July 2024

TABLE OF CONTENTS

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

Review Was Granted in the Following Case During The Month Of July 2024

Wesley Mallery v. El Segundo Coal Co., LLC, Docket No. CENT 2024-0106, Judge Bulluck (June 12, 2024)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

July 10, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. SE 2023-0254 A.C. No. 38-00749-571990
v.	Docket No. SE 2023-0255 A.C. No. 01-03411-570549
LOPKE QUARRIES, INC.	Docket No. SE 2023-0256 A.C. No. 38-00749-572191

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

ORDER

BY: THE COMMISSION

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act").[1] On September 21, 2023, the Commission received from Lopke Quarries, Inc., ("Lopke Quarries") a motion to reopen final orders of the Commission pursuant to section 105(a) of the 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 consolidates these proceedings pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, for the limited purpose of addressing the motion to reopen.

In response to the motion, the Department of Labor's Mine Safety and Health Administration ("MSHA") has provided the following information regarding the status of these final orders.

The proposed assessment in Docket No. SE 2023-0254 was delivered to the operator on March 6, 2023. The assessment contained 11 citations with an aggregate proposed penalty of $7,550. The operator timely submitted payment for one of the citations at issue. The remaining penalties became final orders of the Commission on April 5, 2023. MSHA sent the operator a delinquency notice on May 22, 2023.

The proposed assessment in Docket No. SE 2023-0255 was delivered to the operator on February 6, 2023. The assessment contained 18 citations with an aggregated proposed penalty of $24,154. The operator timely paid the penalty for one of the citations at issue. The remaining penalties became final orders of the Commission on March 8, 2023. MSHA sent the operator a delinquency notice on April 24, 2023.

The proposed assessment in Docket No. 2023-0256 was delivered to the operator on March 6, 2023. A $21,029 penalty was assessed for a single citation. The operator did not submit timely payment and it became a final order of the Commission on April 5, 2023. MSHA sent the operator a delinquency notice on May 22, 2023.

On approximately July 18, 2023, MSHA delivered a "scofflaw" letter to Lopke Quarries, which stated that the Secretary may take additional enforcement actions if the operator fails to submit payment of its unpaid penalties. Lopke Quarries did not pay. On August 29, 2023, MSHA issued Citation No. 9708285, directing the operator to either submit payment or to enter into an installment agreement by September 28, 2023. Instead, on September 21, 2023, the operator filed the subject motion with the Commission.

On October 2, 2023, MSHA issued a section 104(b) withdrawal order to Lopke Quarries, alleging a failure to abate Citation No. 9708285. On October 04, 2023, MSHA received a payment from Lopke Quarries in the amount of $48,932.[2]

Lopke Quarries General Superintendent Mike Lindhorst filed the motion with the Commission *pro se.* The motion states that the operator attempted to timely contest the proposed assessments, but mistakenly mailed the contest forms along with the civil penalty payments to MSHA's payment center. The operator further alleges that it contacted MSHA after receiving a delinquency notice and was informed of its mistake. Mr. Lindhorst states that he attempted to reopen the penalties, but initially erroneously directed his motion to MSHA rather than the Commission as is required. Finally, the operator asserts that it was unfamiliar with the contest process, as it normally pays assessments.

The Secretary opposes reopening the final orders, alleging that the operator failed to provide a detailed accounting of its attempts to timely file and, additionally, has failed to provide

[2] The Secretary represents that although the operator submitted payment, she does not believe that Lopke Quarries motion to reopen is moot; payment was submitted in response to the issuance of the section 104(b) order to withdraw miners from the mine. Sec'y Response at 5 n.2.

a reason for its delay in seeking to reopen. She alleges that by waiting until the Secretary threatened to take enforcement actions to collect, before filing a motion to reopen, the operator demonstrated a lack of good faith.

Here, the operator asserts that its failure to timely file was due to a general lack of understanding of the contest process, two specific mistakes (mailing its contests to the payment center and mailing its first request to reopen to MSHA), and additional "smaller factors." We do not find that this series of issues constitutes excusable error or inadvertence and note that it may reflect an inadequate or unreliable processing system, which would be grounds to deny the motion to reopen. *See, e.g.*, *Pinnacle Mining Co. LLC*, 30 FMSHRC 1066, 1067 (Dec. 2008).

Moreover, "[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) (emphasis added). Conversely, motions filed more than 30 days after such notice should include an explanation as to why the operator waited so long to file for reopening. The lack of such an explanation is grounds for the Commission to deny the motion. *Id*.

Here, the operator received its first notice from MSHA in April and May 2023, when it was sent delinquency notices, and its second notice in July when it was sent a scofflaw letter. However, the operator did not file for reopening until September 21, 2023. Some of this delay was apparently due to the initial misfiling of the request to reopen with MSHA. However, emails provided by the operator show that Lopke Quarries did not even reach out to MSHA until August 8, 2023, approximately three months after being notified that the assessments had become final. The operator has not explained this delay.[3]

We conclude that Lopke Quarries has failed to establish good cause for its failure to timely file to contest the proposed assessments; its motion does not demonstrate exceptional circumstances and the operator has failed to adequately explain its delay in seeking to reopen after it became aware of its errors.

[3] Lopke Quarries states generally that it believed MSHA handled scheduling and would reach out when the matters were due to be heard. However, this does not explain why the operator *continued* to wait after MSHA sent delinquency letters.

Finally, the operator's motion omits mention that it received Citation No. 9708285 on August 29, 2023, after failing to pay the civil penalties owed, and then filed the motion with the Commission. 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).

Based upon these reasons, Lopke Quarries' motion is DENIED.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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

Distribution:

Mike Lindhorst, General Superintendent
Lopke Quarries, Inc.
3430 State Route 434
Apalachin, NY 13732
mlindhorst@fslopke.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

July 10, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEVA 2023-0553 A.C. No. 46-08438-567590
v.	Docket No. WEVA 2023-0554 A.C. No. 46-08438-575849
TAISHAN COAL, LLC	Docket No. WEVA 2023-0555 A.C. No. 46-08438-577887

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

ORDER

BY: THE COMMISSION

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act").[1] On September 27, 2023, the Commission received from Taishan Coal, LLC ("Taishan") a motion to reopen final orders of the Commission pursuant to section 105(a) of the 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 consolidates these proceedings pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, for the limited purpose of addressing the motion to reopen.

According to the records of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Docket No. WEVA 2023-0553 concerns 13 citations that were assessed a total proposed penalty of $3,501. The assessment was delivered to Taishan on December 7, 2022, and became a final order on January 8, 2023. On February 21, 2023, MSHA sent the operator a delinquency notice. On September 21, 2023, MSHA received full payment for the penalties at issue.[2]

Docket No. WEVA 2023-0554 concerns 3 citations that were assessed a total proposed penalty of $12,383. The assessment was delivered to Taishan on May 10, 2023, and became a final order on June 9, 2023. On July 25, 2023, MSHA sent Taishan a delinquency notice. Docket No. WEVA 2023-0555 concerns 2 orders that were assessed a total proposed penalty of $62,738. The assessment was delivered to Taishan on May 30, 2023, and became a final order on June 29, 2023. On August 14, 2023, MSHA sent the operator a delinquency notice.

After failing to receive payment for the latter two cases, on October 20, 2023, MSHA issued a citation to Taishan alleging that the operator had failed to pay delinquent penalties. On November 1, 2023, MSHA received full payment.[3]

Prior to paying, Taishan first filed a motion to reopen. Taishan represents that it filed the motion after receiving a letter from MSHA related to its delinquent debts. Taishan states that it failed to timely file because it did not forward the assessments to its third-party safety consultant, Brent Prichard. Mr. Prichard submitted an affidavit stating that there were "miscommunications" regarding which penalties would be paid or contested. Mot at 1-2 (citing Ex. A). The Secretary opposes the operator's motion, contending that it did not provide sufficient information to justify reopening and the filing of the motion was untimely.

When filing a motion to reopen before the Commission the operator bears the burden of showing exceptional circumstances. *Lone Mountain Processing, Inc*., 35 FMSHRC 3342, 3345 (Nov. 2013). Relief under Rule 60(b) requires more than "general assertions or conclusory statements as to why an operator failed to timely contest." *Sw. Rock Prods.*, 45 FMSHRC 747, 748 (Aug. 2023) (*citing Atlanta Sand & Supply Co*., 30 FMSHRC 605, 608 (July 2008)). "At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. . . ." *Lone Mountain,* 35 FMSHRC at 3345 (citations omitted).

We conclude that the operator has failed to sustain its burden of demonstrating exceptional circumstances with a detailed account of its failure to timely file. The bare assertion that it failed to forward assessments—in three separate cases—does not demonstrate good cause

[2] The Secretary states that because the operator paid the penalties in Docket No. WEVA 2023-0553 its motion to reopen is moot for that case.

[3] The Secretary represents that because the operator paid the penalties at issue in Docket Nos. WEVA 2023-0554 and WEVA 2023-0555 in response to the Secretary's issuance of the citation, their motion is not moot for purposes of those two dockets.

for a failure to timely file. *Sw Rock Prod., Inc*., 45 FMSHRC at 748 (General assertions or conclusory statements are insufficient to justify relief from a final order before the Commission pursuant to Rule 60(b)) (citation omitted). Additionally, while the operator represents that it has made changes to its internal procedures to prevent the reoccurrence of the error, it neither explains what those procedures are or how the error will be corrected.[4]

[4] On August 1, 2023, Taishan filed a motion to reopen a separate case (Docket No. WEVA 2023-0461) before deciding to pay the penalties at issue and filing a motion to withdraw. Repetitive errors tend to demonstrate inadequate or unreliable procedures. Where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *See, e.g., Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010).

Furthermore, the operator makes no attempt to account for its delay in filing to reopen once it was notified of its delinquency. *See, e.g., Left Fork Mining Co*., 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the operator delayed filing a motion for approximately seven months, two months, and one month respectively after receiving notice of its delinquent status. Taishan provides no explanation to account for its delay. Based upon these reasons, Taishan's motion is DENIED with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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

Distribution:

Christopher D. Pence Esq.
Hardy Pence PLLC
10 Hale Street, 4th Floor
PO Box 2548
Charleston, WV 25329
cpence@hardypence.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

July 24, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BRAND INDUSTRIAL SERVICES, LLC	Docket No. LAKE 2024-0155 A.C. No. 12-00064-593013

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

ORDER

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

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On April 9, 2024, the Commission received from Brand Industrial Services, LLC ("Brand") a motion to reopen a final order of the Commission pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to the operator on January 30, 2024, and became a final order of the Commission on February 29, 2024, after Brand did not contest the penalties.

On March 5, 2024, Brand emailed MSHA and attempted to contest the proposed assessment. MSHA rejected Brand's contest because it was filed five days late. Thereafter, on April 9, 2024, Brand filed the subject motion to reopen.

Brand alleges that it failed to timely contest the assessment because an employee mistakenly misrouted the assessment to an incorrect department. Brand alleges that this initial mistake was compounded because MSHA did not provide the company with copies of the citations until February 20, 2024, when MSHA forwarded it a duplicate copy of the assessment.

The Secretary opposes reopening, stating that the citations were properly issued to the operator. The Secretary states that the operator's abatement of the violative conditions identified in the citations indicates that the operator received the citations upon issuance. Furthermore, the Secretary alleges that her records indicate that the assessment was properly delivered and signed for. The Secretary also alleges Brand's motion fails to address why it did not contest the assessment after MSHA forwarded it the duplicate copy.[1] The Secretary maintains that the facts indicate that the company has inadequate or unreliable internal procedures.

When filing a motion to reopen before the Commission the operator bears the burden of showing exceptional circumstances. *Lone Mountain Processing, Inc*., 35 FMSHRC 3342, 3345 (Nov. 2013). "[T]he applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. . . ." *Lone Mountain,* 35 FMSHRC at 3345 (*citing Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010)).

However, it is also well established that an inadequate or unreliable internal processing system does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co*., 31 FMSHRC 1313, 1315 (Nov. 2009): *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co*., 32 FMSHRC 1587, 1588 (Dec. 2010).

We conclude that, in this instance, the initial mishandling of the assessment and the resulting missed filing deadline was the result of excusable neglect and not the result of an unreliable internal processing system. Brand provided a clear and detailed explanation of its error and its belated attempt to file. In finding good cause for its failure to timely contest, we rely upon the operator's attempt to file only five days after the filing deadline and upon the operator's prompt filing of a motion to reopen. An operator's good faith efforts militate in favor of reopening. *See, e.g., Stone Zone*, 41 FMSHRC 272, 274 (June 2019) ("It is well recognized that a

[1] The Secretary states that the duplicate copy was provided to the operator by email after an additional copy of the assessment, mailed to a miner's representative, was returned to MSHA as "undeliverable." Sec'y Resp. at 3.

movant's good faith or lack thereof is an important factor in determining whether good cause exists to reopen a final order.").[2]

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

[2] On May 23, 2024, Brand filed a motion for leave to file a reply to the Secretary's response. We hereby GRANT Brand's motion for leave. We have considered Brand's reply.

Commissioner Marvit concurring,

Though I am in agreement with the arguments contained in the Secretary's Motion in Opposition, I concur in the decision to reopen this case. I do so out of fairness to the operator because the Commission has historically granted reopening based on facts similar to those contained here. Absent this history, I would have voted to deny reopening.

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

Distribution:

Patrick J. Veters, Esq.
Marion Strauss, Esq.
Jones Walker LLP
201 St. Charles Avenue, 50th Floor
New Orleans, LA 70170
pveters@joneswalker.com
mstrauss@joneswalker.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

July 26, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PEABODY TWENTYMILE MINING, LLC	Docket No. WEST 2023-0363 A.C. No. 05-03836-579699

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

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 31, 2023, the Commission received from Peabody Twentymile Mining, LLC ("Peabody") a motion to reopen a final order of the Commission pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to the operator on July 3, 2023, and became a final order of the Commission on August 2, 2023. Thereafter, MSHA received partial payment of the civil penalties. On September 19, 2023, MSHA sent the operator a delinquency notice. The operator then sent an additional payment in satisfaction of the total assessed penalties at issue in the assessment.

Peabody asserts that it intended to contest the civil penalties associated with Citation Nos. 9155573 and 9155217 but failed to timely file a contest because its Safety Manager, who reviews and processes proposed assessments and then forwards them to outside counsel for contesting, was out of the office due to an unexpected short-term disability. During the Safety Manager's absence, the assessment was sent to an employee who was taking over compliance duties. That employee did not know that he was responsible for processing the assessment and had received no training regarding how to process the assessment. The operator's counsel later discovered on MSHA's Data Retrieval System that the proposed penalties had become final. The operator submits that the employee has been trained on procedures for handling assessments and will routinely forward all proposed assessments to outside counsel. Peabody states that it submitted payment for all of the proposed penalties on the assessment, except for the penalties associated with Citation Nos. 9155217 and 9155573. The Secretary does not oppose the operator's motion to reopen.

