3.) Specifically, the West Virginia Occupational Pneumoconiosis Board found that Lockhart's chest X-ray revealed "coalescent large opacities in the right perihilar region and right apex with some coalescence in the left apex" that "are consistent with the development of complicated occupational pneumoconiosis with progressive massive fibrosis." (Compl't Opp'n, Ex. 4.) The International Labor Organization ("ILO"), whose standards are referenced in the BLBA and its regulations, defines "large opacities" on chest X-rays as an opacity "greater than 1 centimeter in diameter." 20 C.F.R § 718.304; 30 U.S.C. § 921(c)(3)(A).

Thus, between July 10 and November 9, 2024, Respondents received several indications that Lockhart was applying for federal and state black lung benefits. Most importantly, on or around November 14, 2024, Respondents learned that Lockhart had been formally diagnosed with complicated occupational pneumoconiosis given the large opacities depicted on his chest X-ray. A diagnosis of complicated pneumoconiosis is the most severe form of the disease and under the federal black lung benefits program would entitle a miner to an "irrebuttable presumption of disability" due to pneumoconiosis if a chest X-ray reveals one or more large opacities (greater than one centimeter in diameter) under defined ILO classifications. 20 C.F.R § 718.304; *see* 30 U.S.C. § 921(c)(3) (same statutory language on irrebuttable presumption).

C. Conclusion

Looking at the entire record "in the light most favorable to" Lockhart, it is possible Respondents could have concluded that Lockhart would apply and qualify for Part 90 status, given that they knew he had applied for federal and state black lung benefits and had been diagnosed with complicated pneumoconiosis. *Diebold*, 369 U.S. at 655. Thus, Respondents' knowledge of Lockhart's diagnosis of complicated pneumoconiosis could arguably provide the motivational nexus alleged by Lockhart, inasmuch as Respondents could have assumed Lockhart would seek Part 90 protections, not knowing he had already sought them and was deemed eligible. Moreover, Lockhart highlights that the coincidence in time between Respondents learning of his complicated pneumoconiosis diagnosis in November 2024 and Respondents terminating his employment on December 2, 2024, further establishes the motivational nexus of his discrimination claim. (Compl't Opp'n at 3.)

[2] Indeed, West Virginia law provides that the Occupational Pneumoconiosis Board "shall make its written report, to the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, of its findings and conclusions . . . and the board shall send one copy of the report . . . to the employer." W. Va. Code § 23–4–8c(a).

These factual disputes surrounding the motivational factors articulated by the Commission are material to a determination of Respondents' motivation in terminating Lockhart's employment. As such, Respondent has failed to establish "[t]hat there is no genuine issue as to any material fact." 29 C.F.R. § 2700.67(b). Consequently, when viewed in the light most favorable to Lockhart, I must **DENY** Respondents' Motion for Summary Decision, **IN PART**, with respect to the "motivation" element of the *Pasula-Robinette* framework.

V. ORDER

In light of the foregoing, it is hereby **ORDERED** that Respondents' Motion for Summary Decision is **DENIED, in part, and GRANTED, in part**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 17, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2024-0092 A.C. No. 23-00079-590989 Docket No. CENT 2024-0175 A.C. No. 23-00079-595627 Docket No. CENT 2024-0255 A.C. No. 23-00079-601408
v.	Docket No. CENT 2024-0309 A.C. No. 23-00079-602966
CENTRAL STONE COMPANY, Respondent.	Mine: Huntington Plant CS01 Mine ID: 23-00079

ORDER GRANTING RESPONDENT'S MOTION TO COMPEL DEPOSITIONS AND ORDER DENYING SECRETARY'S MOTION TO STRIKE OR SEAL EXHIBITS

Before: Judge Simonton

These cases are before me each upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). Central Stone Company ("Respondent" or "Central Stone") filed a Motion to Compel Depositions on September 10, 2025. In its motion, Central Stone moves to compel the depositions of MSHA Staff Assistant Curtis Hardison, MSHA Supervisory Inspector Lawrence Sherrill, and MSHA Chief of Accident Investigations Marcus Smith. Resp't Mot. at 1. Central Stone argues that Hardison, Sherrill, and Smith each have relevant knowledge that is admissible evidence or likely to lead to admissible evidence, are not "high government officials" protected from being deposed, and that the Secretary's asserted objection as to privilege is premature and insufficient to refuse to produce the deponents altogether. Resp't Mot. at 5–11.

On September 22, 2025, the Secretary filed a response opposing Central Stone's Motion to Compel Depositions and also moved to strike or seal privileged exhibits. In its opposition, the Secretary argues: (1) Central Stone deposing Hardison, Sherrill, and Smith will result in testimony that is irrelevant and duplicative because they each have no first-hand knowledge of the material facts and because Central Stone has not shown these officials possess unique, non-cumulative information unavailable from MSHA Inspectors Dunne and Hill which will be

available for Central Stone to depose; (2) the depositions of Hardison, Sherrill, and Smith sought by Central Stone focuses on discussions had between other supervisors, MSHA personnel, and attorneys and therefore would inevitably wander into testimony protected by the deliberative process, work product, and attorney-client privileges; (3) Hardison, Sherrill, and Smith should be considered high-ranking government officials and therefore, because the information Central Stone seeks is already available from the inspectors that the Secretary has made available for testimony, no extraordinary circumstances exist to warrant deposing Hardison, Sherrill, and Smith; and (4) Central Stone's delay in requesting the deposition of Hardison, Sherrill, and Smith was unwarranted and will cause undue delay or impose an undue burden and therefore its motion should be denied. Sec'y Opp'n at 1, 5–15.

