March 2026

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No review was granted or denied during the month of March 2026.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 5, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket Nos. LAKE 2022-0285 LAKE 2023-0013
CARGILL INCORPORATED	

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

DECISION

BY THE COMMISSION:

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). Citation No. 9669536 was issued to Cargill, Inc. ("Cargill") at its Cleveland Mine by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The citation alleged that Cargill failed to maintain a secondary escapeway in safe travelable condition because the escapeway contained excessive levels of nitrogen dioxide ("NO_2") in violation of 30 C.F.R. § 57.11051(a) (which provides in part that "[e]scape routes shall be . . . maintained in safe, travelable condition"). MSHA designated the violation as significant and substantial ("S&S")[1] and proposed a civil penalty of $774. Sec'y Ex. 1- 2.

Cargill contested the citation and the proposed civil penalty before the Commission. After a hearing on the merits, a Commission Administrative Law Judge issued a decision vacating the citation and determining that the operator did not violate section 57.11051(a). 46 FMSHRC 667 (Aug. 2024) (ALJ). The Judge rejected the Secretary's position that concentrations of NO_2 above 5 ppm rendered the escapeway unsafe in violation of the standard. The Judge further found that even if the Secretary's interpretation of the safety standard deserved deference, the operator lacked appropriate notice of that interpretation. The Secretary petitioned the Commission for review, claiming that the Judge's determination that there was no violation was not supported by substantial evidence, and that the Judge's holding of lack of notice was legally incorrect. PDR at 8, 16.

We hold that the operator violated section 57.11051(a) because the secondary escapeway was not maintained in safe condition. We further conclude that the operator was provided adequate notice of the requirements of the standard. As established herein, the operator should have been aware that exceeding the 5-ppm limit for NO_2 would render the secondary escapeway

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

unsafe in violation of section 57.11051(a). Therefore, we reverse the Judge's decision, affirm Citation No. 9669536, and remand for further findings consistent with this decision.

I.

Factual and Procedural Background

A. Factual Background

The Cleveland Mine is a large underground salt mine that produces road salt products. Miners work one of three shifts in the morning, afternoon, or night. The operator uses a mixture of ammonium nitrate and fuel oil to blast sections of the face to loosen the salt. Miners collect the loosened salt, and a conveyor belt carries the salt to an underground mill where it is crushed before it is sent to the surface. A common byproduct of the aforementioned blasting is the release of nitrogen dioxide, or NO_2, a reddish-brown gas that can harm miners at certain concentrations. 46 FMSHRC at 669; Tr. 36-37, 80, 281, 681, 902-03.

On July 26, 2022, MSHA Inspector Marty Morris, accompanied by Jason Wood, the operator's safety specialist, inspected the underground area of the mine during the third shift. 46 FMSHRC at 671; Tr. 31, 62, 77. Earlier in the evening, blasting had occurred at the working face at units 41 and 42. Tr. 42. At those units, there was a primary escapeway containing intake air, and a secondary escapeway containing return air.[2] Sec'y Exs. 1 at 1, 3 at 2-3; Tr. at 40-41, 156, 727. Miners used the escapeways to evacuate the mine during emergencies such as a mine fire. Tr. 59-61, 64. The NO_2 generated by the operator's blasting at Units 41 and 42 travelled south along the return air route of the secondary escapeway. As it travelled south, the concentration of NO_2 decreased as the gas diffused through the mine. Tr. 45-49, 51, 977.

Between July 26 and July 27, 2022, Inspector Morris and Safety Specialist Wood took NO_2 readings at three points along the secondary escapeway. Tr. 45, 52. Inspector Morris travelled south after each reading because travelling north, where the NO_2 had not yet been diffused, would have exposed him to higher NO_2 concentrations. Tr. 51. At the first point, the inspector's meter measured 10.3 ppm of NO_2 while Wood's meter measured 8.2 ppm. Tr. 47-48. At the second and third points, the inspector's meter measured above 6 ppm and 4.2 ppm of NO_2 respectively, while Wood's meter measured 5 ppm and close to 4.2 ppm of NO_2. Tr. 52-53, 55. The operator's own policies prohibit miners from working in an area which has a concentration of NO_2 greater than 5 ppm. Tr. 689-90, 770-74, 857. An operator's employee conceded that such a concentration of NO_2 would be unsafe for miners not wearing respirators while travelling through the secondary escapeway. Tr. 893-94.

On August 5, Inspector Morris issued Citation No. 9669536 for a violation of 30 C.F.R. § 57.11051(a). Sec'y Ex. at 1 at 1. Specifically, the citation alleged that the "secondary

[2] An "intake" is any underground roadway/airway through which fresh air is conducted to the working face. *Intake*, DICTIONARY OF MINING, MINERALS AND RELATED TERMS (2d ed. 1997) ("DMMRT"). A "return" is any airway which carries the ventilating air outby (*i.e.*, out of the mine). *Return*, DMMRT at 919.

escapeway . . . was not properly maintained in a safe . . . condition. . . [t]he post-blast gas readings . . . indicated [concentrations of NO_2] up to 8.2 ppm along the [secondary escapeway] . . . . Continued exposure to elevated levels of NO_2 . . . would likely lead to injury." *Id*. The inspector required that miners be "removed from the portions of the mine where [NO_2] would prevent them from working." *Id.* In order to comply with the regulation, the operator relocated the secondary escapeway from the return air course to an intake air course parallel to the primary escapeway. Tr. 816, 860-62, 1108; 46 FMSHRC at 675.

B. The Judge's Decision

The Judge vacated Citation No. 9669536, rejecting the Secretary's reliance on the exposure limit for NO_2 set forth in 30 C.F.R. § 57.5001(c) to support her assertion that any concentration of NO_2 above 5 ppm would render the escapeway unsafe. 46 FMSHRC at 695-98. Rather, the Judge concluded that a minimum concentration of NO_2 at or above 15 ppm would be necessary to render the secondary escapeway unsafe. *Id*. at 708 (relying on the American Industrial Hygiene Association's ("AIHA") recommendation of 15 ppm of NO_2 as "the maximum airborne concentration all individuals could be exposed to for 1 hour without developing irreversible or other serious health effects"). Reasoning that NO_2 concentrations under 15 ppm would not impair miners' ability to evacuate the mine, the Judge determined that the operator did not violate section 57.11051(a) because the operator was cited for 8.2 ppm.[3] *Id*. at 667-709. Moreover, the Judge found that the respirators[4] used by the operator would render the escapeway safe under 30 C.F.R. § 57.5005. *Id.* at 702. The Judge also determined that, in any event, he would have found that the operator lacked notice of the Secretary's interpretation of a 5 ppm limit for NO_2 in escapeways. *Id.* at 708 n.32.

On appeal, the Secretary claims that the Judge's decision that the secondary escapeway was safe is not supported by substantial evidence. PDR at 8. However, she also makes a legal challenge, asserting that "the way the judge reached the conclusion that NO_2 under 15 ppm renders an escapeway 'safe' ignores the weight of the evidence. . . as well as the regulatory purpose of section 57.11051(a)." *Id.* at 12.

II.

Regulatory Background

While the operator was cited for a violation of 30 C.F.R. § 57.11051(a), the Secretary and the Judge also discussed two other regulations, 30 C.F.R. §§ 57.5001 and 57.5005. 46 FMSHRC at 692, 698.

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[3] The Judge found that "[t]here is no evidence in the record beyond Dr. Schaper's testimony that exposure to 5 ppm NO_2, over the comparatively shorter period of a mine evacuation, would impair a miner's escape." 46 FMSHRC at 698.

[4] The operator uses Ocenco EBA 6.5 self-contained self-rescuers which protect miners from hazardous concentrations of NO_2 by providing a fixed amount of oxygen to miners. 46 FMSHRC at 674; Sec'y Ex. 9 at 6 (illustration of Ocenco respirator).

Section 57.5001(a) provides the threshold limit for airborne contaminants adopted by the American Conference of Government Industrial Hygienists ("ACIGH") as set forth in the Conference's 1973 publication. Importantly, NO_2 was given a ceiling designation by ACIGH in 1973 of 5 ppm. *Id*. at 677; Sec'y Ex. 8 at 6. Section 57.5001(c) provides that employees shall be withdrawn from areas when the concentration exceeds this limit.

Section 57.5005 serves as a narrow exception to the exposure limits of section 57.5001. It provides that "when necessary by the nature of work involved [such as] occasional entry into hazardous atmospheres to perform maintenance or investigation, employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels *if they are protected by appropriate respiratory protective equipment.*" 30 C.F.R. § 57.5005 (emphasis added).

III.

Disposition

A. The Judge Erred When Interpreting the Term "Safe" in Section 57.11051.

Section 57.11051 does not define "safe" or "travelable," and does not provide any examples of unsafe or non-travelable conditions. Instead, the regulation simply provides that "[e]scape routes shall be . . . maintained in safe travelable condition." 30 C.F.R. § 57.11051. Therefore, the regulation is facially unclear as to whether airborne contaminants could render an escapeway unsafe or not travelable.[5]

Broadly worded mandatory safety standards are interpreted by the Commission in accordance with a reasonably prudent person test. *See Sunbelt Rentals, Inc.,* 38 FMSHRC 1619, 1626 (July 2016). As section 57.11051(a) does not define or provide examples of "unsafe" conditions, the regulation is "drafted in general terms in order to be *broadly* adaptable to the varying circumstances of a mine." *Id.* at 1627 (emphasis added), *quoting FMC Wyoming Corp.*, 11 FMSHRC 1662, 1629 (Sept. 1989). Thus, the regulation's reference to safe conditions is

[5] On appeal, the operator implies that the regulation might be interpreted only to require that there be no physical obstacles, such as a fallen rock, in the escapeway. Cargill's Resp. Br. at 22. Section 57.11051 requires that an escapeway be maintained in both "safe" and "travelable" condition. 30 C.F.R. § 57.11051. However, if both safe and travelable simply mean an absence of physical obstacles, then "safe" would appear to become superfluous next to travelable. We also note our precedent holding that "a fundamental rule of construction is that effect must be given to every part of a . . . regulation, so that no part will be meaningless." *Daanen & Janssen, Inc.,* 20 FMSHRC 189, 193 (Mar. 1998).

appropriately considered under the reasonably prudent person test.[6] The test provides that an "alleged violation is appropriately measured against whether a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting correction within the purview of the applicable standard." 38 FMSHRC at 1626.

First, we must consider whether the term "safe" encompasses a requirement to avoid excessive airborne contaminants in an escapeway. Importantly, other mine safety standards specifically limit a miner's exposure to airborne contaminants such as NO_2 to ensure healthful working conditions. *See* 30 C.F.R. §§ 57.5001, 57.5005. In fact, Inspector Morris testified that in other mines, miners do not work underground immediately after blasting so that they are protected from NO_2. Tr. 27-28, 175. Therefore, a reasonable operator would interpret the term "safe" in section 57.11051 as encompassing a requirement to avoid excessive NO_2, an airborne contaminant and potential hazard in an escapeway.

Second, we must consider what types of adverse health effects in escapeways are inconsistent with the term "safe," and the minimum concentration of NO_2 which would cause such effects. The Judge recognized that "the requirement that an escapeway be 'maintained in safe, travelable condition' is 'genuinely ambiguous' with respect to the specific levels of airborne contaminants that may be present in the escapeway, at least with respect to NO_2." 46 FMSHRC at 689. However, the Judge improperly interpreted "safe" to permit NO_2 amounts that are harmful even though they would not cause *immediately observabl*e health effects. The Judge found that immediately observable health effects occur at NO_2 concentrations 15 ppm or above. 46 FMSHRC at 698, 708. Section 57.11051 makes no distinction between short-term and long-term harm, or more serious and less serious harm. 30 C.F.R. § 57.11051. A reasonably prudent miner would interpret "safe" as protecting against adverse health effects resulting from a miner's exposure to excessive NO_2, even if such harmful effects were not immediately observable or did not result in the total incapacitation of the miner.