Having reviewed Peabody's request and the Secretary's response, we find that Peabody has demonstrated that its failure to timely contest the proposed penalties for Citation Nos. 9155217 and 9155573 was due to a mistake. Although Peabody later sent an additional payment to MSHA,[1] it is not clear that the payment was intended as payment of the the proposed penalties associated with Citation Nos. 9155217 and 9155573.[2] In addition, Peabody filed its motion to reopen within 30 days of the proposed penalties becoming final orders and before MSHA sent the delinquency notice. *See Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen received within 30 days of an operator's receipt of its first notice from MSHA of its untimeliness "will be presumptively considered as having been filed within a reasonable amount of time").

[1] We note that the remittance coupon submitted by both parties shows that the operator had an outstanding balance.

[2] 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 fact that the operator's payment here may not have been directed towards the civil penalties at issue but instead towards an unrelated, outstanding balance, Commissioner Baker would determine that in the instant case payment was not the result of an inadequate or unreliable internal processing system.

In the interest of justice, we hereby reopen the contest of 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. *See Sterling Materials*, 45 FMSHRC 467, 468 (June 2023) (reopening when operator failed to timely contest a penalty due to clerical error and paid the penalty). Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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

Distribution:

Christopher G. Peterson, Esq.
Fisher & Phillips LLP
1125 17th Street, Suite 2400
Denver, CO 80202
cpeterson@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 AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710

July 31, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA v. MORTON SALT, INC.	Docket Nos. CENT 2023-0072 CENT 2023-0073 CENT 2023-0074 CENT 2023-0075

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 2, 2023, the Commission granted sua sponte review in the subject contest proceedings of the Judge's decision issued on August 31, 2023. The contest proceedings involve Order Nos. 9674876, 9674877, 9674883, and 9674887.

On May 16, 2024, the Commission issued an order denying with prejudice a motion to reopen filed by Morton Salt, Inc, in Docket No. CENT 2023-0248. 45 FMSHRC ___, No. CENT 2023-0248 (May 16, 2024). In the denial, the Commission declined to reopen proposed penalty assessments that had become final Commission orders pursuant to section 105(a) of the Mine Act, 30 U.S.C. 815(a). The proposed penalties that became final Commission orders include those associated with Order Nos. 9674876, 9674877, 9674883, and 9674887.

On June 3, 2024, the Secretary of Labor filed a letter, pursuant to Fed. R. App. P. 28(j),[1] to bring pertinent authority to the Commission's attention in this matter. The Secretary noted that the Commission denied with prejudice Morton Salt's motion to reopen in Docket No. CENT 2023-0248, which involved penalties associated with the orders that are at issue in the subject contest proceedings. The Secretary states that the Commission's order in CENT 2023-0248 moots the subject contest proceedings.

On June 21, 2024, the Commission issued an order directing Morton Salt, within 30 days, to show why the subject contest proceedings, Docket Nos. CENT 2023-0072 through CENT 2023-0075, should not be dismissed as moot. Morton Salt has not submitted a response to that Order.

[1] Fed. R. App. P. 28(j) provides in part that "[i]f pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations."

Although Morton timely filed contests of Order Nos. 9674876, 9674877, 9674883, and 9674887, it was required to file a timely contest of the proposed penalties associated with those orders to contest the penalties. 29 C.F.R. § 2700.26(a) ("A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation or order pursuant to § 2700.20."); 29 C.F.R. § 2700.21(a) ("The filing of a notice of contest of a citation or order issued . . . does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary . . . which is based on that citation or order.").

Morton failed to timely contest the proposed penalties associated with Order Nos. 9674876, 9674877, 9674883, and 9674887, and the penalties became final pursuant to section 105(a) of the Mine Act. The Commission determined that the reason for the operator's failure to timely contest the proposed penalties was insufficient to justify reopening, and the Commission denied with prejudice Morton's motion to reopen. Morton did not appeal the Commission's denial, and the Commission's order became final 30 days after its issuance. 30 U.S.C. § 816(a).

The Commission has recognized that a "case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome." *North American Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012) (citation omitted). Similarly, the D.C. Circuit has stated that it "cannot decide a case if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than speculative chance of affecting them in the future.'" *Sec'y of Labor v. M-Class Mining, LLC*, 1 F.4th 16, 21 (D.C. Cir. 2021) (citations omitted).

The issues presented in the subject contest proceedings are moot given that the penalties associated with the contested orders are final orders and "the assertion of violation[s] contained in the [orders are] regarded as true." *Old Ben Coal Co.*, 7 FMSHRC 205, 209 (Feb. 1985).[2] Because the allegations of violation are regarded as true, the operator has no legally cognizable interest in the outcome of its contest of the orders.

Accordingly, we hereby dismiss these contest proceedings as moot.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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

[2] Commissioners Althen and Marvit note fundamental problems with the holding of *Old Ben* and relevant portions of Commission Rules 21 and 26. Where there is a conflict between the Mine Act and Commission precedent or rules, the clear language of the Mine Act must prevail.

Distribution:

Donna V. Pryor
Husch Blackwell LLP
1801 Wewatta Street, Suite 1000
Denver, CO 80202
Donna.pryor@huschblackwell.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

Emma L. Goold, Esq.
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
goold.emma.l@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

Administrative Law Judge David P. Simonton
Federal Mine Safety & Health Review Commission
Office of the Chief Administrative Law Judge
721 19th Street, Suite 443
Denver, CO 80202-2500
dsimonton@fmshrc.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 12, 2024

WESLEY MALLERY,	
v.	Docket No. CENT 2024-0106
EL SEGUNDO COAL CO., LLC	

DIRECTION FOR REVIEW

The petition for discretionary review filed by the complainant, Wesley Mallery, on June 12, 2024, is granted with respect to the question of whether the Judge erred in finding no adverse action.

In addition, pursuant to Commission Procedural Rule 71, 29 C.F.R. § 2700.71, and section 113(d)(2)(B) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(d)(2)(B), we vote to grant *sua sponte* review of the Administrative Law Judge's Orders to Show Cause, issued on March 5, 2024 and March 14, 2024, and subsequent dismissals to determine whether they are contrary to law.[1] Specifically, we review whether the Judge erred in issuing her Orders to Show Cause in the absence of any motion to dismiss or motion for summary decision submitted to the Judge.

The Commission will also determine whether the documents filed by Mr. Mallery on July 5, 2024 are part of the record on appeal.

[1] Commissioner Rajkovich would grant review of only the issues raised in the PDR.

The parties shall file their briefs beginning 30 days from the date of this order in accordance with the briefing schedule requirements in 29 C.F.R. § 2700.75. Specifically, Mr. Mallery may file a single brief on or before August 12, 2024, to address the arguments in his petition for discretionary review, and the additional issue identified by the Commission in this direction for review. After the operator files its response brief, Mr. Mallery may file a reply brief within 20 days of service of the operator's response brief.

Thereafter, Mr. Mallery may file documents only in accordance with the Commission's procedural rules and/or as permitted by the Commission. The Commission's procedural rules may be accessed at https://www.fmshrc.gov.

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

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

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

Distribution:

Wesley Wayne Mallery
P.O. Box 666
7120 Zuni Canyon Rd.
Grants, NM 87020
wesleywmallery@yahoo.com

Christopher G. Peterson, Esq.
Fisher & Phillips, LLP
1125 17th Street Suite 2400
Denver, CO 80202
cpeterson@fisherphillips.com

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 520 N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 23, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ALVARO SALDIVAR	
v.	Docket No. WEST 2021-0178-DM
GRIMES ROCK, INC.	

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

NOTICE

On November 28, 2023, the Commission issued a decision remanding this case to the Administrative Law Judge for further findings consistent with its decision. Before the Judge could issue his ruling, Grimes Rock, Inc. ("Grimes Rock") appealed the Commission's decision to the Ninth Circuit.[1] On May 23, 2024, the Court dismissed Grimes Rock's appeal for lack of jurisdiction on the basis that a remand order to a judge is not a final agency decision. *Grimes Rock, Inc. v. FMSHRC*, No. 23-4418 (9th Cir. dismissed May 23, 2024), *citing Alaska v. EEOC*, 564 F.3d 1062, 1065 n.1 (9th Cir. 2009). The Court's mandate returning jurisdiction to the Commission was issued on July 15, 2024.

[1] "Any petition for federal court review of the *Decision* pursuant to section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), must generally await resolution of the remand to the judge, a further petition for discretionary review to the Commission, and disposition by the Commission of the petition." *North Fork Coal Corp*., 33 FMSHRC 589, 596 n.7 (Mar. 2011).

Commission Rule 69(b) states that: "Except to the extent otherwise provided herein, the jurisdiction of the Judge terminates when his decision has been issued." 29 C.F.R. § 2700.69(b); *Vermont Unfading Green Slate Co*., 23 FMSHRC 787 (Aug. 2001) ("The judge's jurisdiction in this matter terminated when his decision was issued. . ."); *Peabody Coal Co*., 2 FMSHRC 1035, 1037 (May 1980) (stating that in as much as the Judge's decision "constitutes his final disposition of the proceedings" within section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1), the Judge's jurisdiction terminates on the date of issuance). In the instant matter, the Judge has yet to issue a decision pursuant to the Commission's November 28 remand order. Therefore, the Judge's jurisdiction here never terminated.

Accordingly, the Judge retains jurisdiction over this case and may proceed on remand as originally instructed and consistent with the Commission's November 28, 2023 decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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

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

Distribution List:

Peter Goldenring, Esq.
Pachowicz & Goldenring PLC
6050 Seahawk Street
Ventura, CA 93003
peter@pglaw.law

Mark R. Pachowicz, Esq.
Pachowicz & Goldenring PLC
6050 Seahawk Street
Ventura, CA 93003
mark@pglaw.law

Alvaro Saldivar
1241 Lookout Drive
Oxnard, CA 93035
saldivarwelding@icloud.com

Ryan M. Kooi, Esq.
U.S. Department of Labor
Office of the Regional Solicitor,
1835 Market Street, Mailstop SOL/22
Philadelphia, PA 19103-2968
kooi.ryan.m@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
scott.emily.t@dol.gov

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Nelson.April@dol.gov

Karla Malagon, Esq.
U.S. Department of Labor
Office of the Solicitor
350 S. Figueroa Street, Suite 370
Los Angeles, CA 90071
malagon.karla@dol.gov

Jessica M. Flores, Esq.
U.S. Department of Labor
Office of the Solicitor
350 S. Figueroa Street, Suite 370
Los Angeles, CA 90071
Flores.Jessica@dol.gov

Bruce L. Brown, Esq.
U.S. Department of Labor
Office of the Solicitor
350 S. Figueroa Street, Suite 370
Los Angeles, CA 90071
Brown.Bruce.L@dol.gov

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

July 30, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. SAIIA CONSTRUCTION CO., LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0002 A.C. No. 01-00028-563327 1KJ Mine: Fort Payne Quarry

DECISION AND ORDER

Appearances: Colleen E. Howard, Esq., & Jean C. Abreu, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Secretary of Labor

Travis W. Vance, Esq., & Lucy M. Anderson, Esq., Fisher and Phillips, LLP, Charlotte, North Carolina, for the Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (The "Act" or "Mine Act"). A hearing was held via Zoom Government on Thursday, March 21, 2024. The parties subsequently submitted briefs. The within Decision has been reached after careful consideration of the evidence presented at hearing and arguments advanced by the parties.

LAW AND REGULATIONS

30 C.F.R. § 56.17001 provides, in pertinent part:

> Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas.

CREDIBILITY ASSESSMENT

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and

consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. 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) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

JOINT STIPULATIONS

1. During all times relevant to this matter, Respondent was the operator of the Fort Payne Quarry Mine (Mine ID 01-00028) located in Fort Payne, Alabama.
2. Fort Payne Quarry is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802 (h).
3. At all material times involved in this case, the products of the subject mine entered commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. The proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
5. When MSHA Inspector Randall Dickerson issued Citation No. 9336782, he was acting in his official capacities as an authorized representative of the Secretary of Labor.
6. The citation contained in this docket was served on Fort Payne Quarry or its agent as required by the Mine Act.
7. The assessed penalty, if affirmed, will not impair Saiia Construction Company, LLC's ability to remain in business.
8. The alleged violation was abated in good faith.

Tr. 7; Jt. Ex. 1.[1]

STATEMENT OF FACTS AND SUMMARY OF TESTIMONY

Saiia Construction Company, LLC, ("Saiia") is a commercial contractor that was providing services at Fort Payne Quarry, a mine site owned by Vulcan Materials, at the time of the citation. Tr. 13. Fort Payne Quarry is located in the eastern time zone, near the threshold between the eastern and the central time zone. Tr. 77.

[1] Hereafter, the joint stipulations, transcript, the petition, the Secretary's exhibits, Respondent's exhibits, the Secretary's post-hearing brief, and Respondent's post-hearing brief are abbreviated as "Jt. Stip.," "Tr.," "Pet.," "Ex. S-#," "Ex. R-#," "S. Br.," and "R. Br.," respectively.

WITNESSES

Victor Johnson

At hearing, former Saiia employee Victor Johnson, who worked for the Respondent from April 2022 until July 2022 as a dump truck operator, testified on behalf of the Secretary. Tr. 17-18. He was certified as a dump truck operator in 2020 and holds other certifications to operate other heavy machinery such as forklifts, sky lifts, excavators, and bulldozers, as well as a mining certificate. Tr. 19. Saiia terminated his employment in July 2022, after the complaint at issue was made, for allegedly using a cell phone while operating a dump truck. Tr. 44. The conditions surrounding his termination are not at issue here.

When Johnson first began his employment at Saiia, his shift was scheduled to start at 6:00/6:30 am. Tr. 19. A few weeks into his employment, Saiia adjusted the shift time to begin instead at 4:30 am. Tr. 19-20. This change in shift start time led Johnson to file a complaint with MSHA on July 21, 2022, alleging inadequate illumination at the worksite. Tr. 17-18, 24. As a dump truck operator, Johnson's job duties entailed dumping material over a ledge with a 1100-foot drop. Tr. 18. The only lights present at the site when the workday began were the lights on the vehicle, which Johnson testified was equivalent to a porch light. Tr. 22. If he were to make a mistake, the truck would fall over the 1100-foot drop and there would be no time to get out of the vehicle because the door was located in the back. Tr. 24. Johnson did not take any photographs or make any video recordings of the lighting conditions at the work site. Tr. 45.