Additionally, the Secretary argues that Central Stone obtained privileged documents inadvertently through FOIA that were subsequently submitted in support of its Motion to Compel Depositions. Sec'y Opp'n at 15–17. Therefore, the Secretary argues that leaving these exhibits in the record would reward Central Stone's use of privileged materials, risk tainting these proceedings, and that the Court should remedy this by striking or sealing the exhibits in their entirety and order Central Stone to sequester or destroy all copies of the exhibits. Sec'y Opp'n ay 15–17.

On October 2, 2025, Central Stone filed its reply to the Secretary's opposition and motion to strike or seal privileged exhibits. Specifically, in response to the Secretary' opposition, Central Stone argued: (1) Hardison, Sherrill, and Smith need not "have firsthand knowledge of the cited conditions" to have discoverable information and may have unique discoverable facts; (2) potential application of a privilege does not bar a deposition; (3) Hardison, Sherrill, and Smith are not high government officials; and (4) the delay in deposing Hardison, Sherrill, and Smith was in part due to the Secretary and their deposition would not cause undue delay or impose an undue burden on the Secretary. Resp't Reply at 2–10.

Additionally, Central Stone argues that the Secretary's motion to strike or seal privileged exhibits should be denied because: (1) there is no lawful basis for striking the alleged privileged exhibits because they were released in response to a FOIA request which waives privilege; (2) there is no authority for a Commission ALJ to strike documents inadvertently released via FOIA as it does not contain any clawback provision; and (3) there is no basis for striking the alleged privileged exhibits because the Secretary has not proven that they are privileged, that she took reasonable steps to justify their return, or that she did not waive privilege under Fed. R. Evid. 502(b). Resp't Reply at 11–23.

I. CENTRAL STONE COMPANY'S MOTION TO COMPEL DEPOSITIONS

A. Relevance and Privilege

Commission Procedural Rule 56(b) states "[p]arties may obtain discovery of any *relevant*, non-privileged matter that is admissible evidence *or appears likely to lead* to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b) (emphasis added). Commission Judges may also look to the Federal Rules of Civil Procedure for guidance on any procedural question not governed by the Mine Act, the Commission's Procedural Rules, or the

Administrative Procedure Act. 29 C.F.R. § 2700.1(b). The scope of discovery under the Federal Rules is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Additionally, under the Federal Rules of Evidence, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401.

After reviewing the parties' submissions, I find that the depositions of Hardison, Sherrill, and Smith may reasonably lead to unique and relevant information. Although the Secretary argues that Hardison, Sherrill, and Smith may not be deposed because they do not have firsthand knowledge of the facts, such a distinction is unpersuasive. *See Jim Walter Res.*, *Inc.*, 26 FMSHRC 317, 319, 321–322 (Mar. 2004) (ALJ) (rejecting the Secretary's argument that MSHA employees could not be deposed because they lacked "firsthand, direct knowledge of the facts related to the issuance of the citation and order"). As Hardison, Sherrill, and Smith each actively participated throughout the investigation to varying degrees, they therefore may have relevant information pertaining to the citations and orders. Resp't Mot. at 5–8; Sec'y Opp'n at 6–8; *See Pocahontas Coal Co., Inc.*, 36 FMSHRC 2326, 2332 (Aug. 2014) (ALJ) (ordering the deposition of an MSHA Supervisor because he "supervise[d] the inspectors that wrote the citations that remain for adjudication [and therefore] . . . may have relevant information pertaining to the citations and orders"); *Buck Creek Coal*, 17 FMSHRC 845,849–50 (May 1995) (ALJ) (allowing the depositions of 19 people, including managers from district offices, because the "fact that these individuals are managers does not mean that they do not have knowledge of the facts underlying these cases or information that might lead to the discovery of admissible evidence").

Even in the event that each deponent does not have information that ultimately leads to relevant information, Central Stone should still have the opportunity to find out whether they do. *See Rail Link*, Inc., 20 FMSHRC 181, 182 (Jan. 1998) (ALJ) (finding that "[t]he fact that [the deponents] may not actually have knowledge of facts that will shed light on the issues raised in this case is not sufficient justification to issue a protective order," because "[t]hey may have such knowledge"). In addition, the Secretary did not provide any persuasive arguments that the proposed depositions would be oppressive or subject Hardison, Sherrill, Smith or MSHA to undue burden or expense.

