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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. BLUESTONE OIL CORPORATION	Docket No. WEVA 2022-0176 Docket No. WEVA 2022-0350

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). The cases involve the interlocutory review of a Commission Administrative Law Judge's denial of a proposed settlement between the Secretary of Labor and Bluestone Oil Corporation ("Bluestone").

At issue is whether the Secretary has unreviewable discretion to remove a significant and substantial ("S&S") designation[1] from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).[2] This same issue was recently decided by the Commission in *Knight Hawk Coal, LLC*, 46 FMSHRC 563 (Aug. 2024).[3] *See also Greenbrier Minerals, LLC*, 47 FMSHRC 933 (Nov. 2024). For the reasons set forth below and as

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

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

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

30 U.S.C. § 820(k).

[3] On September 10, 2024, the Secretary appealed the Commission's decision in *Knight Hawk* to the United States Court of Appeals for the District of Columbia Circuit. On October 22, 2024, the Secretary filed an unopposed motion with the Commission seeking to hold this case in abeyance pending a decision from the D.C. Circuit in *Knight Hawk*. S. Mot. at 1. After considering the Secretary's motion and the arguments therein, the motion for stay is hereby denied.

more fully discussed in our lead decision in *Knight Hawk*, we hold that the Secretary does not have unreviewable discretion to remove a significant and substantial designation from a contested citation without the Commission's approval, affirm the Judge's denial of the settlement motion and remand the case to the Judge.

I.

Factual and Procedural Background

The Secretary filed a motion to approve settlement of 24 citations issued to Bluestone by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Secretary proposed an overall penalty reduction from $51,023 to $30,500. Pursuant to the terms of the proposed settlement: 17 citations would remain unchanged with no penalty reduction; the penalties for two citations would be reduced without other modification; and five citations would be modified with a corresponding penalty reduction.

At issue here, the proposed modifications included removing the S&S designations for two citations (Nos. 9562449 and 9562452). The Secretary did not provide a factual justification for the proposed S&S removals. She explained that she had "exercised discretion to modify the significant and substantial designation" for the citations. Settl. Mot. at 6 (citing *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020)).

The Judge contacted the parties and informed them of his inability to approve the proposed settlement, based on the lack of any justification for the proposed S&S removals. In response, the parties requested that the Judge enter an order denying the settlement motion so that the Secretary could move for interlocutory review.

The Judge issued an order denying the motion to approve settlement on the basis that the parties had provided no justification in support of the proposed S&S modifications. Unpublished Order dated Oct. 31, 2022 ("Order"). He held that parties must provide justifications in support of the proposed modifications for each violation, so that the Judge may set forth reasons for his approval when reviewing settlements. *Id.* at 2. He rejected the Secretary's claim of unfettered discretion to modify a citation's S&S designation, finding the two cases relied upon by the Secretary to be inapposite. *Id.* at 3 (noting that both *Am. Aggregates*, 42 FMSHRC 570, and *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996), address a Judge's authority to add an S&S designation rather than the Secretary's authority to delete an existing S&S designation). The Judge certified the matter for interlocutory review and stayed the proceedings pending the decision on interlocutory review.

The Commission granted interlocutory review on the issue of "whether the Secretary has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 USC 820(k)." 44 FMSHRC 709 (Dec. 2022).

II.

Secretary's Arguments

The Secretary filed her appeal in this case prior to the Commission issuing decisions in *Knight Hawk* and *Greenbrier* and she makes essentially the same arguments in the instant case as she did in those cases.[4] The Secretary asserts that she has unreviewable prosecutorial discretion to remove an S&S designation because S&S designations are "enforcement decisions," and not "penalties," under the language of section 110(k). S. Br. at 1, 9-11. The Secretary cites to the Commission's decisions in *Mechanicsville Concrete* and *American Aggregates* to support her position that she has discretion to vacate S&S designations in settlements. S. Br. at 3-5, 9. Finally, the Secretary argues that the role of the Commission is limited to adjudicating disputes, and that other considerations support the Secretary's unreviewable discretion to remove S&S designations, such as fairness to operators, public confidence in Mine Act enforcement, and the Equal Access to Justice Act ("EAJA"). *Id.* at 14-15, 16-20.

III.

Disposition

A. The Secretary does not have unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k).

For the reasons set forth below and as stated more fully in *Knight Hawk*, we hold that sections 110(k) and 110(i) of the Mine Act, 30 U.S.C. §§ 820(k) and 820(i), demonstrate an intent to circumscribe the Secretary's enforcement discretion, and that they supply a meaningful standard of review to evaluate the Secretary's removal of S&S designations in settlement proceedings.

Agency decisions not to enforce, including an agency's decision to settle, are generally committed to the agency's discretion, and are therefore presumptively unreviewable. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see, e.g.*, *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459-60 (D.C. Cir. 2001). However, this presumption of unreviewability may be overcome if the relevant statute "has indicated an *intent to circumscribe* agency enforcement discretion, and has provided *meaningful standards* for defining the limits of that discretion." 470 U.S. at 834 (emphasis added).

The Commission has held that, in the settlement context, section 110(k) provides an exception to the general rule of unreviewability. Section 110(k) expressly curtails the Secretary's authority to settle a case. As stated in *American Coal Co.*, 38 FMSHRC 1972, 1980 (Aug. 2016) ("*AmCoal I*"), "[s]ection 110(k) is an explicit expression of Congressional authorization that rebuts any presumption of unreviewability" under *Heckler*.

[4] The operator did not file a response brief.

As to the scope of the intended circumscription, a review of the language of the Mine Act, the legislative history, comparisons to other health and safety statutes, and practical considerations all signal an expansive role for the Commission. This includes the authority to review S&S removals in citations within settlements as a necessary component of its settlement review authority. In reaching this holding, we do not grant the Commission any new settlement review authority beyond that of *AmCoal I* and *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*"). 46 FMSHRC at 567.

With respect to the language of section 110(k), the inclusion of the terms "compromised," "mitigated," and "settled" indicates a Congressional intent for Judges to apply a holistic approach to reviewing settlements. The fact that Congress chose these words instead of using narrower language specifying that a penalty amount may not be lowered without Commission approval demonstrates that Judges must be able to review more than the mere settlement of civil penalty dollar figures. Congress' choice of broad language demonstrates that penalties are closely intertwined with the allegations set forth in citations in settlement proceedings.

Our reading of section 110(k) is consistent with previously announced interpretations of the Mine Act. For instance, the Commission has recognized that Judges must "accord due consideration to the *entirety* of the proposed settlement package, including *both its monetary and nonmonetary aspects*." *See, e.g.*, *AmCoal II*, 40 FMSHRC at 989 (emphases added). During settlement review, a Judge cannot be limited to looking solely at discrete penalty dollar amounts. Judges may look at compromises of the citation's allegations, and those compromises may impact the penalty amount or have other legal consequences.[5]

The legislative history and policy considerations of section 110(k) reinforce the need for Commission review of the Secretary's removal of S&S designations in settlement proceedings. As we have previously recognized, Congress unquestionably delegated to the Commission the power to administer section 110(k) by granting the Commission the authority to review *all* settlements of citations under the Act. *See AmCoal I*, 38 FMSHRC at 1976. Congress explained that section 110(k) was intended to assure that prior abuses involved in the unwarranted lowering of penalties, because of off-the-record negotiations, would be avoided by providing for independent Commission settlement review. S. Rep. No. 95-181, at 44, *reprinted in* Senate Subcommittee on Labor, Committee on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632–33 (1978). Section 110(k) serves to maintain the deterrent effect of violations and penalties, in part by preventing the Secretary from abusing her authority to settle such violations without appropriate justification. *See AmCoal I*, 38 FMSHRC at 1976 (citing S. Rep. No. 95-181, at 44). The Commission cannot effectively review the Secretary's reduction of a penalty without examining the factors that go

[5] For example, the decision to vacate the S&S designations for certain citations may affect whether the mine could be further considered by the Secretary to have demonstrated a "pattern of violations." *See* 30 U.S.C. § 814(e)(1) (providing that if an operator has a pattern of S&S violations it shall be given written notice that such pattern exists). The issuance of a pattern of violations notice provides the Secretary with enhanced enforcement authority, including the ability to issue withdrawal orders for future S&S violations of safety standards at the mine.

into it. This underscores the importance of a meaningful, all-encompassing review by the Commission that goes beyond mere dollar amounts.

As the Commission recognized in *Knight Hawk*, Congress' intent is further reinforced by a comparison of the Mine Act to the Occupational Safety and Health Act ("OSH Act"). 46 FMSHRC at 568-69. The OSH Act provides that the Secretary is *authorized* to take such actions to compromise, mitigate, or settle *without approval* by the Occupational Safety and Health Review Commission ("OSHRC"). However, in the Mine Act – which was passed seven years later – Commission approval is required. *Compare* 29 U.S.C. § 655(e) *with* 30 U.S.C. § 820(k). As with the Mine Act's legislative history, this comparison between the language of the statutes elucidates Congress' intent, in drafting the Mine Act, to avoid the abuses arising from off-the-record negotiations by the Secretary, by envisioning a greater role for the Commission under the Mine Act.

Practical and common-sense considerations support an interpretation of the statute that grants broad authority to the Commission to approve or deny settlement motions. Here, during a settlement proceeding, the Secretary's removal of citations' S&S designations resulted in a reduced penalty amount. Whether the penalty amount is appropriate cannot be properly determined without consideration of how other changes to the citations impact the penalty.

As to the requirement for the provision of a meaningful standard, in *Knight Hawk*, we held that sections 110(i) and 110(k) provide a "judicially manageable standard . . . for judging how and when [the Secretary] . . . should exercise [her] discretion" in removing S&S designations in settlement proceedings. 46 FMSHRC at 570 (quoting *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 317 (4th Cir. 2008) (other citations omitted)). Section 110(i) provides a judicially manageable standard by setting forth the six penalty factors that the Commission must consider in assessing a penalty. Although section 110(i) does not explicitly reference S&S, it does require consideration of evidence of the "gravity" of the violation. The Commission has held that gravity and S&S, although not identical, are "based frequently upon the same or similar factual circumstances." *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n. 11 (Sept. 1987), *citing* 30 U.S.C. §§ 820(i), 814(d). S&S is essentially the interplay between the "likelihood" and "severity" components of "gravity" in the Mine Act and its related regulations. *See, e.g.*, 30 C.F.R. § 100.3, Tables XI, XII. In short, the Commission's review of the Secretary's decision to remove an S&S designation is not arbitrary but is instead guided by the statutory language in section 110(i) regarding gravity.

In addition to section 110(i), the Commission has interpreted section 110(k) to require settlements to be "fair, reasonable, appropriate under the facts, and [to] protect[] the public interest." *AmCoal I*, 38 FMSHRC at 1976. This standard also applies with respect to the Secretary's decision to remove an S&S designation. Accordingly, as we held in *Knight Hawk*, the *Heckler* presumption of unreviewability for the Secretary has been overcome. *Knight Hawk*, 46 FMSHRC at 571 (citing *Heckler*, 470 U.S. at 834).

We reiterate that neither *Mechanicsville* nor *American Aggregates* support the Secretary's position in this case that S&S determinations made in the context of a settlement are presumptively unreviewable "enforcement decisions." 46 FMSHRC at 571.

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

Meanwhile, in *American Aggregates*, the Commission reversed the Judge's denial of a settlement, including the removal of the S&S designation, solely because the Judge had failed to consider the relevant justification provided. 42 FMSHRC at 576–79. Nothing in that case supports the parties' broad, sweeping position that the Secretary's decision to remove an S&S designation in a settlement constitutes unreviewable prosecutorial discretion.

In sum, we conclude that sections 110(k) and 110(i) of the Mine Act demonstrate an intent to circumscribe the Secretary's enforcement discretion and that they supply a meaningful standard of review to evaluate the Secretary's removal of S&S designations in settlement proceedings. We find unpersuasive the Secretary's arguments to the contrary.[6]

B. Parties must provide justification to support the removal of an S&S designation in a settlement motion.

Long-standing Commission caselaw holds that Commission Judges must review all settlements of citations, and parties seeking approval of a proposed settlement must therefore provide supporting justifications sufficient for the Judge to determine whether the proposed terms are fair, reasonable, appropriate under the facts, and protective of the public interest. *AmCoal I*, 38 FMSHRC at 1981; *AmCoal II*, 40 FMSHRC at 987-88. For the reasons above, this basic premise holds true for the removal of S&S designations in the settlement context. *Knight Hawk*, 46 FMSHRC at 566 (S&S removals in the settlement context are subject to Commission review and "parties must provide sufficient reasoning and justification to support the removal of an S&S designation in a settlement motion").

Here, the Secretary provided *no justification* to support the proposed removal of the S&S designations for Citation Nos. 9562449 and 9562452, instead relying solely on a claim that she had "exercised discretion" to justify the modification. Settl. Mot. at 6. The Judge rejected the Secretary's claim of unfettered discretion, and consistent with our long-standing caselaw, denied the motion based on the Secretary's failure to provide any support for the proposed S&S

[6] As in *Knight Hawk*, we reject the Secretary's argument that the Act's split-enforcement scheme precludes Commission review of the Secretary's S&S decisions during settlement proceedings. 46 FMSHRC at 573-74. We further hold that the Secretary's remaining policy arguments relying on fairness to operators, public confidence in Mine Act enforcement, and EAJA considerations are not sufficiently compelling reasons to withhold Commission review of S&S removals in settlements. *Id.* at 574-75.

removals. Ord. at 2. The Judge did not abuse his discretion in denying the settlement. *AmCoal I*, 38 FMSHRC at 1984-85; *Knight Hawk*, 46 FMSHRC at 566.

IV.

Conclusion

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

Distribution:

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420-N4430
Washington, DC 20210
Scott.Emily.T@dol.gov

April Nelson, Esq.
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420-N4430
Washington, DC 20210
Nelson.April@dol.gov

Christopher D. Pence, Esq.
Pence Law Firm PLLC 10 Hale Street, 4th Floor
PO Box 2548
Charleston, WV 25329
cpence@pencefirm.com

Chief Administrative Law Judge Glynn F. Voisin
Office of the Chief Administrative Law Judge
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue NW, Suite 520N
Washington DC 20004-1710
gvoisin@fmshrc.gov

Administrative Law Judge Michael G. Young
Office of the Chief Administrative Law Judge
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue NW, Suite 520N
Washington DC 20004-1710
myoung@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@DOL.GOV

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 2, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. SE 2024-0113 A.C. No. 38-00612-587965
BLANCHARD MACHINERY CO.	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 22, 2024, the Commission received from Blanchard Machinery Company ("Blanchard") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 2, 2023, and became a final order of the Commission on December 4, 2023.

Blanchard asserts that it never received the proposed assessment. The operator states that it received a delinquency notice from MSHA on January 23, 2024. On January 25, Blanchard's outside counsel obtained a copy of the proposed assessment from MSHA's Office of Assessments, and attempted to file a penalty contest the next day. However, on January 30, MSHA indicated that the contest was untimely and could not be accepted. In further investigating the matter, Blanchard discovered that the proposed assessment had been sent to the attention of Richard Trotter, whose duties do not include mining operations or safety and health, and was signed for by "M. Carey" on November 2. Blanchard has not employed anyone by that name. Blanchard contacted its third party carrier, who stated that although it once had an employee named "Mike Carey," that person had not worked for the carrier since 2022. Blanchard has updated its contact information with MSHA to include its General Counsel as a recipient for all notifications in order to ensure that this situation does not happen again.

The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Blanchard's request and the Secretary's response, we find that an inadvertent mistake occurred with an unknown person signing for the assessment. *See Robinson Nevada Mining Co.*, 46 FMSHRC 661, 662 (Aug. 2024) (reopening when unknown person signed for assessment). In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

Commissioner Marvit, concurring:

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

In *Explosive Contractors*, 46 FMSHRC __, No. CENT 2024-0122 (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 __, slip op. at 3, No. WEVA 2024-0036 (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

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

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

Distribution:

Arthur M. Wolfson
Fisher & Phillips LLP
6 PPG Place, Suite 830
Pittsburgh, PA 15222
awolfson@fisherphillips.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 6, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BLANCHARD MACHINERY CO.	Docket No. SE 2024-0113 A.C. No. 38-00612-587965

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

AMENDED ORDER

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 22, 2024, the Commission received from Blanchard Machinery Company ("Blanchard") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 2, 2023, and became a final order of the Commission on December 4, 2023.

Blanchard asserts that it never received the proposed assessment. The operator states that it received a delinquency notice from MSHA on January 23, 2024. On January 25, Blanchard's outside counsel obtained a copy of the proposed assessment from MSHA's Office of Assessments, and attempted to file a penalty contest the next day. However, on January 30, MSHA indicated that the contest was untimely and could not be accepted. In further investigating the matter, Blanchard discovered that the proposed assessment had been sent to the attention of Richard Trotter, whose duties do not include mining operations or safety and health, and was signed for by "M. Carey" on November 2. Blanchard has not employed anyone by that name. Blanchard contacted its third party carrier, who stated that although it once had an employee named "Mike Carey," that person had not worked for the carrier since 2022. Blanchard has updated its contact information with MSHA to include its General Counsel as a recipient for all notifications in order to ensure that this situation does not happen again.

The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Blanchard's request and the Secretary's response, we find that an inadvertent mistake occurred with an unknown person signing for the assessment. *See Robinson Nevada Mining Co.*, 46 FMSHRC 661, 662 (Aug. 2024) (reopening when unknown person signed for assessment). In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ 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 __, No. CENT 2024-0122 (Dec. 4, 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 __, slip op. at 3, No. WEVA 2024-0036 (Dec. 5, 2024) (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

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

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

Distribution:

Arthur M. Wolfson
Fisher & Phillips LLP
6 PPG Place, Suite 830
Pittsburgh, PA 15222
awolfson@fisherphillips.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 6, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEST 2023-0348 A.C. No. 45-03710-581640
v.	
L ROCK INDUSTRIES, INC.	

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

ORDER

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 27, 2024, the Commission received from L Rock Industries, Inc. ("L Rock") a motion seeking to reopen a penalty assessment and relieve it from the Default Order entered against it.

On October 16, 2023, the Chief Administrative Law Judge issued an Order to Show Cause in response to L Rock's perceived failure to answer the Secretary of Labor's August 15, 2023 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a default on November 16, 2023, when it appeared the operator had not filed an answer within 30 days.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission. MSHA mailed the operator a delinquency notice on July 5, 2023.

L Rock seeks to reopen this matter, claiming that it mailed a request for a conference, but that it appears that it was not received.[1] The operator also submits that there has been confusion with receiving mail from the Department of Labor's Mine Safety and Health Administration ("MSHA") because the company has a new owner. L Rock states that although it filed a legal identity report, it is still receiving mail at previous addresses.

[1] Per the Chief Judge's order, an answer should have been filed with the Commission to avoid default. The Commission has no record of receiving a request for conference or anything approximating an answer to the civil penalty petition.

The Secretary opposes L Rock's request to reopen the assessment, asserting that L Rock has not established good cause for its failure to contest the penalties. The Secetary contends that the penalty petition and show cause order were served to L Rock at the address listed on its legal identity report, and that a new legal identity report has not been filed since May 2015. She notes that a conference was scheduled by MSHA and held with the operator on June 21, 2023. The Secretary also asserts that L Rock has provided a vague or cursory explanation. Although the operator stated that it mailed a request for a conference and that there has been confusion in receiving mail from MSHA, L Rock failed to explain in detail why it failed to timely answer the petition or show cause order.[2] The Secretary further asserts that L Rock has an inadequate or unreliable internal procedure, as evidenced in part by a previous failure to timely file an answer or respond to show cause orders.

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

A party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely respond. *Revelation Energy, LLC*, 40 FMSHRC 375, 375-76 (Mar. 2018). General assertions or conclusory statements are insufficient. *Southwest Rock Prod., Inc.*, 45 FMSHRC 747, 748 (Aug. 30, 2023); *B & W Res., Inc*., 32 FMSHRC 1627, 1628 (Nov. 2010). At a minimum, the applicant must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010).

[2] The Order to Show Cause was served by the Chief Judge to the operator at the new owner's postal address. A courtesy copy was also mailed to the operator's current email address.

Here, L Rock provides vague statements it had requested a conference, and that there was confusion in receiving mail from MSHA, without identifying the error or the cause of the neglect for why it failed to answer the petition or the show cause order. The operator also fails to specify what steps it has taken to ensure the error does not recur. *See, e.g., KC Transport, Inc.*, 43 FMSHRC 79 (Jan. 2021) (granting reopening, in part, because the operator had taken steps to improve its internal processing systems).

Having reviewed L Rock's request and the Secretary's response, we find that the operator has not provided sufficient explanation to justify reopening the captioned proceeding.

Accordingly, we deny L Rock's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/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 __, No. CENT 2024-0122 (Dec. 4, 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. 30 U.S.C. § 815(a). 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 __, slip op. at 3, No. WEVA 2024-0036 (Dec. 5, 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 operator failed to answer the Judge's Order to Show Cause and it became a final decision under the Act. Similar to section 105(a), the Act here provides a clear directive on the grounds for review of a final decision. 30 U.S.C. § 823(d)(1)-(d)(2)(A)(i). The Commission declined to exercise its authority to review the decision within the period allowed. As such, I do not believe that Rule 60(b) should be invoked under these circumstances either, similar to my reasoning in the cases cited above. 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

Distribution:

John Bredfield
L Rock Industries, Inc.
P.O. Box 850
Castle Rock, WA 98611
lrockindustries@gmail.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 6, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. TATA CHEMICALS SODA ASH PARTNERS, LLC	Docket No. WEST 2024-0151 A.C. No. 48-00155-591498

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

AMENDED ORDER

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (2018) ("Mine Act"). On March 4, 2024, the Commission received from Tata Chemicals Soda Ash Partners, LLC ("Tata") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment for 32 penalties in the sum of $18,975 was delivered to the Post Office where the operator receives mail on January 12, 2024. On February 8, 2024, the operator made a timely partial payment in the amound of $13,385.[1] The unpaid penalties became a final order of the Commission on February 12, 2024. On March 29, 2024, MSHA sent Tata a delinquency notice.

Tata asserts that it retrieves mail from the Post Office on Tuesdays and Thursdays and then distributes the mail to its Safety Manager, who determines whether to pay or contest proposed civil penalties. The operator contends that, although the proposed assessment was delivered to the Post Office on January 12, it did not retrieve the assessment until the following Tuesday, January 16, 2024. Tata believed that it had 30 days from January 16, or until February 15, to contest the proposed assessment. It explains that it inadvertently missed the contest deadline by one day due to an "administrative oversight." MTR at 3.

The Secretary opposes the motion to reopen. She submits that the proposed assessment was sent to the operator's address of record and signed for on January 12. The Secretary argues that the 30-day period for contest began to run on January 12. She notes that regardless of whether the due date was February 11 or 15, the operator missed the deadline, and its asserted reason of administrative oversight is too vague to justify reopening.