Johnson had brought the illumination issue to Saiia supervisor Mike Dunaway two times prior to filing the complaint with MSHA. Tr. 23. While Dunaway eventually brought an excavator to the area to provide additional light, it was not until two or three weeks after Johnson had complained the second time to Dunaway, and the excavator was not present at the work site all the time. Tr. 23. When the excavator was not there, Johnson stated that safety was left to the operator and that it was difficult to determine if the truck was backing up over the berm or over a bad spot. Tr. 23-24. He had never complained about the lighting conditions at the work site before the start time was changed from 6:00/6:30 am to 4:30 am. Tr. 42.

While the shift would begin at 4:30 am, Johnson did not begin to operate machinery until Saiia's pre-shift requirements were completed. Before traveling to the worksite, Saiia required employees to sign in, fill out paperwork and pick up personal protective equipment. Tr. 20, 29, 32. According to Johnson's testimony, this process would take a couple of minutes, before employees got into a company truck to travel to the worksite, Tr. 29-30. Employees were also required to attend a Job Safety Analysis ("JSA") meeting, which reviewed safety issues, production targets, and other objectives before beginning their shift. Tr. 31, 35-36. Typically, this meeting would take approximately five minutes. Tr. 35.

After the JSA meeting, employees would then conduct inspections of the equipment and complete the pre-shift checklist. Tr. 20. The equipment was located about 45 feet away from the utility trailer where the JSA meetings are held. Tr. 37. The pre-shift inspection included a full analysis of the safety features of the vehicle and would take five minutes to complete. Tr. 37, 91.

Several items on the inspection checklist, such as the engine coolant and the vehicle's tires, would require visual tests. Tr. 38-39. Employees would use a flashlight or a cellphone to perform these tests. Tr. 39. The vehicle's lights would be checked with the assistance of another employee, who would confirm to the operator that the lights were functional. Tr. 39. Any problems were brought to the attention of Saiia's management. Tr. 40. The first load of the day was usually collected between 10 and 30 minutes after the pre-shift inspection was conducted. Tr. 42.

Randall Dickerson

Inspector Randall Dickerson has worked for MSHA since 2008 and has conducted approximately 12 inspections per year related to illumination. Tr. 47, 49. Prior to his employment at MSHA, he worked in the mining industry as an underground electrician. Tr. 48. The inspector did not have specific training or certifications regarding industrial hygiene, but he had been certified by MSHA to do noise and dust sampling which is routinely performed to protect miners from these hazards. Tr. 67-68.

Inspector Dickerson visited the mine on July 26, 2022, to observe the lighting conditions in response to the hazard complaint MSHA received on July 21, 2022. Tr. 51. The inspector arrived at the mine around 4:45 am on the day of the inspection. Tr. 51. He presented a copy of the hazard complaint to the mine supervisor. Tr. 52. No one from Saiia's management was present. Tr. 53. The inspector did not meet with Saiia's representative, supervisor Mike Dunaway, until some point between 5:20 and 5:30. Tr. 54. Dunaway accompanied the inspector on his visit. Tr. 94. Prior to entering Saiia's part of the facility, he observed lights moving about the area. Tr. 56, 58. Operations were halted, however, to allow the inspector to conduct his inspection. Tr. 58.

At the dumping area, the inspector noted that it was downhill and a short distance away from the stripping area. Tr. 58. Operators would come, back up, and dump over the edge or short dump and have a bulldozer push the material over the edge. Tr. 58. At twilight, the inspector observed that the dump site had no additional illumination, aside from the headlights and backup lights on the vehicles. Tr. 59. Based on these conditions, trucks may not be able to clearly see the edge of the dump, which is extremely important to ascertain the condition of the berm and see where cracks may be forming or material sloughing off. Tr. 59, 62. The inspector did not believe the illumination was sufficient to see these changing conditions. Tr. 60. He did not witness an operator dump over the edge while he was visiting the site. Tr. 57-58, 72, 74.

The inspector also traveled the haul road when he arrived at the site between 5:20 and 5:30 am. Tr. 60. There was no auxiliary or additional lighting on the road and no clear signs, markers, or reflectors to indicate turns. Tr. 60, 75. Operators would need to navigate a downhill 90-degree turn on this road to proceed to the dump site, using only their headlights and backup lights. Tr. 60-61. The inspector testified that headlights alone were insufficient because it would be difficult to gauge distance and dimensions on the berm, and the berm itself would not be sufficient to stop a truck should it miss the turn. Tr. 61. Even the headlights on the pickup truck used during the inspection were not enough to see the turns. Tr. 75.

The final area the inspector visited was the stripping site, where miners were gathering material from the strip in a pile to load onto the trucks. Tr. 62. The only light in the area was from the headlights on the excavator and a light located on the top joint on the arm of the excavator. Tr. 63. The light was sufficient for loading, but the inspector noted there was no area illumination and it may be difficult for the excavator operator to see others walking in the area and that the operator could injure or kill them with the excavator. Tr. 63. Illumination is needed to operate the equipment, travel safely on the roads, and to see hazards such as people or other equipment coming towards operators unannounced. Tr. 63-64. He did not see other equipment at the stripping site, but Saiia had stopped operations to allow the inspector to examine the various areas. Tr. 63.

The inspector testified that JSA meetings may last anywhere from 30 seconds to 20 minutes. Tr. 70. He did not know the length of the JSA meeting on July 26, 2022. Tr. 71. Miners need to sign a certificate after the meeting to confirm their attendance. Tr. 70. In his estimation, a prudent pre-shift examination may take five to seven minutes. Tr. 71. Completing pre-shift documentation would then take approximately a minute. Tr. 71.

The inspector issued Citation No. 9336782 to Saiia for inadequate illumination of their work area at 5:30 a.m. on July 26, 2022. Tr. 54, 56; Ex. E. In his testimony, the inspector stated that this was the time he issued the citation or verbally told Mike Dunaway that there was a violative condition, but that the actual violative condition may have occurred a few minutes before. Tr. 55. He did not test or take samples of the lighting conditions leading to the citation; while he had used a light illumination meter before, he did not have a meter issued by MSHA. Tr. 72-74, 76. The inspector also did not take photographs, citing concerns that the cameras issued to inspectors would not capture low-light conditions as the human eye would. Tr. 78-79.

The citation was marked as reasonably likely, lost workdays or restricted duty, and significant and substantial. Tr. 55; Ex. R-E. The inspector testified that it would be reasonably likely that going over the edge of a drop more than 100 feet at the dump site would lead to serious injuries or death. Tr. 64. Flipping over the loaded truck could also cause impact injuries, whiplash, head concussions, contusions, and broken bones. Tr. 64-65. This violation would affect one person, the operator of the equipment, because drivers are typically by themselves in the vehicle. Tr. 64. At the stripping site, the inspector determined that it would be reasonably likely that an excavator could spin around and make contact with a person approaching unannounced in low-light conditions. Tr. 65. The negligence was assessed as moderate, because the inspector determined that this condition should have been seen during the daily pre-shift examinations by a reasonable person and work was allowed to continue without correcting the hazardous condition. Tr. 65-66.

Mike Dunaway

Mike Dunaway, a supervisor at Saiia with 17 years of mining experience, testified for the Respondent. Tr. 81-82. He is responsible for the safety and management of employees at the work site, and his job duties involve conducting the daily JSA meeting. Tr. 81, 83. In addition to the JSA meetings, Dunaway also performs a daily work safety audit to ensure that safety

standards are met and that there are enough first aid supplies, safety information, and personal protective equipment available at the work site. Tr. 88; Ex. R-G.

Prior to the JSA meeting, Dunaway inspects the site to look for hazards that may have been caused by weather conditions. Tr. 83. This inspection typically begins at 4:00 am and helps guide the JSA meeting that occurs with the employees. Tr. 83, 93. Dunaway testified that employees did not typically arrive at the work site until 5:00 am, because they need to be transported from the parking lot in a company vehicle and sign in at the maintenance shop prior to beginning their shift. Tr. 92. The JSA meeting typically began at 5:00 am. Tr. 93.

In the meeting, he discusses the jobs that need to be accomplished that day, the types of equipment that will be operated, and any safety procedures that need to be addressed or noted prior to beginning the shift. Tr. 83-84. These general topics were covered in the JSA meeting on July 26, 2022. Tr. 85-87; Ex. R-H. Depending on the topics that need to be reviewed, the JSA meeting may last 15 minutes to one hour. Tr. 87, 93.

After the JSA, the employees conduct the pre-shift examinations on equipment that will be operated that day. Tr. 90-91; Ex. R-F. If there is an issue, including with the equipment's lights, that piece of equipment is tagged out. Tr. 84, 90, 94. Dunaway has never seen an employee operating a vehicle that did not have working lights and testified that disciplinary action would be taken if an employee was found operating a vehicle without lights. Tr. 94. In Dunaway's experience, a prudent pre-shift examination would take between 15 and 20 minutes. Tr. 91.

Saiia changed the shift start time because the days were getting longer and it would allow miners to complete more loads on each shift. Tr. 96. According to Dunaway's testimony, the time change would not have been made if it would impact miner safety. Tr. 97. Dunaway did not believe a light plant needed to be required at the site because there was sufficient light. Tr. 89, 90. He testified that no one had ever complained to him about the lighting conditions and did not recall Johnson's complaint. Tr. 96.[2]

James Childers

James Childers, a former Saiia employee who had worked as a heavy equipment operator running haul trucks, excavators, and dozers, testified for the Respondent. Tr. 99-100. As part of the onboarding training at Saiia, Childers had been instructed to make sure that equipment lights were working and to report any malfunctioning lights to the foreman. Tr. 101. He testified that he never operated a piece of equipment at night that that did not have working lights and that he would ensure the lights were working as part of his pre-shift inspection. Tr. 101-103. He further believed that the work site was very well lit and did not observe or hear anyone make a complaint about the lighting conditions during his tenure. Tr. 106.

[2] This Court found Dunaway to be somewhat evasive in his testimony.

Courtney Enderle

Courtney Enderle, a senior industrial hygienist with over 12 years of experience at the environmental and safety industrial hygiene consulting firm EI Group, testified regarding an illumination assessment she conducted of the conditions at Fort Payne. Tr. 109-110, 115; Ex. R-K, R-M. Enderle was retained in January 2023 to perform this assessment for the Respondent, which was performed on January 20, 2023, between 5:00 and 7:30 am. Tr. 115, 118; Ex. R-L.

As part of the methodology of her assessment, Enderle referenced the MSHA standard, which states that there only needed to be sufficient lighting within the workspace. Tr. 120, 134. Because she determined the MSHA standard to be subjective with no numbers or measurements assigned, Enderle used other agencies' standards and the best practices with ranges associated with the tasks to determine what the appropriate illumination should be for the tasks performed at Fort Payne. Tr. 121, 134, 159. Specifically, she looked at the National Institute for Occupational Safety and Health ("NIOSH"), the Illuminating Engineering Society ("IES"), and the Handbook for Human Factors to find recommendations for the best practices. Tr. 121. From these recommendations, Enderle generated a table that reflected the illumination a work area should have based on the tasks to be performed there and its surroundings. Tr. 122-123, 138-139. She compared the parking areas and public areas with dark surroundings, because she concluded that those areas had the lowest recommendations for light. Tr. 146. She further considered operating machinery and vehicles to be a visual task. Tr. 150. She did not factor operators pushing or dumping material over a substantial drop when she did her analysis because she did not see those activities occurring during her visit to the site. Tr. 153-154. Further, her assessment focused on the light necessary for specific activities and not on preventing hazards. Tr. 160.

To measure the light conditions at the site, Enderle used a field-calibrated Extech SDL 400 series light meter Tr. 132, 133. The readings were measured in lux, the amount of illumination produced by one candle of one meter surface area away from that distance, which provided an objective observation of the light conditions. Tr. 133. The readings from the light meter include both the ambient and the local light. Tr. 156-157, 161.

Enderle arrived at the dump area at 5:12 am and found that the equipment had yet to begin operating. Tr. 124-125, 149. At the site, Enderle began her sampling by collecting background samples for a base. Tr. 131. She then continued to collect area samples by moving up and down the haul road between the parking area and the stripping area. Tr. 131-132, 156. Equipment did not move until 6:29 am, when the illumination was determined to be sufficient based on the guidelines she had developed. Tr. 125. Enderle found sufficient lighting based on the ranges she developed in the parking area, the dump area, and the stripping area at twilight, the time when differences in light conditions are noticeable. Tr. 125-126, 129.

To account for the differences in lighting based on the time of year and weather conditions, Enderle examined the historical data to determine if there were any factors that may have affected the illumination on July 26, 2022, when the citation was issued. Tr. 126-127. She found that the sunrise and twilight times on July 26, 2022, and January 20, 2023, produced

similar light conditions and that the light would have been sufficient in July 2022. Tr. 127-128, 129.[3]

Robert Massengale

Robert Massengale, the mining division safety manager with 18 years' experience working for Saiia, testified for the Respondent. Tr. 163-164. In 2022, he visited the Fort Payne site once per week to tour the area, drive around, and ensure that safety measures were met. Tr. 165. He also provided new hires with the necessary training, which includes how to conduct a proper vehicle equipment inspection. Tr. 165-167. To properly check the lights on a vehicle, the operator would need the assistance of another person to ensure that the lights are functional. Tr. 167-168. If a light on a piece of equipment is not working, the operator should inform the supervisor, and that equipment is not allowed to be operated until the light is fixed. Tr. 169.

He testified that Saiia holds JSA meetings every day to review the specific requirements and tasks to be accomplished daily and to inform employees of any hazards that they may encounter at the site. Tr. 168-169. While the length of the JSA meetings varies from 20 minutes to close to an hour, typically a JSA meeting will last 30 minutes. Tr. 169.[4] A thorough safety inspection would take 15 to 20 minutes. Tr. 167. Massengale had not received a complaint regarding illumination at For Payne and was unaware of any issues regarding illumination at the site. Tr. 171-172.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Burden of Persuasion and Standard of Proof

The Commission has long held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law and the standard applicable here, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

II. The Respondent violated 30 C.F.R. § 56.17001

Section 56.17001 provides, in pertinent part, "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." 30 C.F.R. § 56.17001. The

[3] This Court found this witness's testimony to be unpersuasive for the reasons outlined in the Secretary's post hearing brief. S. Br. at 8-9.

[4] This Court found that the witness was exaggerating the length of JSA meetings in order to diminish the time period during which vehicle drivers would be operating in darkness.

Commission has stated that the issue of what constitutes "illumination sufficient to provide safe working conditions" requires the judge to make a factual determination based on the working conditions in the cited area and the nature of the illumination provided. *Capitol Aggregates, Inc.*, 3 FMSHRC 1388, 1388 (June 1981), *aff'd*, 671 F.2d 1377 (5th Cir. 1982) (unpublished table decision).

It is undisputed that on July 26, 2022, employees began their shift before the sun had risen at 4:30 am. Aside from the lights of the vehicles operating at the site, there was no lighting provided at the work site.