We conclude that the Judge's interpretation—that an escapeway remains in safe condition provided that the NO_2 concentration does not risk irreversible or other serious health effects—is an erroneous interpretation of the standard. The standard requires that for an escapeway to be safe it must be free of NO_2 levels that would cause harm.

[6] In *Ideal Cement Company*, 13 FMSHRC 1346, 1350-51 (Sept. 1991), we applied the reasonably prudent person test to the phrase "affecting safety." We note that the Dictionary of Mining, Minerals and Related Terms uses terminology similar to the Commission's reasonably prudent miner test, defining "safe" as "in general use among employers of ordinary caution and prudence in the same line of business under the same circumstances." *Safe*, DMMRT at 953 (defining safe in the context of safe appliances); *see also Mach Mining, LLC*, 40 FMSHRC 1, 11 (Jan. 2018). The DMMRT, while not always dispositive, is a "recognized authority for [technical] usage." *Wolf Run Mining Co.,* 32 FMSHRC 1669, 1685 (Dec. 2010).

B. The Judge Erred When Determining that the Secretary Failed to Demonstrate that the Secondary Escapeway Was Not Safe.

When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

As the Judge recognized, the parties did not dispute that, between July 26 and July 27, 2022, the night of the inspection, the existing concentrations of NO_2 were as high as 8.2 ppm in at least one part of the secondary escapeway. Tr. 700-01; Sec'y Ex. 1; 46 FMSHRC at 677. Substantial evidence does not support the Judge's finding that exposure to 8.2 ppm of NO_2 is safe and without resultant harm.

Instead, there is ample evidence in the record that such exposure could result in adverse health effects. Dr. Michelle Schaper, an MSHA toxicologist, documented that "[t]here are serious health-related effects of inhalation exposure to NO_2, at and above . . . 5 ppm." Sec'y Ex. 8 at 7.[7] She testified that a miner could encounter sensory irritations including burning and tearing of his eyes, nose, and throat, and choking. She also testified that NO_2 could affect the deepest part of the lung, causing fluid to move into the lungs, *i.e.,* pulmonary edema. Tr. 498-99. In discussing Dr. Schaper's testimony, the Judge erroneously focused on when adverse health effects would impair escape. *See* 46 FMSHRC at 698 ("There is no evidence . . . beyond Dr. Schaper's testimony[8] that exposure to 5 ppm [of] NO_2, over the comparatively shorter period of a mine evacuation, would *impair a miner's escape.*" (emphasis added)). Notably, walking through the escapeway could take an hour to an hour and a half, exposing miners to NO_2 for long periods. It can take 15 to 45 minutes to drive through the escapeway to the exit.

Dr. Schaper's testimony demonstrates that during the MSHA inspection, the concentration of 8.2 ppm of NO_2 would result in some adverse health effects to a miner, even if these effects were not immediately observable and the miner was ultimately able to evacuate the mine. This factual testimony is consistent with the ceiling limit of 5 ppm of NO_2 in a mine, adopted by MSHA. In summation, the record compels the conclusion that the secondary escapeway, during the MSHA inspection, contained an unsafe concentration of NO_2.

[7] Similarly, in response to a question asking "what [will be the] effects [of being] exposed to NO_2 levels above 5 ppm," Dr. Schaper testified that "over 5 ppm . . . that's where you can start to see these [sensory and pulmonary] effects." Tr. at 497-99.

[8] We note that the ALJ provided no explanation for his decision to discredit Dr. Schaper's testimony nor did he cite to any countervailing evidence that undermined her testimony. As noted *infra*, Dr. Schaper's testimony was consistent with the ACGIH determination.

C. The Secretary's Mandatory Safety Standards Do Not Permit Reliance on Personal Protective Devices to Render the Escapeway Safe.

The Secretary's regulations provide a narrow exception to the exposure limits. Section 57.5001 provides that the limits apply "[e]xcept as permitted by § 57.5005," which in turn states that:

> Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. Where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment.

30 C.F.R. § 57.5005. We note that the very terms of the exception indicate that the presence of airborne contaminants constitute hazardous conditions. Respirators would not be necessary in an area where there were no hazards. As a result, the language of the exception belies the operator's argument that the escapeway could be considered safe while having high levels of airborne contaminants.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Consolidation Coal Co*., 15 FMSHRC 1555, 1557 (Aug. 1993). In this regard, section 57.5005 does not countenance regular use of personal protective equipment in lieu of engineering controls to protect against airborne contaminants. Instead, it provides only a narrow exception in limited circumstances. The instant situation does not fit within this narrow exception for two reasons.

First, it is clear that the exception only applies in limited situations where miners must set up engineering controls in the first instance or conduct investigations or maintenance in areas where engineering controls are usually not required because miners are not present (for instance in a sealed off area). Those circumstances are not present here.

Second, as the Judge himself noted, "section 57.5005 . . . is couched throughout in terms of a miner's 'work.'" 46 FMSHRC at 699. The clear terms of section 57.5005 provide for an exception to section 57.5001 only when miners work, not when they seek to escape a mine emergency by utilizing the secondary escapeway. Section 57.5005 allows miners to perform tasks in hazardous conditions if they are "protected by appropriate respiratory protective equipment." However, in *Consol Penn Coal Co.*, 39 FMSHRC 1893, 1901 n.17 (Oct. 2017), we held that "the vagaries of human conduct cannot be ignored." In a chaotic emergency, miners

who forget to use their respirators when evacuating through the secondary escapeway are arguably not "protected" by "appropriate respiratory protective equipment."[9] The respirator exception in section 57.5005 is inapplicable to the facts.

D. The Judge Erred in Finding that the Operator Lacked Notice.

The test for notice is "whether a reasonably prudent person familiar with the mining industry and protective purpose of the standard would have recognized the specific prohibition or requirement of the standard." *Sunbelt Rentals, Inc.*, 38 FMSHRC at 1627. We consider "whether the operator would have been aware of the requirement of the standard because of past case precedent." *Id.* In the past, we have used one mine safety standard to interpret another. *Solar Sources, Inc.*, 37 FMSHRC 218, 221 (Feb. 2015). We find that a reasonably prudent operator would have been aware that MSHA's mandatory safety standards effectively mandate the withdrawal of miners when NO_2 concentrations exceed 5 ppm. *See* 30 C.F.R. §§ 57.5001(a), (c).

Consequently, the operator would have been aware of the specific prohibition of section 57.11051—that miners cannot work underground when the secondary escapeway contains over 5 ppm of NO_2 (the limit in section 57.5001). Moreover, there was comprehensive testimony during the hearing that the operator had an internal policy whereby it required miners to withdraw, for safety reasons, from any areas in the mine which had a concentration of NO_2 greater than 5 ppm. Tr. 116, 689-90, 770, 772, 774, 857. Therefore, the operator was aware, before the MSHA inspection, that NO_2 concentrations which exceeded 5 ppm were hazardous.[10, 11]

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[9] This gets to the heart of an axiomatic principle of the Mine Act which we have emphasized to the point of exhaustion: the existence of a redundant safety measure is irrelevant to the existence of a violation. *See Black Beauty Coal Co.*, 38 FMSHRC 1307, 1313 (Jun. 2016).

[10] Cargill argues that MSHA's prior failure to cite the operator for similar conditions affected its notice. Cargill's Resp. Br. at 21-23. However, the Fifth Circuit rejected an operator's claim of inadequate notice in similar circumstances, finding that "inconsistent enforcement is no[t an] excuse" and that the operator had adequate notice based on a prior Commission decision. *Cactus Canyon Quarries, Inc.,* 64 F.4th 662, 666 (Apr. 2023). Similarly, here, the operator had notice of the Commission's holding that case precedent can provide notice, and of the Commission case precedent using one mine safety standard to interpret another.

[11] The operator, on appeal, raises two constitutional issues regarding the Commission's authority to assess penalties, and the President's ability to remove Commissioners of the Commission. Cargill's Resp. Br. at 24-27. We decline to reach these arguments because Cargill failed to properly raise them.

Cargill failed to raise its constitutional arguments in a petition for discretionary review or during the hearing before the Judge and did not explain its failures to do so. Instead, it raised these issues for the first time in its appellate brief responding to the PDR. Cargill's Resp. Br. at 24, 27. Further, Cargill did not allege, let alone demonstrate, good cause for its failure to raise

(continued…)

IV.

Conclusion

We hold that Cargill violated section 57.11051(a) because the concentration of NO_2 in the secondary escapeway during the MSHA inspection created an unsafe condition. We also conclude that the operator was provided adequate notice of the requirements of the standard. Therefore, we reverse the Judge's decision vacating Citation No. 9669536, find a violation of the safety standard, and remand for further findings consistent with this decision. On remand, the assigned Judge[12] must determine the appropriate penalty amount after resolving any outstanding issues, such as the "significant and substantial" nature of the violation.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

[11] (…continued)
the issue below. We decline to review the constitutional issues belatedly raised by Cargill in its appellate response brief. *See Sunbelt Rentals, Inc.,* 42 FMSHRC 16, 21 (Jan. 2020); 30 U.S.C. § 823(d)(2)(a)(iii).

[12] The Judge who presided over this matter has since retired.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 18, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. RULON HARPER CONSTRUCTION, INC.	Docket Nos. WEST 2022-0249 WEST 2022-0250

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

DECISION

BY: THE COMMISSION

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act" or "Act"), involve the interlocutory review of a Commission Administrative Law Judge's ("ALJ") denial of proposed settlements between the Secretary of Labor and Rulon Harper Construction, Inc. ("Rulon"). *Rulon Harper Constr., Inc*., 44 FMSHRC 671 (Nov. 2022) (ALJ); *Rulon Harper Constr., Inc*., 44 FMSHRC 681 (Nov. 2022) (ALJ).

At issue is whether the Secretary has unreviewable discretion to remove significant and substantial ("S&S") designations[1] from contested citations without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k);[2] and whether denial of the Secretary's motions for settlement constitutes an abuse of discretion. For the reasons set forth below, we answer both questions in the negative (except in one instance, Citation No. 9727208), affirm the Judge's denial of the settlement motions, and remand the cases to the assigned Judge.[3]

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

[2] Section 110(k) of the Mine Act states that "[n]o proposed penalty which has been contested before the Commission . . . shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k).

[3] The Administrative Law Judge originally assigned to these matters has retired. These cases have been reassigned to a new Judge.

I.

Factual and Procedural Background

The captioned dockets contain a total of 10 citations and orders. In two motions to approve settlement, the Secretary proposed modifying six citations and an order, vacating one citation, and leaving two citations unchanged. For Docket No. WEST 2022-0249, the Secretary proposed modifications to the two alleged violations at issue (including reductions in gravity, reductions in negligence and removal of an S&S designation) and a reduction in the overall penalty from $22,944 to $3,936. For Docket No. WEST 2022-0250, the Secretary proposed modifications to five of the eight alleged violations (including reductions in gravity and removal of S&S designations), vacatur of one alleged violation, and a reduction in the overall penalty from $22,134 to $7,227.

After the Commission Judge informed the Secretary of concerns regarding the lack of factual support in the original settlement motions for several violations, the Secretary filed amended motions. The amended motions provided additional language to support the specific modifications.