Tata subsequently filed a statement in support of its motion, explaining that its administrative error was a simple miscalculation of days upon receiving the assessment. It further explains that mail is not delivered to the mine's office, and that the nearest Post Office is 24 miles from the mine's office. [2]

As the Secretary notes, the proposed assessment was delivered to the operator's address of record and signed as having been received on January 12, 2024. Accordingly, the operator was required to have filed a contest by February 11, 2024, and its contest was five days late.

An operator seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief. In addition to providing all known details, including relevant dates and

[1] MSHA applied the payment toward 24 of the 32 violations, including toward the citations whose penalties Tata seeks to reopen. The Secretary states that the payment was an administrative function and not the result of Tata's intent to pay those penalties specifically. Thus, such payment does not render the motion to reopen moot.

[2] On October 27, 2024, the Secretary filed a letter with the Commission pursuant to Federal Rule of Appellate Procedure 28(j). In the letter the Secretary noted that the Commission recently denied reopening in *Georgetown Sand & Gravel, LLC*, 46 FMSHRC 812 (Sept. 2024), which involved facts similar to the subject facts. Tata responded to the Secretary's letter, stating that its administrative oversight caused the late filing, and that its mistake was in good faith and not due to inadequate or unreliable internal processing.

We hereby accept the operator's supplemental statement, the Secretary's Rule 28(j) letter, and Tata's response to the letter as part of the record.

persons involved, the operator must provide a clear explanation that accounts for the operator's failure to timely contest the assessment. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010).

In *Georgetown*, cited by the Secretary, the Commission found the operator failed to explain why its contest was untimely and denied the motion to reopen without prejudice. 46 FMSHRC at 813. In so doing, the Commission explained that denying without prejudice meant that "the operator may refile the motion with additional information." *Id.* In contrast, here the operator provided information, through a supplemental filing, explaining that that when it received the proposed assessment, it simply miscalculated the date that the contest was due.

The Secretary has not alleged that Tata has acted in bad faith. On the contrary, the operator timely paid penalties it chose not to contest, and promptly filed its motion to reopen upon learning that it had failed to timely contest the remaining penalties. *See Western Refractory Constr., Inc.*, 46 FMSHRC ___, slip op. at 2, No. CENT 2023-0191 (Oct. 17, 2024) (reopening where Secretary did not allege bad faith and the operator promptly filed its motion). Moreover, the operator has not filed a motion to reopen during the past ten years.

In the past, we have found simple failure to return a contest form to constitute "mistake" or "inadvertence" sufficient to establish good cause for reopening pursuant to Rule 60(b)(1). *See, e.g., Oak Grove Res., LLC*, 39 FMSHRC 1768, 1769 (Sept. 2017) (reopening where operator paid citations it did not intend to contest but "mistakenly" or "inadvertently" forgot to forward contest form to counsel, which was an isolated incident). Because Tata may have reasonably relied on our prior caselaw regrading simple failure to return contest forms, we find it would be unjust to deny this motion. Miscalculating the due date for the contest is a simple mistake. However, we will look on all future accidental failures to timely file contests with greater scrutiny.

Therefore, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

Commissioner Marvit, dissenting:

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

In *Explosive Contractors*, 46 FMSHRC __, No. CENT 2024-0122 (Dec. 4, 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 __, slip op. at 3, No. WEVA 2024-0036 (Dec. 5, 2024) (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

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

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

Distribution:

Peter S. Gould
Cole A. Wist
SQUIRE PATTON BOGGS (US) LLP
717 17th St., Suite 1825
Denver, CO 80202
Peter.gould@squirepb.com
Cole.wist@squirepb.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 15, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. SE 2024-0080 A.C. No. 40-03530-531187
v.	Docket No. SE 2024-0081 A.C. No. 40-03530-534568
POTTER SOUTH EAST, LLC	Docket No. SE 2024-0082 A.C. No. 40-03530-582391

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

ORDER

BY: Jordan, Chair, and Baker, Commissioner

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act").[1] On January 23, 2024, Potter South East, LLC, ("Potter") filed a motion to reopen the three above-captioned cases which had become final orders 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).

[1] The Commission hereby consolidates these above-captioned matters pursuant to Commission Procedural Rule 12 because they are "proceedings that involve similar issues." 29 C.F.R. § 2700.12.

Potter filed a *pro se* motion to reopen the proceedings which simply states: "[t]he amount of the assessment penalty was a total surprise to us, as we have implemented procedures to prevent and correct every situation that may have resulted in a citation." Mot. at 1.

The Secretary of Labor filed a motion in opposition, arguing that Potter's motion fails to fulfill its burden to explain why it did not timely contest the penalties and to explain its delay in seeking reopening after receiving delinquency notices.[2] She further contends that Potter's repeated record of failures to timely contest penalty assessments in prior cases indicates an inadequate or unreliable internal processing system.

The Commission requires that, at a minimum, a motion to reopen "must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure." *Noranda Alumina, LLC,* 39 FMSHRC 441, 443 (Mar. 2017) (citing *Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010).

Potter's terse motion is deficient as it neither alleges good cause for reopening under Rule 60(b) nor provides a factual accounting for Potter's failure to timely contest the penalties. *See, e.g.*, *Copenhaver Constr., Inc*., 43 FMSHRC 113 (Mar. 2021) (denying a motion as "deficient on its face" because it did not assert a reason justifying relief pursuant to Rule 60(b)).[3]

Finally, with respect to the assessments associated with Docket Nos. SE 2024-0080 and SE 2024-0081, the motion to reopen was filed more than one year after the final order was

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[2] Docket No. SE 2024-0080 concerns five citations and became a final order on April 19, 2021. On June 4, 2021, the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA") sent Potter a delinquency notice for the penalties. Almost one year later, on June 1, 2022, MSHA received a partial payment from Potter which it applied to three of the citations at issue.

Docket No. SE 2024-0081 concerns four citations and became a final order on June 14, 2021. MSHA sent Potter a delinquency notice on July 30, 2021. On April 14, 2022, MSHA received partial payment in the amount of $285.65 for one citation.

Docket No. SE 2024-0082 concerns one citation and became a final order on September 18, 2023. MSHA sent Potter a delinquency notice on November 2, 2023.

[3] Furthermore, it is well recognized that a movant's good faith or lack thereof is an important factor in determining whether good cause exists to reopen a final order. *See, e.g.*, *Stone Zone*, 41 FMSHRC 272, 274 (June 2019) (citations omitted). Some of the factors relevant to the good faith analysis are the number of delinquent penalties outstanding, the period of time the delinquent penalties accrued, and the seriousness of the citations underlying the aforementioned penalties. *Kentucky Fuel Corp*., 38 FMSHRC 632, 633 (Apr. 2016); *see also Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011). Since only December 2021, Potter has accumulated five delinquent penalty assessments that have been referred to the Department of Treasury, which involve 38 unpaid penalties totaling almost $35,000. *See* Sec'y Mot. Opp., Attachment I.

entered. Under Rule 60(c)(1) of the Federal Rules of Civil Procedure, any motion for relief from a final order pursuant to Rule 60(b) must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. *See, e.g.*, *Carmeuse Lime & Stone*, 33 FMSHRC 1783, 1784 (Aug. 2011).

Furthermore, Potter's repeated failures to timely contest prior penalty assessments indicate an inadequate or unreliable internal processing system. Its previous reopens, docketed under SE 2022-0204, SE 2022-0205, SE 2022-0206, SE 2022-0207, and SE 2022-0208, were filed with the Commission on September 1, 2022. The Secretary responded with an opposition on September 16, 2022, and the Commission rendered a decision consolidating the dockets and denying the five motions to reopen "with prejudice" on March 22, 2023.

The Commission has recognized that repeated motions to reopen may indicate an inadequate or unreliable internal processing system. *Morton Salt, Inc*., 46 FMSHRC 15, 17 (Jan. 2024); *see Marfork Coal Co*., LLC, 45 FMSHRC 463, 464–65 (June 2023) (denying a motion to reopen where the operator was on notice of inadequate processes but failed to six them). Repeated failures to file timely contests are construed as inadequate or unreliable internal procedures that do not constitute an adequate excuse.

Potter's repeated failures to timely contest penalties shows that it has inadequate and unreliable procedures. The same rationale, *verbatim*, used in Potter's previous motions to reopen is being used in this motion, with only the case numbers being changed. Because Potter is filing the same reopen as it previously did on September 1, 2022, and as the Commission stated in its decision for that reopen, "Potter's terse motion is deficient as it neither alleges good cause for reopening under Rule 60(b) nor provides a factual accounting for Potter's failure to timely contest the penalties." *Potter South East, LLC*, 45 FMSHRC 152, 154 n.3 (Mar. 2023) (denying a motion to reopen), Potter's current motion to reopen reflects its inadequate or unreliable internal procedures.

For all the aforementioned reasons, Potter's motion is DENIED with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/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 __, No. CENT 2024-0122 (Dec. 4, 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." *Belt Tech, Inc*., 46 FMSHRC __, No. WEVA 2024-0036 (Dec. 5, 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 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

Distribution:

Dwayne Potter
Owner
Potter South East, LLC
P.O. Box 304
Huntsville, TN 37756
pottersoutheastllc@gmail.com

Emily Toler Scott, Esq.
Counsel, Appellate Litigation
Division of Mine Safety and Health
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue NW, Suite N4420 – N4430
Washington, DC 20210
Scott.Emily.T@dol.gov

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420 – N4430
Washington, DC 20210
Nelson.April@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Office of the Chief Administrative Law Judge
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 15, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. GREENBRIER MINERALS, LLC	Docket No. WEVA 2024-0163 A.C. No. 46-09319-590383

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

ORDER

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 1, 2024, the Commission received from Greenbrier Minerals, LLC ("Greenbrier") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 11, 2023, and became a final order of the Commission on January 10, 2024. The following day, Greenbrier filed its contest of the assessment. Greenbrier subsequently received a letter from MSHA

informing Greenbrier that the contest for the assessment had been untimely filed. On January 12, 2023, MSHA received partial payment of the assessment.

Greenbrier seeks to reopen the assessment so that it may contest three citations.[1] Greenbrier maintains that its safety specialist missed the deadline to submit the contest of the assessment due to excusable neglect and extraordinarily difficult circumstances, including being busier than normal, the passing of the Safety Manager's mother, and being short-staffed. This resulted in the contest being filed one day after the deadline to contest the assessment. The Secretary of Labor does not oppose the request to reopen.

We note that the motion to reopen was timely filed. The Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed on February 1, 2024, within 30 days of the final order of January 10, 2024. Therefore, the motion to reopen was filed within a reasonable amount of time.

Having reviewed Greenbrier's request and the Secretary's response, we find that Greenbrier has demonstrated good cause for its failure to timely respond and acted in good faith by timely filing its request to reopen. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

[1] The operator states that it is in the process of paying the full amount of the proposed assessment but maintains that any payment of these citations is made merely to avoid any potential delinquencies and does not waive its right to contest these three citations. Motion to Reopen, at 2 n.1. Commissioner Baker has previously stated that it is his position that the accidental payment of a civil penalty does not constitute excusable neglect. *See, e.g., Omya, Inc.*, 45 FMSHRC 131 (Mar. 2023). However, in light of the operator's explanation for its payment of the civil penalty, Commissioner Baker would determine that in the instant case payment was not the result of an inadequate or unreliable internal processing system.

Commissioner Marvit, dissenting:

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

In *Explosive Contractors*, 46 FMSHRC __, No. CENT 2024-0122 (Dec. 4, 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 __, slip op. at 3, No. WEVA 2024-0036 (Dec. 5, 2024) (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

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

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

Distribution:

Lorna M. Waddell, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501
lorna.waddell@dinsmore.com

Tom Canterbury
Manager of Safety
P.O. Box 446
Man, WV 25635
Tom.canterbury@coronadous.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420 – N4430
Washington, DC 20210
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420 – N4430
Washington, DC 20210
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Office of the Chief Administrative Law Judge
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 17, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), o/b/o ROBERT BAUMANN	Docket No. CENT 2023-0251-DM
v.	
MOSENECAMANUFACTURER, LLC d/b/a AMERICAN TRIPOLI	

ORDER

The Commission directed review of this matter *sua sponte* on June 18, 2024, then granted the Petition for Discretionary Review filed by MOSenecaManufacterer, LLC, *d/b/a/* American Tripoli ("American Tripoli") on June 27, 2024.

American Tripoli subsequently filed a motion entitled "Motion to Cease and Desist Enforcement Actions Pending Final Judgment." The operator's arguments relied on purported cases such as "*Secretary of Labor, MSHA v. Contestant*" and "*Mohammed v. Garland*." Mot. at 2. Following several attempts to locate these cases, the Commission determined that the cases relied upon by the operator could not be identified based on the incomplete information provided, and ordered American Tripoli to submit copies of the relevant cases by December 6, 2024.[1] Unpublished Order dated Nov. 22, 2024.

American Tripoli did not respond. Accordingly, on December 23, 2024, the Commission ordered the operator to show cause why the proceeding should not be dismissed. The Commission directed American Tripoli to explain its failure to respond to the previous Order, and explicitly placed the operator on notice that continued failure to comply with Commission Orders could result in the Commission vacating the directions for review and dismissing this proceeding. 46 FMSHRC __, No. CENT 2023-0251 (Dec. 23, 2024), *citing, e.g.*, *Broken Hill Mining Co., Inc.*, 18 FMSHRC 679 (May 1996).

American Tripoli filed a response on January 9, 2025. The filing offers *no* explanation for the operator's failure to timely respond to the Commission's November Order. Accordingly, American Tripoli has not shown good cause why the proceeding should not be dismissed. *See, e.g.*, *Coal-Mac LLC*, 46 FMSHRC 33 (Jan. 2024) (operator failed to show good cause where it offered no explanation for its failure to timely answer the Secretary's petition); *Earl Begley, employed by Manalapan Mining Co., Inc.*, 22 FMSHRC 629 (May 2000) (miner failed to show good cause where he offered no explanation for his failure to timely file a petition for review).

[1] The Commission noted that American Tripoli's previous filings also appeared to contain incorrect or incomplete case citations. Order at 1 n.1 (Nov. 22, 2024).

Additionally, American Tripoli *still* has not provided copies of the cases upon which it purportedly relied. Instead, the operator asserts that the "lack of proper citations" in the Motion was an "oversight" and summarizes five new cases purportedly relevant to the proceeding.[2] Resp. at 1, 2-4. American Tripoli has apparently chosen to abandon the cases upon which it initially relied rather than attempting to support their legitimacy or existence. Notably, American Tripoli asserts that it has attached "verified case law citations and documentation" for the *new* cases upon which it now purports to rely (Resp. at 5) but has failed to provide any such attachments.

The Commission ordered American Tripoli to establish the legitimacy of the cases upon which it purportedly relied by providing copies. The operator failed to do so. The Commission then ordered American Tripoli to explain its failure to comply with the Commission's previous order. The operator again failed to do so. Accordingly, the Commission concludes that the operator fabricated cases in its filings to the Commission. In light of the foregoing considerations, the directions for review in this matter are hereby **VACATED**, and this proceeding is **DISMISSED**.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

[2] One such case is *Broken Hill Mining Co., Inc.*, 18 FMSHRC 679 (May 1996), which we cited in our December Show Cause Order. The Commission in that case vacated review and dismissed the proceeding for want of prosecution where the operator failed to file an opening brief and was not reachable, and yet American Tripoli cites the case for the proposition that "leniency is warranted." Resp. at 3.

Distribution List:

Russell Tidaback
Jordan Tidaback
American Tripoli
222 Oneida Street
Seneca, MO 64865
Russell.Tidaback@AmericanTripoli.com
RTidaback@deedyco.com

Russell Tidaback
2701 East Grauwyler Road, Bldg. 1, Dept. #1008
Irving, TX 75061
Russell.Tidaback@deedyco.com

Robert Baumann
baumannr24@gmail.com

Laura O'Reilly, Esq.
U.S. Department of Labor
2300 Main Street, Suite 10100
Kansas City, MO 64108
oreilly.laura.m@dol.gov

Quinlan B. Moll, Esq.
U.S. Department of Labor
2300 Main St., Suite 10100
Kansas City, MO 64108
Moll.Quinlan.B@dol.gov

Elaine M. Smith, Esq.
U.S. Department of Labor
2300 Main St., Suite 10100
Kansas City, MO 64108
smith.elaine.m@dol.gov

Susannah M. Maltz, Esq.
U.S. Department of Labor
Office of the Solicitor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420 – N4430
Washington, DC 20210
maltz.susannah.m@dol.gov

Marcus D. Reed, Esq.
U.S. Department of Labor
Office of the Solicitor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420 – N4430
Washington, DC 20210
Reed.Marcus.D@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
U.S. Department of Labor
Office of the Solicitor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420 – N4430
Washington, DC 20210
scott.emily.t@dol.gov

April Nelson, Esq.
Associate Solicitor
U.S. Department of Labor
Office of the Solicitor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420 – N4430
Washington, DC 20210
Nelson.April@dol.gov

Melanie Garris
U.S. Department of Labor
Office of Civil Penalty Compliance
Mine Safety and Health Review Commission
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov

Administrative Law Judge William B. Moran
Federal Mine Safety and Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
wmoran@fmshrc.gov

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety & Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202 434-9987 / Fax 202 434-9949

January 10, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), obo TIMOTHY BARNES, Complainant v. WARRIOR MET COAL MINING, LLC, Respondent	DISCRIMINATION PROCEEDING Docket No. SE 2021-0152 MSHA No. SE-MD-2021-01 Mine: No. 7 Mine Mine ID: 01-01401
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), obo BRANDON HALL, Complainant v. WARRIOR MET COAL MINING, LLC, Respondent	DISCRIMINATION PROCEEDING Docket No. SE 2021-0155 MSHA No. SE-MD-2021-01 Mine: No. 7 Mine Mine ID: 01-01401

JOINT DECISION AND ORDER

These consolidated cases are before me upon separate complaints of discrimination brought by the Secretary of Labor ("Secretary") on behalf of miners Timothy Barnes and Brandon Hall (together "the Complainants") under 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c). The complaints are against Warrior Met Coal Mining, LLC ("Warrior Met," "WMC," or "Respondent"), for unlawfully disciplining the two men and terminating their employment at Warrior Met's No.7 Mine in Tuscaloosa County, Alabama.

A hearing was held in Birmingham, Alabama, at which the Secretary, Respondent, and the miners were represented and presented testimony and documentary evidence. After considering the evidence presented and the parties' subsequent arguments, for the reasons set forth herein, I conclude that Warrior Met's discipline and eventual termination of the two miners was motivated by their protected activity and thus violated section 105(c). I also grant in part the relief requested by the Secretary.

I. INTRODUCTION

The events and hearing in this case took place in the months immediately leading up to and amidst the strike against Warrior Met at its Alabama mines by its unionized miners. Mine Act-related disputes surrounding the strike and its aftermath between labor, management, and the Secretary have resulted in a considerable number of section 105(c) proceedings before the Commission. *See, e.g. Warrior Met Coal Mining, LLC*, 45 FMSHRC 983 (Nov. 2023) (ALJ) (interference proceedings).

Miners Barnes and Hall worked together as shearer operators on a longwall crew at the No. 7 Mine. Following their termination by Warrior Met, the two miners jointly filed a Discrimination Complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"). Ex. C-1.[1]

MHSA began an investigation of the men's joint complaint and the Secretary, pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), soon applied to the Commission for temporary reinstatement of each miner. Both temporary reinstatement proceedings initiated by the applications were assigned to me, in Docket Nos. SE 2021-118 (Hall) and SE 2021-119 (Barnes). In addition to counsel for the Secretary and Warrior Met appearing in the temporary reinstatement proceedings, complainants were jointly represented by their own counsel.

Warrior Met did not request a hearing on reinstatement for either miner. Consequently, I immediately issued orders temporarily reinstating both men to their positions with the Respondent. *See* 43 FMSHRC 293 (May 2021) (ALJ) (Hall); 43 FMSHRC 296 (May 2021) (ALJ) (Barnes). Neither miner returned to his position at the mine, however, because even before the Secretary filed the temporary reinstatement applications, the strike at Warrior Met's mines had begun.[2]

Subsequently, the Secretary filed complaints of discrimination on behalf of both Barnes and Hall in the subject proceedings, in which the complainants are again jointly represented by their own counsel. The basis for the complaints were allegations that the men were suspended by the Respondent for conduct and communications protected by section 105(c) of the Mine Act. While the two men later returned to work, it was on a probationary status. Shortly before their probation periods were to end, Respondent terminated their employment due to an alleged failure to comply with the terms of their probation.

The relief the Secretary originally requested in her complaints on behalf of each of the men included compensation for lost pay and benefits and permanent reinstatement to their former positions. The Secretary also requested that two civil penalties of $20,000 each be assessed against the Respondent.

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[1] Exhibits admitted at hearing were marked "C" for the Secretary and Complainants and "R" for Warrior Met.

[2] The strike reportedly ended in 2023, but there has been no indication from any of the parties that either man ever exercised his right to reinstatement under the still valid orders.

After an extensive discovery period, a joint hearing on both complaints took place in 2022.[3] The Secretary and Warrior Met subsequently submitted considerably comprehensive and detailed initial post-hearing briefs and response briefs.

II. FACTUAL BACKGROUND

A. General Background Testimony

Five night-shift miner eyewitnesses were called to testify by the counsels for the Secretary and the miners. All of the miner witnesses had not only joined the strike the previous year, but remained out on strike as of the date of the hearing. Their preliminary background testimony at the time of the hearing was as follows.

Timothy Barnes (Tr. I 23-148) worked at the Number 7 East Mine from December 2016 up until his discharge in March 2021. Tr. I 24. Barnes worked on the longwall for about two and a half years, and specifically as a shearer operator for approximately a year and a half after he received training on how to be a shearer operator. Tr. I 25, 27. Before that, Barnes worked outby. Tr. I 26. Until January 25, 2021, Barnes had never been the subject of disciplinary action at Warrior Met.

Barnes was aware that the union contract was coming to an end but did not know the strike was going to occur. Tr. I 94. He stated that he did not attend any meetings with union leadership where the expiring contract was discussed, and that neither the union nor other miners had conversations about slowing down production at the mine.

According to Barnes, for a longwall shearer, "a normal daily speed where there's good conditions is 35 to 40" feet per minute ("FPM"), and that he had never seen one moving at 60 FPM or close to it, unless it was not cutting coal. Tr. I 31. Barnes described 35 FPM as a "good pace" not exactly "fast."