"Between the motion and the act falls the shadow." This Court recognizes that period of time at issue, which comprised darkness and early twilight, was relatively brief in duration. Nonetheless, it was of sufficient length so as to create a reasonable likelihood of the occurrence of the hazards testified to by the inspector.

This Court credits Victor Johnson's testimony that it was too dark to see the edge of the dump site when the miners began to operate vehicles. Further, an administrative law judge may credit the opinions and judgment of an experienced MSHA inspector. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-1279 (Dec. 1998) and *Buck Creek Coal, Inc. v. MSHA*, 52 F. 3d 133, 135-136 (7th Cir. 1995). As such, this Court also credits the testimony of Inspector Dickerson regarding the insufficiency of the lighting for the type of work that is performed at the site, as an inspector with considerable experience both in the mining industry and in conducting inspections. When the inspector visited the site, he observed indications that the work shift had started, from the headlights visible at the site and gathered piles of material to load trucks. Based on the lighting conditions present, he did not believe that the lighting was sufficient to operate safely. In addition to seeing the berm itself, it is important for equipment operators to be able to see the condition of the berm to determine if it is safe to approach. The headlights would provide only two-dimensional lighting, which can make it difficult to determine the distance and dimensions of a berm that is the same color as a roadway. It is also difficult to identify other employees who may be approaching a piece of equipment in the absence of additional lights. This Court finds that the amount of light emitted only from vehicle headlights was not sufficient to provide safe working conditions before the sun rises.

Respondent argues that the lighting conditions at the site were sufficient based on the assessment performed by Courtney Enderle. However, the cited standard does not require that light measurements be taken to ascertain if the lighting is sufficient. Further, the assessment only considered whether the lighting was sufficient, and did not consider the types of tasks miners were performing. While it may be true that Respondent never permitted an employee to operate a vehicle that did not have working lights and trained their employees on conducting prudent pre-shift inspections of equipment, it does not detract from the fact that vehicle headlights alone were not sufficient to light the area where work was being performed prior to sunrise.

Accordingly, this Court finds that Respondent violated 30 C.F.R. § 56.17001.

III. The likelihood of injury was properly classified as "reasonably likely", and the resulting injury would result in "lost workdays or restricted duty"

Dickerson designated the citation as reasonably likely to cause an injury that could be reasonably expected to result in an injury causing lost workdays or restricted duty. Ex. S-1. This Court affirms the "reasonably likely" and the "lost workdays or restricted duty" designations.

The citation was also designated as significant and substantial. To establish that a violation is significant and substantial, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).[5]

The Secretary has already established that there has been a violation of a mandatory safety standard. Concerning step 2 of the analysis, the identified hazard the standard aims to avoid depends on the type of work that is being performed in the area. Here, the hazards include trucks falling over a steep edge, driving through a berm, or an operator striking another employee who may be approaching a vehicle unannounced. It is reasonably likely that in an inadequately lit environment, these hazards would occur, satisfying step 2 of the analysis. In his testimony, the inspector stated that a person would experience severe injuries, such as broken bones, concussions, severe whiplash, or even death as a result of the occurrence of these hazards. As these types of injuries are of a reasonably serious nature and would be reasonably likely to occur from the hazards described above, all four elements of the S&S analysis have been met and the violation was appropriately determined to be significant and substantial.

---

[5] This Court notes the mounting criticism of the Commission's *Newtown/Peabody* reformulation of the second step of the Mathies test. See inter alia ALJ Moran's observations in *Sec'y of Labor v. Carmeuse Lime*, 45 FMSHRC 500, 517 n.12 (June 2023), that said reformulation is inconsistent with the Mine Act's definition of S&S which focuses on violations that *could* contribute to the hazard and the legislative history of the Mine Act that suggests that Congress intended all, except technical violations of mandatory standards, to be considered significant and substantial.

In this case, if the hazards identified by the inspector had occurred, regardless of likelihood, it would be reasonably likely that a reasonably serious injury could result, satisfying the elements of the *Mathies* test. Further considering the surrounding circumstances during continuing mining operations, including hilly terrain, sharp curves, and poor lighting, the violation was reasonably likely to result in an injury, thereby also satisfying the *Newtown*/*Peabody* reformulation.

In light of such, this Court finds no need to resolve any conflict between the two tests.

IV. The negligence was properly classified as "moderate"

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). MSHA's regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.[6]

Inspector Dickerson marked the violation as moderate negligence because the violation should have been identified during the pre-shift examination by a reasonable person, yet work was allowed to continue without correcting the hazard. Tr. 65-66. The testimony establishes the dangers of operating equipment in insufficient lighting conditions. The Court affirms the inspector's negligence determination.

V. The originally assessed penalty of $481.00 for the violation is appropriate.

Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). In assessing civil monetary penalties, an ALJ shall consider the six statutory penalty criteria:

> [T]he 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).

In *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997), the Commission held that all of the statutory criteria in § 110(i) should be considered in the court's *de novo* penalty assessment, but not necessarily assigned equal weight. In *Musser Engineering, Inc.,* 32 FMSHRC at 1289, the Commission held that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. Here, the gravity of the violation as to injury was designated as fatal.

---

[6] This Court notes that, in *Secretary of Labor v. Brody Mining, LLC*., 37 FMSHRC 1687, 1701 (Aug. 2015), the Commission affirmed that, in making a negligence determination, Commission judges are not required to apply the definitions of Part 100 and may evaluate negligence from the starting point of a traditional negligence analysis, and are not limited to an evaluation of allegedly mitigating circumstances and can consider "the totality of the circumstances holistically." Further considering the totality of the circumstances holistically in this matter, this Court finds that the Respondent's conduct was moderately negligent in nature.

The Secretary has proposed a penalty of $481.00 for the violation cited in Citation No. 9336782. The Court has considered and applied the six penalty criteria found in § 110(i) of the Act. Considering all the circumstances, the Secretary's original proposed penalty assessment appears appropriate.

The operator is considered large in size under 30 C.F.R. § 100.3. The parties stipulated that payment of the proposed total penalty would not affect Respondent's ability to continue in business. Jt. Stip. 7. The history of assessed violations, submitted in the penalty petition, showed three violations of mandatory health and safety standards by this operator in the 15-month period prior to the issuance of this citation. Pet. at 9. The negligence and gravity factors have been addressed in the discussion above. The parties have also stipulated that this violation was abated in good faith, but this Court accords more weight to the gravity of the violation in determining an appropriate penalty. Jt. Stip. 8.

Based on the foregoing, the Court finds that the assessed penalty of $481.00 is appropriate.

ORDER

The Respondent, Saiia Construction Company, is **ORDERED** to pay the Secretary of Labor the sum of $481.00 within 30 days of this order.[7]

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

Distribution:

Colleen E. Howard, Esq., Jean C. Abreu, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, SW, Room 7Tl 0, Atlanta, GA 30303 (howard.colleen.e@dol.gov Abreu.jean.c@dol.gov atl.fedcourt@dol.gov)

Travis W. Vance, Esq., Lucy M. Anderson, Esq., FISHER & PHILLIPS LLP, 227 W. Trade Street, Suite 2020, Charlotte, NC 28202 (tvance@fisherphillips.com lmanderson@fisherphillips.com)

[7] 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
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

July 24, 2024

GRIMES ROCK, INC., Contestant	CONTEST PROCEEDING
v.	Docket No. WEST 2022-0334-RM §104(b) Order No. 9619115; 08/21/2022
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	Mine: Grimes Rock, Inc. Mine ID: 04-05432
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2023-0015-M A.C. No. 04-05432-563106-01
v.	Docket No. WEST 2023-0016-M A.C. No. 04-05432-563106-02
GRIMES ROCK, INC., Respondent	Mine: Grimes Rock, Inc.

ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY DECISION & ORDER DENYING GRIMES ROCK'S MOTION FOR SUMMARY DECISION

These cases are before me upon a notice of contest filed by Grimes Rock, Inc. ("Grimes Rock") and petitions for assessment of civil penalty filed by the Secretary of Labor (the "Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Grimes Rock pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or the "Act").

The Secretary and Grimes Rock filed cross motions for summary decision and oppositions to the respective motions. For reasons set forth below, the Secretary's motion for summary decision is **GRANTED** and Grimes Rock's motion for summary decision is **DENIED**.

I. BACKGROUND

The contest docket and two penalty dockets at issue involve two 104(a) citations and one 104(b) order that arise from Grimes Rock's alleged failure to comply with orders issued by former Commission Judge Miller ("Judge Miller") in a temporary reinstatement proceeding brought by the Secretary of Labor on behalf of Alvaro Saldivar ("Saldivar") against Grimes Rock, WEST 2021-0178-DM (the "Saldivar TR Case"). A brief history of that case and how it relates to the enforcement actions at issue is helpful to understand the posture of these cases.

On May 18, 2021, Judge Miller issued a Decision and Order of Temporary Reinstatement in the Saldivar TR Case. Subsequently, the parties filed a Settlement Agreement and Joint Motion for Temporary Economic Reinstatement in that matter. On May 28, 2021, Judge Miller approved the settlement agreement and ordered Grimes Rock to pay Saldivar $2,134.78 per pay period, subject to normal deductions, and to otherwise comply with the terms of the settlement.[1] This amount was the difference between Saldivars's earnings at the job he held at the time and his earnings at Grimes Rock. The agreement was silent on what would happen if Saldivar no longer had other employment to offset Grimes Rock's payments. As set forth in more detail in the Saldivar TR Case, the parties disputed how much Grimes Rock should pay Saldivar after he was incarcerated and lost his other job. 45 FMSHRC 947, 948-949 (Nov. 2023).

On May 27, 2022, the Secretary filed a Motion to Enforce the Order Approving Settlement (the "Motion to Enforce") and requested that Judge Miller require Grimes Rock to make certain payments due under the Order Approving Settlement. On June 17, 2022, Judge Miller issued an order (the "Enforcement Order") granting the Secretary's Motion to Enforce and ordering Grimes Rock to pay a sum of $12,533.94 to Saldivar.[2] This amount is what the Secretary contended were overdue and missing temporary economic reinstatement payments due Saldivar. Grimes Rock appealed Judge Miller's Enforcement Order, as well as other issues, to the Commission. On July 22, 2022, the Commission granted Grimes Rock's petition for discretionary review.

The two citations and orders at issue in this proceeding stem from Grimes Rock's alleged failure to comply with Judge Miller's orders in the Saldivar TR Case. Citation No. 9619114, issued under section 104(a) on August 15, 2022[3], alleges a violation of section 105(c) of the Mine Act and asserts that Grimes Rock failed to comply with Judge Miller's Enforcement Order which required Grimes Rock to pay Saldivar $12,533.94.[4] Order No. 9619115, issued under

---

[1] For purposes of this order, I refer to Judge Miller's May 28, 2021 order as the "Order Approving Settlement."

[2] The same day, Judge Miller issued a decision in the companion discrimination case in which she found that Grimes Rock had not discriminated against Saldivar in violation of the Act. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 473 (June 2022) (ALJ).

[3] The issuance dates for the enforcement actions discussed in this paragraph are taken from MSHA Form 7000-3 for Citation Nos. 9619114 and 9619116, and Order No. 9619115.

[4] On August 17, 2022, two days after Citation No. 9619114 was issued, Grimes Rock filed a motion with the Commission asking that it stay Judge Miller's Enforcement Order directing Grimes Rock to pay Saldivar $12,533.94. On August 30, 2022, the Commission denied Grimes Rock's motion to stay. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 725 (Aug. 2022). In its order, the Commission stated that "[f]or purposes of this Motion to Stay, we conclude that it was not unreasonable for all involved to assume that in the event Saldivar were no longer employed elsewhere, Grimes Rock's payments would automatically revert to the full amount under the Judge's Order, consistent with the purpose of temporary reinstatement." *Id*. at 727-728.

section 104(b) on August 21, 2022, alleges that Grimes Rock failed to correct the condition described in Citation No. 9619114 by not making payments required by Judge Miller's Order Approving Settlement and Enforcement Order. Finally, Citation No. 9619116, issued under section 104(a) on August 22, 2022, alleges that Grimes Rock violated section 104(b) when it continued to conduct work activities at the mine site after Order No. 9619115 was issued.

On November 28, 2023, the Commission issued a decision in the Saldivar TR Case affirming Judge Miller's Enforcement Order and remanding certain issues for further determination. For purposes of the instant proceeding, the Commission's affirmation of Judge Miller's Enforcement Order requiring Grimes Rock to pay Saldivar the sum of $12,533.94 is critical. The remanded case was assigned to this court.[5] However, Grimes Rock appealed the Commission's decision to the Ninth Circuit Court of Appeals and I stayed the case pending the Ninth Circuit's ruling on the appeal. On May 23, 2024, the Ninth Circuit dismissed Grimes Rock's appeal for lack of jurisdiction.[6]

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

This statement of undisputed materials facts is based on the submissions of the parties in their respective motions for summary decision, oppositions to such, and this court's taking notice of orders and decisions issued by Judge Miller, the Commission, and the Ninth Circuit Court of Appeals in the Saldivar TR Case. Facts submitted by the parties that are not discussed in this section are either in dispute or are unnecessary for resolution of this matter.

On May 18, 2021, Judge Miller issued a Decision and Order of Reinstatement in the Saldivar TR Case in which she granted the Secretary's application for temporary reinstatement and ordered as Grimes Rock to "immediately upon receipt of receipt of this decision, reinstate Mr. Saldivar to his former position at the mine effective as of the date of this decision." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 43 FMSHRC 287, 292 (May 2021) (ALJ). The Decision and Order of Reinstatement further required that "[t]he employment of Mr. Saldivar shall be at the same rate of pay and with all benefits, including any raises, that he received prior to discharge, pending a final Commission order on the complaint of discrimination." *Id*.

On May 28, 2021, Judge Miller issued an Order Approving Settlement in the Saldivar TR Case in which she ordered Grimes Rock to pay an agreed upon amount every two weeks, subject to normal deductions, and to comply with the terms of the settlement agreement. Unpublished Order (May 28, 2021).

---

[5] Judge Miller retired prior to issuance of the Commission's November 28, 2023, decision in the Saldivar TR Case.

[6] On July 15, 2024, the Ninth Circuit issued its mandate returning jurisdiction to the Commission. On July 23, 2024, the Commission issued a notice in which it confirmed that I "may proceed on remand as originally instructed and consistent with the Commission's November 28, 2023 decision." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 46 FMSHRC ___, No. WEST 2021-0178 (July 23, 2024).

On June 17, 2022, Judge Miller issued the Enforcement Order in the Saldivar TR Case in which she ordered Grimes Rock to pay a sum total $12,533.94 to Saldivar for past due wages owed.[7] *Sec'y of Labor on behalf of Saldivar v. Grimes Rock Inc.,* 44 FMSHRC 497 (June 2022) (ALJ). The Enforcement Order required Grimes Rock to pay Saldivar "the full wages as ordered" in the May 18 Decision and Order of Reinstatement. *Id*. at 499. The Enforcement Order did not explicitly include a due date for payment.