On November 2, 2022, the Judge denied the amended motions, citing settlement deficiencies with six of the violations and noting the seriousness of several of the violations.[4] Specifically, the Judge cited the lack of concrete facts supporting the proposed changes to negligence, gravity, and S&S and the sharp reduction in the proposed penalties. In summation, the Judge concluded that the submitted facts could not support a finding that the settlement terms were fair, reasonable, appropriate under the facts, and protective of the public interest.[5] 44 FMSHRC at 679-80; 44 FMSHRC at 690; *American Coal Co*., 38 FMSHRC 1972, 1982 (Aug. 2016) ("*AmCoal I"*).

On December 12, 2022, the Judge issued an order certifying for interlocutory review the question of whether the Judge's denial of the Secretary of Labor's motions to approve settlement constitutes an abuse of discretion. On December 15, 2022, the Commission granted the Judge's certification.

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[4] The Judge did not include discussion of the proposed modifications to Citation No. 9727212 in Docket No. WEST 2022-0250 nor does the Secretary include it in her brief on appeal. Therefore, we do not opine on the sufficiency of the settlement terms for this citation.

[5] On August 23, 2022, Rulon filed "Position Statement[s]" with the Commission in each of the named dockets providing its explanation for the circumstances surrounding each of the citations and its reasons for why the assessment amounts should be reduced. Much of the information provided in the statements was not included in the proposed motions for settlement. There is no indication that these statements reflect a mutual agreement of the parties or that the Secretary was consulted prior to filing. Therefore, we do not consider these filings as motions for settlement or stipulations of facts. *See Amax Lead Co. of MO*, 4 FMSHRC 975, 979 (June 1982); *American Coal Co*., 40 FMSHRC 983, 991 (Aug. 2018) (*"AmCoal II"*).

II.

Disposition

A. The Secretary's Authority to Remove an S&S Designation

The Secretary filed her appeal in this case prior to issuance of the Commission's recent decisions addressing the scope of the Secretary's authority to remove an S&S designation. Specifically, the Secretary has argued, as she does here, that as an exercise of her enforcement authority, she has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k). Sec'y Br. at 17; Amend. Set. Mot. at 4; Amend. Set. Mot. at 5.

In three separate opinions, we rejected this argument, and we do so again here for the reasons cited in those decisions. Specifically, the Commission held that the Secretary does not possess unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Act. *Greenbrier Minerals, LLC*, 46 FMSHRC 933, 940 (Nov. 2024); *Knight Hawk Coal, LLC*, 46 FMSHRC 563, 566 (Aug. 2024); *Bluestone Oil Corp*., 47 FMSHRC 1, 7 (Jan. 2025).[6] We determined that sections 110(k) and 110(i) of the Mine Act, 30 U.S.C. §§ 820(k) and 820(i), demonstrate an intent to circumscribe the Secretary's enforcement discretion, and that they supply a meaningful standard of review to evaluate the Secretary's removal of S&S designations in settlement proceedings. *Knight Hawk*, 46 FMSHRC at 569-71.

Accordingly, the Judge did not abuse her discretion when she sought to require the Secretary to justify the proposed removal of the S&S designations associated with Citation Nos. 9479096, 9727204, 9727205, and 9727214.

B. The Judge's Denials of the Motions for Settlements

The Secretary argues that the Judge's orders are an abuse of discretion because they are "based on an improper understanding of the law." App. Br. at 17 (citing *AmCoal I*, 38 FMSHRC at 1984). Specifically, she contends that the Judge erred by refusing to accept the facts in the settlement, by assigning probative value to certain facts without a hearing, and by conducting hearing-style analyses. *Id*. at 10-12. The Secretary maintains that the Judge improperly substituted her enforcement preferences for the Secretary's enforcement decisions and failed to consider the future enforcement value of modified violations. *Id*. at 13, 16. Finally, she asserts that the Judge misunderstood Part 100 penalties and did not evaluate whether these penalties are part of a settlement that satisfies *AmCoal*. *Id*. at 14.

Commission Judges review proposed settlements to determine whether they are "fair, reasonable, appropriate under the facts, and protect the public interest." *AmCoal I*, 38 FMSHRC at 1976. "The judges' frontline oversight of the settlement process is an adjudicative function that necessarily involves wide discretion." *Knox County Stone Co*., 3 FMSHRC 2478, 2479

[6] These cases are currently on appeal to the DC Circuit.

(Nov. 1981). The Commission reviews the Judge's decision to approve or reject a proposed settlement under an abuse of discretion standard. *E.g.*, *AmCoal II.*, 40 FMSHRC at 987. An abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law. *Id*. We will affirm a Judge's approval or denial of a proposed settlement that is fully supported by the record, consistent with the statutory penalty criteria, and not otherwise improper, but abuses of discretion or plain errors are subject to reversal. *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012) (citation omitted).

Parties must provide Judges with sufficient information to determine whether proposed settlements are fair, reasonable, appropriate under the facts, and protective of the public interest. *AmCoal II*, 40 FMSHRC at 987-88. The Commission has consistently required its Judges to consider proffered justifications that are both substantive and relevant to proposed modifications before a motion to approve any settlement may be granted. *Greenbrier Minerals*, 46 FMSHRC at 939, *citing, Solar Sources Mining, LLC*, 41 FMSHRC 594, 601, 605, 606 (Sept. 2019) (reversing Judge's determination that the parties presented no justification to support settlement, when the parties "actually presented relevant facts," including the non-applicability of the standard); *Hopedale Mining, LLC*, 42 FMSHRC 589, 597-98 (Aug. 2020) (reversing the Judge's settlement denial because the Secretary had provided relevant justification in part to support the lowering of negligence and gravity).

By the same token, Judges are expected to evaluate the provided facts under the applicable *AmCoal* standard. Rather than engaging in fact-finding, Judges at the pre-hearing settlement stage should determine whether the agreed-upon facts provided by the parties support the proposed settlement terms. 40 FMSHRC at 990-91; *Solar Sources*, 41 FMSHRC at 601-02. In denying a proposed settlement, Judges should "articulate with some particularity" why the facts provided are insufficient to show that the settlement meets the *AmCoal* standard. *Id.* at 602-03.

Even one citation or order lacking in factual support will justify a denial of an entire settlement agreement until the defect is cured. Accordingly, we need not affirm the Judge with respect to each citation on review here to conclude that a denial is proper. In this instance, as addressed below, each docket contained multiple violations lacking the necessary support, thus preventing the Judge from finding that the settlement motions in their entirety were fair, reasonable, appropriate under the facts, or protective of the public interest. 44 FMSHRC at 672; 44 FMSHRC at 682-83.

In addition, we note that the Judge described several of the citations as "serious," the Secretary's arguments as "attempts to downplay" them, and the proposed modifications as

"major changes."[7] 44 FMSHRC at 673; 44 FMSHRC at 688. Without endorsing the Judge's specific descriptions, we emphasize that it is precisely this kind of analysis that is required in evaluating whether a settlement is fair, reasonable, appropriate under the facts, and protects the public interest. The Secretary's reasoning falls short in the proposed modifications for these citations.

Accordingly, we hold that the Judge did not abuse her discretion in denying the amended motions for settlement. We discuss each citation and order below.

1. WEST 2022-0249

a) Citation No. 9727214

Citation No. 9727214, asserting a violation of 30 C.F.R. § 56.14207, alleges that a truck was parked on a 5% grade without wheel chocks, which would prevent uncontrolled or unintended movement, that miners walked up the grade directly behind the vehicle, and that management was aware of the truck and took no action to correct or mitigate the hazard.[8] The gravity was evaluated as reasonably likely, fatal, S&S, and one person affected. The negligence was marked as high, and the violation was deemed an unwarrantable failure and issued as a section 104(d)(1) citation. Pet. for Assess. at 6.

To settle this citation, the Secretary agreed to modify the gravity to unlikely, non-S&S, the negligence to moderate, the action to a section 104(a) citation, which requires deletion of the unwarrantable failure, and reduce the penalty from $10,868 to $662. Amend. Set. Mot. at 3. As support, the parties state "[t]he cited truck was outfitted with an automatic transmission which was observed in the 'park' position, and the provided parking brake was set" and that "[a] review of information provided by the operator supports that there was no one in mine management aware of any hazards on the pickup truck." *Id*.

[7] In discussing the berm citation, the Judge wrote:

> Year after year, miners die because operators fail to install and maintain proper barriers. The severity of these accidents could be minimized if operators were to follow the regulations with diligence and care. But operators take their cue from the Secretary, and time and time again the Secretary has agreed to settle berm violations like those before me today for mere cents on the dollar.

44 FMSHRC at 685.

[8] 30 C.F.R. § 56.14207 provides that "Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank."

The Judge declined to approve the removal of the S&S designation, stating that "[t]he relevant inquiry here is the magnitude of risk presented by the operator's failure to chock the wheels of a truck parked on a grade." 44 FMSHRC at 675. Instead of addressing this inquiry, the parties pointed to other required safety features, like the parking brake, to show that the alleged violation was not S&S. *Id*. The Judge found these safety measures redundant and that she could not consider them as part of the S&S analysis. *Id*. The Judge also found that the operator's claim that mine management was unaware of any hazards on the pickup truck raised several concerns, including the inconsistency of the information with the inspector's account, the credibility of the information, and the fact that it does not say that management was unaware of the unchocked wheels. *Id*.

Relying on *Hopedale Mining*, 42 FMSHRC at 595, the Secretary argues that the Judge erred in rejecting the removal of the S&S due to the factual support consisting of "redundant safety measures," Sec'y's Br. at 7, 11-13. She also maintains that the Judge erred in rejecting the negligence modification because she did not find the parities' contention "credible," and because the settlement differed from the conditions alleged in the citation. *Id*. at 12. The Secretary contends that Judges may not require "parties to prove a particular level of negligence in the context of settlement." *Id*. at 12, *citing Hopedale*, 42 FMSHRC at 599. We disagree with the Secretary.

First, while a Judge is constrained from engaging in post-hearing analysis of the facts when considering a motion for settlement, the facts offered in a settlement must be relevant to the hazard contributed to by the violation when seeking to remove an S&S designation. The Commission has held that if any *relevant* circumstances exist to plausibly suggest that an S&S enforcement action is unwarranted, all the Secretary needs to do is provide justification for removing the S&S designation to the Judge in her settlement motion - and her motion must be granted. *Knight Hawk Coal, LLC*, 46 FMSHRC at 573, *citing AmCoal I*, 38 FMSHRC at 1982; *Hopedale*, 42 FMSHRC at 601.

Here, the parties failed to provide the Judge with relevant circumstances that would suggest that the unchocked wheels of a truck parked on a grade *was not* S&S. The parties stated that the vehicle, on a slight grade, was parked with the parking brake set. However, these facts do not address the part of the standard the operator was alleged to have violated. *See Greenbrier Minerals, LLC*, 46 FMSHRC at 939 ("While such facts might show compliance with other safety standards, such information does not show that the hazard contributed to by the cited violation itself was decreased or eliminated"); *Sec'y of Labor v. Consolidation Coal Co*., 895 F.3d 113, 118 (D.C. Cir. 2018) (noting that "circumstances external to a violation cannot be used to reduce the likelihood that harm will ensue."). The presented facts do not demonstrate that the hazard (the unintended rolling of the vehicle down grade) contributed to by the cited violation (failure to secure a vehicle parked on grade with wheel chocks) was decreased or eliminated. The Judge

properly found that the redundant safety measures were not relevant to whether the cited hazard was S&S.[9]

We also do not find the Secretary's argument regarding negligence persuasive. Although Judges need not engage in fact-finding, weigh conflicting evidence, or make credibility determinations, they must still "probe gaps or inconsistencies in the explanation offered in support of a settlement motion." *Greenbrier Minerals, LLC*, 46 FMSHRC at 939, *citing Hopedale Mining*, 42 FMSHRC at 595. The Secretary seems to suggest that parties need not provide sufficient information that would support a reduction in negligence or even overcome obvious inconsistencies. However, parties are indeed required to provide sufficient and relevant information to support modifying the negligence to a reduced level. *Perry County Res., LLC*, 45 FMSHRC 573, 579 (July 2023); *Ohio Cty Coal Co*., 40 FMSHRC 1096, 1099 (Aug. 2018).