In his experience as a shearer operator, Barnes noted that the presence of gob on the longwall impacts the speed at which the shearer is operated at certain points. Tr. I 27-28. Along with gob, he cited the presence of methane gas as also impacting how the shearer is run. At methane levels of 1%, operators are supposed to shut down the machine. At 2%, the machine will shut itself down. There are gas detectors both on the shearer and at the tailgate, but Barnes stated that the readers do not always match, and the higher percentage reading tends to be on the detector on the shearer. Tr. I 29.

Brandon Hall (Tr. 194-254; Tr. II 261-317) began working at the Number 7 Mine in January 2008, when it was a Jim Walters Resources mine. He worked an outby position for a couple of months before starting a 15-year stint on the longwall. Hall ran a shearer during that time and explained in detail how a shearer runs, how many operators run the shearer at one time, and the shearer operators' responsibilities. Tr. I 196-97. When it comes to operating the shearer,

[3] The joint hearing in the cases took place over the course of three days, with each day of testimony represented by a separate volume of the transcript, consecutively paginated.

Hall maintained that Warrior Met Coal always told the operators that it was in their discretion as to how fast to run the shearer.

Anthony Earnest (Tr. I 149-81) worked at Warrior Met from October 2018 until the strike**.** By January 2021, Earnest thought that everyone had an idea that "something was happening" pertaining to a strike and that some miners had discussed it. He maintained that there were no conversations about trying to slow production in the months leading up to the strike. Tr. I 168. Earnest has been a shield puller for over two years and provided an extensive explanation on how he pulls shields both in automation and manual operation. Tr. I 150.

Charles Bauer (Tr. II 327-64) was the longwall headgate operator, having worked at the Number 7 mine starting with Jim Walters. In his position he kept up with all the production and down time, as well as communication between supervisors and miners on the wall. At the headgate, he monitors the speeds of the shearer.

In January, Bauer knew it was possible that a strike could happen. Tr. II 355. He joined the strike at its outset and had not returned to work as of the hearing. Bauer was active in picketing at the mine but stated that he has not been jailed for any of his activities.

Tieron Knight (Tr. II 182-94) began working at Warrior Met in 2018, first as a contractor and then as a full-time employee. His positions included hazard crew member, a pipe crew member, and a motorman. Part of his responsibilities as a hazard and pipe crew member consisted of operating the manbus. Knight was on strike as of the hearing.

Seven witnesses were called by Warrior Met. They were either management witnesses or miners who, after initially joining the strike, had returned to working at the mine after a few months. The witnesses' preliminary background testimony at the time of the hearing was as follows.

Michael Wilson (Tr. II 515-78) works at Warrior Met as a longwall coordinator and has worked in that position for 10 years. In that position, Wilson supervises the day, evening, and owl shifts on the No. 2 longwall. Prior to that, Wilson was a longwall foreman for over eight years. His whole mining career, roughly 18 years, had involved longwall operations.

When not underground, Wilson utilizes an online application called "TeamViewer" to be updated on the longwall shearer's speed, amps, and other statistics. TeamViewer does not present information about gob or methane. MemoryCut is additional software that Wilson uses to obtain statistics on longwall cycle times and shearer speeds. Wilson states that he primarily looks at the cycle times, but that cycle times and shearer speeds go hand in hand.

Josh Richardson (Tr. II 415-513), who as longwall foreman reported to Wilson, began working at Warrior Met in 2017. Before working there, he worked at Buchanan Mine in Virginia for 15 years as a longwall foreman, and before that, as a longwall systems operator. No miner said anything to Richardson personally about the upcoming contract negotiations, but he had overheard some miners talk about it.

As part of his duties to ensure his crew operates safely, Richardson stated that mainly his job was to "go back and forth, not just on the face, but the entire longwall area that I was in charge of and look for hazards and conditions that could cause, you know, somebody to get hurt." Generally, to learn about the conditions on the longwall, Richardson would have pre-shift conversations with the prior shift foreman and then would go across the face himself and check conditions with his crew. During the actual shift, Richardson observes the conditions on the face every two to four hours, and sometimes every pass of the shearer, because conditions can change. Richardson estimated he makes twice as many passes up and down the face than the shearer does. Richardson has trained dozens of miners on how to run a shearer. Richardson does not have the authority to fire or suspend a miner, but he would have the authority to relieve a miner of his job duties during a shift.

Dustin Beasley (Tr. III 585-598) had worked at Warrior Met for four years, as a shield puller on the longwall from his start. Beasley went out on strike but returned to work after three months.

David Boyd (Tr. III 598-603) had worked at Warrior Met for five years as a mechanic in the maintenance department. He also initially went on strike on April 1, 2021, but returned to work on July 13, 2021. Boyd obtained his position through his father, Brock Barton, a longwall maintenance foreman with Warrior Met.

Brian High (Tr. III 605-21) had worked for over five years as an outby foreman at Warrior Met. He became a foreman in 2008 and had worked as a miner for 25 years. His job duties were usually outby the working sections but occasionally he was on a section.

Barry Kimbrell (Tr. III 622-71) worked as general manager of the Number 7 Mine for 11 years before retiring. Kimbrell worked in the coal mining industry since he finished high school in 1980. He has bachelor's and MBA degrees. Among his various duties as general manager was employee discipline, particularly if it rose to the level of suspension or discharge. Kimbrell was the one who made the decision to terminate both Barnes and Hall.

Sally Brown was unable to testify at hearing so the parties agreed her earlier deposition testimony would be admitted into the record. Ex. R-23. Brown worked at Warrior Met or Jim Walters since 2010, always as a Human Resources manager. Her duties included investigations of complaints and employee discipline and discharge. Brown did not usually have responsibility for the investigation of safety complaints, absent a personnel component to it because there is a specific grievance process for safety complaints that is by and large handled through the company's safety department. Brown is not involved in safety complaints because she is not able to appropriately address them as they are not her area of focus. Brown would be involved in situations where there are policy violations of work rules.

B. The Period Prior to January 25

Wilson stated that when Barnes first came to the longwall he was a top notch miner, and that Hall was always a hard worker. Wilson stated he had "very little, minor issues" with Barnes and Hall before but was able to talk through them. Wilson stated that although he "couldn't put

his finger on it," that whole night crew began having issues and prior to this time, they were the best, "then something happened, and they were the worst, it was always issues. Always something all the time." Tr. II 525.

According to Wilson, on January 16, the longwall had started cutting a new panel, so between then and January 25, he estimated that he was at the longwall every day. He testified that leading up to January 25, he did not observe any irregular or abnormally dangerous methane or gob conditions.

Wilson testified that he had not been underground on January 25 but had been there both the day before and the day after. The day before January 25, Wilson recalls that the longwall conditions were not perfect, but it was a "good straight face" with only 6-8 inches of gob. Tr. II 533.

Richardson testified that, in the days leading up to January 25, he had no problems with Barnes' and Hall's work ethic, and stated that they were both outstanding employees. He stated that Hall is a brilliant man, and that Barnes was an outstanding worker and that he never had any issues with either of them and he did not find either of them to ever be dishonest. Moreover, while Hall liked to argue at times, Richardson did not consider that to be insubordinate and the two always worked out whatever issues they had.

C. The Events on the January 25 Night Shift

1. Barnes' Testimony

On January 25, Barnes worked the evening shift with fellow shearer operator Hall, shield puller Earnest, headgate operator Bauer, and shield puller Beasley, though Barnes could only recall that Earnest was pulling shields that night, and not Beasley. Tr. I 118.

Barnes testified that the shift started with longwall shift foreman Richardson reading from a paper during a safety meeting. Barnes also signed a paper stating that he listened to Richardson and then headed to the shearer. On the night in question, the shearer was at the tailgate because the day shift had not worked that day. Tr. I 37. It was normally at the headgate at the start of a shift.

Barnes recalled that once at the shearer, Earnest called out that its fire extinguisher was missing. Barnes proceeded to check the cutting bits. Richardson provided a fire extinguisher and stated that because they were "taking our time or whatever, trying to play games," that the crew needed to conduct a full service. It is unclear whether the "playing games" comment was from Warrior Met supervisor Keith McGilton and relayed to Barnes by Richardson, or Richardson's own thoughts. Tr. I 101-02. After servicing the shearer, Barnes stated that Richardson went back to the headgate, and the shearer operators started up the shearer at the tailgate and began moving towards the headgate. Tr. I 36-37.

As for the conditions of the longwall on January 25, Barnes stated that when the shearer first started, there were only "small amounts of gob." Tr. I 38. As they got to the headgate,

however, gob was increasing and "it got a lot worse because the shields didn't automatically pick up and pull . . . [t]hey just pulled everything up with it and just made it higher." Tr. I 38. Once at the headgate, Bauer called and told Barnes to take over the shearer speed from Hall. Tr. I 42.

After reaching the headgate and going back to mid-face, Barnes stated the accumulation of gob was "getting really bad," going from only about a foot high during the first pass from tailgate to headgate, to "a lot more" when heading back to the tailgate. Tr. I 38. Barnes described the gob that night as "pretty much all rocks" that the crew was having to walk on bent over trying not to fall. Barnes himself recalls that he was bent over from his "butt bone" to his "head." Tr. I 40. At that point, Barnes stated that he was running the shearer probably around 26 to 27 FPM and thought that Hall had given a cap signal to slow down a bit amidst the dusty environment. Barnes also noticed that the shield puller was "moving really fast trying to get stuff to pick up and move" which prompted Barnes to slow down to 22 to 23 FPM. Tr. I 41. According to Barnes, because of the conditions, the shearer, which is normally operated in automatic, had to be operated in manual mode.

Barnes stated that they received a second call from Bauer, telling them to speed up and that Richardson was with Bauer at the headgate. Thereafter, Barnes recalls receiving a third phone call. Bauer had cut the chain off and relayed that Mike Wilson, longwall production foreman, said to speed up the shearer to 35 FPM. Tr. I 56. Barnes was not around a phone when he heard the message to speed up and stated that some phones work and some don't, so rather than going to find a working one and halt production, he just resumed operating the shearer. Tr. I 46, 103. Barnes recalls pushing a button on one of the phones that was next to him that it didn't work, so he did not call back and respond about safety issues but instead used it to beep to let Bauer know he heard the message. Tr. I 103-04. At that point, Barnes did not speed up the shearer because of safety concerns, mainly that somebody would fall, or that the shearer would leave shield pullers behind and violate the ten-shield rule. Tr. I 105-06. Barnes did not say anything to Richardson because while he usually was around, "that night for some reason he didn't never come down there." Tr. I 104.

After a few more minutes of Barnes not speeding up the shearer, Bauer cut the machine off and told Barnes to come to the headgate. Barnes proceeded to the headgate with Earnest and Hall. Richardson was not at the headgate, but Bauer and Beasley were, and Bauer told Barnes that he was being sent home for not speeding up the shearer. Tr. I 46. Before Richardson arrived, Barnes and Hall tried to contact the CO office to get a union rep and they were denied. There is no other way to contact anybody other than calling the operator.

When Richardson did come to the headgate, he told Barnes that it was not his call and that Wilson had been watching Barnes on his phone. Barnes reiterated that Wilson can't see underground conditions on his phone, just the shearer speed. Barnes recalls that Earnest also complained about the conditions at the headgate saying they were horrible. Tr. I 118. Moreover, Barnes recalls that he told Richardson had not been back down there since giving the crew a fire extinguisher, so he did not understand what was going on. Richardson responded that it wasn't his call and that although Barnes requested that Richardson be the one to take Barnes out to fill out the report, Wilson had called Richardson and stated that William Pouncey, assistant shift foreman, would be taking Barnes out, not Richardson.

Pouncey took Barnes and Hall out of the mine and when he asked if they needed a union rep, they responded they did. Barnes and Hall tried to explain to Pouncey why they were sent out and Barnes mentioned that it was because "we weren't running the shearer as fast as they wanted … mainly because the gob was so high. . . and we had poor vision where we was trying to see . . . I didn't want nobody to get hurt." Tr. I 52. Pouncey eventually wrote Barnes up for "halting production," but he refused to sign it because he wanted a union rep to see the conditions. Tr. I 50.

2. Hall's Testimony

On January 25, Hall was a shearer operator on the evening shift. Also present was Barnes, Earnest, Beasley, Richardson, and Boyd. The crew was short-handed that night. Hall does not recall anything about the evening shift meeting.

Hall noted that the shift didn't start well, as the crew had to walk all the way to the tailgate and servicing the shearer is easier at the headgate than the tailgate. Additionally, there was a missing fire extinguisher. After Richardson provided the extinguisher, Hall went to get bits and met Richardson somewhere between shield 100 to midface going past him. Hall then walked back to the tailgate, set the bits and was ready to run the shearer.

Hall stated that night there was a lot of gob on the face, from mid-face to the tailgate, describing it as "pretty high," both "hard and soft." Tr. I 207-08. He stated that it was hard enough for him to walk on top of it, which meant that he had to bend over. As far as the level of methane that night, Hall described the longwall as pretty gassy that night, which he attributed to them starting to cut a new panel and there being no curtains there to aid in controlling the gas. Tr. I 208.

Hall recalled that, during the shearer's first pass, it was running at 26 FPM so he had to keep bending down. He also described taking his time cutting out of the headgate because there were people at it. It was at that point Wilson called down and had Barnes cut the headgate out. Hall remembers that once the shearer got to mid-face the gob was so high that he was "almost touching his lower back bending down on the face" while still trying to look up and see the shearer. Tr. I 213. Hall also stated that the gas that night stayed around .8-.9% and he believed that if the shearer ran faster it would have to be shut down. Tr. I 221-22. Hall stated that there were two shield pullers that night who at first weren't far behind, but then ran into gob. The shield pullers didn't say anything to alert Barnes and Hall that they were having a tough time moving through the gob, but Hall knew they began pulling shields in manual mode at mid-face. Hall asked Barnes to slow down when they were in the gob and thinks that, given the calls they received about their operating speed, he tried to call up to the headgate at one point to report that there was a lot of gob on the face. The DAK box he tried was not working and before he could find a working one a call came through telling Barnes to come to the headgate. Hall does not remember Richardson being on the face other than when he brought the fire extinguisher. Tr. I 207-19.

Hall accompanied Barnes when the latter was called to the headgate and recalls Richardson telling Barnes he was being sent out for insubordination. Hall wanted to call the

union safety representative to hopefully resolve the situation without anyone having to go home and to have someone learn of the conditions at the longwall that night. Hall stated that there was no way to place a call outside of the longwall without going through the control operator. But when Hall then called the control operator and requested a safety rep, he was told that she could not call a safety rep and he would have to call one himself from outside the mine.

When Richardson at that point instructed Hall to go back to the face and cut coal, Hall responded "you sent Barnes out, might as well send me out too because the conditions on the face not safe." Hall did not ask for other work to do but was hoping that a union rep could "straighten things out." Tr. II 293-294. Hall also stated he told Richardson that there was a lot of gob on the face. Hall stated that this was the first time he was able to speak to a supervisor about his safety concerns that night. Tr. II 292. Hall stated that Richardson then told him to get on the bus, which he did, and at that point, Pouncey was driving the bus and told them they were being sent out for insubordination. Once outside, Hall called Carl White, the safety rep, but Hall does not know if anyone went and inspected the longwall that night.

3. Earnest's Testimony

On January 25, the shearer was on the tailgate, which required the crew to walk to the end of the longwall to get to it. The crew started checking bits and he noticed that the fire extinguisher was missing. As they were changing bits, Bauer kept calling to report that McGilton wanted them to increase their preliminary work pace. At that point the crew was continuing their pre-op duties (i.e. changing bits, getting pressure gauges from the headgate to check water pressure) and McGilton called again and said "oh, y'all want to play games?" Tr. I 153. Once they received the fire extinguisher, they were able to start.

On that night, Earnest initially pulled the shields in automation but within the first hour of the shift had to put it into manual where he had to lift shield legs over the gob. Earnest decided to pull the shields manually because the "face is getting shorter or lower and the gob's piling up . . . if you don't, I mean, you could mess up the entire face in one pass." Tr. I 155-56. Earnest also testified to seeing rocks thrown and gob piling up. Earnest further stated that both he and both shearer operators, Barnes and Hall, would have been in a dangerous situation if he could not have kept up in his job as a shield puller, since the shields are designed to "support the top and pretty much hold the entire world up on that face." Tr. I 157. Earnest recalled that while running in automation, the shearer was operating around 35 FPM but once in manual, it was between 22 and 26 FPM.

Earnest also testified that Bauers called down over a DAK box and said that Mike Wilson said to speed up and that Barnes and Hall did not speed up because Earnest communicated to them that he was behind and trying to keep the top up, and that Barnes and Hall responded, "we know." Tr. I 159-60. Earnest then recalled that the shearer started to back up until they received two more phone calls, one from Bauer telling them to speed up to 35 FPM, but there was no way for them to safely do that. Earnest maintained that they did not try to respond and say that they could not go 35 FPM because some DAK boxes did not work and that he could not tell when one does or doesn't, and that they did not have time to find a working one. Tr. I 171-72.

After that, the face was shut off and Richardson got on the DAK box and told Barnes to come to the headgate. Barnes, Hall, Earnest, and Beasley all went to the headgate. Tr. I 152-160. Before going to the headgate, Earnest did not hear Barnes or Hall make any type of complaint, and that he did not have a chance to throughout the shift because he was too busy trying to keep up while pulling shields. Tr. I 173. Earnest further mentioned that Richardson was not on the face much that night, as he was outby, and there was no one to contact other than Bauer at the headgate. Earnest also recalls telling Richardson when running into him midface that gob was slowing them down. Tr. I 175.

Earnest testified that at the headgate Richardson told Barnes to get on the bus and leave since he would not speed up the shearer. Earnest stated that Barnes "wasn't given a chance" to respond to Richardson, and neither did Earnest, because Richardson had walked away. Tr. I 179. Earnest recalls that, once Richardson told David Boyd, a longwall helper, to replace Barnes on the shearer, Hall stated that they could not speed up to 35 FPM and it was then that Richardson told Barnes to also get on the bus. Earnest continued to pick the shields up that night and, according to him, Burt Pollard and Barton operated the shearer at 26 FPM for the remainder of the shift. Tr. I 160-162.

4. Bauer's Testimony

On January 25, Bauer worked the evening shift. Bauer recalls Barnes, Hall, and either Earnest or Beasley as a shield puller. About 15 minutes into the shift, McGilton called him to ask what was taking so long to start the longwall, so Bauer called down to the tailgate. It was explained to Bauer that the shearer was missing its fire extinguisher, and the crew was waiting on one. One of the shearer operators was walking up to the headgate to get bits as well.

Once the shearer started, Bauer saw that it was operating at 25 FPM. After the shearer double cut at the headgate and started back to the tailgate, Wilson called to ask Bauer what the problem was because the shearer was only running at 25 FPM. Bauer told Wilson that the toes of the shields are gobbed out and that the shields were low and they had to be pulled manually. Bauer knew these details because the shearer operators reported as much when they first reached the headgate. Bauer never saw the longwall conditions that night personally. As for gas conditions, Bauer stated that the methane monitor was .7 to.8% all night. Tr. II 347.

Wilson instructed Bauer to tell the shearer operators to run at 35 FPM. Bauer told them to run at 35 FPM through the intercom system, they beeped back twice, meaning that they had heard him. The shearer operators continued back to the tailgate but never sped up to 35 FPM. Wilson called Bauer back and asked him to put Richardson on the phone. Bauer then called Richardson, who Bauer thought was down at the face and may have been helping pull shields. Richardson was not at the headgate, and it took him five minutes to get there. Bauer told Richardson that Wilson was on the phone for him, Bauer also told Richardson that the shearer wasn't running at 35 FPM because of gob. After Richardson spoke over the phone with Wilson, Richardson shut the chain off and told Barnes to come to the headgate. Tr. II 323-36.

At the headgate, Hall and Earnest came with Barnes. Bauer had told Barnes that Richardson had called to send him out because he was slowing production down and Barnes

responded to Bauer that he wasn't slowing production down on purpose but because the shields were gobbed out. Bauer recalls that Barnes and Richardson discussed it but doesn't know what was said. Bauer remembers Hall saying he also felt unsafe running the shearer at 35 FPM and that he was legally blind in one eye and couldn't see out the other, which is when Richardson told Hall that if he didn't want to run the shearer he could leave too. Tr. II 337. Bauer doesn't remember if Earnest said anything at that time. Bauer remembers Pouncey and Richardson having a conversation and then Pouncey taking Barnes and Hall out of the mine. Richardson then asked Burt to run the shearer, who was at first apprehensive but ultimately did run it. Bauer said that Beasley and Burt as shearer operators, and Earnest as shield puller, ended up running at 25 FPM and nothing else was ever said about their speed. Tr. II 336-43.

5. Wilson's Testimony

Wilson was aware that the night of January 25 it would take the crew more time to get started, given that the shearer was at the tailgate. However, he believed that the crew was stalling. Wilson called Richardson, who mentioned that he was going to get a fire extinguisher and that he did not understand why the crew was taking so long either. Wilson maintained that checking water sprays and retrieving and replacing bits could have happened at the same time, rather than one after the other. Additionally, the shearer was missing an insert. The crew took about 65 minutes until it began operating the shearer.

Once the shearer started, Wilson recalls that the operators double cut the tailgate going towards the headgate running fairly slow. Wilson said he called Richardson a lot that night because he was glued into TeamViewer. Thinking that Richardson was at the headgate, Wilson called back and asked why they were running slow but Richardson did not know why, Wilson guessed that he went to talk to the crew that was operating the shearer at that point. Wilson also recalled that the crew had to double cut the headgate and that something happened at the headgate at that point so they were down for a minute. Wilson called the headgate again after watching the machine travel 30 to 40 shields, telling Bauer to cut the chain off and specifically tell Barnes to run the shearer at 35 FPM. As Wilson continued to watch the longwall progress on TeamViewer, it appeared that they had slowed down again. Wilson called again, told Richardson to get on the phone, and told him to get Barnes off of the machine, as at that point Wilson felt they were "playing games." None of the conversations that Wilson had with Richardson and Bauer included a discussion about adverse longwall conditions.

Wilson later heard from Richardson that once Richardson told the two men to leave that only then did they explain that they had to slow down because of gob and gas. Wilson stated that the gob was not a safety issue because "if we have a safety issue its Josh Richardson's responsibility to deal with it immediately" and if they had a safety issue, they should've brought it to Richardson "at the moment that he asked them to run it at 35 FPM or when I called down there to stop the face chain and ask them to run 35 FPM." Tr. II 543. Wilson was also aware, via Richardson, that Barnes and Hall discussed their safety rights and the need for a safety rep.

Wilson went underground to the longwall the next day during the evening shift and stated that the conditions allowed a shearer to operate at 35 FPM. Generally, Wilson finds that 35 FPM is very slow and not dangerous to walk even if there is some gob. After Barnes and Hall were

sent out, the crew that worked on the remainder of the shift varied speed between 35 FPM in some areas and slower in others. Wilson stated that after Barnes and Hall were sent out, things improved "immediately." Tr. II 547. Wilson was not involved in the decision to suspend Barnes and Hall. Wilson did have a meeting with Brown the day after Barnes and Hall were sent out.