On August 16, 2022, MSHA Investigator Troy Van Wey traveled to the mine and confirmed Grimes Rock had not paid Saldivar $12,533.94 as instructed in the Enforcement Order. Sec'y Mot. 4 (citing Sec'y Mot. Ex. 3 ¶9).[8] Investigator Van Wey served Citation No. 9619114 on Grimes Rock the same day and set the abatement time for 4:00 p.m. the following day, April 17, 2022. Sec'y Mot. 4 (citing Sec'y Mot. Ex. 3 ¶9).[9]

On August 22, 2022, Van Wey returned to the mine and determined that Grimes Rock had not yet abated Citation No. 9619114. Sec'y Mot. 4 (citing Sec'y Mot. Ex. 3 ¶¶10 and 10(a), Ex. 4 p. 12). Grimes Rock did not ask for an extension of the abatement time. Sec'y Mot. 4 (citing Sec'y Mot. Ex. 3 ¶10(a)). Van Wey did not extend the abatement time. Sec'y Mot. 4 (citing Sec'y Mot. Ex. 3 ¶10(a)).[10] At 7:00 a.m. on August 22, Van Wey served 104(b) Order No. 9619115 on Grimes Rock, which covered the entire mine site. Sec'y Mot. 4 (citing Sec'y Mot. Ex. 3 ¶10(b)).

The mine continued to operate after Order No. 9619115 was issued. Sec'y Mot. 4 (citing Sec'y Mot. Ex. 3 ¶10(b), Ex. 4 p. 14). After Order No. 9619115 was issued, Vic Lester, the safety

---

[7] Grimes Rock, in its opposition, disputes the validity of Judge Miller's Enforcement Order. As discussed below, the Commission affirmed Judge Miller's Enforcement Order and the Ninth Circuit dismissed Grimes Rock's appeal in the Saldivar TR Case for lack of jurisdiction. Accordingly, the validity of the Enforcement Order is not at issue in this matter.

[8] Grimes Rock, in its opposition, disputes that its safety coordinator confirmed to the investigator that it had not paid Saldivar the $12,533.94. Grimes Opp'n 2-3; Grimes Rock Objections to Petitioner's Purported Evidence ¶2(C). However, the Secretary's motion and the investigator's declaration it relies upon do not state that the employee confirmed that payment had not been made. Rather, the Secretary's motion makes no mention of the employee in the statement of undisputed facts, and the investigator's declaration states only that the investigator met with the employee and served Citation No. 9619114 upon the same employee after the *investigator* confirmed payment had not been made.

[9] Grimes Rock, in its opposition, argues that the abatement time was unreasonable and arbitrarily set because the Enforcement Order did not set a due date. Grimes Opp'n 3. However, Grimes Rock's argument is legal in nature, and does not dispute that Van Wey set an abatement time. The lack of a due date on the Enforcement Order is addressed below.

[10] While the Secretary framed this fact as "Vany Wey determined that the abatement time should not be extended[,]" Sec'y Mot. 4, which Grimes Rock disputed, Grimes Opp'n 3, I need only take from it the fact that Van Wey did not extend the abatement time, which is not an opinion as Grimes Rock suggests in its opposition.

coordinator at the mine, stated to Van Wey that "we are not shutting down" and "I just called the boss and we're not shutting down." Sec'y Mot. 5 (citing Sec'y Mot. Ex. 3 ¶ 10(c)).

At 8:07 a.m. on August 22, 2022, Van Wey issued Citation No. 9619116 for working in the face of Order No. 9619115. Sec'y Mot. 4 (citing Sec'y Mot. Ex. 3 ¶10(d)). After Citation No. 9619116 was issued, Grimes Rock paid Saldivar $12,533.94, less taxes and standard deductions. Sec'y Mot. 5 (citing Sec'y Mot. Ex. 4 pp. 17-18).

On August 30, 2022, the Commission issued an order denying Grimes Rock's August 17, 2022, motion to stay Judge Miller's Enforcement Order. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 725 (Aug. 2022).

The Secretary proposed specially assessed penalties of $1,264.00 for Citation No. 9619114 and $1,485.00 for Citation No. 9619116. Sec'y Mot. 5 (citing Exhibit A in the Petitions for the Assessment of Civil Penalty in docket numbers WEST 2022-0015 and WEST 2022-0016).

In 2022, Grimes Rock reported 93,597 working hours and an average of 32 employees.[11] Sec'y Mot. 5 (citing MSHA's Mine Data Retrieval System). The Secretary provided a copy of the Assessed Violation History. Sec'y Mot. 5 (citing Sec'y Mot. Ex. 5).[12]

On November 28, 2023, the Commission issued a decision in the Saldivar TR Case in which a majority, among other things, affirmed Judge Miller's Enforcement Order. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 45 FMSHRC 947 (Nov. 2023). On December 8, 2023, Grimes Rock filed a motion for reconsideration of the Commission's decision or, in the alternative, a motion to stay all proceedings, including the instant proceeding. On December 18, 2023, the Commission denied Grimes Rock's motions. Unpublished Order (December 18, 2023).

---

[11] Grimes argues that the information on hours worked and average number of employes is irrelevant, that any probative value of that information will be substantially outweighed by unfair prejudice and the confusing of issues, and that the information is based on inadmissible hearsay. Grimes Opp'n 3. I disagree. First, the information is clearly relevant given that it goes directly to the size of the operator, i.e., one of the factors I must consider when assessing a penalty. Second, the court routinely takes notice of information found on MSHA's Mine Data Retrieval System and the information presented by the Secretary matches that which court found in this case. There is no risk of confusion and Grimes Rock will not be prejudiced. Third, and finally, although the Commission is guided by the Federal Rules of Evidence, it is not bound by them. Like the Assessed Violation History Report discussed below, the information regarding the size of the operator is routinely offered by the Secretary and accepted by the court.

[12] Grimes Rock makes essentially the same arguments about the Assessed Violation History Report as it did regarding the information about the size of the operator. Information regarding the history of violations, like the information regarding the size of the operator, must be considered by the court when assessing a penalty, will not prejudice Grimes Rock, and is routinely offered by the Secretary and accepted by the court.

On December 26, 2023, Grimes Rock appealed the Commission's decision in the Saldivar TR Case to the Ninth Circuit Court of Appeals. On May 23, 2024, the Ninth Circuit dismissed the appeal for lack of jurisdiction. *Grimes Rock, Inc. v. FMSHRC and Sec'y of Labor*, No. 23-4418 (9th Cir. May 23, 2024).[13]

III. SUMMARY OF THE PARTIES' ARGUMENTS

The parties' submissions and arguments are quite extensive. As a consequence, I felt it necessary to summarize their arguments in detail before analyzing the issues, which makes this order somewhat repetitive and long.

A. The Secretary's Motion for Summary Decision

The Secretary asserts that this case presents no genuine issues of material fact and that she is entitled to summary decision as a matter of law on the two citations and order at issue. Sec'y Mot. 2.

Regarding Citation No. 9619114, the Secretary asserts that Grimes Rock violated an order promulgated under the Act when it failed to comply with Judge Miller's Order Approving Settlement and subsequent Enforcement Order. Sec'y Mot. 2. Section 104(a) of the Act requires the Secretary to issue a citation if an operator violates any order promulgated pursuant to the Act. Sec'y Mot. 6. The Secretary cites *C.R. Meyer & Sons Co., Inc.*, 38 FMSHRC 2950 (Dec. 2016) (ALJ) and *WV Rebel Coal Co.*, 7 FMSHRC 2234 (Dec. 1985) (ALJ) and argues that the Order Approving Settlement and subsequent Enforcement Order in the Saldivar TR Case were promulgated pursuant to the Act and issued under section 105(c)(2), and therefore may be enforced by issuing a 104(a) citation. Sec'y Mot. 6. Judge Miller's Enforcement Order required Grimes Rock to pay $12,533.94 in overdue and missing temporary reinstatement payments to the miner. Sec'y Mot. 4. On August 16, 2022, a MSHA investigator traveled to the mine and confirmed Grimes Rock had not made the payments due under the Enforcement Order. Sec'y Mot. 4, 9. In response, the investigator issued Citation No. 9619114 for failing to comply with the order. Sec'y Mot. 9. The Secretary argues that because Grimes Rock did not comply with Judge Miller's order, the fact of violation is proven. Sec'y Mot. 9.

Further, the Secretary asserts that Grimes Rock acted with reckless disregard when it deliberately chose to ignore Judge Miller's order and "failed to exhibit the slightest degree of care." Sec'y Mot. 10, 16. A full two months elapsed after Judge Miller issued the Enforcement Order before the MSHA investigator traveled to the mine to verify compliance, which suggests "Grimes would never have paid the miner were it not for the Secretary's intervention." Sec'y Mot. 10. Grimes Rock did not seek a stay of Judge Miller's order until after Citation No. 9619114 was issued and, instead, simply chose to not comply with the order. Sec'y Mot. 10.

Regarding Order No. 9619115, the Secretary asserts that the order was validly issued and should be affirmed because Grimes Rock failed to abate the condition at issue in Citation No. 9619114. Under section 104(b) of the Act, if the Secretary finds that a violation described in a

[13] The Ninth Circuit's order was issued after the parties had filed their motions.

section 104(a) citation has not been abated within the time set for abatement, and the Secretary determines that the abatement time should not be extended, the Secretary shall issue an order immediately withdrawing miners and prohibiting all non-exempt persons from entering the area affected until the Secretary determines the citation has been abated. Sec'y Mot. 6. The Secretary cites *WV Rebel Coal Co.*, 7 FMSHRC 2234 (Dec. 1985) (ALJ) and argues a 104(b) order is proper where the violation described in the underlying section 104(a) citation is the failure to comply with an order enforcing temporary reinstatement. Sec'y Mot. 7, 11. For a 104(b) order to be validly issued, the Secretary must prove by a preponderance of the evidence that the violation described in the underlying 104(a) citation existed at the time the 104(b) withdrawal order was issued. Sec'y Mot. 10-11. Here, when the investigator served Citation No. 9619114 on August 16, 2022, he set the abatement time for 4:00 p.m. the following day, August 17. When the investigator traveled to the mine on August 22, he determined that Grimes Rock still had not abated the condition cited in Citation No. 9619114 and, accordingly, issued 104(b) Order No. 9619115 to Grimes Rock. Sec'y Mot. 11. The Secretary asserts that she properly issued the order and is entitled to judgment as a matter of law. Sec'y Mot. 11.

With regard to Citation No. 9619116, the Secretary argues that Grimes Rock worked in the face of Order No. 9619115, which required that Grimes Rock withdraw all miners from the entire mine site. Sec'y Mot. 11-12. A 104(a) citation may be issued for failure to comply with a valid 104(b) order. Sec'y Mot. 6 (citing *BC Quarries, LLC*, 44 FMSHRC 267 (Apr. 2022) (ALJ)). Here, the MSHA investigator who issued the 104(b) order observed that Grimes Rock continued operations at the mine, and therefore worked in the face of the validly issued 104(b) order. Sec'y Mot. 11-12. As a result, the investigator issued Citation No. 9619116 under section 104(a) for violating an order promulgated under the Act. Sec'y Mot. 6, 12.

The Secretary asserts that Grimes Rock exhibited reckless disregard when it intentionally worked in the face of Order No. 9619115. Sec'y Mot. 12. An operator acts with reckless disregard when it intentionally causes the violative conduct. Sec'y Mot. 12 (*citing Hidden Splendor Res., Inc.*, 34 FMSHRC 3310 (Dec. 2012) (ALJ)). Here, Grimes Rock made no attempt to comply with the 104(b) order and had already disregarded Judge Miller's Enforcement Order and Citation No. 9619114, which was issued for failing to comply with the Enforcement Order. Grimes Rock's negligence with respect to Citation No. 9619116 was "severe." Sec'y Mot. 12.

The Secretary maintains that the purpose of the Act's temporary reinstatement provision is twofold: to provide a miner with income until the discrimination case on the merits is resolved and to prevent a chilling effect on other miners' willingness to exercise their rights under the Act. Sec'y Mot. 13. Grimes Rock cannot elect to follow or not follow judicial orders based on its own determination whether an order is valid. Sec'y Mot. 13-14. Grimes Rock's failure to comply with Judge Miller's Enforcement Order, as well as the citations and orders at issue, undermines both the power of the Commission to require operators to comply with the Act and the Secretary's power to protect miners and enforce the Act. Sec'y Mot. 13-14.

The Secretary argues that the recommended penalties for Citation Nos. 9619114 and 9619116, both of which involve a proposed special assessment, are appropriate. Sec'y Mot. 14. She states that in the fifteen months preceding the first citation Grimes Rock had 19 violations, 7 of which were S&S. Sec'y Mot. 15. She asserts that, although Grimes Rock is a moderately sized

operator, its actions have the potential to influence each of its 32 employees who may be aware of Grimes Rock's failure to pay Saldivar as ordered. Sec'y Mot. 15-16. Further, the Secretary asserts that the reckless disregard designations for both citations should weigh heavily in assessing penalties, and that the penalties should convey that ignoring orders issued pursuant to the Act is "unacceptable, possibly dangerous, and not to be repeated." Sec'y Mot. 16-17. Furthermore, while the Secretary acknowledges that the citations were not S&S, she asserts that they are nevertheless serious given the potential impact to the rule of law. Sec'y Mot. 17. Grimes Rock has not asserted or otherwise established that the proposed penalties will impact its ability to continue in business. Sec'y Mot. 17. Finally, the Secretary avers that Grimes Rock did not abate the citations in good faith. Sec'y Mot. 17-18. Based on these factors, the Secretary asserts that the proposed special assessments "reflect the dangerous and cavalier attitude Grimes Rock took toward a judicial order . . . and the Secretary's withdrawal order[.]" Sec'y Mot. 18. The larger than regular penalties will impress upon Grimes Rock that compliance with Mine Act orders is not optional. Sec'y Mot. 18.

B. Grimes Rock's Opposition to the Secretary's Motion for Summary Decision

Much of Grimes Rock's opposition to the Secretary's motion involves arguments regarding the alleged invalidity of Judge Miller's Enforcement Order and other issues already litigated in the Saldivar TR Case.[14] For reasons set forth later in this order, I do not describe those arguments in detail.[15] However, other arguments made by Grimes Rock in its opposition are relevant to the instant proceeding. A summary of those arguments follows.