In the instant matter, the Judge recognized that the parties assert only that management was unaware of any conditions it deemed a hazard, not "that management lacked knowledge of the unchocked wheels."[10] 44 FMSHRC at 675. Assuming arguendo the parties are asserting that management lacked knowledge of the unchocked wheels, context or explanation would still be necessary to explain the glaring factual inconsistencies. *See Black Beauty*, 34 FMSHRC at 1863, n.6 (finding that the Judge did not abuse discretion by requiring additional facts where explanation in motion for a reduction in penalty was inconsistent with inspector's description of the violation and the inconsistency was not explained in the motion).

Accordingly, we conclude that the Judge did not abuse her discretion in finding that the the parties' amended settlement motion does not adequately support modification of Citation No. 9727214 to non-S&S or moderate negligence.

b) Order No. 9727216

Order No. 9727216, asserting a violation of 30 C.F.R. § 56.18002(a), alleges that the operator failed to ensure that an adequate examination of the working place was conducted prior

[9] It is well settled that redundant safety measures are irrelevant to the analysis as to whether a cited violation is S&S. That is because, as the court stated in *Buck Creek Coal, Inc*., the fact that the operator "has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners …. the precautions are presumably in place … because of the significant dangers associated with coal mine fires." 52 F.3d 133, 136 (7th Cir. 1995).

[10] The Secretary correctly asserts that the Judge erred in her consideration of the credibility of the operator's contention that mine management was unaware of any hazards on the pickup truck. *See Greenbrier Minerals,* 46 FMSHRC at 939. However, the error was harmless as the Judge also rejected the negligence modification on other grounds as discussed above.

to miners working around the crusher and wash plant.[11] The inspector found 20 violative conditions not recorded in the operator's examination record, and that some were extensive and obvious and had existed for days or weeks. The gravity was evaluated as reasonably likely, fatal, S&S, and one person affected. The negligence was marked as high, and the violation deemed an unwarrantable failure and issued as a section 104(d)(1) order. Pet. for Assess. at 7.

The Secretary agreed to modify the negligence to moderate, the type of action from a section 104(d)(1) order to a section 104(a) citation, which requires deletion of the unwarrantable failure, and to reduce the penalty from $12,076 to $3,274. As support, the parties state "[a] workplace examination had been conducted and documented, and there was no evidence that the examination was inadequate." Amend. Set. Mot. at 3.

The Judge found the parties' assertion failed to negate the fact of violation, the negligence finding, or the unwarrantable failure designation, and noted that the examination must be meaningful or "adequate" under Commission case law. 44 FMSHRC at 676-77. The Judge observed that none of the 20 violative conditions identified by the inspector (some of which were "extensive and obvious") had been annotated in the operator's examination record, in direct contrast to the parties' assertion that there was no evidence the examination was inadequate, and that the Secretary had failed to explain this opposing conclusion. *Id*. at 677.

We agree. The parties submitted nothing more than a conclusory statement denying the inspector's finding. The parties fail to explain how or why the 20 violative conditions relied on by the inspector are not "evidence" of an inadequate examination. *See Black Beauty*, 34 FMSHRC at 1863, n.6. As the Judge noted, failure to identify conditions that adversely affect safety and health can be evidence of an inadequate examination. *Sunbelt Rentals, Inc*., 38 FMSHRC 1619, 1627 (July 2016). Here, the Judge properly probed the inconsistent facts alleged in the settlement motion.

Accordingly, we find that the Judge did not abuse her discretion when determining that the Secretary failed to submit sufficient support for the modifications proposed for Order No. 9727216.

2. WEST 2022-0250

BERM CITATIONS

The Judge broadly determined that much of the submitted information in support of modifying the berm citations "is irrelevant, uninformative, or unconvincing." 44 FMSHRC at 686. The Secretary argues that the Judge erroneously assigned more weight to the allegations in the citations than to the facts in the settlement. Sec'y Br. at 11-12. The individual citations are addressed below.

[11] 30 C.F.R. § 56.18002(a) provides that: "(a) A competent person designated by the operator shall examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health."

a) Citation No. 9479096

Citation No. 9479096, asserting a violation of 30 C.F.R. § 56.9300(a), alleges that the berms on the elevated feed ramp for the crusher were not maintained.[12] The South berm was in marginal condition while the north berm was almost entirely gone. The ramp was about 100 feet long and the north edge had about a 6-feet drop off. The gravity was evaluated as reasonably likely, fatal, S&S, and one person affected. The negligence was marked as moderate and the violation issued as a section 104(a) citation. Pet. for Assess. at 6.

The Secretary agreed to modify the gravity to unlikely, to non-S&S, and to reduce the penalty from $3,274 to $662. As support, the parties state: "[t]he feed ramp was straight, visibility was good, and a partial berm was in place" which "would have alerted the loader operator that they were close to the edge of the ramp[.]" Amend. Set. Mot. at 3.

The Judge found the parties' assertion that "visibility was good" unpersuasive, as the S&S analysis is conducted in the course of continued normal mining operations and, visibility could worsen. The Judge also reasoned that the "partial berm," described by the inspector as "almost entirely gone," would do little to prevent accidents or satisfy the standard. 44 FMSHRC at 686. We conclude that the Judge was well within the discretion to require more factual support for this citation.

The purpose of the berm requirement of section 56.9300(a) is to minimize the severity of accidents resulting from an out-of-control vehicle traveling over the edge of a road drop-off and overturning. *See* Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32496-01 (1988). However, the facts offered by the parties presume that any traveling vehicle will be in adequate condition. In the event that a miner loses control of the vehicle and approaches the edge of a roadway, neither the linear construction of the ramp nor the good visibility will stop the over traveling or overturning of the vehicle if the berm is not provided or being maintained.[13] Additionally, the partial berm in place at the south end of the feed ramp will not prevent a vehicle from traveling over the edge where the north berm is "almost entirely gone."[14]

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[12] 30 C.F.R. § 56.9300(a) provides that: "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

[13] The Secretary's failure to address the relevant hazard provides sufficient grounds for the Judge's rejection of the S&S modification. Therefore, we need not reach whether it was appropriate for the Judge to analyze this in the context of "continued normal mining operations."

[14] We also reject the Secretary's implication that a miner will take the necessary precautions to avoid over traveling the edge once he or she sees a partial berm. *See, e.g., Consolidation Coal*, 895 F.3d at 118; *Newtown Energy Inc*., 38 FMSHRC 2033, 2044 (Aug. 2016); *Eagle Nest, Inc*., 14 FMSHRC 1119, 1123 (July 1992).

b) Citation No. 9727204

Citation No. 9727204, asserting a violation of 30 C.F.R. § 56.9300(a), alleges that an elevated roadway adjacent to a 4-feet deep hole did not have a berm to prevent equipment from falling over the edge. The area is used by a skidsteer and a service truck was parked within a few feet of the edge. The gravity was evaluated as reasonably likely, fatal, S&S, and one person affected. The negligence was marked as moderate and the violation issued as a section 104(a) citation. Pet. for Assess. at 12.

The Secretary agreed to modify the gravity from reasonably likely to unlikely, from S&S to non-S&S, from fatal to lost workdays or restricted duty, and to reduce the penalty from $3,274 to $199. As support, the parties state that "[v]ehicles in the area stop at this location and do not continue to travel farther," that the skidsteer was equipped with rollover protection and a seatbelt, and the alleged drop off was only four feet. Amend. Set. Mot. at 4.

The Judge found the factual support inadequate, stating that the seatbelts and rollover protection on the mobile equipment are redundant safety features inappropriate to the S&S analysis. 44 FMSHRC at 686.

The parties state that "vehicles in the area stop at this location and do not continue to travel farther." However, it is unclear if the parties are asserting that vehicles stop at the threshold and do not travel over the elevated roadway or if they stop at some point on the elevated roadway, which would explain the service truck being parked near the edge. Additionally, the rollover protection and seatbelt *may* reduce the injuries sustained or prevent a fatality. However, these safety measures would do nothing to prevent the equipment from over-traveling the edge of the elevated roadway and injuring a miner. In other words, the factual support provided does not adequately speak to whether the violation is no longer of "such nature as could significantly and substantially contribute to the cause or effect of a . . . hazard." 30 U.S.C. § 814(d)(1); *Sec'y of Labor. v. JWR*, 111 F.3d 913, 917 (D.C. Cir. 1997).

c) Citation No. 9727208

Citation No. 9727208, asserting a violation of 30 C.F.R. § 56.9300(a), alleges that an elevated roadway being used for the front-end loader ("FEL") to access a feed pile did not have a berm on the south side of the ramp. The gravity was evaluated as reasonably likely to cause a fatal injury, the violation is significant and substantial, and one person affected. The negligence was marked as moderate and the violation issued as a section 104(a) citation. Pet. for Assess. at 16.

The Secretary agreed to modify the gravity from fatal to permanently disabling, and to reduce the penalty from $3,274 to $1,472. As support, the parties state "[t]he front-end loader was outfitted with an enclosed cab with roll over protection and seatbelt, and the highest overtravel hazard was 6 [feet] above soft earthen material, thereby lessening the likelihood of a fatality." Amend. Set. Mot. at 4.

Here, the Judge made an error in her consideration of the settlement terms which affected her analysis. The parties sought to modify the gravity of a potential injury from the cited "fatal" to "permanently disability." However, the Judge mistakenly thought the parties also sought to remove the S&S designation. She concluded that the proffered factual support was insufficient to justify the removal of the S&S designation. The Judge misinterpreted the parties' proposal. Accordingly, we conclude that the Judge abused her discretion in denying settlement of this citation.

BRAKE CITATION

d) Citation No. 9727205

Citation No. 9727205, asserting a violation of 30 C.F.R. § 56.14101(a)(2), alleges that upon testing, the park brake on the service truck failed to hold with its typical load on the maximum grade it travels.[15] The test area was an access road to the pit and was selected by the mine. The truck rolled immediately and rapidly when the park brake was tested and only stopped when the service brake was reapplied. This truck is used as needed around the mine site, including to haul maintenance supplies, and miners access the back of the truck as a work platform. The gravity was evaluated as reasonably likely, fatal, S&S, and one person affected. The negligence was marked as moderate, and the violation issued as a section 104(a) citation. Pet. for Assess. at 14.

The Secretary agreed to modify the gravity to unlikely, to non-S&S, and reduce the penalty from $3,274 to $662. As support, the parties state "[t]here is no evidence that the truck is used while on grades, and the work areas around the plant are level. The service truck is used for maintenance, travels and parks on level ground, and is not reasonably likely to cause serious injury." Amend. Set. Mot. at 4.

The Judge found it disingenuous to say that no grades exist at the mine, even though the road selected by the operator itself for the test was on a grade. The Judge noted that the parties do not explain or account for the discrepancy between these facts and the inspector's findings.

The Parties' "support" here is full of gaps and inconsistencies. Consequently, we, along with the Judge, are left with more questions than answers. Accordingly, the Judge did not abuse her discretion.

[15] 30 C.F.R. § 56.14101(a)(2) provides that "Minimum requirements . . . If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

III.

Conclusion

We hold that the Secretary does not have unreviewable discretion to remove a significant and substantial ("S&S") designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

We also conclude that the Judge did not abuse her discretion in denying the motions for settlement. These dockets are remanded to the Judge for further proceedings consistent with this decision.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 9, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LEROY'S EXCAVATING, INC.	Docket No. CENT 2025-0031 A.C. No. 29-02500-602275

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

ORDER

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

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On June 23, 2025, the Commission received a motion from Leroy's Excavating, Inc., ("Leroy") seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On February 18, 2025, the Chief Administrative Law Judge issued an Order to Show Cause in response to Leroy's perceived failure to answer the Secretary of Labor's December 16, 2024 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on March 21, 2025, when it appeared that the operator had not filed an answer within 30 days.