6. Richardson's Testimony

At the start of the night shift on January 25, Richardson held a pre-shift safety meeting with the longwall crew. During that meeting, Barnes and Hall did not say anything and left early along with Earnest and Beasley. It was not normal for miners to leave the meeting midway before it finished. Richardson did not have the crew sign anything at the end of the meeting and later, when they started up, Richardson covered the new Standard Operating Procedure with Barnes separately.

After the meeting, the crew went to the shearer at the tailgate and Richardson began doing his checks and air readings at the face. Richardson was at midface when he was alerted that the crew needed a fire extinguisher. Richardson was on his way to the tailgate when he met Hall, who stated he was on his way back to the headgate to get bits. After Hall returned, the crew conducted a complete pre-op check on the shearer, and at some point after that Barnes realized he needed an insert so they had to go back to the headgate again to get an insert, bring it back, put it in and check water pressure. All of this took approximately 70 minutes to complete. Pre-production service is common on nights where the crew was not hot seating but normally takes 20 minutes. Both the previous day and owl shift had been idle. Richardson acknowledged that the pre-production service could have taken longer given that the shearer was at the tailgate, maybe 30 minutes, but felt that it could've been handled quicker because, including himself, there were four of them that could've pitched in to help.

While the crew was going through pre-production, Wilson called down twice and Richardson had to go to talk to him. Wilson, who was monitoring on TeamViewer from home, was inquiring as to why pre-ops were taking longer than normal. After the calls, Richardson headed back to help the crew get ready and the longwall started to run.

According to pre-shift reports (Ex. R-6) and what Richardson observed, the methane level along the longwall "wasn't elevated as far as at the tailgate or really even return" or at all throughout the shift, and ventilation controls were all in place. Tr. II 436. When it comes to addressing methane, the shearer operators and headgate men are responsible for stopping the machine when methane reaches 1%. The longwall crew can either improve ventilation in some way or let the methane bleed off. In Richardson's opinion, slowing the speed of the shearer does not make a difference in controlling methane levels and just because levels are rising it is just as likely to plateau as to continue to rise. Tr. II 443.

Richardson noted that there were issues with gob because they hadn't been on the panel for very long. Richardson stated that once gob is knee high, then it needs to be addressed with additional measures such as assigning men to shovel it. Below knee level, Richardson does not think gob affects the ability of pullers who are running shields in automation. Tr. II 446. On January 25, Richardson does not recall the shields running in manual, because that usually sets

off an alarm across the face and he did not recall hearing an alarm. If the gob is hard, miners would be walking on top of it. On the night of the 25th, Richardson stated that the gob was soft "like fire clay . . . about the same consistency as crush and run gravel . . . like a powder." Tr. II 448. In Richardson's many years as a longwall miner, he has not had a shield puller trip and hurt himself or get hit by flying rock. Moreover, there are safety measures in place to prevent injuries from that and Richardson believes that increasing the speed of the shearer does not increase the danger of rocks being flung. The fastest speed that Richardson has seen a shearer run while cutting coal is 65 FPM, and he sees it running at over 35 FPM regularly. Tr. II 454.

Richardson recalls Wilson calling back again to ask why the shearer was running so slow and having to travel three to four times to talk to him. Richardson was unaware of any broken DAK boxes, as nobody had reported that to him. The crew was communicating through DAK boxes and Richardson himself used two at the tailgate. When Wilson asked Richardson why they were running slow, Richardson told him that he didn't know it wasn't running at a certain speed because Richardson was down at the power center on the phone with him. Richardson then told Bauer to tell the crew to increase their speed. Richardson then stated it seemed like he went to the tailgate and told Hall to speed up and asked if there was a reason he couldn't, to which Hall responded that the rocks were slinging. Richardson told Hall to increase his distance from the shearer to avoid the rocks. Tr. II 470-72.

Richardson passed Barnes on his way back to the tailgate but did not speak with him. At the tailgate, the crew again started running the shearer and Wilson started calling again and asked that Richardson get back on the phone, so he went back to the headgate, where the shearer stopped so that the crew could replace a broken bit. At that point, nobody mentioned to Richardson that it was gobby or gassy, Richardson, himself, did see that it was gobby about ankle to mid-calf high in the mid-face area from shield 80-120. Richardson did not walk by Barnes and Hall again after they replaced the broken bits.

After the bits were changed and the longwall began running again back towards the tailgate, Wilson called down again asking why they were not speeding up, so Richardson had to go talk to him again. Wilson then asked Bauer to cut the chain off and tell the crew to speed up, which it acknowledged. The crew started up again and Richardson was going across the face again when Wilson called back again and made Richardson come back. At that time, Richardson stayed at the tailgate and spoke to Wilson. Wilson said that Barnes controls the speed, tell him to put in on 35 FPM. Richardson cut the chain again, spoke through the DAK box to Barnes and relayed Wilson's order. The crew double-beeped Richardson and started back up and was going 28 FPM. Tr. II 474-75. Wilson called back again because they were not going 35 FPM, Richardson told the crew again, the crew acknowledged again by beeping and started up running at 22 FPM. Wilson called back again, told Richardson to shut the chain off, and told Barnes to come to the headgate. Neither Barnes nor Hall mentioned the conditions at this point. Richardson did not observe the shield pullers struggling.

After Richardson called Barnes up to the headgate, he walked around to the head drive and told Boyd that he needed him to run the shearer. When Richardson came back around from getting Boyd, Barnes, Hall, Earnest, Beasley, and Bauers, as well as Boyd and Pollard, were all there. Richardson recalls Barnes being upset and asked why Richardson was sending him out, to

which Richardson responded that Barnes was slowing down production, not doing what he was told, and not running at 35 FPM. That is when Hall began bringing up safety, saying it was gobby and that he had a hard time seeing and climbing over the gob. At that point, Richardson said there was nothing he could do about it and that it should have been communicated earlier during the shift. Barnes brought up concerns about methane as well and Richardson explained how to manage it.

At that point, Pouncey was coming to get Barnes out of the mine, but Barnes requested that Richardson be the one to take him out. Richardson could not take Barnes out of the mine because Barton, the maintenance foreman on the long wall, who was Richardson's partner, was off that night so Richardson couldn't leave. Hall also got upset saying that the shearer was throwing rocks, and then mentioned methane levels. Hall then said if Richardson was going to send Barnes out, he might as well send him out too. Richardson responded that if Hall did not feel safe and that there was no way Richardson could make it safe, that Hall was more than welcome to get on the bus with Pouncey, which Hall did. Tr. II 481. Richardson stated that he did not want to send the two men out, noting that Barnes and Hall had valid points but that there were solutions for them.

Richardson observed the conditions after Barnes and Hall were sent out and did not see any reason why the shearer couldn't be safely operated at 35 FPM. When Boyd and Pollard took over, they ran the shearer at 35 FPM. After Barnes and Hall left, no one raised concerns about gas or gob. The subsequent evening shift on Jan 26 had similar conditions and the shearer ran at 35 FPM. Richardson said that the conditions that day were gobby but no different than the night before.

7. Beasley's Testimony

On January 25, Beasley worked the evening shift as a shield puller at the longwall. He remembers that the face was gobby and gassy, stating that the gob was "pretty bad" in some spots, the whole face "wasn't that bad" but then also stated again that "it was bad." Tr. III 586. In some places the gob was at the shield toes, and in others it was halfway up the pan line and pretty high. Beasley stated that he pulled the shields in automation that night and does not recall using the manual feature. He could not recall what speed the shearer was running at or having trouble keeping up at the speed the shearer was operating. Beasley believes he could have pulled shields faster if the shearer was moving faster. He could not remember if the longwall gassed out. Beasley stated that he told Richardson during the shift that the face was gobby but does not know whether Richardson came down to look at it. When Barnes and Hall were sent out, Beasley was at the headgate. When the shearer resumed running afterwards, Beasley recalls that the operators ran it at 35 FPM and they did not receive calls from Richardson or Wilson to speed up.

D. Testimony on the Subsequent Investigation and Miner Discipline

Two days after Barnes was sent out of the mine, he received a phone call from HR manager Sally Brown. Barnes, who was unaware that Brown was recording the phone call, reiterated to her his safety concerns. Barnes mentioned to Brown that he did not speed up to 35 FPM as he was ordered because Barnes is 5'7" tall and was struggling in the gob, so he knew

that the 6'1" tall Hall had to be struggling as well. Barnes explained that the "gob and stuff" was the main issue that led to the slower shearer speed, and that the gas was and had been dealt with. Barnes understood Brown to tell him that he should have run the shearer at a higher speed despite his safety concerns and maintained that the longwall conditions on January 25 were not good conditions that allowed him to operate the shearer at 35 FPM. Tr. I 58-60.

After the phone call with Brown, Barnes spoke to James Blankenship of the union, to whom he also expressed his safety concerns. He informed Barnes that the union had negotiated his discipline from Warrior Met down from a 180-day probation, that could be challenged through the grievance process, to a 30-day probation that could not be challenged. Ultimately, Barnes was suspended without pay for two weeks and felt that it was best to take the 30-working day probation, given the recent holidays and his desire to return to work. Tr. I 61-65, 127. Before returning to work, Barnes had a counseling session with mine manager Barry Kimbrell, district union president Carl White, Brown, and Hall. Again, Barnes was not aware that Brown was recording the session. Kimbrell told the men he wanted "no lip" and warned against "outside influences," neither remarks Barnes understood. Barnes stated that he felt that there was an "agenda" behind the 30-day probation, given the way he was treated when he mentioned safety. Tr. I 65-69.

Brown also called Hall to discuss what occurred the night of January 25. Hall stated that he did not know what Brown was referring to when she mentioned there had been game playing. Additionally, Hall maintained that he did not consider his leaving of the mine that night to be voluntary, because he was not given the safety representation that he had requested. Hall also understood Brown telling him that when you don't do something that just gets everyone screwed up as her telling him that he should have run the machine despite his safety concern. Hall had experience calling a safety rep before, stating that if you called and asked for your union rep, they would get one down there, especially if one is working that shift. Tr. I 237-38.

After the call with Brown, Hall served a two-week unpaid suspension and a 30-working day probation. Hall stated he told Blankenship about his safety concerns and that he would "try to get to the bottom line." On February 8, Hall had a counseling session with Barnes, Kimbrell, and Brown (deposition testimony includes transcript of phone call). Hall mentioned during the call that he would "try to communicate a little better" going forward. Tr. II 297.

Brown explained that her investigations of employee issues depend on the circumstances. She sometimes records witness interviews on her cell phone but not every time. When she records conversations, she doesn't necessarily let the other party know that they are being recorded because she uses it for her own records. In reference to her recorded conversations with Barnes and Hall, Brown did not play the recordings for management but paraphrased the conversations to the decisionmakers involved. Brown does not recall whether she told management whether she recorded conversations, including Kimbrell.

As for who has the authority to recommend discipline of hourly workers, Brown stated that all supervisors can recommend discipline but the mine manager, who in the first part of 2021 was Kimbrell, was the one who determined what level of discipline was appropriate. Brown's role in deciding discipline was to advise Kimbrell about that employee's existing discipline file,

make recommendations regarding general practices, and report on past discipline. Brown was not aware of any employees who were suspended in 2020 for slowing production or not running a particular piece of machinery as instructed.

As for Warrior Met's safety policy, Brown has seen the policy before but had not recently reviewed it nor had she been trained on it. Brown considers the policy to be one that permits employees to correct hazards that they observe prior to reporting the condition to a supervisor.

After speaking with McGilton on January 26, Brown became aware of the actions that Barnes and Hall took the night before. McGilton informed her that there had been communication between the surface and underground about shearer speeds and that his foreman believed insubordination had occurred. Brown also learned from McGilton that there was troublesome behavior on the longwall that evening shift, such as tasks taking longer to perform than usual and that miners were delaying production. Brown did not take a written statement from McGilton because she did not consider him to be involved that evening.

Brown helped Wilson and Mark Milligan, the longwall maintenance coordinator, gather their thoughts and put it on paper. Wilson explained to Brown that he was watching the shearer through his "longwall TV," had called down several times regarding the speed of the shearer, and that Barnes' failure to reach the requested speed prompted his being ordered to exit the mine.

In addition to management employees, Brown spoke with Bauer, Beasley, Knight, Hall, and Barnes. Brown did not record or take notes on her conversation with Bauer but stated that Bauer told her that there were issues on the evening shift and there had been people not working as diligently as they could have. Brown took notes about her conversation with Beasley, but his comments were vague and lacked much information. Beasley did indicate there was gob.

Brown recorded her conversation with Barnes and Barnes did not know she was recording him. Barnes had not been disciplined before for anything other than attendance. From her conversation with Barnes, Brown understood that he was concerned about running the shearer at 35 FPM because of gassing out and tripping over gob. Brown's recommendation to Barnes was to demonstrate his concerns to his supervisor, rather than be insubordinate. During the call, Barnes told Brown that he felt he was sent out because he raised a safety concern. Brown said she consulted with McGilton who examined the area the next day and said the gob didn't seem to be an issue at that time. Brown also spoke with Wilson. Brown stated that no one else believed the unsafe conditions existed except for the employees that were disciplined.

Brown also recorded her conversation with Hall without his knowledge. Hall indicated to Brown that he had safety concerns about running the shearer at 35 FPM. Brown questioned why Hall xeroxed copies of the new SOP because it was "unusual behavior" for an employee to do so. Brown also told Hall that him and Barnes "got the whole world involved in this," referring to people at multiple levels of management becoming involved in the situation. Brown recalls that in her separate conversations with Barnes and Hall, both men believed that they did not think it was safe to run the shearer at 35 FPM given the conditions. Brown did not know what Warrior Met did to evaluate Hall's concerns about gas or gob prior to sending Hall out of the mine. Brown also understood that Hall had called the CO to ask her to get a safety rep on his behalf but

that is not the correct process for that; rather Hall should have gone outside and called one of the union reps listed on the board. According to Brown, it is not the CO's responsibility to provide miners representation.

After Brown's discussions with those involved, she discussed what she learned with Kimbrell who concluded that both Barnes and Hall would be suspended. Warrior Met did not offer either Barnes or Hall the opportunity to do other work at the mine during the investigation. At that point, Blankenship became involved regarding the circumstances of the suspension and a two-week suspension and 30-working day probationary period were agreed upon. There had been both calendar and working day suspensions at Warrior Met in the past.

When Barnes and Hall completed their two-week suspension, they had a counseling session with Kimbrell, Brown, and Carl White. Brown recorded the session without Barnes' and Hall's knowledge. Brown stated that she recorded this meeting if she needed to refer to it later. During the session, Barnes reiterated his concern about the safety of shield pullers if the shearer were to run at 35 FPM under the conditions present on Jan. 25—specifically of a shield puller falling and tripping. Brown said that no hazards existed, as nobody had fallen.

E. Testimony on the Miners' Return to Work on Probation and Termination

Barnes returned to work at the mine on February 8, 2021, and did not receive any discipline between then and March 12, 2021. That day, Barnes worked the evening shift and left the mine with Hall and Beasley upon their shift ending. Tieron Knight was driving the manbus and picked up the three men and drove them to get on the cage and get out of the mine. When the manbus arrived at its destination, Barnes recalls outby supervisor Brian High walking towards him. From approximately 15 feet away High asked Barnes about the bus being clean. Barnes stated he responded that the manbus was all clean on the end of the bus that Barnes and Hall were sitting near. Barnes testified that Knight said that he would clean the manbus and Barnes, knowing he was on probation, waited until it was clean. Barnes recalled that High approved the area as clean.

Barnes and Hall entered the cage and Hall asked another outby foreman, Bill Brewer, what was wrong with High. According to Barnes, Brewer responded that High was "a fat lazy SOB" and that they all started laughing. Barnes himself maintained that he did not say anything directly and that the sort of language that was used was common around the mine. Tr. I 73-77.

Barnes left the mine, had the next day off, and returned on Sunday for the evening shift. When Barnes arrived, High told him that Wilson wanted to speak with him. Wilson told Barnes he was sending him home and that Brown would call Barnes tomorrow to explain why. Barnes reached out to his union reps, who cited three different reasons as to why he was terminated, including disobeying a direct work order, talking about High on the cage, and poor workmanship. According to Barnes, Brown did not give him a reason but just that he was in his probation period. Barnes learned that Hall was also terminated that same day. After his termination, Barnes contacted both an attorney and MSHA which led to the beginning of an investigation conducted by MSHA Inspector Gregory Willis.

Hall worked from February 8 until March 12, which was his last day of probation. Hall recalls raising a safety complaint once during this time, to Richardson about not wanting miners to go behind longwall shields. Hall did not receive any disciplinary action for raising this concern. Tr. II 299.

On March 12, Hall worked the evening shift. Hall recalls High asking him and Barnes if they cleaned off the bus, whereupon Hall and Barnes turned around and headed toward the manbus to make sure it was clean. On their way back to the manbus, Knight told them that he had to stay two more hours and for them to go ahead and leave and that Knight would make sure the bus was cleaned off. Hall doesn't know if High heard the conversation between Knight, Barnes, and Hall. Hall did not leave any of his own trash on the manbus, and states that Barnes did not either. Hall stated that he was trying to be extra careful during his probationary period and once he got on the cage, he asked Brewer what the protocol was for cleaning the bus to make sure he understood. Brewer stated that the boss was supposed to clean off the bus and that High is just lazy. Hall laughed and did not say anything else. Hall clocked out and never went back to work, as he learned from a phone call from Barnes that they "got us for insubordination for not cleaning the manbus out." Only two people—Barnes and Hall—were written up for not cleaning the manbus, despite Beasley being there as well. Tr. I 242-45.

Hall called Brown to ask about his status and reminded her that he did his 30 days and that he clocked out on March 12 with no issues. Brown called Hall back and told him that he had been terminated for reasons including insubordination and poor work performance but did not give further details. Hall then called MSHA, hired an attorney, and spoke to MSHA investigator Willis.

Knight testified that on March 12 his boss, Brewer, asked him to provide a valve to a part of the longwall. Once finished, Knight, Barnes, Hall, and Beasley got on the bus and headed to the cage. When Knight pulled up to the bottom, he overheard Barnes talking about how he had off the next day and Knight told Barnes, Hall, and Beasley that he would clean off the bus because he had two more hours and "nothing but time to waste." Knight recalls that there was not much trash, only three to four pieces. High was coming out of the outby hole, approximately seven to eight cars away walking towards the manbus when he asked Knight whether the manbus was acceptable. Knight responded that it was, they bumped fists, and Knight returned to the motor pit. High did not say anything to Knight about Barnes and Hall. Tr. I 184-86.

Knight testified that he did not think High heard him tell Barnes, Hall, and Beasley that he would take care of detrashing the bus. Knight stated that generally it is the manbus operator who is responsible for everything on the manbus and while everyone has the responsibility of cleaning their trash it was mainly the driver's. Tr. I 191-92.

Two days later, Barnes asked Knight if he got in trouble, and further stated that he was being sent home because he didn't clean the manbus. Knight told Barnes that they did not send him home and that he had told Barnes he would clean it. Knight is not aware of anyone who has been either disciplined or terminated for failing to detrash a manbus. Knight spoke with Investigator Willis after the incident. Tr. I 193.

In March 2021, High worked the evening shift and knew Hall and Barnes through work, seeing them at the beginning of the shift and maybe mid-shift. High was familiar with Hall more so than Barnes since Hall also worked outby. Regarding cleaning a manbus, High stated that it is company policy to remove trash when you come back from entering the mines because trash is combustible material. Tr. III 607.

On March 12, High asked Barnes and Hall if they removed their trash from the manbus while on the bottom of the area where they exit the mine. High stated that Barnes and Hall did not respond to him, but just kept walking. High was 15 to 20 feet from Barnes and Hall, and 60 to 65 feet away from the manbus, when he asked if they had removed the trash from it. High could not see any trash on the manbus from where he was standing. While Barnes and Hall were wearing glasses and hearing protection, High said he knew that they heard him because they made "eye contact." Tr. III 617-18.

High then went to the manbus and its driver Tieron Knight, known as TK, told High that he removed the trash. High thanked TK but said that he didn't ask him to remove the trash but that he asked the two people sitting where the trash was to remove it. High does not remember anyone else on the manbus with Barnes and Hall. High was concerned about Barnes and Hall's behavior because he is a supervisor. High stated he did not know either were on probation at the time. High was working outby on January 25 when Barnes and Hall were sent out, but he did not know of their subsequent discipline.

After this interaction, High said he gave Barnes and Hall a verbal written warning for insubordination because they failed to follow a direct work order by not cleaning their trash. Additionally, two other supervisors told High that Barnes and Hall were laughing and using expletives when talking about High on the cage ride out of the mine. High said this information was not factored into his decision to write Barnes and Hall up. High testified that he had never previously written up any other miners for failing to detrash a manbus, but that was because he has never had to. Tr. III 618.

Brown became aware of an incident concerning Barnes and Hall being insubordinate by refusing to remove trash from a manbus and that they were overheard by a foreman laughing about it with each other. Brown spoke with the foreman, Barton, who confirmed the two miners were laughing about it. She also spoke with High. She took no written statement from either man or notes of the conversations, nor did she record the conversations. Brown spoke to Knight, but he said he would prefer not to be involved, so she did not preserve a record from their talk. Brown stated that Knight said Barnes and Hall ignored High and walked off. Brown also stated that Knight told her that Barnes and Hall told High it wasn't their trash and walked off. Other than High and Knight, Brown also spoke with Barton. Brown also spoke with Barnes and Hall about the matter but did not have any notes or records on it and remembers that both men denied that High asked anything of them.

As for how WMC decided what discipline Barnes was to face for the March 12 incident, Brown stated that he was still within his probationary period and Brown provided that information to Wilson and McGilton, who ultimately terminated Barnes based on his violation of company rules during his probationary period. Additionally, Hall was terminated because the

March 12 infraction occurred during his shift on his 30th working day of probation. Brown stated that whether termination is automatic if someone breaks a rule during a probationary period is on a case-by-case basis and largely depends on the circumstances—such as past behavior.

F. The MSHA Investigation

At the time he investigated this matter, Gregory Willis regularly inspected mines in Alabama but he also served collateral duty as a special investigator. Willis had previously worked as a coal miner, including on a longwall. He has been trained on how to record interviews accurately. Tr. II 365-66, 368.

Willis was assigned as the investigator of Barnes' and Hall's joint complaint to MSHA. In his testimony, Willis detailed his investigation process and how he interviewed Barnes, Hall, and other individuals pertinent to the case such as Earnest, Knight, Bauer, and others, including members of Warrior Met Coal management. Willis shared how he drafts the memorandum of interview for each person he speaks with as well. He takes handwritten notes during the interview and then types them up thereafter. After he completed all interviews, he continues to build the case, puts it all together, reviews it, and types a final report. Willis acknowledged that he was unable to interview everyone that he wanted to due to time constraints, including Richardson and High. Willis believes that the strike was part of the reason why he was unable to interview certain individuals at Warrior Met due to the shortage of workers.