Grimes Rock makes three primary arguments in support of its contention that the Secretary had no right to threaten to shut down the mine if Grimes Rock did not pay more than was agreed to in the temporary economic settlement agreement. Grimes Opp'n 12. First, Grimes Rock asserts that the Secretary did not issue Citation No. 9619114 in connection with an "inspection or investigation" as is required by the language of section 104(a). Grimes Opp'n 12. Second, it argues that the Secretary admitted that the citations and order at issue do not allege a

[14] Among other things, Grimes Rock argues that (1) Judge Miller lacked authority to retroactively rewrite the settlement agreement reached by the parties in the Saldivar TR Case and require more money be paid, (2) Saldivar's incarcerations during the temporary economic reinstatement constituted changed circumstances that were not properly considered by either Judge Miller or the Commission, (3) after-acquired evidence that Saldivar hid convictions on his job application were not properly considered by either Judge Miller or the Commission, (4) and Judge Miller failed to consider certain evidence in the Saldivar TR Case and denied Grimes Rock evidentiary hearings, thereby depriving it of due process.

[15] Grimes Rock also argues in its opposition that the proposed penalties are inappropriate because the Secretary was estopped from taking a position inconsistent with a position taken in the appeal of the Saldivar TR Case to the Ninth Circuit. Grimes Opp'n 24-25. Further, it argued that, if it prevailed in its appeal to the Ninth Circuit, it could not be found to have committed the actions at issue in this case with the requisite negligence. Grimes Opp'n 25-26. However, as stated above, the Ninth Circuit dismissed the appeal for lack of jurisdiction. Accordingly, I do not address those arguments.

health or safety violation. Grimes Opp'n 12. Third, Grimes Rock asserts that "the citations were vague as to what amount is owed and did not provide a reasonable time to abate." Grimes Opp'n 12.

With regard to Citation No. 9619114, Grimes Rock argues that the Secretary only provided Grimes Rock with one day to abate the cited condition and that the case relied upon by the Secretary to support the validity of issuing a 104(a) citation for an alleged violation of a judicial order in temporary reinstatement case, i.e*., C.R. Meyer & Sons Co. Inc.*, 38 FMSHRC 2950 (Dec. 2016) (ALJ), is not binding on this court. Grimes Opp'n 26. Moreover, Grimes Rock cites the Commission's decision in *Hopkins County Coal, LLC*, 38 FMSHRC 1317 (June 2016), which is binding, and argues that, unlike the situation in that case where an operator was cited for refusing to provide employee records to an inspector, "there is no hazardous safety risk – immediate or non-immediate" in the case at hand. Grimes Opp'n 26-27.

Grimes Rock also argues that the Secretary must prove that it was negligent in the context of Citation No. 9619114 and asserts that the Secretary cannot prove that Grimes Rock acted with even ordinary negligence. Grimes Opp'n 27. It cites Commissioner Althen's dissent in the Commission's decision in the Saldivar TR Case as evidence that it did not act negligent and asserts that the reasonable thing would have been for the Secretary to stay any payment until the Commission decided the legal issues involved.[16] Grimes Opp'n 27. Further, Grimes Rock asserts that, contrary to the Secretary's statement that it "failed to exhibit the slightest degree or care," the record shows that it has gone to "extraordinary lengths to ensure the novel legal issues Commissioner Althen found 'important' are properly preserved for appellate review" and that it "respected and complied with the ALJ's Orders."[17] Grimes Opp'n 28.

With regard to Order No. 9619115, Grimes Rock argues that the order was invalidly issued. Grimes Opp'n 28. Citing the Fifth Circuit's decision in *Allied Products Co. v. FMSHRC*, 666 F. 2d 890 (5th Cir. 1982), it asserts that 104(b) withdrawal orders can only be issued for health and safety violations and argues that Judge Miller's "temporary reinstatement backpay order was not a 'health and safety' violation." Grimes Opp'n 28. It further argues her order was effectively a contempt order which needed to be filed in the district court. Grimes Opp'n 29.

In addition, Grimes Rock argues that the Secretary did not provide a reasonable time to abate. Grimes Opp'n 29. A determination of reasonableness depends on the circumstances. Grimes Opp'n 29 (citing *Nelson Brothers Quarries*, 24 FMSRHC 980 (Nov. 2002) (ALJ)). Here, it was "unreasonable to subject Grimes Rock to a withdrawal order when the Secretary knew the

[16] Grimes Rock cited Commissioner Althen's dissent in the Saldivar TR Case throughout both its motion for summary decision and opposition to the Secretary's motion in this matter. However, dissenting opinions are not binding. That is especially true when the dissenting opinion reaches conclusions that contradict the conclusions of the majority in a case that forms the basis of another directly related matter, such as is the case here.

[17] In addition, Grimes Rock asserted that if the Ninth Circuit reversed the Commission's decision in the Saldivar TR Case, then no negligence could be found for violating an invalid order. Grimes Opp'n 27. However, as previously mentioned, the Ninth Circuit dismissed Grimes Rock's appeal for lack of jurisdiction.

Commission had granted Grimes' petition to review the underlying issue." Grimes Opp'n 29. Instead, the Secretary threatened to close the mine even though she did not have that power because a "safety finding is required for a citation where a withdrawal is involved." Grimes Opp'n 29 (again citing *Allied Products Co.*).

Further, Grimes Rock argues that the Secretary's reliance on *WV Rebel Coal*, 7 FMSHRC 2234 (Dec. 1985) (ALJ) for the proposition that a 104(b) order can be issued where an operator failed to abate a violation of an order reaffirming temporary reinstatement, is misplaced. Grimes Opp'n 29-30. In *WV Rebel Coal* the operator had filed a motion for interlocutory review, which was denied, whereas here the Commission had granted the petition for discretionary review on the precise underlying legal questions. Grimes Opp'n 29-30.

Regarding Citation No. 9619116, Grimes Rock argues that the underlying 104(b) order was invalid and "citations involving withdrawal cannot be issued if non-*safety* related." Grimes Opp'n 30 (emphasis in original). Here, the citation did not allege a health or safety violation. Grimes Opp'n 30. Moreover, the Secretary's statement of the law regarding *BC Quarries LLC*, 44 FMSHRC 267 (Apr. 2022) (ALJ) is overbroad and incorrect as applied to this case, given that in that case the operator worked in the face of "*safety hazards* violations." Grimes Opp'n 30 (emphasis in original). Further, Grimes Rock argues that it did not act with reckless disregard in the context of this citation and, rather, it was the Secretary who acted in such a manner when she threatened to shut down the mine. Grimes Opp'n 30.

With regard to the penalty factors, Grimes Rock argues it was the Secretary who acted with negligence both in compelling Grimes Rock to pay Saldivar and in issuing the 104(b) order under these circumstances. Grimes Opp'n 31. Further, it asserts that the gravity of the citations was de minimus and there will be "zero gravity of harm" to Saldivar if Grimes Rock prevails before the Ninth Circuit. Grimes Opp'n 31. Grimes Rock argues that the good faith abatement factor favors it because, on August 16, 2022, it requested that the Secretary stay payment of funds to Saldivar while the Commission reviewed the Saldivar TR Case. Grimes Opp'n 32. Regarding the penalty factor addressing the size of its business, Grimes Rock argues that any penalty imposed under the circumstances has the potential to influence its current employees in a way not intended by Congress, i.e., to "transform temporary reinstatement into a haven for otherwise terminable employees[.]" Grimes Opp'n 32. With regard to its ability to continue in business, Grimes Rock asserts that despite the Secretary's best efforts to shut down the mine, Grimes Rock will continue its business. Grimes Opp'n 32. Finally, regarding its history of previous violations, Grimes Rock cites *WV Rebel Coal* for the proposition that, given the nature of the violation, that factor is not helpful in determining an appropriate penalty. Grimes Opp'n 32-33.

With regard to the proposed special assessments, Grimes Rock argues that it engaged in no dangerous actions and that it terminated Saldivar because he was a danger to the mine. Grimes Opp'n 33. There is no justification for larger than regularly assessed penalties, and Grimes Rock asserts it is due its overpayment for time that Saldivar was unjustly enriched, and this court should stay issuing a penalty until the Ninth Circuit issues its decision in the Saldivar TR Case. Grimes Opp'n 33. Alternatively, the court should impose a nominal penalty of $1.00 and that penalty should be subtracted from Grimes Rock's overpayment to Saldivar. Grimes

Opp'n 33. Finally, Grimes Rock argues that the Secretary is attempting to make an example out of it and seeks to penalize Grimes Rock with an amount roughly nine times greater than that imposed by the court in the *C.R. Meyer* case cited by the Secretary. Grimes Opp'n 33-34.

C. Grimes Rock's Motion for Summary Decision[18]

Much of Grimes Rock's motion for summary decision raises arguments identical those raised in its opposition to the Secretary's motion for summary decision. Many of those arguments are not relevant to this proceeding, e.g., the alleged invalidity of Judge Miller's Enforcement Order in the Saldivar TR Case and the Commission's decision upholding that order. The remaining arguments relevant to this proceeding are summarized below.[19]

Grimes Rock makes the same three primary arguments in support of its contention that the Secretary had no right to threaten to shut down the mine if Grimes Rock did not pay more than was agreed to in the temporary economic settlement agreement. Grimes Mot. 13. First, Grimes Rock asserts that the Secretary did not issue Citation No. 9619114 in connection with an "inspection or investigation," as is required by the language of section 104(a). Grimes Mot. 13. Second, it argues that the Secretary admitted that the citations and order at issue do not allege a health or safety violation. Grimes Mot. 13. Third, Grimes Rock states that "the citations were vague as to what amount is owed and did not provide a reasonable time to abate." Grimes Mot. 14.

D. The Secretary's Opposition to Grimes Rock's Motion for Summary Decision

The Secretary, in her opposition to Grimes Rock's motion for summary decision, argues that the only issue in this case is whether she can establish the violations alleged in the citations and order by a preponderance of the evidence. Sec'y Opp'n 1. Grimes Rock's arguments regarding the Saldivar TR Case have already been decided by the Commission and are irrelevant to this case. Sec'y Opp'n 1. Further, Grimes Rock does not identify any disputed material fact and asserts meritless legal arguments. Sec'y Opp'n 1. Furthermore, Grimes Rock's motion does not establish that the Secretary's citations and order are invalid as a matter of law and, accordingly, summary decision should be granted in favor of the Secretary. Sec'y Opp'n 1-2.

---

[18] Of the arguments and issues raised in Grimes Rock's motion for summary decision, largely only section III and H on pages 7 and 8, and section V on pages 13 and 14 address issues that are presently before me.

[19] Following the submission of Grimes Rock's motion for summary decision the Secretary filed a motion to strike certain exhibits included in Grimes Rock's motion. Specifically, the Secretary sought to strike exhibits 8, 16, and 20 because those documents allegedly did not comply with Commission Procedural Rule 5(e), which requires parties, when submitting information to the Commission, to take certain steps to "protect information that tends to identify certain individuals or constitute an unwarranted intrusion of personal privacy." In response, Grimes Rock withdrew the originally filed unredacted exhibits 8, 16 and 20 and filed redacted versions of those exhibits. The court has removed the unredacted versions of the exhibits from the official record.

The Secretary takes issue with several of the facts Grimes Rock asserts as uncontroverted.[20] Specifically, she maintains that Grimes Rock's assertion that the citations and order were not issued as part of an inspection or investigation and did not allege any health or safety violations are legal conclusions not facts. Sec'y Opp'n 2. Second, the Secretary asserts that several of the allegedly uncontroverted facts are immaterial to this case. Sec'y Resp. 2-3.[21]

The Secretary argues that Grimes Rock's assertion that Judge Miller lacked authority to order payment of past due wages is wrong both because the Commission already determined that Judge Miller's order was valid and, even if the order had not been valid, the Secretary has authority to enforce unstayed, appealed orders regardless of whether those same orders are ultimately found to be valid. Sec'y Opp'n 3-4 (citing *Coleman v. Tollefson*, 575 U.S. 532 (2015) and other cases).

Further, the Secretary asserts that, contrary to Grimes Rock's opinion, the Act's language does not limit the issuance of 104(a) citations to only alleged health and safety violations. Sec'y Opp'n 4. Rather, the Secretary can issue 104(a) citations for violations of any mandatory health or safety standard, rule, order or regulation promulgated pursuant to the Act, including violations of 105(c) temporary reinstatement orders, which encourage miner participation in health and safety enforcement. Sec'y Opp'n 4 (citing C.*R. Meyer & Sons Company*, 38 FMSHRC 2950 (Dec. 2016) (ALJ)).

The Secretary asserts that, despite Grimes Rock's arguments to contrary, Citation No. 9619114 was validly issued following an investigation/inspection and, accordingly, the subsequently issued order was also validly issued. Sec'y Opp'n 5. The activity code listed on the citation indicates that it was issued as part of a "special investigation." Sec'y Opp'n 5. MHSA conducts several types of inspections and investigations, including special investigations involving section 105(c) discrimination complaints. Sec'y Opp'n 5. Here, Citation No. 9619114 was issued as a result of an inspection and the subsequent order and citation were issued as a result of the investigator's obligation to verify abatement of the original citation. Sec'y Opp'n 5.

The Secretary asserts that the citations and order at issue are not impermissibly vague, as alleged by Grimes Rock. Sec'y Opp'n 5. Rather, the citations and order are clear: "Grimes must comply with Judge Miller's order." Sec'y Opp'n 6. Moreover, Citation No. 9619114 clearly states an amount owed, which is the same total amount Judge Miller ordered Grimes Rock to pay in her Enforcement Order, i.e., $12,533.94. Sec'y Opp'n 5-6. Further, Order No. 9619115 also references Grimes Rock's duty to pay. Sec'y Opp'n 6. Grimes Rock ultimately paid the amount due, which suggests it understood what was due. Sec'y Opp'n 6. Even if Grimes Rock misunderstood, that does not excuse its failure to comply with Judge Miller's order. Sec'y Opp'n 6.

[20] In addition to its motion for summary decision, Grimes Rock filed a document entitled Separate Statement of Uncontroverted Facts in Support of Motion for Summary Decision.

[21] My statement of undisputed materials facts can be found above.

Although Grimes Rock asserts that the citations and order did not set a reasonable time to abate the violations, the Secretary disagrees. Sec'y Opp'n 6. A cited condition must be capable of being abated within the time set, and the time set does not consider the convenience of the operator. Sec'y Opp'n 6. Almost two months elapsed after Judge Miller issued her Enforcement Order before Citation 9619114 was served on Grimes Rock at 12:50 p.m. on August 16. Sec'y Opp'n 7. The citation set an abatement time the following day at 4:00 p.m. Sec'y Opp'n 7. Grimes Rock still had not abated the condition as of August 22, and failed to explain why the abatement time was unreasonable. Sec'y Opp'n 7. Moreover, although Grimes Rock can contest the reasonableness of the abatement time set for Citation No. 9169114, it was required to "immediately" comply with Order No. 9619115, i.e., the subsequently issued 104(b) order. Sec'y Opp'n 7. Further, the abatement time set for Citation No. 9619116, i.e., 45 minutes, must have been reasonable because Grimes Rock was able to issue a check to Saldivar within that time. Sec'y Opp'n 7.