The Secretary also attempts to bar the depositions of Hardison, Sherrill, and Smith because they may stray into information that will be subject to the deliberative process, work product, and attorney-client privileges. Sec'y Opp'n at 8–10. However, this is an insufficient basis to bar the depositions altogether as it is not clear at this juncture to what extent the asserted privileges will apply. *See Newmont Gold Co.*, 18 FMSHRC 1304, 1307 (July 1996) (ALJ) (finding that "the fact that [the deliberative process privilege] may be raised during a deposition does not provide a sufficient basis to bar the deposition altogether [as] . . . it is not clear at this juncture that the . . . privilege will apply"). Indeed, the Secretary does not dispute that it objected to the depositions of Hardison, Sherrill, and Smith in part because "certain questions *may* implicate the deliberative process privilege." Resp't Mot. at 3–4, Ex. P (emphasis added). Therefore, barring the depositions entirely simply because privilege may be implicated is

premature and unwarranted as the Secretary may still object to the privilege provoking questions at the deposition.

B. High-Ranking Officials

The Secretary argues that even if Hardison, Sherrill, and Smith may produce relevant and unprivileged information, they are exempt from deposition by virtue of the official positions they hold. Sec'y Opp'n at 11–13. However, Commission ALJs have routinely held that positions that are equivalent in rank or greater than those of Hardison, Sherrill, and Smith are not the type of "top government officials" to whom the protection usually is extended. *See Jim Walter Res.*, *Inc.*, 26 FMSHRC 317, 323 (Mar. 2004) (ALJ) (denying the Secretary's motion for a protective order for the depositions of the Assistant Administrator of Coal Mine Safety and Health and the MSHA District . . . Manager because "they are not the type of 'top government officials' to whom the protection is usually extended"); *Pocahontas Coal Co., Inc.*, 36 FMSHRC 2326, 2332 (Aug. 2014) (ALJ) (finding a MSHA District Manager "is not in a position to be considered a high-ranking official privileged to protection from a deposition"); *Rail Link, Inc.*, 20 FMSHRC 181, 182 (denying the Secretary's motion for a protective order for depositions of an MSHA District Manager and an Assistant District Manager because "they are not the type of high level officials that require such protection"); *Newmont Gold Co.*, 18 FMSHRC at 1306–08 (finding that a MSHA District Manager and a MSHA District Assistant Manager "are not the type of high level government officials that require . . . protection [from depositions]"). Therefore, I find that Hardison, Sherrill, and Smith are not the type of "top government officials" to whom the protection from depositions is extended, and thus preventing their depositions is unwarranted.

C. Central Stone's Alleged Delay

Lastly, the Secretary argues that I should deny Central Stone's Motion to Compel Depositions because it "had ample opportunity to obtain the discovery it now claims to urgently need" and that "[c]ourts routinely deny discovery under these circumstances." Sec'y Opp'n at 14–15. Specifically, the Secretary characterizes Central Stone's approach as a "strategic decision to bypass the primary fact witnesses while seeking to compel testimony from supervisory personnel," noting that Central Stone "has not even noticed or taken the depositions" of other MSHA Inspectors identified in discovery. Sec'y Opp'n at 15. Central Stone responds that its delay in conducting depositions resulted from the Secretary's initial cancellation of scheduled depositions, the Secretary's reluctance to commit to deposition dates due to a potential government shutdown, and the difficulties it encountered in obtaining the Secretary's compliance with her discovery obligations. Resp't Reply at 10.

After reviewing the parties' submissions, I find no unexplained or inordinate delay in requesting the depositions of Hardison, Sherrill, and Smith, particularly in light of the complications Central Stone identified in its reply. Resp't Reply at 10. Nor has the Secretary shown that producing these witnesses for deposition would impose an undue burden. In the interest of allowing full and complete discovery, Central Stone will be permitted to depose these witnesses.

Accordingly, Respondent's Motion to Compel Depositions is **GRANTED** and the Secretary is **ORDERED** to produce Curtis Hardison, Lawrence Sherrill, and Marcus Smith for deposition.

II. SECRETARY'S MOTION TO STRIKE OR SEAL PRIVILEGED EXHIBITS

The Secretary asserts that Central Stone utilized privileged materials that were inadvertently released to Central Stone via a Freedom of Information Act ("FOIA") request, to support its Motion to Compel. Sec'y Opp'n at 15–16. Specifically, the Secretary argues: (1) these documents contain deliberative-process, attorney-client, and work-product material; (2) courts have held that inadvertent FOIA disclosure does not strip privileged status from protected material;(3) Federal Rules of Evidence and Procedure dictate that inadvertent disclosure does not waive privilege where the producing party took reasonable steps to prevent disclosure and the Secretary promptly took steps to rectify the error; and (4) to protect the integrity of proceedings, the Commission has authority to regulate discovery and issue orders to prevent undue prejudice or delay. Sec'y Opp'n at 15–17. Therefore, the Secretary requests that I strike or seal Exhibits B, C, D, E, F, H, I, J, K, L, M, N, and O from Central Stone's Motion to Compel Depositions and order Central Stone to sequester or destroy all copies of the privileged documents consistent with Fed. R. Civ. P. 26(b)(5)(B). Sec'y Opp'n at 16–17.