Leroy's Excavating asserts neither it nor its attorney received the Commission's Order to Show Cause. The Secretary of Labor opposes the motion, arguing that the Order was properly issued to the operator's attorney. According to the Secretary, a copy of the underlying petition and a notice of appearance were also sent to the operator's counsel. Counsel did not respond to any of these filings.

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

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall

be guided so far as practicable by the Federal Rules of Civil Procedure""); *Jim Walter Res., Inc*., 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc*., 17 FMSHRC 1529, 1530 (Sept. 1995).

The President of Leroy's Excavating represents that neither the operator nor its counsel received the Commission's Order. The Commission sent the Order to Show Cause to the operator's designated attorney. The operator's motion contains no explanation for its attorney's failure to respond. For instance, there is no affidavit attesting to his non-receipt of the Commission's Order. We conclude that in the absence of a sufficient explanation from its counsel, the operator has not demonstrated good cause for its failure to timely respond. *See Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010) (requiring that "[a]t a minimum, the applicant must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response."). Simply stating that the Order was not received is not sufficient. *See Southwest Rock Prods., Inc.*, 45 FMSHRC 747, 748 (Aug. 2023) ("a grant of relief under Rule 60(b) requires more than "general assertions or conclusory statements as to why an operator failed to timely contest"). Therefore, the motion is denied.

Having reviewed the operator's request and the Secretary's response, we conclude that the operator has failed to establish good cause for a failure to timely file a response to the Commission's Order to Show Cause. The motion is denied.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Commissioner Marvit, concurring:

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

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

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority denies reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 9, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. TRAP ROCK & GRANITE QUARRIES, LLC	Docket No. CENT 2025-0051 A.C. No. 23-02327-606696

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

ORDER

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

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On June 30, 2025, the Commission received from Trap Rock & Granite Quarries, LLC ("Trap Rock") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On March 3, 2025, the Chief Administrative Law Judge issued an Order to Show Cause in response to Trap Rock's perceived failure to answer the Secretary of Labor's December 30, 2024 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on April 3, 2025, when it appeared that the operator had not filed an answer within 30 days.

Trap Rock asserts that the captioned matter was formerly handled by its site superintendent; he left the company around January 27, 2025. The operator's new superintendent was not aware of the civil penalty proceeding and thus did not respond to the Commission's Order. The Secretary does not oppose the operator's request and notes that, given the change in personnel, it cannot confirm that a representative of the operator received the Commission's Order. Furthermore, the Secretary represents that Trap Rock has recently hired an environmental compliance manager who reached out to the Secretary to sort through outstanding penalties.

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

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

Having reviewed the operator's request and the Secretary's response, we conclude that the operator has established good cause for its failure to timely respond to the Commission's Order to Show cause. Specifically, Trap Rock articulated a clear explanation for its failure to timely respond, including the personnel involved and relevant dates. *See Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010) (requiring that "[a]t a minimum, the applicant must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response."). Furthermore, the operator's proactive attempts to communicate with the Secretary and resolve the matter upon discovery of the error demonstrates the operator's good faith. *See Explosive Contractors, Inc*., 46 FMSHRC 965, 966 (Dec. 2024) (citations omitted) ("[a] movant's good faith and intent to contest are both relevant in determining whether the movant has demonstrated good cause to reopen a final assessment.").

In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded 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.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Commissioner Marvit, dissenting:

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

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

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

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

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March 9, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. SMART SAND, INC.	Docket No. LAKE 2025-0274 A.C. No. 47-03625-618663

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

ORDER

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

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On June 23, 2025, Smart Sand, Inc., ("Smart Sand") filed a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On April 28, 2025, the Secretary delivered a proposed assessment to the operator. On May 28, 2025, the assessment became a final order of the Commission when Smart Sand did not file a contest within the required 30-day period.

Smart Sand represents that on June 9, 2025, it discovered that it had failed to timely contest Citation No. 8736120 during a review of the Secretary of Labor's Mine Data Retrieval

System ("MDRS"). Counsel explained that previously, on May 2, 2025, counsel and the operator met and decided to contest Citation No. 8736120 and its civil penalty. The penalties for the other citations in this matter were timely paid. However, the contest date for Citation No. 8736120 was never properly calendared by the firm. Counsel attributed the error to a recent departure of a paralegal. Counsel has since changed office procedures so that multiple people have the responsibility to ensure compliance with deadlines. Counsel attested to these representations in an accompanying affidavit. R. Ex. A. The Secretary does not oppose the request to reopen, noting that the operator has a history of timely paying or contesting penalties. Furthermore, counsel acted promptly upon realizing his mistake in this instance.

The Commission has recognized that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co*., 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, counsel's prompt filing of a motion upon realizing its failure to timely file, in association with the operator's history of timely compliance with Mine Act filing deadlines, indicates that the failures were the result of a mistake rather than inadequate office procedures.

Accordingly, having reviewed Smart Sand's motion and the Secretary's response, we find that the operator's failure to timely file was the result of a mistake. *See Wyo-Ben, Inc*., 47 FMSHRC __, slip op. 2, No. WEST 2023-0320 (Dec. 8, 2025) (reopening a case after determining that "[t]he operator demonstrated that the mistake was made in good faith by proactively reviewing MSHA's MDRS and promptly moving to reopen upon discovery of the error."). In the interest of justice, we hereby reopen Citation No. 8736120 and remand it to the Acting Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Commissioner Marvit, dissenting:

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

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

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

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

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March 9, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. KALAMAZOO MATERIALS, INC.	Docket No. WEST 2025-0326 A.C. No. 02-02520-610896

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

ORDER

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

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On July 23, 2025, the Commission received from Kalamazoo Materials Inc., ("Kalamazoo") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary opposes the operator's request.

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 12, 2024. The assessment became a final order of the Commission on January 11, 2025, after the 30-day contest period expired. On February 26, 2025, the Secretary sent the operator a delinquency letter, noting that the penalties remained unpaid. On May 28, 2025, the Secretary sent the

operator a "scofflaw letter" warning of escalating penalties if the fines continued to remain unpaid.

On July 23, 2025, Kalamazoo forwarded a copy of the Secretary's May 28th letter to the Commission with an accompanying attachment listing citations and unpaid penalties.[1] We construe this filing as a request to reopen the final order.

In *Higgins Stone Company, Inc*, 32 FMSHRC 33, 34 (Jan. 2010) the Commission stated:

> An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. 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. The operator must also identify which specific citations or orders in the assessment it wishes to contest upon reopening. Affidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen.

Kalamazoo's motion does not provide an explanation for its failure to timely file. Accordingly, the operator has not demonstrated a good cause reason for its failure to timely file. The motion is denied.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

[1] Citation No. 9999735 and the associated penalty of $12,089 was highlighted in yellow.

Commissioner Marvit, concurring:

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

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

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority denies reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 2, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Complainant, v. DOE RUN CO, Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2025-0167 A.C. No.: 23-01800-614185 Mine: Viburnum #35 (Casteel Mine)

DECISION ON MOTION FOR SUMMARY DECISION

Before: Judge Simonton

This case is before me upon the Secretary's petition for assessment of civil penalty issued in accordance with the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Mine Act) and 29 C.F.R. § 2700.20 et seq. Chief Administrative Law Judge Glynn F. Voisin assigned me this case on July 7, 2025. In dispute is one citation issued under section 104(a) of the Mine Act to Doe Run Co. ("Respondent" or "Doe Run"), as owner and operator of the Viburnum #35 (Casteel Mine) in Bixby, Missouri.

I. STATEMENT OF THE CASE

The Secretary issued Doe Run Citation No. 9767916 under section 104(a) of the Mine Act for an alleged violation of health and safety standards. Specifically, Citation No. 9767916 alleges a violation of 30 C.F.R. § 57.13015(a) for failing to have a 250-gallon pressure vessel inspected by an inspector holding a valid national board commission certification with a proposed penalty of $151.00.

I set this matter to be heard on November 13–14, 2025. On September 10, 2025, the Secretary filed a Motion for Summary Decision. Thereafter, Doe Run filed an Unopposed Motion for Extension of Time to File Response to Secretary's Motion for Summary Decision on September 12, 2025. Finding good cause, I granted Doe Run's motion and set the due date for its response on October 3, 2025.

On October 3, 2025, Doe Run filed its response to the Secretary's Motion for Summary Decision. However, due to the six-week federal government shutdown, the Secretary could not file its reply brief and the hearing set for November 13–14, 2025, could not be held. During the period of the shutdown, Doe Run filed a motion to postpone the hearing on October 21, 2025. Upon conclusion of the government shutdown, I granted Doe Run's Motion to Postpone Hearing

on November 14, 2025, with a new hearing to be set in the future. Thereafter, on November 20, 2025, the Secretary filed its Reply in Further Support of Summary Decision.[1]

II. SUMMARY DECISION STANDARD

Commission Procedural Rule 67 sets forth the following grounds for granting summary decision:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
>
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has long recognized that "'[s]ummary decision is an extraordinary procedure,"' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact."' *Hanson Aggregates*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

"Material facts" are those that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Pursuant to Commission Procedural Rule 67, "Material facts identified as not in issue by the moving party shall be deemed admitted for the purposes of the motion unless controverted by the statement in opposition." 29 C.F.R. § 2700.67(d). The court must evaluate the evidence "in the light most favorable to . . . the party opposing the motion." *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn "from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Id.*

A. No Dispute of Material Fact

The Secretary argues that Summary Decision is appropriate in this matter because there are no disputes of material fact. Sec'y Memorandum in Support at 1–2. Specifically, the Secretary argues it is undisputed that Doe Run operated a pressure vessel that was not inspected which is a plain and clear violation of 30 C.F.R. § 57.13015(a). *Id.* at 3, 8–10; Sec'y Reply at 1. Instead, "[t]he parties only dispute what version of the inspection requirements apply, a pure legal issue." Sec'y Memorandum in Support at 1.

[1] The Secretary's exhibits, Doe Run's exhibits, the Secretary's Memorandum in Support of Summary Decision, Doe Run's Memorandum of Points of Authorities in Response to Motion for Summary Decision, and the Secretary's Reply in Further Support of Summary Decision are abbreviated, respectively, as: "Ex. S–#," "Ex. R–#," "Sec'y Memorandum in Support" "Resp't Response," and "Sec'y Reply."

In response, Doe Run argues that Summary Decision is inappropriate in this matter because "there are material facts intertwined with the legal issues that remain in dispute." Resp't Response at 3–4. The material facts that Doe Run identifies are:

> 1. Whether, given the absence of previous notice by inspector activity and MSHA policy as well as the National Board exemption, whether Doe Run received adequate notice of the applicability of the standard.
>
> 2. Whether any MSHA inspector had ever previously indicated that the tank on the drill was subject to inspection by a certified inspector of the National Board of Boiler and Pressure Vessels.
>
> 3. Whether the 1979 Boiler Inspection Rules clearly apply to the tank on the drill at issue.
>
> 4. What is the effect of [the]subsequent document issued in 2004, NB-132 (Exhibit 3), that identified certain exemptions to the National Board's inspection requirement.
>
> 5. Whether Missouri law concerning pressure vessels applies to the tank on the drill at issue.

Id. at 3.