E. Reply Briefs

Following the submission of the parties' oppositions to the respective cross motions for summary decision, Grimes Rock filed a reply brief in which it made an estoppel argument regarding a position taken by the Secretary in the Saldivar TR Case that was, at the time of filing of the reply brief, pending before the Ninth Circuit Court of Appeals. In addition to the estoppel argument, Grimes Rock's reply brief also sought to address statements in the Secretary's opposition regarding Grimes Rock's purported statement of undisputed material facts. The Secretary, in turn, filed a motion to strike Grimes Rock's reply brief, in which she argued that the Commission's procedural rules do not contemplate reply briefs and that a party should seek permission to file such. Grimes Rock filed an opposition to the Secretary's motion to strike in which it requested that its reply brief be accepted by the court.

Subsequently, the Secretary filed a motion for leave to file a reply brief in response to Grimes Rock's opposition of the Secretary's motion for summary decision, as well as the reply brief itself. In her reply brief the Secretary addressed an argument made by Grimes Rock in its opposition that alluded to a potential claim for attorney fees under the Equal Access to Justice Act.

Although Grimes Rock would have been better served to request leave of the court to file its reply brief, I have accepted the brief and included it in the record. However, because the Ninth Circuit recently dismissed the Saldivar TR Case for lack of jurisdiction, Grimes Rock's estoppel argument is moot. Moreover, the other points raised in Grimes Rock's reply brief are addressed above in section II and below in section IV(A) of this order. Further, I decline to address any arguments regarding a potential EAJA action or defenses to such in this proceeding. Those arguments and defenses must be made in a separate a formal proceeding initiated via an application filed pursuant to 29 C.F.R. Part 2704. Nevertheless, the Secretary's Motion for Leave to File Reply to Grimes' Opposition to the Secretary's Motion for Summary Decision is **GRANTED** and I have accepted the reply brief and included it in the record.

IV. DISCUSSION

A. Preliminary Matter

As mentioned previously, much of Grimes Rock's motion for summary decision, its opposition to the Secretary's motion for summary decision, and other filings in this matter include arguments regarding the alleged invalidity of Judge Miller's June 17, 2022 Enforcement Order and the Commission's decision upholding that order. In my February 21, 2023, Order Denying Grimes Rock's Request for Stay I made clear that when the Commission issued its decision in the Saldivar TR Case, its findings became the law of the Commission on the issues decided. Although Grimes may not agree with the Commission's decision to uphold Judge Miller's Enforcement Order, the decision is nevertheless binding on the parties, as well as this court, "unless and until stayed or overturned by a reviewing court of appeals." *Maben Energy Corporation*, 3 FMSHRC 2776, 2777 (Dec. 1981) (citing 30 U.S.C. § 816(c). Nothing has changed since I issued my order denying the request for stay, aside from the fact that the Commission's decision in the Saldivar TR Case is no longer before the Ninth Circuit. Accordingly, the Commission's decision in the Saldivar TR Case continues to be the law of the Commission. Unlike the Commissioners and Courts of Appeal, I do not sit in a position of review regarding already decided questions of law and fact. Consequently, I have not considered Grimes Rock's proposed undisputed facts that are related to, or arguments premised upon, the alleged invalidity of Judge Miller's Enforcement Order and/or the Commission's decision affirming that order and making other findings. I address the remaining arguments below.

B. Alleged Violations

i. Citation No. 9619114

On August 15, 2022, MSHA Investigator Troy Van Wey issued Citation No. 9619114 under section 104(a) of the Mine Act for an alleged violation of section 105(c) of the Mine Act. The citation alleges as follows:

> The mine operator has refused to comply with an order promulgated pursuant to the Mine Act. FMSHRC ALJ Miller ordered Grimes to temporarily reinstate miner Alvaro Saldivar at his previous rate of pay. The Commission affirmed this order. ALJ Miller approved a temporary economic reinstatement agreement. Grimes did not seek or obtain a stay of the temporary reinstatement order. On June 17, 2022, ALJ Miller issued an order granting the Secretary's motion to enforce the court-ordered settlement agreement. The ALJ ordered Grimes to pay Saldivar the economic reinstatement for the period from May 17, 2022 through June 17, 2022, which Grimes had not paid at all. The ALJ also ordered Grimes to pay the full amount owed for November 8, 2021 through March 28, 2022, which Grimes had only paid a portion of. In total, the ALJ ordered Grimes to pay Saldivar $12,533.94. Grimes did not seek or obtain a stay of this order. Grimes has not made the reinstatement payments as ordered.

> This failure to comply with an order promulgated pursuant to the Mine Act is a violation of section 104(a) of the Act.

Investigator Van Wey determined that the alleged violation presented no likelihood of an injury or illness, was not S&S, and one person was affected. He further determined that the alleged violation was a result of Grimes Rock's reckless disregard. The Secretary proposed a specially assessed civil penalty in the amount of $1,264.00 for the alleged violation.

Grimes Rock raises three issues I address before moving to an evaluation of whether a violation existed.

First, Grimes Rock argues that the citation is invalid because it was not issued during an "inspection" or "investigation," as required by section 104(a) of the Act.[22] I disagree. MSHA conducts several types of inspections and investigations. The type of inspection or investigation is denoted by a code in Section 19 of the "Mine Citation/Order" form, i.e., MSHA Form 7000-3. Section 19 of the completed form for Citation No. 9619114 indicates the type of action was an "E05" event. The Secretary, in her response to Grimes Rock's motion for summary decision, explained that "E05" is the "'special investigation' activity code associated with section 105(c) enforcement activity." Sec'y Opp'n 5. Here, the citation was issued by an authorized representative of the Secretary, i.e., special Investigator Van Wey, as a result of his investigation to confirm compliance with Judge Miller's Enforcement Order requiring Grimes Rock to pay an amount due in the Saldivar TR Case. Accordingly, I reject Grimes Rock's argument and find that the citation was issued in connection with an inspection or investigation.

Second, Grimes Rock argues that the citation is invalid because it does not allege a "health" or "safety" violation, as is required by section 104(a). I disagree and find that, in making its argument, Grimes Rock misinterprets the language of section 104(a). Section 104(a) grants the Secretary authority to issue a citation for a violation of the "Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act." 30 U.S.C. § 814(a). In *C.R. Meyer & Sons Co.*, 38 FMSHRC 2950 (Dec. 2016) (ALJ) Judge Miller found that because a temporary reinstatement order is an *order* promulgated pursuant to the Act,

---

[22] Section 104(a) of the Act reads, in pertinent part, as follows:

> If, upon *inspection or investigation*, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator.

30 U.S.C. § 814(a) (emphasis added).

section 104(a) "clearly authorizes the Secretary to issue a citation" for a violation of such.[23] Although I am not bound by her decision in that matter, I agree with her interpretation and find that section 104(a) authorizes the Secretary to issue a citation for a violation of a temporary reinstatement order, which is an order promulgated pursuant to the Act, and that such citation need not involve an alleged "health" or "safety" violation.

Third, Grimes Rock argues that the citation is vague on its face as to what amount was owed. I disagree. Judge Miller's Enforcement Order required Grimes Rock to pay two separate amounts, i.e., $9,723.08 and $2,810.86, and explained how those amounts were calculated. The sum total of those amounts is $12,533.94. The citation body clearly indicates that Judge Miller ordered Grimes Rock to pay the same amount and asserts that Grimes Rock did not make the payment as ordered. Accordingly, I find that the citation is not vague as to the amount owed.

a. Fact of Violation

In order for the Secretary to prove a 104(a) violation of section 105(c) in this matter, the undisputed material facts must establish that Grimes Rock failed to comply with an order promulgated pursuant to the Mine Act. The body of the citation alleges that Grimes Rock failed to comply with Judge Miller's orders when it did not pay Saldivar $12,533.94 in past due economic reinstatement payments. The undisputed material facts establish that Grimes Rock had not paid that amount when Citation No. 9619114 was issued on August 15 and served on August 16. However, that is not the end of the analysis.

Grimes Rock argues that it did not violate the Enforcement Order because the order did not set a due date for payment. Although it is true the Enforcement Order did not include an explicit due date for compliance, I find that Grimes Rock nevertheless failed to comply with the order. Judge Miller, in her May 18, 2021, Decision and Order of Reinstatement, ordered Grimes Rock to "immediately upon receipt of receipt of this decision, reinstate Mr. Saldivar to his former position at the mine effective as of the date of this decision[,]" and stated that "[t]he employment of Mr. Saldivar shall be at the same rate of pay and with all benefits, including any raises, that he received prior to discharge, pending a final Commission order on the complaint of discrimination." Judge Miller's requirement that Saldivar be "immediately" reinstated was not a choice on her part. Rather, the Mine Act requires that where a discrimination complaint is not frivolously brought the Commission "shall order the *immediate* reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). When the parties submitted their Settlement Agreement and Joint Motion for Temporary Economic Reinstatement in the Saldivar TR Case and Judge Miller issued her Order Approving Settlement, nothing changed regarding

[23] Judge Miller's decision in *C.R. Meyer & Sons Co*. explains why the "mandatory health or safety" language in section 104(a) applies to the term "standard" and is not a "series qualifier" for the terms listed after, i.e., "rule, order, or regulation[.]" 38 FMSHRC 2950, 2953-2954 ("The series-qualifier canon should not be applied where contextual cues point to another meaning." Because "'mandatory health or safety standard' is a defined term referring to a specific set of regulations[,] . . . it is most likely that Congress intended to invoke a term of art in Section 104(a) and did not intend 'mandatory health or safety' to apply to all of the terms in that provision.")

the need for Saldivar's immediate temporary reinstatement aside from the fact that the reinstatement became economic in nature, i.e., Saldivar was to be paid as if he was working but was not required to report to his job. Similarly, nothing changed regarding the immediate need for compliance when Judge Miller issued her Enforcement Order, in which she ordered Grimes Rock "to pay Saldivar the full wages as ordered in the [original May 18, Decision and Order of Reinstatement.]" The need for immediate compliance, whether in the form of temporary *actual* reinstatement or temporary *economic* reinstatement, always existed.[24] Grimes Rock ignored that instruction and, in doing so, violated an order promulgated pursuant to the Act.[25]

b. Gravity

The issuing investigator determined that there was no likelihood of an injury or illness and that, if an injury or illness were to occur, it could reasonably be expected to result in no lost workdays. Moreover, he found that only one individual was affected. However, the Secretary argues that "[a]lthough the citations here are not S&S, that does not mean the violation was not serious. Indeed, the potential harm to the rule of law is quite significant." Sec'y Mot. 17. I reject the Secretary's attempt to analogize the potential for physical harm to miners that generally forms the basis for an evaluation of gravity,[26] with the potential for harm to the rule of law. Failure to follow Judge Miller's order did not put any miners at risk of physical harm in the form of injury or illness. The one miner directly affected, Saldivar, had been temporarily economically reinstated up until the date Judge Miller issued the Enforcement Order and, therefore, was not at the mine site and was not at risk of sustaining any injury or illness as a result of the violation at the time the citation was issued roughly two months later. The gravity of the violation was exceptionally low, as accurately reflected by the issuing investigator's determination that there

[24] The Commission, in its November 28, 2023, decision in in the Saldivar TR Case, noted that in lieu of a temporary reinstatement order the parties may reach a temporary economic reinstatement agreement "'that is consistent with the purposes of section 105(c).'" 45 FMSHRC at 957 (quoting *Lehigh Cement*, 42 FMSHRC 467, 469 (July 2020) (emphasis added by Commission in *Saldivar*)). The Commission acknowledged that a purpose of section 105(c)'s temporary reinstatement provision is to, during the temporary reinstatement period, put the miner in no worse a position than they were in when working for the operator, and that "economic reinstatement agreement[s] must work in tandem with any existing order of temporary reinstatement and cannot deprive a miner of the full wages owed under and intended by the Mine Act's temporary reinstatement provision." *Id*. at 957-58.

[25] As a practical matter, common sense dictates that any payment ordered for *past due* wages is, by nature, overdue and should be paid immediately. However, I am mindful of the fact that there may be situations where immediate compliance in the form of payment is difficult. That is not the case here. Here, Grimes Rock did not pay Saldivar until August 22, 2022, i.e., more than two months after Judge Miller issued the Enforcement Order.

[26] The Commission has held that it has "consistently considered gravity holistically, considering 'factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected.'" *The American Coal Co.*, 39 FMSHRC 8, 20 (Jan. 2017) (citing *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016)).

was no likelihood of an injury or illness, and that any potential injury would not result in lost workdays.

c. Negligence

The Secretary's regulations define "reckless disregard" as "conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3. However, Commission judges are not bound by the Secretary's definitions of negligence and, rather, may evaluate negligence "from the starting point of a traditional negligence analysis[.]" *Brody Mining LLC*, 37 FMSHRC 1687, 1701-1702 (Aug. 2015). In determining whether an operator has met the high duty of care required by the Act, the judge "consider[s] what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Id*. at 1702.

With regard to Citation No. 9619114, I find that Grimes Rock's negligence was quite high. As discussed above in regard to Grimes Rock's argument that there was no due date on the Enforcement Order, the need for immediacy in complying with the order to reinstate Saldivar pending a final Commission order on the complaint of discrimination was clear. When the parties bargained for Saldivar's reinstatement to take the form of "economic reinstatement," nothing changed with regard to the need for immediacy. Nevertheless, Grimes Rock failed to make payment prior to service of Citation No. 9619114 on August 16, 2022, i.e., almost two months after Judge Miller issued the Enforcement Order. A reasonably prudent person familiar with the mining industry and need for immediacy in complying with an order of temporary actual reinstatement or temporary economic reinstatement certainly would not have waited two months to pay past due wages. Accordingly, I find that Grimes Rock exhibited very high negligence in connection with Citation No. 9619114.

ii. Order No. 9619115

On August 21, 2022, MSHA Investigator Van Wey issued Order No. 9619115 under section 104(b) of the Mine Act for an alleged violation of section 105(c) of the Mine Act. The citation alleges as follows:

> The condition described in citation 9619114 was not corrected. Grimes Rock Inc. has not complied with the order promulgated pursuant to the Mine Act. Grimes Rock has not paid the amount owed in temporary economic reinstatement as required by the ALJ's temporary reinstatement order and order to enforce temporary reinstatement.