In response, Central Stone argues: (1) there is no lawful basis for striking Exhibits B, C, D, E, F, H, I, M, N, and O because they were released in response to a FOIA request which waives privilege as the documents are now public; (2) there is no authority for a Commission ALJ to strike documents inadvertently released via FOIA as it does not contain any clawback provision; and (3) there is no basis for striking Exhibits J, K, and L because the Secretary has not proven that they are privileged, that she took reasonable steps to justify their return, or that she did not waive privilege under Fed. R. Evid. 502(b). Resp't Reply at 11–22.

As a preliminary issue, Central Stone distinguishes Exhibits J, K, L from the remainder of the exhibits at issue. Resp't Reply at 12. Specifically, Central Stone asserts that while Exhibits B, C, D, E, F, H, I, M, N, and O were disclosed via a FOIA request, Exhibits J, K, and L were produced by "the Secretary . . . in response to its requests for production of documents." Resp't Reply at 11–12. Therefore, Central Stone admits that Exhibits J, K, and L were disclosed "in a federal proceeding" and thus are guided by Fed. R. Evid. 502(b). Resp't Reply at 13 n.2.

In contrast, the Secretary makes no distinction between the exhibits and simply asserts that "Respondent obtained privileged documents inadvertently through FOIA . . . [and] knowing that the documents contain privileged, non-public information, submitted some of the information in support of its Motion, specifically Exhibits B, C, D, E, F, H, I, J, K, L, M, N, and O." Sec'y Opp'n at 16. However, the Secretary admits that its initial letter to Central Stone asserting its non-waiver of privilege, only specified Exhibits B, C, D, E, F, H, I, M, N, and O as being disclosed via a FOIA request. Sec'y Opp'n at 16 n.2. It is only until her Opposition to Respondent's Motion to Compel Depositions that the Secretary asserts that the addition of Exhibit J, K, and L demonstrates a "more complete" reflection of "the documents addressed in [its] motion." Sec'y Opp'n at 16 n.2. However, nowhere in the Secretary's motion does she explicitly state if the additional Exhibits of J, K, and L were also inadvertently disclosed via a

FOIA request. Additionally, as Central Stone notes, Exhibits J, K, and L bear distinctive blue "DOL" stamps and numbering, which Central Stone argues indicate that the Secretary produced these documents in discovery. Resp't Reply at 12; Resp't Mot. at Exs. J, K, L. Despite this apparent conflict in how Exhibits J, K, and L were disclosed, the Secretary elected to not file a reply. Therefore, based on the parties' representations, I find that Exhibits J, K, and L were produced by the Secretary in response to Central Stone's discovery requests, not through a FOIA request. For that reason, I will address Exhibits J, K, and L separately from Exhibits B, C, D, E, F, H, I, M, N, and O.

A. Exhibits B, C, D, E, F, H, I, M, N, and O

The Secretary argues that courts and agencies routinely strike or seal privileged materials to protect the integrity of proceedings, and that Commission judges likewise have authority to regulate discovery and issue orders to prevent undue prejudice or delay. Sec'y Opp'n at 15–17. Therefore, because leaving these exhibits in the record would reward Central Stone's use of privileged materials and risk tainting these proceedings, the Secretary argues that I strike or seal them and order Central Stone to destroy or sequester the materials. Sec'y Opp'n at 15–17.

Preliminarily, any discussion regarding whether inadvertent disclosures under FOIA waives privilege, and the applicability of these disclosures under Fed. R. Evid. 502(b) and Fed. R. Civ. P. 26(b)(5)(B), is moot if the Commission does not have the inherent authority to grant the Secretary's request to strike, seal, sequester, or destroy Exhibits B, C, D, E, F, H, I, M, N, and O. Therefore, I will first address whether Commission judges have the authority to issue such orders for materials that are inadvertently released via a FOIA request.

The Court's review of Commission case law provided little guidance in addressing whether Commission judges have the inherent authority to strike, seal, sequester, or destroy privileged materials that were inadvertently disclosed via FOIA and thus this issue is one of first impression for the Commission. 30 U.S.C. § 816 (a)(1), provides that Commission decisions are reviewable in the circuit in which the violation allegedly occurred, or, in the D.C. Circuit. Therefore, as the dispute before me arises out of Hannibal, Missouri which falls within the Eighth Circuit, I canvassed the decisions of both the Eighth and D.C. Circuit Court of Appeals for guidance.

Although the Eighth Circuit has not addressed the issue before me, the D.C. Circuit recently did in *Human Rights Def. Ctr. v. U.S. Park Police*, 126 F.4th 708 (D.C. Cir. 2025). There the D.C. Circuit Court reviewed a district court's issuance of a clawback order for FOIA documents which similarly failed to fully redact privileged information and thus were erroneously produced. *Human Rights Def. Ctr*, 126 F.4th at 712. The district court's order acknowledged that "FOIA does not provide for the return or destruction of inadvertently produced documents but held that it could draw on inherent judicial authority to bar [Plaintiff] from disclosing, disseminating, or making use of the accidentally produced names." *Id.* at 715. However, the D.C. Circuit Court reversed the judge's order because the assertion that the

> court could use its inherent authority to redress the agency's mistaken disclosures . . . cannot be squared with the terms of FOIA and the structure of its disclosure

> process [as] Congress designed FOIA to function largely without court compulsion. . . . And if the agency during that administrative stage fails to make intended redactions, neither FOIA nor any inherent judicial authority enables it to seek a court order to limit the effects of its error. Nothing suggests the agency acquires an otherwise absent clawback remedy just because a FOIA requester resorts to litigation to enforce an unfulfilled FOIA entitlement.