As a result of his investigation, Willis concluded that Warrior Met had engaged in discriminatory acts against Barnes and Hall. Tr. II 390-91. He testified that he did so by weighing the facts he learned and the description of the conditions underground, which sounded feasible to him. Willis found that Barnes and Hall had engaged in protected activity by exercising their miner's rights and making safety complaints. Additionally, Willis found that Warrior Met had taken adverse action against them because they each raised a safety complaint and were disciplined for that complaint. Tr. II 391-92.

III. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

In her post-hearing briefs, the Secretary urges I find that Warrior Met discriminated against both Barnes and Hall, in violation of their rights as miners under section 105(c)(1) of the Mine Act, and award relief she considers appropriate under the circumstances. The Secretary attributes Warrior Met's original decision to remove Barnes and Hall from the mine on January 25 on the grounds of alleged insubordination to have in fact been based on actions the two men took that constituted textbook protected activity under Mine Act, particularly their refusal to operate the longwall shearer at a speed they reasonably believed to be unsafe. The Secretary further alleges that the ensuing investigation by Warrior Met, which resulted in each man's suspension for two weeks without pay and return to work only under probationary status, intentionally avoided addressing the safety concerns they repeatedly raised prior to the company's decision on their discipline. The Secretary further asserts that, upon their return to work, Barnes and Hall were fired at or near the very end of their 30-day probationary periods for reasons both scant in substance and documentary support. S. Br. 28-46.

Warrior Met's position is no discrimination in violation of section 105(c)(1) occurred, as the evidence overwhelmingly indicates that the two miners raised safety concerns only *after* it had become apparent to them that they were going to be disciplined for their insubordinate behavior throughout their shift the night of January 25. This includes any safety concerns they raised as to operating the longwall shearer at the expected speed. Warrior Met maintains that, immediately following that night, its investigation into the two men's concerns was thorough and supported the company's decision to suspend the two men and permit their return under a probationary status period. Warrior Met also argues that there is no evidence connecting the later discharge of the two miners while they were on probationary status with the safety complaints they made during that investigation. Warrior Met further submits that even if Barnes and Hall could establish that the company was motivated by their protected activity, the evidence demonstrates that it would have nevertheless discharged them for non-protected activity. WMC Br. at 18-30.

A. The Mine Act's Anti-Discrimination Provisions

Section 105(c)(1) of the Mine Act provides in pertinent part that:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner, . . . has 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.

30 U.S.C. § 815(c)(1). To decide whether discrimination in violation of section 105(c)(1) has been established, the Commission developed and applies what is known as the *Pasula-Robinette* test or framework.

The Commission most recently summarized this method of deciding section 105(c)(1) discrimination claims as follows:

> A miner alleging discrimination under the Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981) (the "*Pasula-Robinette*" analysis).
>
> Under *Pasula-Robinette*, the operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone. *Id*. at 817-18; *Pasula*, 2 FMSHRC at 2799; *see also*

> *Con-Ag, Inc. v. Sec'y of Lab.*, 897 F.3d 693, 700 (6th Cir. 2018) ("Discrimination claims under the Act are analyzed using the *Pasula–Robinette* framework."); *Boich v. Fed. Mine Safety & Health Rev. Comm'n*, 719 F.2d 194 (6th Cir. 1983) (same).

Sec'y on behalf of Hargis v. Vulcan Constr. Materials, LLC, 46 FMSHRC 523, 529-30 (Aug. 2024).

As the Commission cited, over time various federal circuit courts of appeal adopted and applied *Pasula-Robinette* in reviewing Commission discrimination decisions. *See, e.g., Con-Ag*, 897 F.3d at 700; *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987) (characterizing method of establishing a prima facie case under the Mine Act as "well settled"); *Cordero Mining LLC v. Sec'y of Labor*, 699 F.3d 1232, 1236 (10th Cir. 2012).[4]

However, as recognized by the Commission in *Hargis*, *Pasula-Robinette* no longer governs in at least one, if not more, circuit courts of appeal. Nevertheless, in *Hargis* the Commission held that it would apply *Pasula*-Robinette in the case, reasoning that:

> The Ninth Circuit in *Thomas v. CalPortland Co*., 993 F.3d 1204, 1210–11 (9th Cir. 2021), recently decided that Commission discrimination cases in that Circuit must apply the Supreme Court's "but for" analysis used for Title VII cases. *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). The instant case is not within the Ninth Circuit, and neither party has contested the application of the *Pasula-Robinette* standard. *Contrast Cont'l Cement Co. v. Sec'y of Lab.,* [94 F.4th 729, 732-33] (8th Cir. [] 2024) (acknowledging Commission's application of *Pasula-Robinette* but following the Secretary's position that the approach "requires but-for causation.").

Hargis, 46 FMSHRC at 530 n.8.

The instant case is also "not within the Ninth Circuit," or the Eighth Circuit for that matter.[5] As far as which of the various federal circuit courts of appeal could eventually review a

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[4] I note that at least one circuit court has approved of using the *Pasula-Robinette* test to decide cases under section 105(c) as consistent with the deference principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Pendley v. FMSHRC*, 601 F.3d 417, 423-24 & n.3 (6th Cir. 2010). Recently, in *Loper Bright Enterprises v. Raimondo*, 603 U. S. ___, ___, 144 S. Ct. 2244, 2257-73 (2024), the Supreme Court overruled *Chevron* with respect to the level of deference owed to an agency interpretation of a statute the agency is charged with administering.

[5] Presently before the Commission on review is *Sec'y on behalf of Baumann v. Mosenac Manufacturer LLC*, 46 FMSHRC 339 (May 2024) (ALJ). In her recent response brief in the case, the Secretary argues that the Eighth Circuit in *Continental Cement* misunderstood the Secretary's argument in that case regarding *Pasula-Robinette* and "but-for" causation. *See* Docket No. CENT 2023-0251, S. Resp. Br. at 31-32 (Oct. 28, 2024).

Commission decision in this case, Alabama is under the jurisdiction of the Eleventh Circuit. When it last reviewed a Commission discrimination decision, the Eleventh Circuit applied *Pasula-Robinette*. *See National Cement Co. v. FMSHRC*, 27 F.3d 526, 532 (11th Cir. 1994); *see also Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 750 (11th Cir. 1991) (citing *Eastern Assoc.* in concluding that the Secretary had made a sufficient showing of the *Pasula-Robinette* elements of a section 105(c)(1) complaint to establish the complainant miners' rights to temporary reinstatement under section 105(c)(2)).[6]

The question of whether, in this case, "[]either party has contested the application of the *Pasula-Robinette* standard" (*Hargis*, 46 FMSHRC at 530 n.8), is not so cut and dried. Unsurprisingly, the Secretary's post-hearing brief cites *Pasula-Robinette* as the governing law. S. Br. at 29 ("To prevail, the Secretary must show that a miner engaged in protected activity and that the decision to terminate was motivated, at least in part, by the protected activity.").

In contrast, Warrior Met in its post-hearing brief sends mixed signals, as the parties did in *CalPortland*. *See* 993 F.3d at 1208-09. Warrior Met first cites the Ninth Circuit's *CalPortland* decision. WMC Br. at 18 ("A complainant may establish a *prima facie* case by showing (1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action because of that protected activity. See . . . *CalPortland*[], 993 F.3d [at] 1210 . . . .").

The court in *CalPortland* rejected *Pasula-Robinette*, instead adopting and applying a "'but-for' causation" standard. Under "but-for" causation, a section 105(c) miner complainant must show that the respondent employer would not have taken the adverse action at issue against the miner "but for" the protected activity in which it was established that the miner engaged. *CalPortland.*, 993 F.3d at 1210-11. Consequently, on remand in *CalPortland*, "the Commission applie[d] the but-for standard at the direction of the Ninth Circuit[,] but noted that "*Pasula-Robinette* remains the standard in cases arising under other jurisdictions." 46 FMSHRC 119, 122 n.5 (Mar. 2024), *pet. for rev. docketed*, No. 24-1442 (9th Cir. Mar. 12, 2014); *see also Sec'y on behalf of Alvaro v. Grimes Rock, Inc.*, 43 FMSHRC 299, 302-03 (June 2021) (recognizing but-for causation standard in affirming grant of temporary reinstatement in case within the Ninth Circuit).[7]

[6] Court review in this case could also be sought in the District of Columbia Circuit. *See* 30 U.S.C. § 816(a)(1). The D.C. Circuit has also recognized and applied *Pasula-Robinette*. *See, e.g., Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 88 (D.C. Cir. 1983).

[7] I note that, in its *Continental Cement* decision, that issued around the time the Commission issued its *CalPortland* decision on remand, the Eighth Circuit cited as "but-for" causation precedent an Eleventh Circuit case, *Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236, 1241-43 (11th Cir. 2010), that defined and applied "but-for" causation. 94 F.4th at 733. In *Schaaf*, the Eleventh Circuit did so in the context of deciding an employee's claim that her employer had interfered with her exercise of rights protected by the Federal Medical Leave Act. 602 F.3d at 1241.

Despite citing *CalPortland* as authority, however, Warrior Met does not argue for a "but-for" causation standard. Rather, Warrior Met summarizes its arguments pursuant to the standard *Pasula-Robinette* framework. WMC Br. at 18-19.

Because in these cases there is no real dispute over the cause of the initial discipline of the two miners that led to their eventual termination by Warrior Met, just over whether their actions that brought about that initial discipline were protected under the Mine Act, there is no difference in result when either test is applied. In fact, Commission precedent establishes that in protected work refusal cases such as these, "but for" causation is applied to end the inquiry into whether discrimination was established.

When protected activity is found, and the operator does not contest that the adverse action taken was based *only* upon the protected activity, a prima facie case of discrimination under the Mine Act is established. If there is no question with respect to cause of the discipline, as is the case here, under long-standing Commission precedent there is no further need to examine the evidence with respect to the employer's motivation.[8] The cited cases, where there was no dispute over the miner's actions that formed the basis for his discipline by his employer, just over whether that basis was protected activity, are thus prime examples of "but-for" causation, even though all them were decided by the Commission applying the first parts of *Pasula-Robinette*.

[8] *See, e.g., Dunmire v. Northern Coal Co.*, 5 FMSHRC 126, 138 (Feb. 1982) (finding miners had engaged in protected work refusal, and "[b]ecause they were fired for this work refusal, the terminations violated section 105(c)(1) of the Mine Act."); *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1943 (Nov. 1982) ("Because the [disciplinary] warning was admittedly issued [by the employer] for not changing the line, the only question is whether [the miner] met the requirements for a protected work refusal . . . . If [his] work refusal meets this test, then the warning he received was issued in violation of section 105(c)."); *Sec'y on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534-35 (Sept. 1983) (finding discharge of miner to violate section 105(c) when it was based on miner's good faith reasonable belief that fighting a battery fire was hazardous and operator had failed to adequately address miner's fears); *Sec'y v. Metric Constructors, Inc.*, 6 FMSHRC 226, 230-31 (Feb. 1984) (upholding Judge's decision that operator violated section 105(c) when it required miners to choose between working under conditions they reasonably and in good faith believed to be unsafe or having their employment terminated); *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1419 (June 1984) (where the operator disciplined the miner "solely for engaging in [a] work refusal[,] [b]ecause the refusal was protected, the discipline was done in violation of section 105(c)"); *Sec'y on behalf of Hogan v. Emerald Mines Corp.*, 8 FMSHRC 1066, (July 1986) (after reversing Judge's finding that a protected work refusal had not been established, "[a]ccordingly" reversing him and holding that violation of section 105(c) had been established because "[t]here [wa]s no dispute that the . . . suspension of the" complainant miners was based on their protected activity), *aff'd*, 829 F.2d 31 (3d. Cir. 1987) (table); *Sec'y on behalf of Johnson v. Jim Walters Res., Inc.*, 18 FMSHRC 841, 847-49 (June 1996) (affirming Judge that miner's actions constituted a protected work refusal and that operator's discipline of miner for those actions was discrimination under section 105(c)).

Accordingly, in such cases there is no need to choose between applying *Pasula-Robinette* and the causation analysis adopted by the Ninth Circuit in *CalPortland* and, perhaps, by the Eighth Circuit in *Continental Cement*. That is because the Commission recognized early on that in cases that do not involve allegations of a mixed motive, there is no alternative to applying "but for" causation, even under *Pasula-Robinette*. Moreover, in such cases there is no reason to be concerned about the miner having to prove the operator's true motive, the operator having revealed a motive that violates the terms of section 105(c).

B. Whether the Secretary Established a Prima Facie Case of Discrimination by Warrior Met Against the Complainant Miners.

1. Adverse Actions Against the Two Miners

It is undisputed that there were two separate adverse employment actions taken against each of the two miners in this case. The first was their 14-day suspension and subsequent return to work under probationary status. The suspensions by themselves constituted adverse employment actions with the potential to constitute discrimination under section 105(c) of the Mine Act. *See* S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Committee on Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (listing suspension among common forms of adverse actions that can be taken for discriminatory and retaliatory purposes by employers). As for the men's return to work, it is clear from the record that it was part of the discipline Warrior Met meted out in connection with the suspension.

The second adverse employment actions were the men's discharge for allegedly violating the terms of their probationary employment status before they completed the 30-working day period for that status.

2. The Cause of the Original Suspension and Probation of the Miners.

The Secretary contends that Barnes and Hall, in choosing to run the longwall shearer at a speed of less than the 35 FPM requested by management the night of January 25, were acting reasonable under the circumstances, and thus engaging in a form of work refusal that the Commission has recognized as protected activity under the Mine Act. The Secretary argues that, in the context of the working conditions that night and the events as they unfolded, together the two men sufficiently communicated the safety concerns motivating their decision to only operate the shearer at a lower speed to both co-workers and supervisors before departing from the mine. In the Secretary's view, the accounts the two men provided during the subsequent investigation, prior to the company's official decision on the discipline to be meted out to them, confirmed that their actions were motivated by a good faith, reasonable belief that to comply with orders to operate the shearer at 35 FPM would have put themselves and other longwall crew members at risk of injury. The Secretary takes the position that for Warrior Met to nevertheless continue to consider the two miners as having been "insubordinate" that night and discipline them in any respect, much less suspend them, demonstrates that the company was motivated by the miners' protected activity in reaching its disciplinary decision. S. Br. at 30-39.

Warrior Met strenuously defends every step it took January 25 and afterwards with respect to disciplining the two men. It cites management opinion that even prior to that night, with the expiration of the collective bargaining agreement between it and its unionized miners looming, the evening shift No. 2 longwall crew had gone from being the best of the three crews to its worst. Warrior Met points to evidence that both Barnes and Hall had ample opportunity to explain to their supervisors why they were not following direct orders, relayed to them multiple times, to operate the shearer at 35 FPM, and yet failed to do so every time. The company contends it was only after it became apparent to the men that they were going to be disciplined for ignoring instructions regarding the shearer speed that they concocted a safety justification for doing so. Warrior Met maintains that the men's safety concerns, having only been expressed after the fact, were in fact no more than ad hoc, pretextual excuses for the insubordinate behavior they had engaged in from the outset of the shift. The company's position is that its subsequent investigation confirmed beyond a doubt that any safety concerns the men expressed during the investigation were entirely unfounded, and that therefore the company was well within its rights to discipline them pursuant to its well-established and understood policies. WMC Br. at 19-25 & n.18.

My findings of fact are based on the record as a whole and, where relevant, my observation of the witness demeanor during his testimony. The omission of detail regarding a witness's testimony does not mean that I have not considered that detail. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

In resolving any conflicts in the testimony, I have considered consistencies, or inconsistencies, in each witness's testimony and between the testimony of the witnesses. I have also considered the interests of the witnesses, or lack thereof.[9]

Addressing the issues the parties have raised in the cases in chronological order in which they arose provides, in my opinion, the clearest way of understanding what happened in the case. The first issue addressed does not neatly fit into the *Pasula-Robinette* framework but is an important preface to later events.

a. The Company's Claims Regarding the Recent Work History of the No. 2 Longwall Evening Shift Crew.

There is no avoiding the fact that the key events in this case took place in the shadow of negotiations for a new collective bargaining agreement between Warrior Met and the Union. Warrior Met did not hesitate at hearing and afterwards to question the work ethic of the entire No. 2 longwall evening shift crew, accusing it of "exhibiting several issues" in the weeks leading to January 25, and further suggesting that the crew could have been motivated by the pending

[9] In general, witness testimony among the rank-and-file miners who testified tended to diverge on key aspects of the case based on whether the witness had joined the strike and not returned to work at the mine by the time the hearing was held, or whether the witness was presently working at the mine, usually after having initially joined the strike but returned to work some months into the strike while it continued.

labor situation to engage in an intentional work slowdown in the guise of a concern for safety. *See, e.g.*, WMC Br. at 20-21; WMC Resp. Br. at 5.

As support for this view, Warrior Met cites the testimony of Wilson. In the context of answering questions regarding his knowledge of the work histories of Barnes and Hall with Warrior Met, Wilson offered the view that in the January 2021 timeframe, the "whole" evening shift crew had been having "issues," going from his "number one loading crew, hands down, best crew [he] had" to the "worst" crew. Wilson testified that "[s]omething happened, and they were the worst. It was always issues. Always something all the time. And I don't know what that was." Tr. II 525-26, 546-47. Then on cross-examination, he stated he had talked with more than one supervisor of the crew, and then proceeded to provide a clearly conflicting statement: "I don't know what the problem is to this today. I did know that we definitely had a problem and it was—everybody pointed toward two individuals." Tr. II 547. He stopped there, not specifically identifying the individuals, but it is clear to me he was referring to the complainants.

Other management personnel also addressed the strike and its impact upon Warrior Met's productivity. Kimbrel testified that prior to the night of January 25 there was "turmoil around the upcoming contract negotiations. And there was—the workforce was antsy about that. And so, you know, that was moving over into the—into the actual[] work in some cases." Kimbrel stated that he took this background into account in viewing the events of the night of January 25, and in deciding to suspend the two miners instead of discharging them. Tr. III 631-32.

In addition, Sally Brown during her deposition testified that, with respect to the No. 2 longwall, before January 25 she "was aware that there were issues on the evening shift. I'm not sure who communicated that to me, but I had been made aware that evening shift had been causing—had been having more issues. Specifically I couldn't tell you what those were, but more issues than normal, than the others shifts normally, day shift and owl shift." Ex. C-23, at 55. She said that as part of her investigation she learned from longwall coordinator McGilton "that there had been troublesome behavior on the longwall evening shift specifically for an extended period of time." She said McGilton described evening shift employees taking extended periods of time to do maintenance tasks that would normally be completed sooner. Ex. C-23, at 52, 54.

These views provide background to the ensuing events, but in my opinion the quality of the evidence offered detracts from the credibility of Warrior Met's claims regarding the night shift crew. The recent productivity of the No. 2 longwall evening shift could have been much more readily and reliably established by documentary evidence, rather than by vague, accusatory testimony and suspect hearsay. Warrior Met routinely prepares daily activity and production reports for each of its longwalls, and the Secretary submitted them as evidence for the three-week period starting with January 17. Ex. C-8. If the night shift's output had declined during January 2021 as noticeably as Warrior Met claimed it had, such reports would have documented

it. The reports for the dates included in Exhibit C-8 do not do so, and Warrior Met did not provide reports from earlier in January or from 2020.[10]

In addition, the supervisor who worked closest to the night shift crew, foreman Josh Richardson, did not testify to an overall decline in the work of the crew during January 25. In contrast to Wilson's barely veiled insinuation that Barnes and Hall were the source of the problems the crew was having in January 2021, Richardson testified he never had a problem with either man's work before January 25. Tr. II 492-93.

b. Whether the Secretary Established That the Two Miners Engaged in Protected Activity on or Around January 25.

In deciding discrimination claims under the Mine Act, the Commission has developed an extensive body of law regarding what miner activity is protected by the terms of the Mine Act and thus subject to section 105(c)(1)'s anti-discrimination provisions. In so doing, the Commission, with the approval of reviewing courts, has relied upon the legislative history of the Mine Act. There it was stated that:

> The [Senate] Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends to include not only the filing of complaints seeking inspection under Section [103(g)] or the participation in mine inspections under Section [103(t)], but also the refusal to work in conditions which are believed to be unsafe or unhealthful ... , or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

S. Rep. No. 95-181 at 35, *Leg. Hist.* at 623 (quoted in *Sec'y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005)); *see Miller v. FMSHRC*, 687 F.2d 194, 195 (7th Cir. 1982) ("In the absence of any contrary legislative history, so clear a statement in the principal committee report is powerful evidence of legislative purpose, which we are obliged to give effect to even if it is imperfectly expressed in the statutory language."); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 960-61 (D.C. Cir. 1984);[11] *see also Brock on behalf of Parker v. Metric Constructors, Inc*, 766 F.2d 469, 472 (11th Cir. 1985).

[10] According to Warrior Met's Pre-Hearing Statement, it intended to submit its longwall shearer daily reports as evidence as well, but at hearing it refrained from introducing exhibits duplicative of the Secretary's exhibits.

[11] This legislative intent was further supported by the Committee's view that section 105(c) itself should be "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181 at 36, *Leg. Hist.* at 624. "[I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35, *Leg. Hist.* at 623.

i. The Delay in the Startup of the Longwall and Protected Activity

Warrior Met's position is that from the outset of the January 25 night shift, the No. 2 longwall crew engaged in what Warrior Met contemporaneously considered to be "game playing," designed to hinder production that night. Warrior's witnesses estimated that the preliminaries to starting the longwall should typically take no more than 30 minutes, but that night took more than twice that long. These conclusions are suspect for several reasons.

First, the evidence is that the start of the shift was anything but normal that night. The No. 2 longwall did not operate during the day shift because the day shift crew instead had electrical training scheduled that day. Tr. II 324-25. Thus, the night shift could not directly take over from the day shift on the longwall, as it sometime did, which is a practice widely known as "hot seating" a shift change. Tr. II 324-25.

Secondly, the shift prior to the day shift, the owl shift, had not ended its shift by positioning the shearer at the longwall headgate, where crews arrive and depart the longwall, as was the standard practice when hot seating was not possible. Rather, the shearer was at the tailgate, at the other end of the longwall. Tr. I 37, II 322-23.[12]

This required the crew to walk 5 to 10 minutes down the longwall, where it learned that the fire extinguisher was missing from the shearer. That necessitated a call up to the headgate, and a further delay while a replacement fire extinguisher was located and brought down to the tailgate.