After reviewing the entirety of the parties' filings, neither party disputes the factual circumstances underlying Citation No. 9767916, namely that Doe Run's 250-gallon pressure vessel had not been previously inspected. *Id.* at 1–2, 5; Resp't Amended Pre-Hr'g Statement at 1–3; Sec'y Memorandum in Support at 3, 8–9, 10; Sec'y Reply at 1.

The only arguable fact that Doe Run asserts is intertwined with a relevant legal issue is "[w]hether any MSHA inspector had ever previously indicated that the tank on the drill was subject to inspection by a certified inspector of the National Board of Boiler and Pressure Vessels." Resp't Response at 4. However, even under the assumption that an MSHA Inspector had never previously indicated that the cited tank was subject to inspection, this fact is not material as, regardless of what information may be presented from it, it is insufficient to support the vacating of a citation. *See Cactus Canyon Quarries, Inc. v. Sec'y of Lab*., 953 F.3d 790, 793 (D.C. Cir. 2020) (rejecting operator's argument that an inspector was not allowed to cite equipment that had never been cited for decades because the "Secretary 'cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator'"); *see also Mainline Rock & Ballast, Inc. v. Sec'y of Lab.*, 693 F.3d 1181, 1187 (10th Cir. 2012) (rejecting an operator's lack of adequate notice argument because "'those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to the law'") (citing *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416–1417 (10th Cir. 1984)).

Accordingly, in reviewing each of Doe Run's asserted issues, I determine that each question focuses solely on legal issues regarding regulatory interpretation, lack of adequate notice, and the applicability of state law rather than disputes of material fact. Therefore, I conclude that Summary Decision is appropriate in resolving this matter as the questions of law at issue may properly be decided based on the record before me.

III. STATEMENT OF FACTS

Doe Run operates the Viburnum #35 ("Casteel Mine") underground mine in Bixby, Missouri, which produces lead, copper and zinc. Sec'y Memorandum in Support at 2; Resp't Response at 1; Resp't Amended Pre-Hr'g Statement at 1. The mining process in the Casteel Mine involves using drills to create holes that are then loaded with explosives and detonated. Resp't Response at 1; Resp't Amended Pre-Hr'g Statement at 1. These drills are connected to a 250-gallon water tank that is under 125 psi of pressure. *Id.* The water tank sends drilling water up the drill steel to the bit head, where it cools the bit, clears cuttings from the borehole, and provides dust suppression. Resp't Response at 1–2; Resp't Amended Pre-Hr'g Statement at 1.

On August 21, 2024, MSHA Inspector James Santhuff traveled to the Casteel Mine to perform a standard quarterly inspection of the mine and its equipment. Sec'y Memorandum in Support at 3; Resp't Response at 2; Resp't Amended Pre-Hr'g Statement at 1–2. During Santhuff's inspection, he noticed a 250-gallon vessel mounted to the Tamrock Solo SN# 0106 drill. Sec'y Memorandum in Support at 3; Ex. S–A. Based on Santhuff's training and experience, he recognized the vessel as an unfired pressure vessel because it is a receiver tank that is pressurized by a motor. *Id.* Santhuff then inspected the 250-gallon vessel, finding it to be in good condition, and then spoke to Maintenance Manager Clay McNeil, inquiring if the vessel had been inspected by a certified National Board of Boiler Pressure Vessel inspector ("certified inspector"). Sec'y Memorandum in Support at 3; Ex. S–A; Resp't Response at 2; Resp't Amended Pre-Hr'g Statement at 1–2. McNeil responded that the pressure vessel had been in use at the mine for approximately 20 years and it had not been inspected by a certified inspector because Doe Run believed it was exempt from inspection. *Id.* Accordingly, Santhuff issued Citation No. 9767916 to Doe Run on August 21, 2024, in which he wrote the following:

> The 250-gallon pressure vessel located on the Tamrock Solo SN# 0106 had not been inspected by an inspector holding a valid national board commission certification. The pressure vessel relief valve and tank appeared to be in good condition. The pressure vessel was available for use to miners at the time of the inspection. This condition exposes a miner to injuries related to the pressure vessel failing.

Ex. S–A. MSHA Inspector Santhuff also assessed the gravity of the violation as "unlikely" to result in "lost workdays or restricted duty" to one person and determined that Doe Run exhibited a "low" level of negligence. *Id.*

After the issuance of Citation No. 9767916, Maintenance Manager McNeil continued to discuss the citation with Santhuff and was adamant that the unfired pressure vessel was exempt from inspection. Sec'y Memorandum in Support at 3; Ex. S–A; Resp't Response at 2; Resp't

Amended Pre-Hr'g Statement at 2. McNeil then, in an attempt to have the citation vacated, called Independent Inspector Tim Swanson from ARISE–a private inspection organization–to come to the Casteel Mine. Resp't Response at 2; Resp't Amended Pre-Hr'g Statement at 2. Once Swanson arrived, he informed Santhuff that, in his opinion, the cited unfired pressure vessel was exempt from inspection. *Id.* However, after contacting an official with the State of Missouri Division of Fire Safety, Santhuff remained adamant that the cited vessel was not exempt from inspection. *Id.* Santhuff then issued the abatement date for Citation No. 9767916 for the following day, August 22, 2024. Sec'y Memorandum in Support at 3; Ex. S–A. However, on August 27, 2025, Santhuff extended the abatement date to September 6, 2024, as Doe Run was in the process of scheduling an inspection of the pressure vessel with ARISE. *Id.* The pressure vessel was then first inspected on September 6, 2024, by Independent Inspector Swanson. Sec'y Memorandum in Support at 3; Ex. S–A; Resp't Response at 2; Resp't Amended Pre-Hr'g Statement at 2.

IV. ISSUES

The Secretary argues that I should affirm Citation No. 9767916 as issued along with her proposed penalty of $151.00. Sec'y Memorandum in Support at 1; Sec'y Reply at 1. Doe Run contests the penalty and argues that the citation should be vacated. Resp't Response at 1. Neither party disputes the factual circumstances of Citation No. 9767916. Resp't Response at 1–2, 5; Resp't Amended Pre-Hr'g Statement at 1–3; Sec'y Memorandum in Support at 3, 8–9, 10; Sec'y Reply at 1.

Accordingly, I determine that the following issues are before me: (1) whether the issuance of the National Board's 2004 NB-132 document alters the applicability of section 57.13015(a); (2) whether Doe Run had adequate notice of the applicability of section 57.13015(a) to the cited tank at issue; (3) whether Citation No. 9767916's gravity determinations are properly designated; (4) whether Citation No. 9767916's negligence is properly designated; and (5) whether the Secretary's proposed penalty for this alleged violation is appropriate.

For the reasons set forth below, Citation No. 9767916 is **AFFIRMED** as issued.

V. PRINCIPLES OF LAW

To comport with due process, laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [the person] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (Sept. 1991). Under Commission precedent, if the language of a regulation provides clear and unambiguous notice of its coverage and requirements, no further notice is necessary. *Bluestone Coal. Co.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that when a regulatory provision is clear and unambiguous, then the regulation provides adequate notice); *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 (Sept. 2000) (holding that if the regulation is unambiguous, the regulation's clear meaning is controlling and it "'follows that the standard provided the operator with adequate notice of its requirements'") (citing *LaFarge Constr. Materials,* 20 FMSHRC 1140, 1144 (Oct. 1998)).

Many Mine Act health and safety standards are "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981); *see also Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec. 1982). Thus, when a regulation does not provide unambiguous notice of its coverage, the appropriate test for notice of an ambiguous regulation is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In determining whether a party had adequate notice of regulatory requirements, a wide variety of factors are considered, such as "the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question." *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694–85 (July 2002).

VI. ANALYSIS AND CONCLUSIONS OF LAW

A. What Does 30 C.F.R. § 57.13015(a) Incorporate by Reference?

Doe Run was cited for a violation of 30 C.F.R. § 57.13015(a), which requires, in relevant part, that:

> Compressed-air receivers and other unfired pressure vessels shall be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code, a Manual for Boiler and Pressure Vessel Inspectors, 1979. This code is incorporated by reference and made a part of this standard.

30 C.F.R. § 57.13015(a).

Doe Run argues that "a citation should not have been issued" because the National Board Inspection Code's ("NBIC") 2004 NB-132 document exempted the cited vessel and therefore altered the applicability of the 1979 version of "a Manual for Boiler and Pressure Vessel Inspectors" referenced in section 57.13015(a). Resp't Response at 3; Ex. R–3. Specifically,

> Exemption #3 in Section E provides that pressure vessels operated completely full of water or a liquid of comparable hazard level are exempt, provided the vessel's contents do not exceed 140°F in temperature or 200 psi[] in pressure. The water tanks installed on the drill meet these conditions, as they are routinely filled with water and do not exceed either the temperatures or pressure threshold.

Id. Accordingly, Doe Run argues "that the drill pressure vessel in question qualifies for exemption under current National Board guidelines." Resp't Response at 3.

In response, the Secretary argues that section 57.13015(a) "explicitly incorporates the 1979 Code, and . . . [t]hus, as a matter of law, the 1979 Code is the governing code and the only code relevant to citations issued for violations of 30 C.F.R. § 57.13015." Sec'y Memorandum in

Support at 6. Additionally, the Secretary argues that allowing the issuance of the National Board's 2004 NB-132 document to alter the scope of section 57.13015(a) violates section 101(a)(9) of the Mine Act as it would "reduce the protection afforded miners by an existing mandatory health or safety standard." *Id.* at 7.

In reviewing the parties' filings and supporting documentation in the light most favorable to Doe Run, I find Doe Run's argument unpersuasive for the following reasons.

1. Dynamic Incorporation Violates the Administrative Procedure Act and 1 C.F.R. § 51.11(a)

Doe Run's argument–that the applicability of section 57.13015(a) is altered by the issuance of the National Board's 2004 NB-132 document–suggests a dynamic incorporation in section 57.13015(a) in which "the applicable chapters of the [1979 NBIC], a Manual for Boiler and Pressure Vessel Inspectors" would automatically change whenever the National Board issues subsequent recommendations affecting boiler and pressure vessels. However, in the context of promulgated regulations, such dynamic incorporation is impermissible as it violates the notice and comment requirements of the Administrative Procedure Act ("APA"). *City of Idaho Falls v. FERC*, 629 F.3d 222, 227–28 (D.C. Cir. 2011) (holding that FERC violated the APA by attempting to adopt, without additional notice and comment, updated Forest Service fee schedules, a previous version of which was incorporated by reference in its regulations); *see also BHP Navajo Coal Co.*, 2015 WL 9684710, *8 (Dec. 2015) (ALJ) (rejecting operator's argument that the language "'in effect at the time of the installation'" means that section 77.516 automatically updates whenever a new edition of the National Electric Code is published because "[s]uch dynamic incorporation . . . violate[s] the notice and comment requirements of the Administrative Procedure Act").

Additionally, Doe Run's position would require that I ignore the requirements of 1 C.F.R. § 51.11(a).[2] As Judge Bulluck correctly noted in *BHP Navajo Coal Co.*, dynamic incorporation goes against the "unambiguous instructions to agencies" in 1 C.F.R. § 51.11(a) regarding how to change a publication that is approved for incorporation by reference. *BHP Navajo Coal Co.*, 2015 WL 9684710 at *8. Although not binding, I find Judge Bulluck's reasoning persuasive.

2. Doe Run's Argument Fails Under Reference Canon Interpretation

In the analogous context of interpreting federal statutes, Doe Run's argument equates to an interpretive tool commonly known as reference canon interpretation. The Supreme Court in *Brown v. United States* explained that reference canon interpretation "provides that a statutory reference to a '*general* subject' incorporates 'the law on that subject as it exists whenever a question under the statute arises.' *Brown v. United States*, 602 U.S. 101, 115–16 (2024) (citing

[2] 1 C.F.R § 51.11(a) provides that "[a]n agency that seeks approval for a change to a publication that is approved for incorporation by reference must–(1) Publish notice of the change in the Federal Register and amend the Code of Federal Regulations; (2) Ensure that a copy of the amendment or revision is on file at the Office of the Federal Register; and (3) Notify the Director of the Federal Register in writing that the change is being made."