Id. at 719.

As a result, the D.C. Circuit Court viewed "[t]he primary function of the [judge's] order . . . [as] not to support a core judicial authority, but to fill a perceived hole in the FOIA statute by enabling the government to put the proverbial cat back in the bag." *Id.* at 718. Notably, the D.C. Circuit Court also rejected an analogy to Fed. R. Civ. P. 26(b)(5)(B), in which the Respondent argued that as Fed. R. Civ. P. 26(b)(5)(B) "explicitly address[es] the risk that, in reviewing and disclosing large volumes of information, mistakes may be made" the court may use its inherent authority to "'address the same problems inherent in responding to FOIA requests' through a clawback order." *Id.* at 719. However, the D.C. Circuit Court responded that "the comparison hurts more than it helps. A provision akin to Rule 26(b)(5)(B) could have been but was not included in FOIA. That alone defeats any persuasive effect of the [Respondent's] analogy. Congress presumably acted deliberately in omitting general clawback authority from FOIA." *Id.*

In light of the discussion above, I find the reasoning of the D.C. Circuit Court in *Human Rights Def. Ctr*, highly persuasive. Therefore, I find that that I do not have the inherent authority to issue an order to strike, seal, sequester, or destroy Exhibits B, C, D, E, F, H, I, M, N, and O that were inadvertently disclosed via FOIA. As a result, I need not address whether Exhibits B, C, D, E, F, H, I, M, N, and O are privileged, the applicability of Fed. R. Evid. 502(b) and Fed. R. Civ. P. 26(b)(5)(B), or whether the Secretary has waived privilege.

B. Exhibits J, K, and L

The Secretary argues that "Exhibits . . . J, K, [and] L. . . contain deliberative-process, attorney-client, and work-product material." Sec'y Opp'n at 16. The Secretary, as the party asserting privilege over Exhibits J, K, and L, has the burden of proving that they apply. *United States v. Ivers,* 967 F.3d 709, 715 (8th Cir. 2020) (holding "the party seeking to assert the [attorney -client] privilege . . . has the burden of showing that the privilege applies"); *Citizens for Resp. & Ethics in Washington v. United States Dep't of Just.*, 45 F.4th 963, 972 (D.C. Cir. 2022) (affirming that "[a]n agency invoking the deliberative-process privilege thus must 'establish what deliberative process is involved, and the role played by the documents in issue in the course of that process'"); *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997) (holding that "[t]he burden of satisfying the three-part test is on the party seeking to invoke the work-product privilege"). As Central Stone correctly points out, the Secretary "has offered only conclusory assertions with no evidence. She has not identified which pages, or specific text, of Exhibits J, K, and L she asserts are privileged, or which privileges she asserts apply to which pages." Resp't Reply at 13.

However, despite the Secretary's lack of guidance, I nevertheless reviewed Exhibits J, K, and L and found no indication of privileged material under the deliberative-process, attorney-client, or work-product material privileges. Accordingly, because I find that Exhibits J, K, and L contain no privileged material, I need not address the applicability of Fed. R. Evid. 502(b) or Fed. R. Civ. P. 26(b)(5)(B), nor whether the Secretary has waived privilege. *See Sec'y of Labor v. Aggregate Industries Wrc, Inc.,* 39 FMSHRC 1997, 1999 (Oct. 2017) (ALJ) (reviewing the alleged privileged document and finding that "[b]ecause . . . the email in question is not protected by the attorney-client privilege, I need not reach the issue whether the email should be destroyed or returned under Fed. R. Evid. 502(b) and Fed. R. Civ. P. 26(b)(5)(B)").

Accordingly, the Secretary's Motion to Strike or Seal Privileged Exhibits is **DENIED**.

III. ORDER

In light of the foregoing, it is hereby **ORDERED** that Central Stone Company's Motion to Compel Depositions is **GRANTED**. Additionally, the Secretary's Motion to Strike or Seal Privileged Exhibits is **DENIED**.

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

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December 23, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) O/B/O JAMES SUMMERS, Complainant, v. CALLENDER CONSTRUCTION COMPANY, INC., Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2026-0045 MSHA No. VINC-CD-2025-05 Mine: Thomas Quarry Mine ID: 11-00214

ORDER GRANTING TEMPORARY REINSTATEMENT OF JAMES SUMMERS

Before: Judge Lewis

Pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801, *et. seq.*, and Commission Procedural Rule 45, 29 C.F.R. § 2700.45, the Secretary of Labor (Secretary) on December 16, 2025, filed an Application for Temporary Reinstatement (Application) of miner James Summers (Complainant) to his former position as a haul truck operator with Callender Construction Company (Respondent), at the Thomas Quarry mine pending a final hearing and disposition of this discrimination case. I was assigned this temporary reinstatement case by Order dated December 22, 2025.