In the meantime, the crew discovered that some of the cutting bits on the shearer were broken and needed to be replaced. So, Hall made the roundtrip to the headgate, where the replacement bits stored. Tr. II 326-27. Then, upon Hall's return and the changing of the bits, Richardson ordered "a complete preop" check on the shearer. During that time, Barnes discovered an insert missing on the shearer, which led to another roundtrip to the headgate. Tr. II 461.

Warrior Met does not contest that the crew had a right under the Mine Act to not begin longwall operations if longwall conditions violated one or more mandatory safety standards. *See Sec'y on behalf of Zecco v. Consolidation Coal Co.*, 21 FMSHRC 985, 992 (Sept. 1999) ("Heeding the command of a mandatory safety standard promulgated pursuant to the Mine Act is clearly the exercise of a protected right. An operator may not retaliate against a miner for invoking such a right.").

Thus, the night shift crew had every right to refuse to start cutting coal until the required fire extinguisher, which was strangely missing from the shearer (Tr. I 98), was replaced.

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[12] Bauer explained that when a shift crew anticipated it did not have sufficient time for the shearer to make a roundtrip from the headgate to the tailgate and back, a "ghost cut" could enable time to be saved so that the shearer would end up at headgate. The shearer would not cut coal on the way down to the tailgate, only on the way back to the headgate. Tr. 320-23. Clearly the owl shift did not employ this practice at the end of its shift.

Similarly, the crew was well within its rights to replace the broken shearer bits. For over ten years, MSHA has taken the position that operation of a longwall shearer with damaged cutting bits is unsafe, and a violation of 30 C.F.R. § 75.1725(a).[13] Program Policy Letter No. P13-V-03 (effective May 29, 2013; last validated Mar. 31, 2021) ("[c]utting coal or rock with . . . longwall shearers that have damaged, worn, or missing cutting[] bits have ignited methane resulting in serious injuries and fatalities.").

Warrior Met's objection was more to *the timing* of the crew's exercise of its protected rights. Warrior Met's complaint is that the crew would only complete one startup task at a time, before moving on to the next, when it could have been doing more than one at a time. While there is some evidence supporting that position, the bulk of the evidence is to the contrary. Hall did not wait for the fire extinguisher to arrive at the tailgate before he inspected the shearer and learned that bits need replacing; Richardson testified that while carrying the replacement fire extinguisher from the headgate to relay to a crew member, he crossed paths with Hall heading toward the headgate to retrieve replacement cutting bits. Tr. II 460-61.

Moreover, it was the foreman, Richardson, who ordered and assigned the crew to conduct a complete "pre-op" inspection, even though the shearer was already getting a late start that night. Tr. II 461. This was not consistent with a concern that the crew was unduly delaying the start of operations.[14].

I also find it at least curious that, within 15 minutes of the crew's arrival, Richardson's superiors, began calling down to the headgate inquiring why the longwall hadn't started up. Tr. II 324, 326. That the shearer was down at the tailgate, instead of at the headgate, necessitating that the crew members spend additional time traveling back and forth between the headgate and tailgate, should have been known by most, if not all, the longwall supervisors. Richardson testified that he spoke with the mine agent who had conducted the pre-shift examination of the longwall area about the longwall conditions. Tr. II 436.[15]

In any event, no miner on the crew was disciplined for the delay in the start of the longwall that night. I find it relevant background to the evening's eventual events, however, and indicative that any "game playing" that night may not have been solely the province of the miners on that shift.

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[13] Section 75.1725(a) provides "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

[14] Richardson's role in the delay may be why he described it in terms not nearly as drastic as his supervisors. He testified that the delay was "stretching it a little." Tr. II 462.

[15] McGilton was not called to testify by either the Secretary or Warrior Met.

ii. The Operation of the Shearer at Less than the Requested Rate of Speed

(A) The Protected Work Refusal Doctrine

The Secretary argues that the two miners' refusal to operate the shearer at the rate of speed requested by their supervisors, because it was prompted by their fear of adverse safety impacts from operating at that speed, was a refusal protected under the Mine Act. S. Br. at 30-35. "The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger." *Dykhoff v. U.S. Borax, Inc.*, 22 FMSHRC 1194, 1198 (Oct. 2000); *see, e.g., Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989) ("It is by now well settled that section 105(c)(1) protects a miner's right to refuse work under conditions that he reasonably and in good faith believes to be hazardous. Although the Mine Act does not state this right explicitly, this court has recently noted that 'the legislative history of the statute unequivocally supports the Commission's view.'") (quoting *Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C. Cir. 1988)) (other citations omitted); *Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 366 (4th Cir. 1986) (rejecting operator's contention that omission of grant of right of work refusal from the text of the Mine Act prohibits it's recognition by the Commission and the courts on the ground that "[c]ase law . . . is uniformly to the contrary").

In outlining what is known as the protected work refusal doctrine, the Commission has explained the policy behind protecting work refusals where certain conditions are met. The Commission has recognized that, "[f]rom a practical standpoint," protecting a miner who "has a good faith, reasonable belief in a hazardous condition"

> means that miners are able to make decisions removing themselves from potentially hazardous conditions without the concern of having to prove that the condition actually existed. This is an extremely important legal construct, particularly in the mining industry, *where hazards often appear instantaneously* and a miner's decision to remove him or herself from a dangerous situation could be the difference between life and death.

Dolan v. F&E Erection Co., 22 FMSHRC, 171, 179-180 (Feb. 2000) (emphasis added).

Warrior Met makes much of the fact that the two men that night never even stopped the shearer, much less refused to operate it. WMC Br. at 21-22 & Resp. Br. at 8, 16, 25, 27, 30. However, in cases in which a miner has claimed to have taken additional precautionary measures for safety reasons, resulting in lower productivity for which the miner allegedly suffered adverse action by management, the Commission has treated the miner's actions as akin to a protected work refusal. *See Zecco*, 21 FMSHRC at 993 ("extra precautions should be protected when, like a protected work refusal, they are based on a miner's 'good faith, reasonable belief' that such precautions are needed, and when the precautions themselves are reasonable"); *Sec'y on behalf of Dunmire v. Northern Coal Co.*, 5 FMSHRC 126, 130 (Feb. 1982) (work refusal "may extend to 'affirmative self-help', such as shutting off *or adjusting equipment*") (emphasis added).

Consequently, I examine the miners' actions here under the protected work refusal doctrine. The Commission has purposefully developed the doctrine on a case-by-case basis. *See Sec'y on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1533 (Sept. 1983) ("We continue to believe that, insofar as this adjudicatory Commission is concerned, gradual development of the law in the cases contested before us is the appropriate vehicle for molding th[e] important right" to refuse to work in the face of a hazard).

As mentioned, precautions taken by a miner will be considered to constitute a protected work refusal only if it is shown that, like with a protected work refusal, the miner had a "reasonable, good faith belief" that hazardous conditions necessitated the measures taken by the miner. "The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed." *Sec'y on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997-98 (June 1983).

(B) Whether the Complainants' Established That They Had a Good Faith Reasonable Belief That Operating the Shearer at 35 FPM Was Hazardous Given the Mining Conditions.

The Secretary's position is that "Hall and Barnes had a reasonable belief that operating the shearer at 35 FPM under the gassy and gobby mine conditions on January 25, 2021 was unsafe." S. Br. at 31-33; *see also* S. Resp. Br. at 8-9. The Secretary also cites record evidence she believes establishes that the men's belief was held by them in good faith, and, under the circumstances, was sufficiently communicated by them to Warrior Met management. *Id*.

Warrior Met points to contrary evidence on the mining conditions that evening, particularly with respect to whether the level of gob posed a hazard while the shearer was operated at 35 FPM, arguing that it undermines the notion that the men's belief that it was not safe to do so was a reasonable one. As for whether the men were acting in good faith in refusing to operate the shearer at that speed, Warrior Met describes the evidence as establishing that the two men passed on every opportunity to communicate any safety concern to management that night until they learned that they were being sent home for their insubordinate refusal to operate the shearer at 35 FPM. WMC Br. at 19-23; WMC Resp. Br. at 25-29.

The Commission has indicated that determinations of miner good faith and reasonableness in cases such as this may involve an evaluation of "all the evidence for detail, inherent logic and overall credibility." *Sec'y on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519 (Mar. 1984) (citing *Robinette*, 3 FMSHRC at 807-12)). Here, all three of those considerations are important, particularly because the conditions alleged were transitory ones. The levels of methane on a longwall section can vary over even short periods of time, as can the amount and impact of the gob with respect to the mine floor in front of the shields and on the legs of the shields.

(1) The Complainants' Concerns About Methane Levels

The Secretary argues that the two miners were concerned about methane levels at the face of the longwall that evening. She contends that their decision to operate the shearer at a slower

speed would better permit methane to dissipate, and not have the methane reach 1.0%. S. Br at 31-32. MSHA regulations require that the cutting of coal cease once there is a reading of 1.0% methane. *See* 30 C.F.R.§ 75.323(b).

There was a methane monitor on the shearer that shearer operators could watch while operating the shearer. Shearer operators also had individual monitors they could use to measure methane levels. Tr. I 29. Finally, there was a methane monitor at the tailgate of the longwall, that provided a methane level measurement reading at the headgate to the operator there. Tr. III 590-91.

It appears that the Secretary is arguing that the men's running of the shearer at a speed designed to reduce the possibility of reaching the shutdown level of 1.0% methane mandated by MSHA regulation was protected activity in this instance. The Commission has recognized that miners taking safety measures "beyond the precautions of MSHA's regulations" can constitute protected activity. *Zecco*, 21 FMSHRC at 993. But the Eleventh Circuit has made clear that, to constitute a protected work refusal, a miner's refusal must be "'motivated'" by health or safety concerns. *National Cement*, 27 F.3d at 533 (quoting *Miller*, 687 F.2d at 195) *Cf. Zecco*, 21 FMSHRC at 993 ("It would appear that the precautions taken by Zecco and his crew were conceded by Consol to be reasonable in light of the extremely hazardous conditions present . . . .").

I find that the Secretary failed to carry her burden of proof with respect to whether the two men, in choosing to operate the longwall shearer at a slower speed, were acting upon a good faith reasonable belief that to do otherwise would be hazardous due to the presence of methane at the longwall. While both men cited the methane levels on the longwall that night as a consideration in running the shearer at a lower speed than requested, the record evidence is that they both did so with production, not safety concerns, in mind.

Miner Barnes was the Secretary's lead witness in the case, consistent with his having been ordered during the events in question to take over from Hall as the lead shearer operator. Tr. I 42, 212. I found Mr. Barnes to, in general, have answered questions at hearing in a relatively straightforward manner. His explanation for why he chose to operate the shearer at less than 35 FPM that night provided a particularly helpful outline to his concern with the mining conditions that he considered in setting the shearer speed. On cross-examination, he explained that "the gob is why I wouldn't get up to [the shearer speed management] wanted. Like I told Sally [Brown] in that recording, if it wasn't for the gob and the problems of me afraid somebody's going to get hurt, we run 35, 40, whatever they want, and when it hits 1 percent [methane], just cut it off." Tr. I 114. This testimony was in line with his testimony on direct examination. Tr. I 45, 57.

Hall's testimony was not as clear on the subject, as he mentioned the methane levels as justifying the men's operation of the shearer at less than 35 FPM. It is Hall's testimony that the

Secretary cites on the subject. *See* S. Br. at 31 (citing Tr. Vol. II 217), 32 (citing Tr. Vol. II 217), 33 (citing Tr. Vol. II 221, 224).[16]

But when asked on direct examination to explain his concern with operating the shearer at 35 FPM with the methane at the level the shearer methane monitor was showing, Hall, like Barnes, did not express his concern in terms that to do so was unsafe. Rather, his opinion was that operating the shearer at the requested speed would hasten reaching 1.0% methane, which would necessitate shutting down the longwall. He stated that "either you was going to run it fast and shut down all the time at .9 percent. It wouldn't have took you no time to get to 1 percent. Then you was going to be down anyway. The faster you– the faster that machine run, the faster you gas out. Tr. I 222.

The Secretary argues that the evidence establishes that methane and gob on the longwall that night were "abnormally bad," citing the testimony of various witnesses. S. Br. at 32. The only testimony she cites with respect to the methane level alone, however, is that of a third member of the crew, shield puller Beasley, who described "[t]he face" as "gassy." Tr. III 586. Beasley further explained, however, that by gassy he meant .4 to .8% methane. Tr. III 590. His testimony in no way established there were safety considerations in operating the shearer at 35 FPM in methane levels below 1.0%. Indeed, like Barnes and Hall, he stated that the shearer could be operated at that speed until such time that methane would get to the 1.0% level, at which point the longwall would be "shut down." Tr. III 592.

Longwall production would plainly be impacted by shutdowns due to excessive methane levels. There is no record evidence, however, that Warrior Met would blame reductions in production due to methane-induced shutdowns on the longwall crew members. Indeed, the evidence is that Warrior Met expected longwall shutdowns to occur for various reasons, including methane at the 1.0% level or higher on the section. Tr. II 441-42, 577.

(2) The Concern About the Gob

In contrast to the two miners' concerns about methane being limited to the impact upon production, they, along with at least one other miner on the crew, clearly stated at hearing that they feared the gobby conditions along the longwall that evening for safety reasons. I thus address whether the Secretary adequately established that those fears were (1) reasonable and (2) held by the miners in good faith.

[16] Hall also testified that he operated the shearer at the lower speed out of fear of being struck by a rock thrown during the cutting process. Tr. I 217. The Secretary does not address that fear of Hall's in her post-hearing briefs, so I will not consider whether it was reasonable and held in good faith by Hall.

(a) The Reasonableness of the Miners' Belief in the Danger Posed by Operating the Shearer at 35 FPM in the Gob Present that Night.

With respect to the impact of gob upon longwall mining operations, it is undisputed by Warrior Met that gob above certain amounts and of certain compositions can adversely impact such operations, including with respect to miner safety. The greater amount of gob that lands outside of a longwall pan, the greater the difficulty miners have in advancing the longwall. Tr. II 445-46 (Richardson's testimony that gob when it reaches knee high levels needs to be shoveled), 531. The composition of gob—which runs the gamut from hard rock to soft clay—can also impact longwall operations. Tr. II 531.

Shearer operators walk along the longwall while using their remote operating equipment, so the amount and composition of the gob they must traverse impacts their working speed and degree of difficulty. Tr. I 38-39, 92. As for shield pullers, the amount or composition of the gob can necessitate that they move shields manually, instead of automatically, as the longwall advances. In addition, should the shearer operators and shield pullers fall out of sync with one another, as can occur due to the gobby conditions, there can be an adverse impact upon miners' ability to safely operate the longwall. Tr. I 33, 106.

Importantly, in determining whether a miner's fear of a hazard is reasonable "the Commission consistently has held that the perception of a hazard must be viewed from the miner's perspective at the time of the work refusal. To be accorded the protection of the Act, the miner need not objectively prove that an actual hazard existed." *Gilbert*, 866 F.2d at 1439. The Commission has emphasized that "[t]he human factor cannot be ignored in the evaluation of hazards." *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1419 (June 1984).

With respect to the hazard that gob may pose during longwall operations, it is important to remember that gob amounts along a longwall can be extremely transitory. Thus, it is not unreasonable for different witnesses to have different impressions of gob if their accounts are from different locations along the longwall or have been provided with respect to different times. Consequently, in determining whether from their perspective the two miners' belief that the longwall gob conditions required they slow the shearer down that night to protect one or more crew members' safety was reasonable, I accord the greatest weight to the testimony of the witnesses who were actually working the longwall that evening and thus had the greatest geographical and temporal exposure to the conditions. *See Robinette*, 3 FMSHRC at 811-12 ("Unsafe conditions can occur suddenly and in remote sections of mines; the miner in question may be the only immediate witness; and physical evidence may be elusive.").

During his testimony, Barnes explained how the gob was worse at some locations and times than at others. Tr. I 38 (only "small amounts of gob" when they started from the tailgate, but on the second pass midface, it had increased from a foot high to "a lot more"), 42 ("it got a lot worse" near the headgate). For those points at which the largely rocky and thus unsteady gob was the greatest, Barnes described how he and other crew members could only walk bent over in order to avoid falling, but that made it difficult for each to pay attention to his job duties and where he was going. Tr. I 40, 45. He also described how poor the visibility was that night. Tr. I 52.

The focus of Barnes' testimony was more about his concern for other crew members than for himself. He knew without having to look, that if he was having difficulty moving over the gob, Hall, some six inches taller, had to have been struggling, and at one point saw him working from his knees. Tr. I 41, 58.

Barnes also explained that he saw that the amount of gob prevented the shields from being pulled in automatic mode (Tr. I 38), so he kept the shearer at a slower speed to not get too far ahead of the shield puller manually moving the shields. Barnes understood that shearer should not cut more 10 shields ahead of where the closest shield had advanced. Tr. I 105-06.

The shield puller that Barnes was concerned about was Earnest. Tr. I 118. Earnest corroborated at least some of Barnes' testimony, particularly with respect to the increasing amount of gob the crew was encountering. He confirmed that he eventually had to manually pull shields, which takes more time, and that it would have been dangerous if the shearer traveled too far ahead of the last pulled shield, as it would result in too much unsupported mine roof that could fall on the miners. Tr. I 155-58.

The taller shearer operator, Hall, considered the gob to be considerable at the start of the shift, from midface down to the tailgate, such that he had to bend over to walk. Tr. I 207. After going up to the headgate and returning, the amount of gob midface was such that it was touching Hall's lower back. Tr. I 213. Hall also described conditions as so bad that he asked Barnes to slow down so that he could keep up. Tr. I 217. Like the other witnesses, Hall attributed the intentional slowing of the shearer to the need to permit the shield pullers, manually pulling shields through and over the gob, to stay within 10 shields of the shearers. Tr. I 215.

The other shield puller on the crew, Beasley, was called by Warrior Met and corroborated some of testimony of his fellow crew member. He recalled the gob was bad in some spots, such as at certain points on the face when it was halfway up the pan line (Tr. III 586-87), and he recalls reporting it as such to longwall foreman Richardson when he saw him at the headgate. Tr. III 591. Beasley did not recall, however, having to manually move the shields, and thus did not believe he had trouble keeping up with the shearer operators. Tr. III 588-89.

Longwall foreman Richardson testified the highest level of gob he recalled seeing that night was in the midface area, where he described it reaching his mid-calf. Tr. II 473, 501. He recalled it as reaching it as no higher than the top of the toes of the shields, and that not being enough to prevent the shields from operating in automatic mode. He also did not recall hearing the alarm that would indicate the shields moving from automatic to manual mode. Tr. II 456, 473.

I do not put nearly as much stock in the testimony of foreman Richardson as in the testimony of the miners, for several reasons. Richardson cited that gob was a concern because it was early in the mining cycle of that longwall panel. Tr. II 437. He also described seeing gob as high as two feet that night, which is considerably above the middle vertical point of his calf. Tr. II 501.

Most importantly, there was testimony that Richardson was not only performing his own foreman duties that night but was covering for another foreman. Tr. II 542. While it was clear he spent time early in the shift that night at the headgate and tailgate, there was little evidence that he spent much if any time on the longwall face between those two points while the Barnes and Hall operated the shearers. Indeed, he does not recall seeing them at all while they were operating the longwall. Tr. II 476.

Given the foregoing, I find that the Secretary put forth sufficient evidence with respect to there being gobby conditions at certain points along the longwall to establish a basis for the two miners to be reasonably concerned at times that night about running the shearer at 35 FPM.

(b) Whether the Miners' Safety Concerns Were Put Forth in Good Faith.

As for the second element to establishing a protected work refusal, the requirement that the miner's belief in the hazard be held in "good faith," the Commission has explained that "[g]ood faith belief simply means honest belief that a hazard exists[,]" in order to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Robinette,* 3 FMSHRC at 810; *see also Sec'y v. Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (Feb. 1984) ("there is no hint in the record that the [complainant miners] fraudulently expressed a fear of the working conditions"), *aff'd* 766 F.2d 469. A miner's burden of proving good faith does not include the demonstration of an absence of bad faith. *Bush,* 5 FMSHRC at 997.

In determining a miner's good faith, one key element is communication regarding the perceived hazard. "Proper communication of a perceived hazard is an integral component of a protected work refusal, and responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner." *Conatser v. Red Flame Coal Co.*, 11 FMSHRC 12, 17 (Jan. 1989) (citing *Smith v. Reco, Inc.*, 9 FMSHRC 992, 995-96 (June 1987)). "[T]he communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the mine's motivations for refusing work." *Smith*, 9 FMSHRC at 995.[17]

In *Dunmire*, after taking several competing considerations into account, the Commission set forth what has been described as a "qualified" communication requirement in protected work refusal cases:

> Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonable possibility" may be lacking where, for example, a representative of the operator is not present,

[17] The Commission has explained that "[t]he miner's failure to communicate his safety concern denies the operator an opportunity to address the perceived danger and, if permitted, would have the effect of requiring the Commission to presume that the operator would have done nothing to address the miner's concern." *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460, 2463 (Dec. 1993) (citing *Smith*, 9 FMSHRC at 995).

> or exigent circumstances require swift reaction. We also have used the word, "ordinarily" in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances--such as futility--may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal.
>
> . . . .
>
> We stress that our purpose is promoting safety, and we will evaluate communication issues in a common sense, not legalistic, manner. Simple, brief communication will suffice, and the "communication" can involve speech, action, gesture, or tying in with others' comments. We are confident that the vast majority of miners are responsible and will communicate such concerns in any event. In short, we believe that the practical effect of this rule will be to assist in weeding out work refusals infected by bad faith--conduct that enjoys no protection under the Mine Act.

Dunmire, 4 FMSHRC at 133-34; *see also Sammons v. Mine Servs. Co.*, 6 FMSHRC 1391, 1417 (June 1984) ("Our cases contemplate . . . that the miner has engaged in some form of conduct or communication manifesting an actual refusal to work."); *Conatser*, 11 FMSHRC at 17 ("communication of a safety concern 'must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used . . . .'") (quoting *Sec'y on behalf of Hogan v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1074 (July 1986), *aff'd mem.*, 829 F.2d 31 (3d. Cir. 1987)).

In *Simpson*, the D.C. Circuit quoted and approved the Commission's approach in *Dunmire*. The court stated that "[w]hile this requirement is not planted in the language or history of the Mine Act, it is certainly 'rational and consistent with the statute,' and we therefore accept this qualified communication requirement as part of a reasonable interpretation of the Mine Act by the Commission." 842 F.2d at 459 (quoting *NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 123 (1987)).

The parties argue at length regarding whether the two miners adequately communicated to their superiors that evening of the presence of gob in such quantities that it was unsafe to operate the shearer at 35 FPM. I agree with the Secretary (S. Resp. Br. at 5) and find that Barnes, when he spoke with Bauer the first time he ran the shearer up to the headgate, adequately communicated the crew's concern about operating the shearer at 35 FPM at those points between the headgate and tailgate where there was excessive gob.