Jam v. Int'l Fin. Corp., 586 U.S. 199, 206 (2019)). However, "a reference 'to another statute by specific title or section number'—such as ACCA's reference to 21 U.S.C. § 802—'in effect cuts and pastes the referenced statute *as it existed when the referring statute was enacted*, *without any subsequent amendments*.'" *Id.* (emphasis added). For example, the Court in *Brown*–in interpreting statutory language–concluded that "it is hard to see the phrase 'as defined in section 102 of the Controlled Substances Act' as anything but a specific reference." *Brown v. United States*, 602 U.S. 101, 115–16 (2024); *cf. Jam v. Int'l Fin. Corp.,* 586 U.S. 199, 209–211 (2019) (holding that the language "'same immunity from suit . . . as is enjoyed by foreign governments'" is not a specific reference to a provision of another statute, but instead a general reference to an external body of potentially evolving law).

In applying the Supreme Court's reasoning, I similarly find it hard to see section 57.13015(a)'s phrase "the applicable chapters of the [NBIC's], a Manual for Boiler and Pressure Vessel Inspectors, 1979" as anything but a specific reference as it explicitly states the 1979 version. 30 C.F.R. § 57.13015(a).

3. 1979 Version is Consistently Maintained as Incorporated by Reference

The explicit mention of "1979" in section 57.13015(a) has been consistently maintained as being incorporated by reference by the Federal Register since its enactment.[3] In 1980 and, again, in 1981, the Director of the Federal Register approved the incorporation by reference of the "National Board Inspection Code: 1979 edition" into section 57.13015. *Approvals of Incorporation by Reference*, 45 Fed. Reg. 44090, 44098 (June 30, 1980); 46 Fed. Reg. 33980, 33991 (June 30, 1981). Moreover, since 2009, the Federal Register has consistently published in its electronic "Incorporation by Reference" page on the U.S. Government Printing Office's e-CFR website, as having the "National Board Inspection Code, 1979" be incorporated by reference into section 57.13015. *See Electronic Code of Federal Regulations, Title 30--Mineral Resources, Material Approved for Incorporation by Reference*, U.S. Government Printing Office, https://www.ecfr.gov/incorporation-by-reference/title-30/1-199 (last visited February 23, 2026).

4. Doe Run's Interpretation Leads to Absurd Results

If the Court accepts Doe Run's position and alters the applicability of section 57.13015(a) because of the issuance of the National Board's 2004 NB-132 document, absurd results will follow. Specifically, Subpart L– which section 57.13015(a) is contained in–also contains section 57.13030(b) which not only similarly references that "gauges, devices and piping" of boilers must be in accordance with "a Manual for Boiler and Pressure Vessel Inspectors, 1979," but

[3] The practice of incorporation by reference began in 1966 to reduce the volume of material published in the Federal Register. *See* 5 U.S.C. § 552(a). Incorporation by reference "allows Federal agencies to comply with the requirement to publish rules in the Federal Register and the Code of Federal Regulations (CFR) by referring to material already published elsewhere. The legal effect of incorporation by reference is that the material is treated as if it were published in the Federal Register and CFR." *Electronic Code of Federal Regulations, Incorporation by Reference*, U.S. Government Printing Office, https://www.ecfr.gov/incorporation-by-reference (last visited February 23, 2026).

even explicitly lists the specific applicable chapters and titles of the 1979 version. 30 C.F.R. § 57.13030(b).

Therefore, if the Court were to accept Doe Run's interpretation and substitute the National Board's 2004 NB-132 document into section 57.13015(a), then this results in the absurd outcome of having two regulations within the same subpart following different versions of the same cited standards. While I recognize that section 57.13030(b) is distinguishable from section 57.13015(a) as it addresses boilers rather than "compressed-air receivers and other unfired pressure vessels," it would be illogical to find that such a distinction resolves the absurd result of having two regulations within the same subpart follow different versions of the same cited standards. 30 C.F.R. §§ 57.13015(a), 57.13030(b). Thus, section 57.13030(b) provides additional confirmation that the 1979 version of "a Manual for Boiler and Pressure Vessel Inspectors" is what is incorporated by reference in 57.13015(a).

5. Doe Run's Interpretation Violates the No-Less Protection Rule

The Secretary argues that accepting Doe Run's position–that the National Board's 2004 NB-132 document alters the applicability of section 57.13015(a)–violates the no-less protection rule in section 101(a)(9) of the Mine Act. Sec'y Reply at 6; Sec'y Memorandum in Support at 7.

Section 101(a)(9) of the Mine Act provides that "[n]o mandatory health or safety standard promulgated under [Title 1] shall reduce the protection afforded miners by an existing mandatory health or safety standard." 30 U.S.C. § 811(a)(9). In addressing the applicability of section 101(a)(9), the D.C. Circuit Court of Appeal in *Dole* explained that Congress

> placed an explicit constraint on the Secretary's authority to alter the level of protection afforded miners. . . . Thus when new standards replace existing mandatory health or safety standards it is not sufficient that the new standards demonstrate a reasonable accommodation of the competing goals of safety and efficient coal mine operation. The statute expressly mandates that no reductions in the level of safety below existing levels be permitted, regardless of the benefits accruing to improved efficiency.

UMWA v. Dole, 870 F.2d 662, 668 (D.C. Cir. 1989); *see also Brody Mining, LLC,* 36 FMSHRC 2027, 2035 (Aug. 2014).

Accordingly, as section 57.13015(a) is a mandatory health or safety standard promulgated under section 101, it falls under the umbrella of the no-less protection rule in section 101(a)(9) of the Mine Act. Therefore, if I accept Doe Run's interpretation and find that the issuance of the National Board's 2004 NB-132 document exempts the cited equipment from the requirements of section 57.13015(a), then such a position would allow the regulation to reduce the protection afforded to miners from the National Board's 1979 "Manual for Boiler and Pressure Vessel Inspectors" and thus violate section 101(a)(9) of the Mine Act.

6. 30 C.F.R. § 57.13015(a) Incorporates the 1979 Standard

While I am sympathetic to Doe Run's situation, even in the light most favorable to it, I cannot ignore and substitute the plain language of section 57.13015(a) that clearly states that the applicable chapters of the "[NBIC], a Manual for Boiler and Pressure Vessel Inspectors, *1979*" is what is incorporated by reference. 30 C.F.R. § 57.13015(a) (emphasis added). Doing so would not only ignore the plain reading of the regulation but would also violate section 101(a)(9) of the Mine Act and lead to an absurd result. Additionally, it would be erroneous for me to ignore the repeated explicit affirmation from the Director of the Federal Register, listing the material approved for incorporation by reference for section 57.13015 as being the "National Board Inspection Code, *1979*." *Electronic Code of Federal Regulations, Title 30--Mineral Resources, Material Approved for Incorporation by Reference*, U.S. Government Printing Office, https://www.ecfr.gov/incorporation-by-reference/title-30/1-199 (last visited February 23, 2026) (emphasis added). Lastly, even in the light most favorable to Doe Run, I cannot ignore that the dynamic incorporation that Doe Run suggests is impermissible in either a regulatory or statutory framework as it would violate the notice and comment requirements of the APA and require that I forego the explicit requirements of 1 C.F.R. § 51.11(a).

In light of the discussion above, I determine that the issuance of the National Board's 2004 NB-132 document does not alter the applicability of section 57.13015(a). Accordingly, I conclude that section 57.13015(a)'s specific reference to the 1979 version of "a Manual for Boiler and Pressure Vessel Inspectors" indicates that the materials incorporated by reference are solely the applicable chapters of the 1979 version.

B. Adequate Notice to Doe Run

In the alternative, Doe Run argues that it lacked adequate notice to the applicability of section 57.13015(a) to the cited vessel because: (1) the exempting of certain pressure vessels by the National Board's 2004 NB-132 document called into question the applicability of section 57.13015(a) to the cited vessel; (2) section 57.13015(a) is ambiguous as it does not define pressure vessel; and (3) MSHA never cited the tank under section 57.13015(a) in the past 20 years and there are no MSHA policy documents that address this standard or issue. As a result, Doe Runs argues that section 57.13015(a) is impermissibly vague and therefore Citation No. 9767916 should be vacated. Resp't Response at 5–9.

In response, the Secretary argues that "[n]othing about [section 57.13015(a)]'s language is ambiguous . . . [as] [t]he standard plainly and unambiguously points the reader to the 1979 Code." Sec'y Reply at 7. Additionally, the Secretary argues that the fact that Doe Run had never received a citation for this violation before is irrelevant because "[t]here is no requirement that an operator be cited prior to the enforcement of a standard." Sec'y Reply at 8.

In reviewing the parties' filings and supporting documentation in the light most favorable to Doe Run, I find Doe Run's arguments unpersuasive for the following reasons.

1. 30 C.F.R. § 57.13015(a) is Unambiguous

At the outset, the Commission has held that if the language of a regulation provides clear and unambiguous notice of its coverage and requirements, no further notice is necessary. *Bluestone Coal. Co.*, 19 FMSHRC at 1028–29 (holding that when a regulatory provision is clear and unambiguous, then the regulation provides adequate notice); *Nolichuckey Sand Co.*, 22 FMSHRC at 1061 (holding that when "'the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements'") (citing *LaFarge Constr. Materials,* 20 FMSHRC at 1144).

A plain reading of section 57.13015(a) clearly states "the applicable chapters of the [NBIC], a Manual for Boiler and Pressure Vessel Inspectors, ***1979*** . . . is incorporated by reference and made a part of this standard." 30 C.F.R. § 57.13015(a) (emphasis added). Thus, it is difficult to view such language as unclear or ambiguous as to what version it refers to. Indeed, both the Commission and two ALJs reviewed the identical regulatory language for the analogous surface mine standard–30 C.F.R. § 56.13015(a)–and held that the standard's plain and unambiguous language "provided [the operator] with adequate notice that an inspection by a person with a valid Commission was required." *Rain For Rent*, 39 FMSHRC 1448, 1452, (July 2017) (ALJ), *aff'd*, 40 FMSHRC 976, 978 (July 2018), *aff'd*, 2015 WL 9684710, * (Feb. 2020) (ALJ). Accordingly, I determine that section 57.13015(a) is unambiguous.

2. Definition of Pressure Vessel

Doe Run argues that because both the 1979 manual and section 57.13015(a) do not define "pressure vessel," it is unclear whether the cited vessel is considered a "pressure vessel" under section 57.13015(a). Resp't Response at 5–6. Therefore, Doe Run asserts that "[i]n the circumstance where a vital term has not been defined [a] statute may be considered impermissibly vague." Resp't Response at 6 (citing *Stephenson v. Davenport Community School District*, 110 F. 3d 1303, 1308 (10th Cir. 1997). In response, the Secretary argues that the undisputed facts regarding the cited equipment's specifications clearly establish that it is a pressure vessel. Sec'y Reply at 4–5.

It is undisputed that "[t]he term "pressure vessel" is not defined in the Mine Act, the accompanying regulations, or the 1979 Code." Sec'y Reply at 4. However, as the Secretary correctly notes, "[i]n the absence of a statutory definition, courts typically 'construe a statutory term in accordance with its ordinary or natural meaning.'" Sec'y Reply at 4 (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). Indeed, in these instances the Commission has looked to common dictionary definitions to determine a word's ordinary or natural meaning. *See Knight Hawk Coal, LLC*, 46 FMSHRC 563, 567 n.5 (Aug. 2024) (looking to the dictionary to determine the meaning and intent of terms not defined by the Mine Act).