On December 16, 2025, the parties entered an Agreement providing for economic temporary reinstatement of Complainant, effective December 16, 2025, to "remain in effect until the entry of a final order of the Federal Mine Safety [and] Health Review Commission . . . regarding Summers underlying discrimination complaint (MSHA Case No. VINC-CD-2025-05) or until [the entry of an order issued by an Administrative Law Judge] approving [the parties' Agreement] is dissolved, whichever shall occur first." Agreement at ¶ 2.[1] The first paragraph of the Agreement stated that Respondent "hereby waives its right to a hearing on the Application for Temporary Reinstatement filed by the Secretary on Summers' behalf." *Id.* at ¶ 1. The Agreement was signed by Counsel for the Secretary, Counsel for Complainant, and Counsel for Respondent. *Id.* at 3. On December 19, 2025, the parties simultaneously filed a Joint Motion to

[1] The Agreement further provided that "If the Secretary notifies Summers that she has decided not to prosecute Summers' case on the merits, [Respondent] will file a motion with the presiding [Administrative Law Judge] to dissolve [the] Agreement, and neither Summers or the Secretary will oppose said motion." *Id.* at ¶ 2.

Approve Agreement for Economic Reinstatement, which Motion I have granted by separate Order issued this same day.

Governing Legal Standard

> Pursuant to Commission Procedural Rule 45(c),
>
> [i]f no hearing [on an Application for Temporary Reinstatement] is requested, the ALJ assigned to the matter *shall immediately review* the Secretary's application and, if based on the contents thereof the ALJ determines that the miner's complaint was not frivolously brought, the ALJ *shall immediately issue* a written order of temporary reinstatement.

29 C.F.R. § 2700.45(c) (emphasis added).

Section 105(c) prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. § 815(c)(1) & (2). The plain language of the Mine Act also provides that "if the Secretary finds that the complaint was not frivolously brought, the Commission, on an expedited basis upon application by the Secretary, *shall* order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2) (emphasis added). The Commission's regulations control the temporary reinstatement procedure and temporary reinstatement is designed to maintain the status quo while miners proceed with their discrimination claims. *Sec'y on behalf of Jeffrey Pappas c. Calportland Co.,* 38 FMSHRC 137, 144 (Feb. 2016).

In this case, Respondent waived its right to a hearing on the Application. Agreement at ¶ 1. Thus, Commission Procedural Rule 45(c) compels me to immediately review the Secretary's determination that Complainant's Complaint in this matter was not frivolously brought. *See* 29 C.F.R. § 2700.45(c). Legislative history of the Mine Act suggests that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition, the Commission and the courts have equated the "not frivolously brought" standard with "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990).

Supporting Evidentiary Basis

The Secretary's Application provides the evidentiary basis for the Secretary's conclusion that the Summers' Complaint was not frivolously brought. *See* 29 C.F.R. § 2700.45(b) (requiring a temporary reinstatement application to include the miner's complaint and an affidavit setting forth the Secretary's supporting reasons). The Mine Act requires the Secretary to investigate a miner's complaint of discrimination, 30 U.S.C. § 815(c)(2), and here, the Secretary's Application includes the Complaint filed by Complainant (Exhibit B), as well as the Declaration of Special

Investigator Rexdon Boliard (Exhibit A), indicating that Boliard is "in the process of investigating the discrimination complaint" filed by Complainant Summers and that his investigation has revealed the following facts to date:

> a. At all relevant times, the Respondent was engaged in the operation of a surface limestone mine and is, therefore, an "operator" within the meaning of Section 3(d) of the Act.
>
> b. At all relevant times, Mr. Summers was employed by the Respondent as an equipment operator and was a "miner" as defined by Section 3(g) of the Act.
>
> c. The Respondent's Thomas Quarry mine, located in Winchester, Illinois, has products that enter commerce and is, therefore, a "mine" as defined in Sections 3(b), 3(h) and 4 of the Act.
>
> d. Mr. Summers has asserted to me that between September 17, 2025, and September 22, 2025, he engaged in protected activity when he informed management of Respondent that a haul truck he was assigned to operate was not safe to drive. This assertion does not appear to me to be frivolous.
>
> e. On September 22, 2025, the Respondent terminated Mr. Summers' employment. Mr. Summers has asserted this constitutes an act of discrimination under the Mine Act. This assertion does not appear to me to be frivolous.

Dec. of Rexdon Boliard (dated Dec. 16, 2025) (Exhibit A). *See also* Exhibit C (Complainant's Summary of Discriminatory Action (dated Sept. 30, 2025), providing "On Sep[t.] 17 Tom [Parker, Quarry Foreman] told me to drive CAT Haul Truck[.] I told him it's not safe[.] Door won't close and stay shut. Sent home[.] Sep[t.] 18 same thing again[.] Tom told me to drive the CAT Haul Truck[.] I told him I don't feel safe driving it. Sent home. Sep[t.] 19 Tom told me to drive the CAT Haul Truck or go home and think about it. Said next time I don't drive the CAT Haul Truck I would be fired, Tom called me on Sep[t.] 22 and fired me for not driving CAT [Haul] Truck.")