I credit Bauer's testimony to that effect, as well as Bauer's account of informing Wilson of the crew's concern. Tr. II 329-34, 348. While Bauer was not part of management, and indeed

was a staunch union advocate at the mine, his opinion on crew matters on the evening shift was sought out and credited by Sally Brown. Tr. II 342, 351.[18]

After that, Wilson was clearly on notice of the two men having provided a reason for why they were not operating the shearer as fast as he had requested. He nevertheless continued to have others on the longwall instruct the two to operate at 35 FPM.

There is no evidence whatsoever that Wilson even attempted to try to personally speak to either of the men regarding what he had heard from Bauer regarding the conditions at points along the longwall, much less ascertain whether there was an actual basis for the men's safety concerns. Instead, Wilson chose to communicate through intermediaries. Tr. II 518.

This had the effect, perhaps intended, of signaling to the two men that their concerns were not worthy of Warrior Met's consideration. At a minimum, Wilson's response fell well short of what is expected of an operator once a miner has satisfied the requirement that, as part of a work refusal, he communicate, or at least attempt to communicate, his concern regarding safety. *See Gilbert*, 866 F.2d at 1141; *Pratt*, 5 FMSHRC at 1534.

Acting on the men's concerns about running the longwall shearer at 35 FPM when those concerns were first raised, was particularly important in this instance because of the transitory nature of gob in connection with longwall mining. Reliance by Warrior Met management on their impression of conditions the day prior to the shift, or the day after (Tr. II 532-33), is a poor substitute for prompt action to confirm whether there was a basis for the men's concerns.

That, however, seemed to be the primary basis for the conclusions Brown reached after her subsequent investigation into the men's complaints about the conditions that night. Putting aside her qualifications to investigate a safety complaint, and thus the weight that should be accorded to her conclusions (Ex. R-23 at 16,70),[19] it cannot be ignored that she failed to interview the shield puller Earnest regarding the conditions that night. He could have provided the first-hand accounts of the conditions that Bauer could not, as he capably did at hearing.

That is not to say that I am absolutely convinced that the two miners were acting entirely in good faith. I do not ignore the fact that, from the outset that evening, while operating the shearer they never reached anywhere near the 35 FPM standard set by Warrior Met for that

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[18] Given their respective backgrounds, I question Brown's veracity on Bauer speaking ill of his fellow crew members to management at the mine. Ex. R-23, at 66. She was unable to testify at hearing, however, so I am not comfortable discrediting her deposition testimony entirely without being able to observe her while she testified. Upon her later recovery from her injuries, she was scheduled to testify on behalf of Warrior Met in at least one other case I was assigned to hear, and I looked forward to observing her demeanor while she testified. That case, however, after several continuances, eventually settled without a hearing being held.

[19] In another Warrior Met discrimination case on which I was asked to decide a motion for summary decision, evidence was presented that the company has a safety director who investigates health and safety complaints.

night. This despite the fact that Barnes testified that, when beginning to cut coal that night, the two did not encounter problematic amounts of gob. Tr. I 37-38, 102, 106, 117. This, and Barnes lack of attention at the earlier safety meeting (Tr. II 458-59), raises some question about how sincere he was in at least some of his actions that evening.[20]

However, such evidence is not nearly enough to support Warriors Met's chosen narrative, which appears to have greatly impacted Wilson's response to the miner's concerns: that the evening shift longwall crew had intentionally turned on a dime and sought to become a thorn in management's side in advance of the looming expiration of the collective bargaining agreement, WMC Br. at 20-21 n.18. As discussed, Wilson passed on the opportunity to substantiate this allegation, as he also did when he implicitly singled out Barnes and Hall as the source of this change in the crew's work habits.[21]

3. Warrior Met's Termination of the Two Miners at the Very End of their Probationary Periods

The record evidence is that, along with being suspended for 14 days as discipline for not operating the longwall shearer at 35 FPM as ordered, the two miners agreed to a 30-physical workday probationary period following their return from their suspensions. The terms of the men's probations permitted Warrior Met to terminate each at the company's "sole discretion . . . without regard" to those provisions of its collective bargaining agreement with the union that required "just cause" for "discipline[]or discharge[]" of miners. Ex. C-4b (Record of Disciplinary Action for Barnes), C-4h (Record of Disciplinary Action for Hall); C-9, at 45-46 (Article XVII — Discharge Procedure of Agreement).

Following Brian High's accusations that the two men had not cleaned up a mantrip as High had ordered them to on or around the last day of their probationary periods, each miner received a "Notice Regarding Unsatisfactory Probationary Period" signed by Sally Brown and dated March 16, 2021, notifying him that the company considered him to have failed to successfully complete his probationary period and terminating his employment with the company. Ex. C-5b, C-5h. Given the terms of their earlier probationary agreements with the

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[20] Given Bauer's communication with Wilson, it is not necessary to resolve any testimonial conflict over any later attempt by Barnes to communicate to management regarding the gob situation with which the crew was dealing that night. There is also insufficient evidence to resolve the dispute over operability of the DAK boxes. Richardson testified to the boxes working at the tailgate, while Barnes testified that the box he tried to use while operating the shearer between the headgate and the tailgate was inoperable. Tr. I 110, II 469.

[21] This at least raises the question of whether it was *Wilson* who was motivated by labor-management reasons that night and was perhaps seeking out an opportunity to make examples of the two men to their fellow miners. That question, which is more the province of the labor-management grievance process than a Mine Act proceeding, need not be answered here. It is enough that the Secretary has put forward sufficient evidence of the good faith, reasonable belief of the two miners that for safety reasons they needed to operate the shearer at a speed less than that ordered by Wilson.

company, neither had recourse to a grievance procedure under the collective bargaining agreement.

Even if I were to believe High's accusations (which in large part I do not),[22] it is impossible to not regard the terminations as further discipline for the men's earlier protected work refusals. Neither miner would have been excluded from the protection of the collective bargaining agreement if he had not been suspended. And, as set forth below, the evidence is clear that neither would have been suspended but for having engaged in the earlier-described protected work refusal.

No evidence was presented by Warrior Met of the usual discipline for a miner's insubordinate refusal to clean a mantrip of trash, whether for a first offender (which both men were if their suspensions are no longer considered as legitimate discipline), or otherwise. Rather, Warrior Met argues that High knew nothing about the circumstances of the probationary status of the two men. WMC Br. at 27-28.

That is hard to believe, given the labor relations' atmosphere at the mine leading up to the expiration of the collective bargaining agreement later that month and more than a month had gone by since the two miners had been ordered off the longwall on January 25. Even if true, however, it does nothing to severe the connection between their earlier discipline for protected activity and their termination, at the very end of the probationary status imposed upon them because of their protected activity.

4. Motivation

Once a miner who has suffered an adverse employment action has been found to have engaged in protected activity, as I have found above with respect to both miners here, the question turns to whether it has been established that the adverse action was motivated by the protected activity. *See* 30 U.S.C. § 815(c)(1) ("No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.").

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[22] High specifically testified that when he was 60 to 65 feet away from the manbus, he asked Barnes and Hall whether they had removed "their" trash from the manbus that they had already departed, but neither responded. High also did not recall any other miner on the bus, but there is record evidence that Beasley, who was not on probationary status, was on that bus as well. Tr. III 593, 609-10, 620. High then later, in acting to discipline the two men, made the far broader claim that he had made a specific request of them to remove trash in general from the bus that they did not heed. However, it was only after High passed the two men and approached the bus that he learned that there was trash on the bus. Tr. III 612, 620.

High also testified that later he learned from other Warrior Met supervisors that Barnes, while on the cage to the surface, had been laughing about the incident at High's expense. Tr. III 613. However, Barnes' testimony was that the laughter was due to a third supervisor making a derogatory remark regarding High. Given the previously described conflicts in High's testimony, I am not inclined to credit his hearsay testimony over Barnes' direct account.

The Secretary states that Warrior Met admitted that the suspension and eventual termination of the two miners were directly attributable to them not operating the shearer at the 35 FPM required by Warrior Met. She argues that because the men, in choosing to operate at a slower speed were engaging in a form of protected work refusal, Warrior Met's admission supplied direct evidence of its discriminatory motivation in this instance. She also points to what she contends is additional circumstantial evidence establishing that Warrior Met was motivated by the men's exercise of protected rights in disciplining them. S. Br. at 38-44.

Warrior Met's position is that none of its discipline of the two miners could have been motivated by their protected activity because at no point did their actions and communications with supervisors qualify them for protection under the Commission's protected work refusal doctrine. WMC Br. at 23-26. It argues that there is no evidence, direct or otherwise, of a retaliatory motive on its part. WMC Resp. Br. at 32-33. It maintains that the men's communications of safety concerns occurred well "after the fact," and the Secretary failed to establish a causal connection between those complaints and their discipline. *Id*. at 33-35.

As I have found, well before the original suspension of the two men was decided upon by Warrior Met management, on January 25 the men had sufficiently communicated to a representative of management their reasonable safety concerns about operating the shearer at 35 FPM in the adverse conditions posed by the gob during the early part of their shift that evening. Moreover, the evidence is unequivocal that the basis for the initial suspensions of both men was management's view that their failure to run the shearer at that speed after being directed to do so that evening constituted insubordination under Warrior Met employment policies and practices. *Cf. Cont'l Cement*, 94 F.4th at 734 (employer had to know of miner's activity alleged to be protected for it to have played a role in decision-making process).

Warrior Met's "Record of Disciplinary Action" for each of the men cites "Violation of Company work rules, including 1, Insubordination" as the basis for their initial suspensions. Ex. C-4b & 4h. In her deposition testimony, Sally Brown cited the same the reason for the suspensions. She alleged that Barnes had "violated Work Rule 1 and he was insubordinate." R-Ex. 23, at 104. Warrior Met's Work Rule 1 forbids "Insubordination." C-Ex. 6, at 1.[23]

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[23] The preface to the Work Rules states:

> The orderly and efficient operation of the mine requires that employees maintain proper standards of conduct at all times. In order that all employees may know the basic standards of conduct expected of them, the Company's Work Rules are set forth as follows and the following actions are forbidden except as otherwise noted:

Work Rule 1 provides:

> Insubordination, including but not limited to: making disparaging comments about the Company, management, or co-workers (verbally as well as in writing or

(continued…)

Brown described Barnes as having been insubordinate when he "neglected to and refused to change the shearer speed to what was being asked . . . ." R-Ex. 23, at 105. When asked if Barnes had been insubordinate in any other way, Brown flatly replied "No." *Id*. As for Hall, she stated that he had been involved in "the same or similar infractions and part of the same situation," having also violated "Work Rule 1, insubordination," when "[h]e refused to follow instructions, which is to say that he refused to operate the shearer at the speed that the foreman was indicating or attempt to do so." *Id*. at 129-30.

When protected activity is found, and the adverse action was taken based only on the protected activity, as Brown's testimony establishes with respect to both miners here, a prima facie case of discrimination under the Mine Act is established. As set forth previously (*supra* n.8), under long-standing Commission precedent, there is no further need to examine the evidence with respect to the employer's motivation.

As for Warrior Met's potential rebuttal of the Secretary's prima facie case, I have addressed above its contentions that no protected activity occurred. Furthermore, its own witness foreclosed any argument by Warrior Met that its discipline of the two miners was in no way motivated by the miner's actions on the night of January 25, which Warrior Met views as insubordinate but which were established by the Secretary to be protected under the Mine Act and its court and Commission precedents.

Accordingly, the Secretary has established by direct evidence motivation on the part of Warrior Met. In addition, there is circumstantial evidence of Warrior Met's motivation. As the Commission reiterated in *Hargis*,

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

46 FMSHRC at 530.

Here, there is no disputing that Warrior Met was minutely aware of the activities of the two complainants along the longwall. The only dispute is over whether any of those activities were protected under section 105(c), or, as Warrior Met viewed them, entirely insubordinate. In

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[23] (…continued)
electronically via e-mail or social media), job abandonment, wasting time, loafing, loitering on the job or on Company premises, during working hours, neglect of job duties and responsibilities (unacceptable work performance, carelessness or inattention to job duties), and unprofessional and/or argumentative behavior.

addition, the discipline for the men's actions began almost immediately, as they were not even permitted to finish out the shift on jobs that did not require them to operate the shearer.

As for animus, the Commission explained in *Hargis* that

> it is the very definition of animus towards a protected activity when a miner makes a health or safety complaint or engages in protected activity that requires attention, and the operator chooses to ignore it and do nothing. . . . . While hostility directed towards a miner may indicate animus, the Commission has clearly stated that the proper inquiry should focus on animus "specifically directed towards the alleged discriminatee's protected activity." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC at 2511.
>
> Animus towards a protected activity does not require that the operator display anger or unkindness towards the miner. If a miner makes a complaint about an unsafe condition at the mine and the supervisor responds with a smile and shrug but takes no action to investigate or correct the condition, the supervisor has displayed animus toward the protected activity.

Id. at 531-32 (footnotes omitted). In this case of course there was no "smile and shrug," but just as importantly, no timely investigation of the conditions that I have found the two complainants to have reasonably and in good faith believed to pose a hazard to operating the shearer at 35 FPM.

Thus, there is also circumstantial evidence in this instance of discriminatory intent on the part of Warrior Met.

IV. CONCLUSION

Based on the reasons stated above, I conclude that the evidence, as a whole, establishes that Respondent discriminated against miners Barnes and Hall for engaging in protected activity in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c).

V. DAMAGES AND OTHER RELIEF

The Secretary, citing section 105(c)(3) of the Mine argues that relief in this instance should include "back pay, [attorneys'] fees, interest, penalties, and injunctive relief." S. Br. at 44. Warrior Met takes issue with the Secretary's computation of back pay and an award of attorney's fees. WMC Br. at 38-39 & n.1.

With regard to a case such as this, brought under section 105(c)(2) of the Mine Act, "[t]he Commission shall have authority . . . to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. § 815(c)(2). The Commission has interpreted this language to grant it "broad remedial power in fashioning relief for victims of discrimination."

Sec'y on behalf of Rieke v. Akzo Nobel Salt, Inc., 19 FMSHRC 1254, 1257 (July 1997). "The Mine Act's legislative history similarly indicates Congressional intent for expansive remedial relief to victims of discrimination." *Id*. at 1258 (quoting S. Rep. No. 95-181 at 37, *Leg. Hist.* at 625). The Commission's "concern and duty is to restore discriminatees, as nearly as [it] can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Dunmire*, 4 FMSHRC at 143.

A. Reinstatement

While the Secretary sought and obtained orders of temporary reinstatement for both miners, and in her complaints in these proceedings requested that both be permanently reinstated, after hearing the Secretary has limited her permanent reinstatement request to miner Hall. She no longer seeks permanent reinstatement for miner Barnes. S. Br. at 46. Warrior Met did not respond to this request. Consequently, I am ordering Warrior Met to reinstate Brandon Hall to the position he would have held but for the discharge, or to a similar position, at the same rate of pay, same shift assignment, and with the same or equivalent duties.

In addition, my earlier temporary reinstatement orders remain in effect pending a final Commission order in this proceeding. *See Hargis*, 46 FMHRC at 535-43.

B. Backpay and Interest

The parties agree that if backpay is owed to the men, it is at a rate of $29.80 for the first 40 hours of a week, and $44.80 for overtime hours. The parties disagree as to both the time periods for which back pay is owed and the hours of overtime the two would have worked had they been working during those periods.

1. Time Periods for Backpay

The Secretary has requested backpay for both the period during which the men were first suspended and then for the period from the date of their discharge until the date on which they declined to exercise their right to temporary reinstatement, for a total of 10.7 weeks of backpay for each of the men. S. Br. at 45-46. The Respondent objects to including the two-week suspension period, arguing that "[t]he Union—on behalf of Barnes and Hall—explicitly and undisputedly agreed to this suspension." WMC Br. at 38 (citing record).

The Commission has repeatedly held that it will not "decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights." *Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891,899 (May 1987) (citing *Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp.*, 3 FMSHRC 1175, 1179 (May 1981)); *see Rieke*, 19 FMSHRC at 1259. Moreover, from the record it appears that the Union put no more effort into investigating the safety complaints of the two men than Warrior Met did. Neither man should have to suffer consequences for the Union's decision to do so. Consequently, I agree with the Secretary that the backpay period for each of the two men is 10.7 weeks. S. Br. at 45 n.9.

2. Overtime Hours

As for the overtime the men would have worked, the Secretary based her backpay calculation on Barnes working 25 hours per week of overtime and Hall 30 overtime hours per week, thus $2,309.50 and $2,533.00, respectively. S. Br. at 45 n.9. Warrior's estimate is 5 hours less per week for each of the miners, so $2,086.00 per week for Barnes and $2,309.50 per week for Hall. WMC Br. at 38-39 n.1.

Neither party provided documentation supporting its competing overtime hour estimates. Given that the burden of proof is on the Secretary, the backpay awards will be based on Warrior Met's estimate of the overtime hours due each of the men. Subtracting 5 hours of overtime from pay for each man from the Secretary's calculation results in a backpay award to Barnes of $22,320.20 and to Hall of $24,711.65.

3. Interest

The Secretary requests interest on back pay in the amount of $1,590.37 for Barnes and $1,744.25, citing the five percent quarterly Internal Revenue Service ("IRS") interest rate as of July 1, 2022. S. Br. at 45 & n.10. Under Commission case law, prevailing discrimination complainants are entitled to interest until damages amounts are paid, and at the short-term Federal underpayment rate established by the IRS. *See Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-06 (Nov. 1988), *aff'd on other grounds*, 895 F.2d 773 (D.C. Cir. 1990). The Secretary's interest calculation appears to take the IRS interest rate that was applicable during the third quarter of 2022 and apply it through the entire period during which the two miners would have been owed backpay up until the time she filed her initial post-hearing brief.

While the Secretary cites the appropriate source for the interest rate to be applied for Commission backpay awards, the Commission has held that the IRS interest rate should be applied on a quarterly basis. *See Sec'y on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2049-54 (Dec. 1983). In addition, interest on backpay amounts accrues until the "date of payment" to the miner. *Id*. at 2052. Thus, a final interest calculation is not possible until then.

C. Attorneys' Fees

The Secretary seeks an award of attorneys' fees, not for herself for bringing and prosecuting the action on behalf of the two complainant miners, but rather for the miners' private counsel. That counsel entered an appearance in both the temporary reinstatement proceedings as well as these proceedings, appeared at hearing, and examined and cross-examined several of the witnesses. A total fee of $29,412.50 is sought, with the attorney's time records submitted as support for his work on the cases from March 12, 2021, through August 31, 2022, accompanied by an affidavit from him. S. Br. at 50-51 & Ex. 1.

Respondent objects to the award of any attorneys' fees on the ground that the record is devoid of evidence that there was an agreement between private counsel that he would ever charge the miners for his legal services and the miners that they would be obligated to pay.

Respondent also points to the hearing testimony of complainant Hall that he viewed private counsel as "the union lawyer." Resp. Br. at 38 (citing Tr. I 251-52). Without citing the statutory language, Respondent appears to be relying upon section 105(c)(3)'s remedial language, which provides "[w]henever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably *incurred by the miner* . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation." 30 U.S.C. § 815(c)(3).

Neither party addresses the threshold issue, however, which is whether attorneys' fees can be awarded to a miner's private counsel in a section 105(c)(2) proceeding. The Secretary's sole legal basis for her request for fees on behalf of the miners' private counsel is the Commission's decision in *Secretary on behalf of Ribel v. Eastern Associated Coal Corp.*, 7 FMSHRC 2015, 2017 (Dec. 1985). She quotes the Commission as holding that "[a]n award of attorney's fees is 'a matter that lies within the sound discretion of the trial judge.'" S. Br. at 50.

It is true that in *Ribel* the Commission overruled the administrative law judge, who had rejected the prevailing miner's request for attorneys' fees on the ground that such fees are not awardable in cases initiated and litigated on the miner's behalf by the Secretary pursuant to section 105(c)(2). The Commission disagreed and went on to hold that "private attorneys' fees may be awarded to a prevailing miner in a Secretary-initiated section 105(c)(2) discrimination proceeding, provided that private counsel's efforts are *non-duplicative* of the Secretary's efforts and further, that private counsel contributes *substantially* to the success of the litigation." 7 FMSHRC at 2023 (emphases in original).

However, the Commission's reversal of the judge in *Ribel* did not survive appeal to the United States Court of Appeals for the Fourth Circuit. In *Eastern Associated Coal Corp. v. FMSHRC*, that court summarily held that attorneys' fees may *only* be awarded in cases where a miner prevails in a case brought pursuant to section 105(c)(3).

The *Eastern Associated* court relied upon what it considered to be "the clear language" of section 105(c): its explicit mention of the right to attorneys' fees only in section 105(c)(3), and not in the equivalent remedial language of section 105(c)(2). *See* 813 F.2d at 644; *compare* 30 U.S.C. § 815(c)(2) ("The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.") *with* 30 U.S.C. § 815(c)(3) ("Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation."). The *Eastern Associated* court reasoned that if Congress intended attorneys' fees to also be awardable in cases brought other than under section 105(c)(3), it could have easily provided a broader such right in the statute. The court concluded that "[i]t makes good sense that Congress would authorize the award of fees and costs where the complainant had brought the action on his own behalf, and would refuse to authorize such an

award where the Secretary served as the representative of the complainant without expense to the complainant." 813 F.2d at 644.

The holding in *Eastern Associated* that attorneys' fees may only be awarded with respect to litigation arising out of a complaint brought by a miner pursuant to section 105(c)(3) has been subsequently adopted by other courts and followed by the Commission and its Judges. *See, e.g., Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1430 (D.C. Cir. 1989) (holding that prevailing miner had right to attorneys' fees because he had initiated and pursued his own case under section 105(c)(3) and was not merely an intervenor in the related section 105(c)(2) case brought by the Secretary); *Gilbert v. FMSHRC*, 866 at 1442-43 (holding that prevailing miner had right to attorneys' fees because he had properly sought to initiate his own case under section 105(c)(3) and was not merely an intervenor in the section 105(c)(2) proceeding); *Sec'y on behalf of Cook v. Panther Creek Mining, LLC*, 46 FMSHRC ___, Docket No. WEVA 2023-0337-D (Dec. 18, 2024) (ALJ), at 18.

The Secretary does not address any of the foregoing case law that post-dates the Commission's reversed *Ribel* decision. Consequently, I do not read her request that attorneys' fees be awarded to the miners' private counsel for the time he devoted to these and the corollary temporary reinstatement proceedings as a challenge to the existing state of the law. Moreover, while as discussed earlier, an appeal of these cases could eventually be taken to the Eleventh Circuit, which has not addressed this issue, this case could also be appealed to the D.C. Circuit, which has clearly decided the issue contrary to the Secretary's position.