Doe Run admits that the cited equipment in Citation No. 9767916. is "a tank that holds 250 gallons of water under 125 psi of pressure."[4] Resp't Response at 1; Resp't Amended Pre-Hr'g Statement at 1. Utilizing the same approach as the Commission in *Knight Hawk Coal, LLC*, the term "pressure vessel" is defined by Merriam-Webster as "a container (as a tank, boiler, shell, cylinder) subjected in use to disruptive pressure." *Pressure Vessel*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/pressure%20vessel (last visited February 23, 2026). Similarly, another dictionary defines "pressure vessel" as "engineering a vessel designed for containing substances, reactions, etc, at pressures above atmospheric pressure." *Pressure Vessel*, DICTIONARY.COM, https://www.dictionary.com/browse/pressure%20vessel (last visited February 23, 2026)." Doe Run's own admitted characteristics of the cited equipment clearly places it under either dictionary definition as it is a container or vessel–"tank"– that contains a substance–"250 gallons of water"–that is held at above atmospheric pressure–"125 psi."[5] Resp't Response at 1; Resp't Amended Pre-Hr'g Statement at 1. Indeed, even the National Board's 2004 NB-132 document, which Doe Run argues is the applicable standard for section 57.13015(a), similarly defines "pressure vessel" as "a vessel in which the pressure is obtained from an external source, or by the application of heat from an indirect source, or from a direct source other than those boilers defined in item 14." Resp't Response at 3; Ex. R–3. Similarly, Doe Run's own admitted characteristics of the cited equipment fall into this definition as well.

Accordingly, I determine that the tank on the Tamrock Drill is a pressure vessel given the term's ordinary and natural meaning.

3. Estoppel is Contrary to Law

Doe Run argues that it lacked adequate notice as to the applicability of section 57.13015(a) because the fact that MSHA never cited the tank in the past 20 years may be evidence that previous MSHA inspectors had contrary interpretations. Resp't Response at 5, 9. Additionally, Doe Run argues that the fact that there are no MSHA policy documents that address section 57.13015(a), and that an independent third party inspector indicated that the tank was "exempt," is further indication that it lacked adequate notice. Resp't Response at 5–6. In response, the Secretary argues that there is no requirement that an operator be cited prior to the enforcement of a standard and that such a belief is contrary to law. Sec'y Reply at 8.

Despite Doe Run's assertions, courts have consistently held that there is no requirement that an operator be cited prior to the enforcement of a standard. *See Cactus Canyon Quarries, Inc.* 953 F.3d at 793 (rejecting operator's argument that an inspector was not allowed to cite equipment that had never been cited for decades because the "Secretary 'cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator'"); *see also Mainline Rock & Ballast, Inc.* 693 F.3d at 1187 (rejecting an operator's lack of adequate

[4] Although the Secretary disputes the psi of the cited equipment as being 150-160 psi, I interpret the facts of this matter in the light most favorable to Doe Run. Accordingly, I find that the cited equipment in Citation No. 9767916 is under 125 psi.

[5] Atmospheric pressure at sea level is 14.7 psi *Air Pressure*, NOAA, https://www.noaa.gov/jetstream/atmosphere/air-pressure, (last visited February 23, 2026).

notice argument because "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to the law") (citing *Emery Mining Corp.* 744 F.2d at 1416–1417). Moreover, there are "no regulations requiring MSHA to police the mining industry to the extent of discovering and preventing every mine operator from using every piece of equipment which may violate MSHA regulations. Such a requirement would exceed the capabilities of the agency and throw into question the feasibility of the regulatory scheme." *Wallace v. U.S. Dep't of Lab.*, 717 F. Supp. 1466, 1468 (D. Wyo. 1989).

Additionally, Doe Run's reliance on an independent third party inspector–who indicated that the cited vessel was exempt from inspection–is misplaced as the opinions of a third party have no bearing on whether MSHA can cite a violation. In fact, courts have gone so far as holding that an operator's reliance on an MSHA inspector incorrectly informing them that equipment did not need to be guarded was insufficient to prevent the finding of a violation. *Mainline Rock & Ballast, Inc.* 693 F.3d at 1187 (rejecting an operator's lack of adequate notice argument because "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to the law"); *see also Emery Mining Corp.* 744 F.2d at 1416–17 (holding that "MSHA officials . . . [have] no authority to waive the [Mine] Act's requirements" and that an operator assumes the risk that an MSHA official's interpretation may be in error). Instead, the court in *Mainline* emphasized that as long as the standard is "sufficiently specific that a reasonably prudent person, familiar with the conditions of the regulation are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations would require," then the due process notice requirements are met. *Mainline Rock & Ballast, Inc.,* 693 F.3d at 1187.

In light of the discussion above, I cannot ignore the overwhelming amount of precedent rejecting the same estoppel arguments that Doe Run puts forth in support of its claim that it lacked adequate notice. Accordingly, even though MSHA never cited the pressure vessel in the past 20 years, there are no MSHA policy documents that address this standard or issue, and an independent third party inspector indicated that the pressure vessel was "exempt," this is still insufficient to support Doe Run's claim that it lacked adequate notice.

4. Doe Run had Adequate Notice

Even in the light most favorable to Doe Run, I cannot ignore the plain and unambiguous language of section 57.13015(a) that "the applicable chapters of the [NBIC], a Manual for Boiler and Pressure Vessel Inspectors, 1979" is what is incorporated by reference. 30 C.F.R. § 57.13015(a). Additionally, Doe Run's argument–that the regulation is impermissibly vague–still fails as the ordinary or natural meaning of "pressure vessel" provides adequate notice of its applicability. Lastly, it would be erroneous for me to ignore the overwhelming amount of precedent rejecting the estoppel arguments that Doe Run puts forth in support of its claim that it lacked adequate notice.

Accordingly, in light of the discussion above, I conclude that Doe Run had adequate notice as to the applicability of section 57.13015(a) to the cited pressure vessel in Citation No. 9767916.

C. Violation of 30 C.F.R. § 57.13015(a)

The requirements of section 57.13015(a) are twofold. First, it requires that "[c]ompressed-air receivers and other unfired pressure vessels . . . be inspected by inspectors holding a valid National Board Commission [certification]." 30 C.F.R. § 57.13015(a). Second, it requires that the inspection be conducted "in accordance with the applicable chapters of the [NBIC], a Manual for Boiler and Pressure Vessel Inspectors, 1979." *Id.*

Neither party disputes the factual circumstances of Citation No. 9767916–namely, that Doe Run's 250-gallon pressure vessel was not inspected by an inspector holding a valid National Board Commission certification. Resp't Response at 1–2, 5; Resp't Amended Pre-Hr'g Statement at 1–3; Sec'y Memorandum in Support at 3, 8–9, 10; Sec'y Reply at 1. Indeed, Doe Run admits that it "believed it was exempt from such inspection" and does not dispute MSHA Inspector Santhuff's claim that the "tank had not been inspected for 20 years." Resp't Response at 2, 5. Therefore, based on my determination that the issuance of the National Board's 2004 NB-132 document does not alter the applicability of section 57.13015(a), and that Doe Run had adequate notice of the applicability of section 57.13015(a), I determine that Doe Run's failure to have the cited pressure vessel inspected by an inspector holding a valid national board commission certification constitutes a violation of section 57.13015(a). *See* discussion *supra* Part VI.A–B.

Therefore, as Doe Run violated the first requirement of section 57.13015(a), I find that consideration of the second requirement unnecessary.[6] *See Rain For Rent*, 39 FMSHRC at 1452 (holding that the court need not address arguments regarding the enforcement of state regulations as they relate to the NBIC because the violation of section 56.13015[7] could be established solely on the MSHA Inspector's findings that the cited pressure vessel was not inspected by an individual with a National Board Commission certification), *aff'd*, 40 FMSHRC 976, 978 (July 2018). Accordingly, I conclude that the Secretary has established that Doe Run violated section 57.13015(a).

1. Gravity Designations for Citation No. 9767916

Doe Run does not dispute MSHA Inspector Santhuff's gravity assessment for Citation No. 9767916. Resp't Response at 1–10; Resp't Amended Pre-Hr'g Statement at 1–3. Santhuff assessed the likelihood of injury or illness to be "unlikely," because the "pressure vessel relief valve and tank appeared to be in good condition." Sec'y Memorandum in Support at 12; Ex. S–A. Santhuff also determined the violation could cause an injury resulting in "lost workdays or

[6] Both parties presented arguments and introduced evidence regarding the applicability of Missouri state regulations to the cited pressure vessel and how they relate to the NBIC. Resp't Response at 4, 8–9; Sec'y Memorandum in Support at 9–10. However, as this matter can be decided solely on the safety standard cited by MSHA Inspector Santhuff, I do not address the issue of whether Missouri state regulations are applicable to the cited pressure vessel.

[7] Section 56.13015 is the analogous surface mine standard and contains the identical regulatory language as section 57.13015. *See* 30 C.F.R. §§ 56.13015, 57.13015.

restricted duty" to one person because if the "vessel deteriorates it could fail under pressure which could lead to injuries from flying shrapnel" such as "cuts, broken bones, and eye injuries" to "personnel in the surrounding work area, including the individual operating the Tamrock drill." Sec'y Memorandum in Support at 4, 12; Ex. S–A. In light of the circumstances, I agree with Santhuff's assessment and conclude that an incident involving the violative conditions was unlikely to cause an injury resulting in "lost workdays or restricted duty" to one person.

2. Negligence Designation for Citation No. 9767916

The Commission evaluates the degree of negligence using "a traditional negligence analysis" that considers what actions a reasonably prudent person familiar with the mining industry would have taken under the same circumstances, the relevant facts, and the protective purpose of the regulation. *Am. Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016) (citation omitted)); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015).

Doe Run does not dispute MSHA Inspector Santhuff's negligence assessment for Citation No. 9767916. Resp't Response at 1–10; Resp't Amended Pre-Hr'g Statement at 1–6. Santhuff designated Doe Run's negligence as "low" because he "understood this was the first citation Doe Run had received for this type [of] vessel attached to mobile equipment." Sec'y Memorandum in Support at 4, 12; Ex. S–A. Based on the totality of the evidence, I conclude Doe Run's negligence to be low.

VII. PENALTY

The Commission is not bound by the Secretary's proposed penalty and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary proposes a penalty of $151.00 for Citation No. 9767916. Ex. S–D. Doe Run is a large operator, operating 243,997 mine hours in the last four quarters of operation. Sec'y Memorandum in Support at 4, 13. In the fifteen months preceding the issuance of this citation, MSHA did not issue any violations of section 57.13015(a) to Doe Run's Viburnum #35 (Casteel Mine). Ex. S–D. Doe Run has stipulated that the proposed penalty would not adversely affect its ability to continue in business. Resp't Amended Pre-Hr'g Statement at 5. I concluded that Doe Run exhibited a low level of negligence. *See* discussion *supra* Part VI.C.2. Regarding gravity, I concluded that the violation was unlikely to cause an injury resulting in lost workdays or restricted duty to one person. *See* discussion *supra* Part VI.C.1. Finally, Doe Run demonstrated good faith in abating the citation by having the cited pressure vessel inspected by a certified inspector. Sec'y Memorandum in Support at 13; Ex. S–A. In considering the criteria set

forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $151.00.

VIII. ORDER

In light of the foregoing, the Secretary's Motion for Summary Decision is hereby **GRANTED**. Accordingly, it is hereby **ORDERED** that Citation No. 9767916 is **AFFIRMED** as issued.

Respondent is **ORDERED** to pay the Secretary of Labor a civil penalty of **$151.00** within 30 days of this decision. [8]

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

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[8] 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.