The facts provided in support of the Secretary's conclusion, if true, would establish jurisdiction, a timely Complaint of Discrimination, and that the Complainant engaged in protected activity and suffered an adverse action close in time to the protected activity under circumstances that provide reasonable cause to believe there was a causal nexus between the safety complaints he made to management and his refusal to perform a work assignment in light of those complaints, and his termination from employment on September 22, 2025.

Findings and Conclusion

At this stage, the facts alleged by the Secretary are undisputed. Upon careful review of the Application, I find that the Complaint "was not frivolously brought," 29 C.F.R. § 2700.45(c), and that Complainant Summers is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Mine Act.

ORDER

It is hereby **ORDERED** that **James Summers** be **immediately TEMPORARILY ECONOMICALLY REINSTATED**, effective December 16, 2025, in accordance with the parties' Agreement Regarding Economic Temporary Reinstatement and my Order Granting Joint Motion to Approve Agreement for Economic Reinstatement entered on this same day, December 23, 2025.

This Order of Temporary Reinstatement **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission. *See also* Agreement at ¶ 2; n. 1 *supra*. I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint as soon as possible.

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

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December 23, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) O/B/O JAMES SUMMERS, Complainant, v. CALLENDER CONSTRUCTION COMPANY, INC., Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2026-0045 MSHA No. VINC-CD-2025-05 Mine: Thomas Quarry Mine ID: 11-00214

ORDER GRANTING JOINT MOTION TO APPROVE AGREEMENT FOR ECONOMIC REINSTATEMENT OF JAMES SUMMERS

Before: Judge Lewis

Pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801, *et. seq.*, and Commission Procedural Rule 45, 29 C.F.R. § 2700.45, the Secretary of Labor (Secretary) on December 16, 2025, filed an Application for Temporary Reinstatement (Application) of miner James Summers (Complainant) to his former position as a haul truck operator with Callender Construction Company (Respondent), at the Thomas Quarry mine pending a final hearing and disposition of this discrimination case. I was assigned this temporary reinstatement case by Order dated December 22, 2025.

On December 16, 2025, the parties entered an Agreement providing for economic temporary reinstatement of Complainant, effective December 16, 2025, to "remain in effect until the entry of a final order of the Federal Mine Safety [and] Health Review Commission . . . regarding Summers underlying discrimination complaint (MSHA Case No. VINC-CD-2025-05) or until [the entry of an order issued by an Administrative Law Judge] approving [the parties' Agreement] is dissolved, whichever shall occur first." Agreement at ¶ 2.[1] The Agreement was signed by Counsel for the Secretary, Counsel for Complainant, and Counsel for Respondent. *Id.*

[1] The Agreement further provided that "[i]f the Secretary notifies Summers that she has decided not to prosecute Summers' case on the merits, [Respondent] will file a motion with the presiding [Administrative Law Judge] to dissolve [the] Agreement, and neither Summers or the Secretary will oppose said motion." *Id.* at ¶ 2.

at 3. On December 19, the parties filed a Joint Motion to Approve Agreement for Economic Reinstatement (Joint Motion), which is presently before me.[2]

I have reviewed the Joint Motion as well as the Agreement and the file in general and do hereby **ORDER** that the Joint Motion is **GRANTED**.[3]

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

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[2] The Joint Motion contained a signature block signed by the Complainant, whereas the Certificate of Service attached to the Joint Motion listed only Counsel for Respondent and Counsel for Complainant. Joint Motion at 3-4.

[3] By separate Order issued this same day, I granted temporary reinstatement of Complainant James Summers, subject to the Agreement referred to herein.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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December 29, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), O/B/O BRITTNY LUDESCHER, Complainant, v. HAAS SONS, INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. LAKE 2025-0284-DM MSHA No. NC-MD-2025-03 Mine: Wash Plant 5 Mine ID: 47-03293

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND EXHIBIT "A" TO DISCRIMINATION COMPLAINT

This discrimination proceeding is before me pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2). On July 3, 2025, the Federal Mine Safety and Health Review Commission received a complaint of discrimination filed by the Secretary of Labor on behalf of the complaining miner, Brittny Ludescher. Respondent, Haas Sons, Inc., timely filed an answer to the complaint on July 23, 2025. Chief Administrative Law Judge Glynn F. Voisin then assigned me this matter on August 20, 2025. I initially set a hearing for January 7–9, 2026. I continued this hearing to January 28–29, 2026, upon the Secretary's request.

I. MOTION TO AMEND COMPLAINT

On November 24, 2025, counsel for the Secretary filed her Motion to Amend Exhibit A to Discrimination Complaint, although due to a glitch in eCMS my office only became aware of the motion on December 22, 2025. In her motion the Secretary seeks to "withdraw the Exhibit A attached to the original Discrimination Complaint e-filed by the Secretary and replace it with the attached Exhibit A" consisting of MSHA Form 2000-123 (Discrimination Complaint) and MSHA Form 2000-124 (Discrimination Report). (Mot. at 1.) In support, the Secretary states that Haas Sons "will suffer no prejudice as a result of this amendment, given that Haas Sons Inc[.] was already made aware of the discrimination complaint when MSHA presented MSHA Form 2000-124 to Haas Sons, Inc." (Mot. at 3.)