Section 104(b)[27] of the Act authorizes the Secretary to issue a withdrawal order when an operator fails to totally abate the violative condition described in a 104(a) citation and the inspector determines that the time set for abatement in the underlying 104(a) citation should not be extended.[28] 30 U.S.C. § 814(b). The Act requires the inspector to determine the extent of the area affected by the underlying violation and then issue an order compelling the operator to immediately withdraw all persons, except those authorized under the statute, from the affected area until the underlying violation is abated. *Id*. The Secretary "bears the burden of proving that the violation has not been abated within the time period originally fixed or as subsequently extended[,]" and "establishes a prima facie case . . . by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued." *Hibbing Taconite Co.*, 38 FMHSRC 393, 397 (citing *Mid-Continent Res., Inc.*, 11 FMSHRC 505, 509 (Apr. 1989)). An "operator may challenge the reasonableness of the time set for abatement or the Secretary's failure to extend that time." *Id*. (citing *Clinchfield Coal Co.*., 11 FMSHRC 2120, 2128 (Nov. 1989)). In reviewing a challenge to the reasonableness of the time set for abatement or the failure to extend that time, the Commission reviews the inspector's decision under an "abuse of discretion" standard. *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996).

Here, the undisputed material facts establish that when Investigator Van Wey served Citation No. 9619114 on Grimes Rock on April 16, 2022, he set an abatement time of 4:00 p.m. the following day, April 17, 2022. The undisputed material facts further establish that Grimes Rock had not abated the condition described in Citation No. 9619114, i.e., failure to follow Judge Miller's order and make payment of $12,533.94 to Saldivar, at the time Van Wey issued 104(b) Order No. 9619115 at 7:00 a.m. on August 22, 2022, i.e., several days after the time for abatement had passed. Accordingly, I find that the Secretary has proven a prima facie case regarding this violation.

---

[27] Section 104(b) reads, in pertinent part, as follows:

> If . . . an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

[28] Under section 104(a) the inspector, in the citation, must "describe with particularity the nature of the violation" and "fix a reasonable time for abatement of the violation." 30 U.S.C. § 814(a).

Although Grimes Rock argues the Secretary did not provide a reasonable time to abate the underlying 104(a) citation, I disagree.[29] I find that time set for abatement was reasonable and Van Wey did not abuse his discretion. The process for abating the citation was not complex. Grimes Rock needed only to pay the amount due Saldivar via direct deposit or check – something which should take only a matter of minutes, or at most hours. However, Van Wey, in an exercise of his discretion, set the abatement time for 4:00 p.m. the following day. In doing so, he afforded Grimes Rock approximately an entire workday to make the payment. Grimes Rock provided no reason for why it could not comply and at no point requested an extension to the abatement time.[30] It is important to recognize that even before Citation No. 9619114 was issued, Grimes Rock had *almost two months* to comply with Judge Miller's Enforcement Order following its issuance. However, Grimes Rock chose not to comply within that window and then again chose not to comply within the abatement window set by Investigator Van Wey. Even after the time for abatement had passed, Grimes Rock still failed to comply and only eventually did so after Van Wey issued the subject 104(b) order and a subsequent 104(a) citation for working in the face of that order.

Grimes Rock argues that, as a general matter, 104(b) withdrawal orders "can only be issued for violation of health and safety violations" and cites the Fifth Circuit's decision in *Allied Products Co. v. FMSHRC*, 666 F.2d 890 (5th Cir. 1982). However, I find that Grimes Rock's reliance on *Allied Products Co.* is misplaced. In *Allied Products Co*. the court was not concerned with a 104(b) withdrawal order. Rather, in a footnote, the court drew a distinction between citations issued under section 104(a), which are not withdrawal orders and do not require a "safety" finding, and withdrawal orders issued under section 104(d)(1), which do require a "safety finding."[31] Here, the withdrawal order was issued under section 104(b), the language of which does not include any required "safety finding." Moreover, the language of section 104(b) is quite clear in that 104(b) orders may be issued where a "violation described in a citation issued pursuant to subsection [104](a) has not been totally abated." 30 U.S.C. § 814(b). As discussed

---

[29] Grimes Rock framed its argument as a challenge to the abatement time for the 104(b) order. However, as noted in the Secretary's opposition, compliance with a 104(b) order must be "immediate." 30 U.S.C. § 814(b). To the extent Grimes Rock intended to challenge the abatement time set in the underlying 104(a) citation, I have addressed that argument.

[30] Although Grimes Rock argues it was unreasonable for the Secretary to pursue enforcement actions in light of the fact that the Commission had granted discretionary review on multiple issues, I find that argument to be without merit. At no time did a court, the Commission, or the Secretary ever agree to stay enforcement of Judge Miller's order. Rather, the order remained in effect and Grimes Rock was required to comply. However, Grimes Rock failed to comply both prior to the issuance of Citation No. 9619114 and after the reasonable abatement time had passed.

[31] A representative of the Secretary is authorized to issue a withdrawal order under section 104(d)(1) after first issuing a citation under the same section. Citations can be issued under 104(d)(1) for violations that "significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" and are "caused by an unwarrantable failure . . . to comply with such mandatory health of safety standards." 30 U.S.C. § 814(d)(1).

above, Citation No. 9619114 was validly issued under section 104(a) and, accordingly, issuance of a 104(b) order was proper when Van Wey discovered that the condition had not been abated. See *WV Rebel Coal Co.*, 7 FMSHRC 2234 (Dec. 1985) (ALJ).

Finally, in its argument regarding Order No. 9619115, Grimes Rock makes passing mention that Judge Miller's "temporary reinstatement backpay order was . . . a contempt order, which needed to be filed in the district court." Grimes Opp'n 28-29. I disagree. It is true that the Commission does not possess contempt power. However, Judge Miller's Enforcement Order only ordered Grimes Rock to make payments that were past due. That is, the order did not instruct Grimes Rock to make any payments beyond that which Judge Miller determined were required under the Decision and Order of Temporary Reinstatement and subsequent Order Approving Settlement. Nothing about the Enforcement Order was punitive in nature, nor did it set forth any sanction or consequence for Grimes Rock's failure to make the ordered payments. Accordingly, I find that Judge Miller's order was not in the nature of a contempt order and, as are result, it was not necessary for the Secretary to file the Motion to Enforce with the district court.[32]

For the above reasons, Order No. 9619115 is **AFFIRMED** as issued.

iii. Citation No. 9619116

On August 22, 2022, MSHA Investigator Van Wey issued Citation No. 9619116 under section 104(a) of the Mine Act for an alleged violation of section 104(b) of the Mine Act. The citation alleges as follows:

> The mine operator has continued to conduct work activities at the mine site. MSHA issued a 104(b) order no. 9619115 on 8/22/2022 at 07:00 hrs and work activities have continued in the affected area (the entire mine site) despite the order. Grimes Rock Inc has continued to operate the crushing plant and load-out customer trucks since the issuance of the order.

Investigator Van Wey determined that the alleged violation presented no likelihood of an injury or illness, was not S&S, and affected zero persons. He further determined that the alleged

[32] In the event Grimes Rock's argument was intended to assert that Order No. 9619115 was a contempt order, I again disagree. Judge Miller's analysis of an almost identical issue in *C.R. Meyer & Sons Co., Inc*., 38 FMSHRC 2950 (Dec. 2016) (ALJ), is persuasive on this point. In *C.R. Meyer* Judge Miller, in finding that a 104(a) citation issued for failing to comply with an order of temporary reinstatement was valid, drew a distinction between situations in which an agency attempts to enforce its own order and cases like the present where the Secretary asks the Commission, a separate agency, to enforce an order. *Id*. at 2954-2955. Judge Miller went on to state that "[t]here is no precedent in the Commission body of cases or the court of appeals that prohibit the Secretary from issuing both a 104(a) citation for a violation of a temporary reinstatement order and simultaneously proceeding in the federal district court to enforce the order." *Id*. at 2955. The same is true for 104(b) orders.

violation was a result of Grimes Rock's reckless disregard. The Secretary proposed a specially assessed civil penalty of in the amount of $1,485.00 for the alleged violation.

a. Fact of Violation

In order for the Secretary to prove a 104(a) violation of section 104(b), the undisputed material facts must establish that Grimes Rock worked in the face of a validly issued 104(b) withdrawal order. See e.g., *BC Quarries, LLC*, 44 FMSHRC 267 (Apr. 2022) (ALJ). I have already found that the underlying 104(b) withdrawal order was validly issued. Moreover, the undisputed material facts establish that the mine continued to operate after the order was issued and that Grimes Rock's safety coordinator communicated to Investigator Van Wey that the mine would not be shutting down. In doing so, Grimes Rock worked in the face of the validly issued withdrawal order. Accordingly, I find that the undisputed materials facts establish that a violation is proven.[33]

b. Gravity

The issuing investigator determined that there was no likelihood of an injury or illness and that, if an injury or illness were to occur, it could reasonably be expected to result in no lost workdays. Moreover, he found that zero persons were affected. The Secretary raised the same argument regarding gravity for both Citation Nos. 9619114 and 9619116. For the same reasons discussed above in relation to the gravity of Citation No. 9619114, I find that the gravity of this citation was exceptionally low.

c. Negligence

My negligence findings for Citation No. 9619114 are equally applicable to Citation No. 9619116. Grimes Rock failed to comply with Judge Miller's order, failed to abate Citation No. 9619114 issued for failing to comply with Judge Miller's order, and ultimately worked in the face of the withdrawal order issued for failing to abate the underlying 104(a) citation. In addition, although Grimes Rock ultimately paid Saldivar the past due wages shortly after Citation No. 9619116 was issued, it did so defiantly, as evidenced by its safety coordinator's statement to the MSHA investigator after the withdrawal order was issued that Grimes Rock was "not shutting down." Even though only a short period elapsed after the withdrawal order went into effect before Citation No. 9619116 was issued for working the face of that order, the safety coordinator's statement indicates Grimes Rock had no intention of complying with the

[33] Grimes Rock, in contesting the validity of Citation No. 9619116, again argues that the underlying 104(b) order that gave rise to this citation was invalid. For reasons discussed above, I reject that argument. Similarly, and also for reasons discussed above, I reject Grimes Rock's apparent argument that a 104(a) citation can only be issued for "working in the face of *safety hazards* violations." Grimes Opp'n 30. Nothing in section 104(a) limits issuance of citations under that section to violations involving safety hazards. As discussed above, 104(a) citations may be issued for violations of orders promulgated under the Act. Here, Citation No. 9619116 was issued for a violation of Order No. 9619115, i.e., an order promulgated under the Act.

withdrawal order. Accordingly, I find the Grimes Rock exhibited extreme indifference and was highly negligent when it worked in the face of the validly issued 104(b) withdrawal order.

C. Penalties

The Secretary proposed specially assessed penalties of $1,264.00 for Citation No. 9619114 and $1,485.00 for Citation No. 9619116.

Section 110(i) of the Mine Act states that "[i]n assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i). Commission judges assess penalties *de novo* pursuant to section 110(i) and are not bound by the Secretary's proposed assessments or Part 100 regulations governing those proposed assessments. *Solar Sources Mining, LLC*, 43 FMSHRC 367 (Aug. 2021).

I have already discussed the negligence and gravity associated with the two citations for which penalties have been proposed. Grimes Rock's negligence with regard to both citations weighs heavily in my penalty determinations and, for both citations, justifies significant penalties. I have also considered the very low gravity of both citations. The remaining factors are discussed below.

i. History of Violations

Grimes Rock was issued 19 104(a) citations during the 15 months preceding issuance of the enforcement actions that the are the subject of this order. Sec'y Mot. Ex. 5. Five of those citations were ultimately vacated as part of a court approved settlement. Unpublished Decision Approving Settlement (March 30, 2022). Of the remaining citations, a number were modified to reduce the negligence and modify the gravity to non-S&S as part of the same court approved settlement. *Id*. Grimes Rock's violation history is minimal given the size of the operator. Given the nature of the violations at issue here, I find that this factor is not particularly significant.

ii. Size of the Operator

In 2022, Grimes Rock reported 93,597 working hours and an average of 32 employees, Sec'y Mot. 5 (citing MSHA's Mine Data Retrieval System), meaning that Grimes Rock is a small to moderately sized operator.

iii. Effect on the Operator's Ability to Continue in Business

As a general matter, in the absence of proof that a penalty will adversely affect an operator's ability to continue in business, it is presumed that no such adverse effect will occur. *Sellersburg Co.*, 5 FMSHRC 287, 294 (Mar. 1983). Here, Grimes Rock does not assert that the proposed penalties will impact its ability to continue in business and even concedes that, despite

the Secretary's "best efforts to shut down" the mine, it "will continue its business[.]" Grimes Opp'n 32. Accordingly, my penalty assessment is made with the presumption that the originally proposed specially assessed penalty amounts will not affect Grimes Rock's ability to continue in business.

iv. Good Faith Abatement

As discussed above in the context of my negligence analysis, the record is quite clear that Grimes Rock did not abate either citation in good faith. First, with regard to Citation No. 9619114, Grimes Rock did not abate the cited condition until after both the 104(b) order and subsequent 104(a) citation for working in the face of the order were issued. Second, with regard to Citation No. 9619116, Grimes Rock did not abate the citation by immediately withdrawing its miners so as to comply with the 104(b) order, and instead indicated to the MSHA investigator that it would not be shutting down. Although Grimes Rock ultimately paid Saldivar the amount due, its actions were certainly not taken in good faith. Accordingly, I find that this factor weighs heavily in my penalty calculations for Citation Nos. 9619114 and 9619116.

Considering the above findings and analysis, I find that penalties of $1,264 for Citation No. 9619114 and a $1,485 for Citation No. 9619116 are appropriate.

V. ORDER

For the above reasons, the Secretary's motion for summary decision is **GRANTED** and Grimes Rock's motion for summary decision is **DENIED**.[34] Citation Nos. 9619114 and 9619116 and Order No. 9619115 are **AFFIRMED** as discussed above. Grimes Rock is **ORDERED TO PAY** a sum of $2,749.00 within 40 days of the date of this order.[35]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

[34] Grimes Rock filed a Motion for Evidentiary Hearing in which it requested a hearing in the event there are genuine issues of material fact that preclude summary decision in favor of Grimes Rock. However, because the Secretary's motion for summary decision is being granted and I am affirming the citations and order, there is no need for an evidentiary hearing. Accordingly, Grimes Rock's Motion for Evidentiary Hearing is **DENIED**.

[35] Payment (check or money orders) should be sent to U.S. Department of Labor, Mine Safety and Health Administration, Payment Office, P.O. Box 790390, St. Louis, MO. 63179-0390; Electronic payments can be applied via https://www.pay.gov/public/form/start/67564508 Please include Docket Number & A.C. Numbers with payment.

Distribution (Via Certified Mail and email)

Kenneth H. Moss, Esq., Mark R. Pachowicz, Esq., and Tina Amoke, Pachowicz Goldenring, 6050 Seahawk Street, Ventura, CA 93003 (ken@pglaw.law mark@pglaw.law tina@pglaw.law)

Alexandra J. Gilewicz, Esq., and Ryan M. Kooi, Esq., Office of the Solicitor, MSHA, U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202 (gilewicz.alexandra.j@dol.gov kooi.ryan.m@dol.gov)