Consequently, I see no choice but to deny the attorneys' fees request. To do otherwise and grant it would ignore existing law, which would constitute an abuse of the discretion I have with respect to imposing a remedy for the Respondent's violations of section 105(c)(1).[24]

D. Other Non-Monetary Relief

In addition, the Secretary requests I order the following non-monetary relief: (1) a declaratory judgment that Warrior Met unlawfully discriminated against Hall and Barnes; (2) an order directing Warrior Met to completely expunge from Brandon Hall's and Timothy Barnes' employment records all references to the circumstances involved in this matter; and (3) an order requiring all members of Warrior Met's management personnel to participate in a training course on rights protected under Section 105(c) of the Mine Act. S. Br. at 46. Warrior Met's response did not address these requests.

I find that the record supports the second and third requests and include them in my order in this case. However, the requested declaratory judgment is denied, given that no explanation of the need for such was provided.

[24] I thus do not reach Respondent's arguments with respect to the insufficiency of the factual support for the request in this instance.

VI. PENALTIES

The Secretary requests that I assess a penalty of $20,000 against Warrior Met in each of these two discrimination proceedings, for a total of $40,000. S. Br. at 45. The Secretary bases her request on the size Warrior Met's No. 7 Mine and its 15-month violation history, including with respect to section 105(c) violations, as well as the size of the controller in this instance (presumably the controller of Warrior Met identified in the online MSHA Mine Data Retrieval System) and its section 105(c) violation history. She also sets forth the penalty points MSHA ascribes to these various factors under 30 C.F.R. §100.3(b) and (c). *Id*. at 45 n.12.[25]

Warrior Met did not address the penalties issue in either of its briefs, nor did it respond to the Secretary's proposed penalty amounts and her support for them as itemized under the Part 100 regulations. The $20,000 proposed penalty for each miner's discrimination case is identical to the penalty amount the same parties agreed would be appropriate in *Secretary on behalf of Smitherman v. Warrior Met Coal Mining*, in the event the Judge's finding of discrimination was upheld there (as it later was). *See* Docket No. SE 2021-0153, ALJ Order dated Apr. 25, 2022, at 1.

The Secretary does not explain how using the MSHA Part 100 point-system in these two cases results in her proposed penalty amounts. That is of little consequence, however, because

> [t]he Commission possesses independent authority to assess all penalties *de novo* pursuant to section 110(i) of the Mine Act. While the Commission considers the same criteria as the Secretary in assessing such penalties, it is bound neither by the Secretary's proposed assessment nor by his Part 100 regulations governing his penalty proposal process. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("neither the ALJ nor the Commission is bound by the Secretary's proposed penalties;" and "neither the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3"); *Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) ("'[U]nder both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings.'") (citations omitted). It is important to keep that line of separation between the Commission and the Secretary to maintain the review process's integrity.

Solar Sources Mining, LLC, 43 FMSHRC 367, 370 (Aug. 2021).

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[25] It appears that the Secretary incorporated the factors and penalty points from penalty assessments MSHA issued for the two discrimination cases. As far as I can tell, no such assessments were ever filed with the Commission as part the Secretary's discrimination complaints, as she often does to try to comply with Commission Procedural Rule 44(a), Petition for Assessment of Penalty in Discrimination Cases. *See* 29 C.F.R. § 2700.44(a) (requiring the Secretary to propose a specific civil penalty amount in discrimination cases she brings and that "[t]he petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act.").

Section 110 of the Mine Act governs the assessment of civil penalties, including for violations of section 105(c). *See* 30 U.S.C. § 820(a)(1). ("The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provisions of this Act, shall be assessed a civil penalty . . . ."); *see also* 30 U.S.C. § 815(c)(3) ("Violations by any person of [Mine Act section 105(c)](1) shall be subject to the provisions of sections 108 and 110(a)"). Section 110(i) of the Act sets forth the following criteria to be considered in the Commission's assessment of a civil penalty under the Act: "the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i).

Warrior Met did not take issue with the Secretary's use in her brief of 2020 coal tonnage figures to establish the size of Warrior Met's relevant business operations. Moreover, Warrior Met's employment figures both in March 2021 and after the strike against it ended establish that it was and remains a very large operator. Not surprisingly, Warrior has made no claim that the Secretary's proposed penalty totals of $40,000 would affect its ability to continue in business.

Consistent with Commission precedent, the Secretary also included in her brief figures on Warrior Met's 15-month violation history at its No. 7 Mine, both with respect to Warrior Met's overall violations history and with respect to section 105(c) violations that were assessed. *See Sec'y on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 557 (Apr. 1996). The numbers show a moderate level of violation history with respect to each. As far as taking the level of Warrior Met's negligence into account, my findings that its disciplining of the two miners was based on an inadequate investigation of their reports on the longwall conditions the night of January 25 support the conclusion that Warrior Met's negligence was more than moderate in this instance.

Taking the foregoing into account, as well as the other section 110(i) factors, the purpose of section 105(c), and all other relevant facts and circumstances, I hereby assess a civil penalty of $20,000 for each violation, for a total of $40,000.

VII. ORDER

Accordingly, it is **ORDERED** that Respondent Warrior Met Coal Mining, LLC, reinstate miner Brandon Hall to the position he would have held but for the discharge, or to a similar position, at the same rate of pay, same shift assignment, and with the same or equivalent duties. Also, my earlier temporary reinstatement orders (43 FMSHRC 293 (May 2021) (ALJ); 43 FMSHRC 296 (May 2021) (ALJ)) shall remain in effect pending final Commission orders in this proceeding.

Respondent is further **ORDERED** to pay backpay to Barnes in the amount of $22,320.20 and to Hall in the amount of $24,711.65. Miners Barnes and Hall **SHALL** also be paid quarterly interest at the Federal underpayment rate through the date of payment to them, to be calculated by the parties at that time.

The Secretary's request for attorney's fees is **DENIED** as a miner who retains private counsel to intervene in a section 105(c)(2) discrimination proceeding brought by the Secretary is not entitled to recover their private attorney's fees. The Secretary's request for declaratory judgment is also **DENIED**.

It is further **ORDERED** that Warrior Met completely expunge from Hall's and Barnes' employment records all references to the circumstances involved in this matter, and require all members of Warrior Met's management personnel to participate in a training course on the rights protected under Section 105(c) of the Mine Act.

It is finally **ORDERED** that the Respondent pay a penalty to the Secretary of Labor in the sum of **$40,000** within 30 days of the date of this decision.[26]

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

Distribution:

Kristin R. Murphy, Senior Trial Attorney, Office of Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303 (Murphy.Kristin.R@dol.gov; Atl.Fedcourt@dol.gov)

Brock Phillips, Attorney, MaynardNexsen, 1901 Sixth Ave. N., Ste. 1700, Birmingham, AL 35203 (bphillips@MaynardNexsen.com)

John R. Jacobs, Maples, Tucker & Jacobs LLC, 2001 Park Place North, Suite 1325, Birmingham, AL 35203 (jack@mtandj.com)

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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

January 21, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KENNETH M. ADKINS, Complainant, v. GREENBRIER MINERALS, LLC, and its Successors, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEVA 2024-0340-D MSHA No. PINE-CD-2024-04 Middle Fork Surface Mine Mine ID 46-09645

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

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 June 17, 2024, the Federal Mine Safety and Health Review Commission ("Commission") received a complaint of discrimination filed by the Secretary of Labor ("Secretary") on behalf of the complaining miner, Kenneth M. Adkins. Respondent, Greenbrier Minerals, LLC ("Greenbrier"), timely filed an answer to the complaint on July 16, 2024. Chief Administrative Law Judge Glynn F. Voisin then assigned me this case on October 8, 2024. I initially set a hearing for January 29–31, 2025. I continued this matter upon the Secretary's request, and it will now be heard on February 12–14, 2025, in South Charleston, West Virginia. On January 4, 2024, Respondent filed its Motion for Summary Decision, including a memorandum in support along with attachments, whereafter the Secretary timely filed her Opposition on January 15, 2025.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Adkins' Discrimination Complaint to MSHA

Adkins worked as a mobile equipment operator at Greenbrier's surface coal mines in its Logan County (West Virginia) Division from December 12, 2022, until his termination on March 7, 2024.[1] (Compl. at 2; Resp't Mot., Mem. at 2–3.) The Secretary alleges that during Adkins' initial interview with Greenbrier, Superintendent Rick Hunter asked Adkins if he had any equipment preferences, and Adkins informed Superintendent Hunter that he preferred not to drive haul trucks, such as a rock truck. (Compl. at 2.) Thus, the Secretary alleges Adkins was primarily assigned to Co. No. 229, Caterpillar D10-R Dozer ("dozer"), and only drove a rock truck on occasions when the dozer was inoperable. (Compl. at 2.)

[1] Pursuant to Administrative Law Judge John T. Sullivan's Order dated May 14, 2024, Adkins is temporarily reinstated at Greenbrier as of May 15, 2024. (Compl. at 2.)

In September 2023, Adkins began noticing issues with his assigned dozer and started to log his concerns in the daily pre-shift safety inspection reports. (Compl. at 2; Resp't Mot., Mem. at 3.) Adkins logged his issues for approximately two months, noting, among other things, a worn out hardbar, a hydraulic leak, defective lights, and defective fire suppression. (Compl. at 2; Resp't Mot., Mem. at 3.) The Secretary alleges that although the pre-shift inspection reports were reviewed by Foreman Chris Bellomy, Greenbrier did not address Adkins' concerns. (Compl. at 2–3.) Adkins discussed the issues surrounding the dozer with his wife, who in turn filed a complaint with MSHA on November 9, 2023. (Compl. at 3.)

Following Adkins' wife's complaint, MSHA Inspector Paul Milum investigated the North Fork Surface Mine on November 10, 2023. (Compl. at 3; Resp't Mot., Mem. at 4.) Inspector Milum issued two citations related to the dozer and removed the dozer from service. (Compl. at 3; Resp't Mot., Mem. at 4.) Inspector Milum noted that the conditions he witnessed had been reported on Greenbrier's pre-shift inspection reports, that Foreman Bellomy collected the pre-shift inspection reports, and that Greenbrier failed to remedy the listed conditions. (Compl. at 3.)

The Secretary alleges that while the dozer was undergoing repairs, Superintendent Hunter assigned Adkins to a rock truck. (Compl. at 3.) The Secretary also alleges that on November 20, 2023, Greenbrier held a safety meeting during which Safety Supervisor Brandon Vance discouraged employees from calling MSHA with safety concerns without first notifying management. (Compl. at 3.) During the safety meeting, Adkins acknowledged filing the hazard complaint with MSHA. (Compl. at 3.)

The Secretary alleges that after the dozer was placed back in service, Adkins continued to be assigned to either a rock truck or a lizard truck,[2] while the drivers who originally drove the rock truck were assigned to the dozer. (Compl. at 4.) The Secretary further alleges that Adkins asked Superintendent Hunter for additional training to drive the rock truck, but his request was denied. (Compl. at 4.) The Secretary also claims that Adkins observed safety hazards on the rock truck but did not report his observations due to fear of reprisal. (Compl. at 4.)

The Secretary alleges that on March 1, 2024, Adkins was supposed to operate a grader but instead was assigned to operate a rock truck. (Compl. at 4; Resp't Mot., Mem. at 4.) Adkins expressed his frustration about the rock truck over the company radio, which was used by all employees at the mine. (Compl. at 4; Resp't Mot., Mem. at 4.) Adkins specifically stated over the radio that he felt he was being primarily assigned to operate rock trucks in retaliation for his complaint to MSHA. (Compl. at 4; Resp't Mot., Mem. at 4.)

On the next working shift, March 4, 2024, Superintendent Hunter and Mine Manager Ben Collins spoke to Adkins about his use of the radio during the last shift. (Compl. at 4; Resp't Mot., Mem. at 5.) Adkins informed Hunter and Collins that he felt Greenbrier was retaliating against him for calling MSHA by always having him drive a rock truck. (Compl. at 4.) Hunter denied that Adkins was being retaliated for calling MSHA. (Compl. at 4.)

[2] A lizard truck is an articulated truck similar to a rock truck. (Compl. at 4.)

Following the meeting, Superintendent Hunter directed Adkins to confirm his daily assignment with Foreman Gordon Tomblin, who assigned him to a grader to grade haulage roads at the North Fork and Middle Fork surface mines. (Compl. at 4.) The Secretary alleges Adkins told Foreman Tomblin that he would switch with someone and instead drive a rock truck because he expected to be back on a rock truck sooner or later regardless. (Compl. at 4.) Adkins subsequently boarded a bus for the Middle Fork Surface Mine. (Compl. at 4.) Shortly after, Hunter radioed the bus to stop and he pulled Adkins off the bus and asked him to report to Wayne Cooper, the Human Resources Manager for Greenbrier's Logan County Division. (Compl. at 5; Resp't Mot., Mem. at 6.)

Adkins explained to HR Manager Cooper that he felt Greenbrier was retaliating against him. (Compl. at 5.) The Secretary alleges that HR Manager Cooper told Adkins he was suspended for three days and assured Adkins that he would be in touch. (Compl. at 5.) Adkins did not receive any written notice or paperwork regarding his suspension at that time. (Compl. at 5.) When Adkins returned to work three days later, on March 7, 2024, Mine Manager Collins asked him to report to Cooper's office. (Compl. at 5; Resp't Mot., Mem. at 7.) While in the waiting room at Cooper's office, Adkins received a call from Cooper, who informed Adkins that he was terminated. (Compl. at 5; Resp't Mot., Mem. at 7.) The Secretary alleges that Greenbrier failed to provide any paperwork or written explanation regarding the reason for Adkins' termination. (Compl. at 5.)

On March 11, 2024, Adkins timely filed a section 105(c) discrimination complaint with MSHA against Greenbrier. (Compl. at 5; Resp't Mot., Mem. at 9.) On June 17, 2024, the Secretary of Labor, on behalf of Kenneth Adkins, filed a complaint alleging Greenbrier engaged in discrimination against Adkins in violation of 105(c)(1) of the Mine Act. (Compl. at 1.)

B. Respondent's Motion for Summary Decision and the Secretary's Response

In its Motion for Summary Decision, Greenbrier does not dispute that Adkins engaged in certain protected activity and that he was subject to adverse employment actions in March 2024 when he was suspended and terminated. (Resp't Mot., Mem. at 11.) However, Greenbrier argues there is no record evidence that the adverse actions were motivated in any part by any protected activities.[3] (Resp't Mot., Mem. at 11.) Greenbrier attaches several exhibits including excerpts from the transcript of Adkins' Temporary Reinstatement Hearing on May 7, 2024, and the depositions of Ricky Hunter, Gordon Tomblin, Ben Collins, and Wayne Cooper.

The Secretary in her Opposition to Respondent's Motion for Summary Decision argues a genuine issue exists regarding the credibility of Greenbrier's witnesses and the reliability of their testimony. (Sec'y Opp'n at 2.) The Secretary further argues Greenbrier failed to establish that the

[3] In Part IV of its memorandum in support of its motion for summary decision, Greenbrier provides several arguments to support its contention that the Secretary cannot establish a prima facie case of discrimination. (Resp't Mem. at 11–13.) However, I need not address Respondent's substantive arguments given that material facts are in dispute.

adverse action was not motivated by retaliatory intent.[4] (Sec'y Opp'n at 2.) The Secretary attaches several exhibits including excerpts from the transcript of Adkins' Temporary Reinstatement Hearing on May 7, 2024, and the depositions of Ben Collins, Wayne Cooper, Ricky Hunter, and Gordon Tomblin.

II. PRINCIPLES OF LAW

A. Summary Decision

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only 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, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id*. at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences to be drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Commission Judges should not grant motions for summary decision "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

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 of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by [the Mine Act]." 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.

[4] In Part III of its motion in opposition, the Secretary provides several arguments to support its contention that Adkins' suspension and termination was motivated by his protected activity of reporting safety concerns to Greenbrier management and MSHA. However, I need not address these substantive arguments in this Order as there are material facts in dispute.

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). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. If the mine operator cannot rebut the *prima facie* case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328–29; *Pasula*, 2 FMSHRC at 2800.

III. DISCUSSION AND ANALYSIS

A. Disputed Facts for Motivational Nexus Under Section 105(c)

The parties dispute material facts related to Adkins' discrimination claim. In particular, the parties dispute facts related to the motivation behind Adkins' suspension and termination of employment. Greenbrier asserts that on March 4, 2024, Adkins refused Foreman Tomblin's directions and refused to perform the job assigned to him, telling Tomblin that he was going to drive a rock truck instead. (Resp't Mot., Mem. at 5.) Specifically, Greenbrier claims Adkins told Tomblin that he could "put somebody else on that grader," and he was "going to Middle Fork to drive a fucking rock truck." (Resp't Mot., Mem. at 2; Resp't Ex. N: Tomblin Dep. at 20:20–21:7.) However, Adkins testified at the May 7, 2024, Temporary Reinstatement Hearing that he was going to trade the grader with someone else, which was common practice. (Sec'y Opp'n at 2–3; Sec'y Ex. 1: TR Hr'g 46:4–21.) Adkins also testified that Tomblin told him to get on the Middle Fork bus, which he did. (Sec'y Opp'n at 2–3; Sec'y Ex. 1: TR Hr'g 47:3–8.) Thus, the directions Tomblin gave Adkins on March 4, 2024, and Adkins' response are genuine issues of material fact in dispute.

In its motion, Greenbrier asserts that Mine Manager Collins did not speak with HR Manager Cooper about Adkins or Adkins' behavior after he and Superintendent Hunter called Cooper on March 4, 2024, other than days later to "find out . . . if he was coming back to work, if he had just been suspended three days or if he had been terminated." (Resp't Mot., Mem. at 6; Resp't Ex. P Collins Dep. 34:8–14.) Yet, Collins also testified that Cooper asked him at a "later date" for a statement about the incident. (Sec'y Opp'n at 3–4; Sec'y Ex. 3: Collins Dep. 34:15–22.) Additionally, in his written statement about the incident, Collins wrote that Adkins described feeling "retaliated against and singled out due to the complaint called into MSHA." (Sec'y Ex. 2: Collins Statement.) Thus, genuine issues of material facts surrounding discussions between Collins and Cooper about Adkins' behavior are in dispute.

Greenbrier claims that HR Manager Cooper told Adkins that he was suspended for three days with intent to discharge for insubordination during their meeting on March 4, 2024. (Resp't Mot., Mem. at 7.) However, at the Temporary Reinstatement Hearing, Cooper did not confirm that he communicated his intent to discharge Adkins to Adkins, rather he stated, "it was [a] pending investigation, so at that point, he had not been discharged." (Sec'y Opp'n at 4; Sec'y Ex. 1: TR Hr'g 81:12–16.) Additionally, in his deposition, Cooper confirmed that he did not tell Adkins he would be terminated after his three-day suspension. (Sec'y Opp'n at 4–5; Sec'y Ex. 4: Cooper Dep. 54:19–55:21.) Moreover, in his notes about his meeting with Adkins on March 4,

2024, Cooper wrote, "I informed him that he is suspended for 3 days pending investigation for insubordination." (Sec'y Opp'n at 5; Sec'y Ex. 5.) Thus, the timing of when Adkins learned he would be terminated is in dispute, which is a material fact in this case.

Greenbrier asserts that during HR Manager Cooper's phone call with Superintendent Hunter and Mine Manager Collins, Cooper said Adkins would be suspended with intent to discharge based on insubordination. (Resp't Mot., Mem. at 7; Resp't Ex. R: TR Hr'g 78:14–20.) However, during his deposition, Hunter testified that Cooper did not communicate his intent to suspend Adkins during the March 4, 2024, phone call between Cooper, Hunter, and Collins. (Sec'y Opp'n at 6; Sec'y Ex. 6: Hunter Dep. 40:17–19.) Additionally, Collins testified that he did not learn that Adkins was going to be terminated until Adkins returned to work on March 7, 2024. (Sec'y Opp'n at 6; Sec'y Ex. 3: Collins Dep. 45:7–22.) Thus, Cooper's discussion with Collins and Hunter about Adkin's discipline puts in dispute an issue of material fact.

Greenbrier claims that prior to HR Manager Cooper's decision to suspend and terminate Adkins' employment, neither Superintendent Hunter nor Mine Manager Collins ever told Cooper that Adkins or Adkins' spouse contacted MSHA in November 2023. (Resp't Mot., Mem. at 8; Resp't Ex. R: TR Hr'g 79:24–80:8.) However, as previously noted, Cooper requested Collins to write a statement about the incident. (Sec'y Opp'n 8–9; *see* Sec'y Ex. 2: Collins Statement.) In this statement, Collins wrote that Adkins described feeling "retaliated against and singled out due to the complaint called into MSHA." (Sec'y Ex. 2.) Since Cooper requested this statement, it is reasonable to assume at this time that he read it. Thus, material facts surrounding the communications between Cooper and Collins about Adkins' protected activity remain in dispute.

Lastly, Greenbrier argues that Cooper decided to suspend Adkins' employment with intent to discharge before Adkins told him about the complaint made to MSHA in November 2023. (Resp't Mot., Mem. at 9; Resp't Ex. R: TR H'g 80:20–24.) Yet, as the Secretary points out (*see* Sec'y Opp'n at 9), Greenbrier also asserts that Cooper "wanted to talk to Adkins, however, before proceeding with the suspension because he wanted to make sure that Adkins' refusal to operate the grader was not because of any safety-related issue or safety concern regarding the grader." (Resp't Mot., Mem. at 7.) Similarly, during his deposition, Cooper testified that he decided to suspend and terminate Adkins' employment "pending [his] conversation with" Adkins. (Resp't Ex. S: Cooper Dep. 45:12–14.) Thus, when Cooper made the decision to suspend Adkins' employment with the intent to discharge is an issue of material fact in dispute.

B. Conclusion

As discussed above, I have determined that the Temporary Reinstatement Hearing testimony and witness deposition testimony the Secretary cites—specifically regarding Adkins' behavior on March 4, 2024, and subsequent discipline—places the material facts regarding Greenbrier's motivation in dispute. As a result, 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, Respondent

Greenbrier is not entitled to summary decision as a matter of law under Commission Procedural Rule 67(b). 29 C.F.R. § 2700.67(b).

IV. ORDER

In light of the foregoing, it is hereby **ORDERED** that Respondent's Motion for Summary Decision is **DENIED**.

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

Distribution: (Via Electronic Mail & U.S. Certified Mail – Return Receipt Requested)

Aditi Kumar, Esq., U.S. Department of Labor, Office of the Regional Solicitor,
201 12th Street South, Suite 401, Arlington, VA 22202
(kumar.aditi@dol.gov)

Samuel B. Petsonk, Esq., Petsonk PLLC, P.O. Box 1045, Beckley, WV 25802
(sam@petsonk.com)

Kelby Thomas Gray, Esq., Dinsmore & Shohl LLP, 707 Virginia Street East,
Suite 1300, Charleston, WV 25301
(kelby.gray@dinsmore.com)

/MEK