At the time the motion to amend was filed, the Secretary had not yet received word from opposing counsel whether Haas Sons had any objection to the filing of the Motion to Amend Exhibit A to the Discrimination Complaint. (Mot. at 4.) Per email correspondence received by my Law Clerk on December 22, 2025, counsel for Haas Sons does not object to the motion.

II. PRINCIPLES OF LAW AND ANALYSIS

A. Principles of Law

The Commission has no specific rule regarding the amendment of pleadings, yet Commission Procedural Rule 1(b) states "[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . . the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure." 29 C.F.R § 2700.1(b). Federal Rule of Civil Procedure 15(a)(2) states that after more than 21 days after filing initial pleadings, a party may amend its pleading "only with the opposing party's written consent, or the court's leave," but that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

The Supreme Court interprets Rule 15 liberally to allow amendments to pleadings unless one of the following factors is present that justifies denial—(a) undue delay; (b) bad faith by movant; (c) repeated failure to cure deficiencies by previous amendments; (d) undue prejudice to the opposing party; or (e) futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Commission takes a similar view when it comes to amending petitions, especially when the amendment does not prejudice the non-moving party in preparing its defenses. *See Cyprus Empire Corp.*, 12 FMSHRC 911, 914–16 (May 1990) (finding no abuse of discretion by ALJ who permitted Secretary's prehearing amendment to the citation where the non-moving party was not prejudiced by the amendment); *see also Wyo. Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) ("amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed"); *CDK Contracting Co.*, 23 FMSHRC 783, 784 (July 2001) (ALJ) ("It is well settled that administrative pleadings are liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party" in granting Secretary's motion to amend to allege violations of two alternative safety standards).

B. Analysis

In applying the Supreme Court's five-factor test under *Foman v. Davis* on whether to grant a motion filed under Rule 15(a), I first note that the Secretary's amendment causes no undue delay because the Secretary's motion was filed eight weeks before the scheduled hearing date. Secondly, I find no indication of bad faith because the amended Exhibit A does not assert any new allegations. Third, given that this is the Secretary's first proposed amendment in this case, the repeated failure to cure deficiencies by previous amendments is inapplicable. Fourth, the amendment is not futile because the Secretary could reasonably prove the allegations set forth in the amended Exhibit A at the hearing.

Lastly, under the *Foman v. Davis* factors, I must determine if granting the motion to amend creates "undue prejudice" to Haas Sons. 371 U.S. at 182. The Commission has held that "[m]ere allegations of potential prejudice or inherent prejudice should be rejected," and the non-moving party must demonstrate more than a danger of prejudice to show actual prejudice. *Long Branch Energy*, 34 FMSHRC 1984, 1992–93 (Aug. 2012).

Here, the Secretary states that MSHA previously provided MSHA Form 2000-124 (Discrimination Report) to Haas Sons. (Mot. at 2.) Indeed, MSHA's Special Investigations Procedures Handbook notes that upon receipt of a written discrimination complaint MSHA sends a notification letter to the Respondent and includes "the completed MSHA Form 2000-124." U.S. Department of Labor, *Special Investigations Procedures Handbook: PH20-I-5*, Mine Safety and Health Administration, https://www.msha.gov/sites/default/files/Directive%20%26%20Guidance/Handbooks/PH20-I-5%20Special%20Investigations%20Procedures%20Handbook.pdf. Additionally, MSHA Form 2000-123 (Discrimination Complaint) includes information already made available to Haas Sons through the Complaint and its own employment records. Haas Sons, therefore, has had notice of the underlying facts in the Secretary's Amended Exhibit A, and it does not require additional discovery.

In determining undue prejudice, Commission Administrative Law Judges have found no prejudice for amendments made with significantly less time before hearing, including amendments made at hearing. *See Higman Sand & Gravel*, 18 FMSHRC 951, 958–59 (June 1996) (ALJ) (granting Secretary's amendment and finding no prejudice where amendment was made for the first time at the hearing); *Bob Bak Constr.*, 28 FMSHRC 817, 822–23 (Sept. 2006) (ALJ) (granting Secretary's motion to amend pleading to add an alternative standard and finding no prejudice where amendment was first made at hearing). Consequently, early notice here weighs in favor of finding the amendment nonprejudicial. Additionally, Haas Sons has filed no response alleging the amendment would cause undue prejudice.

Under Federal Rule of Civil Procedure 15(a) and Commission case law, Commission Judges may liberally grant amendments to petitions when justice requires. Here, the Discrimination Report that the Secretary wishes to add to the Complaint was already given to Haas Sons shortly after Ludescher filed her initial discrimination complaint. The Secretary therefore provided notice of this amendment in advance of the upcoming hearing date. Moreover, Haas Sons does not oppose the motion to amend Exhibit A. Consequently, I conclude that allowing the Secretary to amend Exhibit A of the discrimination complaint in Docket No. LAKE 2025-0284-DM is appropriate.

III. ORDER

WHEREFORE, it is hereby **ORDERED** that Complainant's Motion to Amend Exhibit A to Discrimination Complaint is **GRANTED**, and the Amended Complaint is accepted as filed.

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

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