

May 2025

**TABLE OF CONTENTS**

**COMMISSION ORDERS**

05-07-25	P&K STONE, LLC	CENT 2024-0295	Page 344
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**ADMINISTRATIVE LAW JUDGE DECISIONS**

05-21-25	SEC. OF LABOR O/B/O GUILLERMO ORTIZ v. KILAUEA CRUSHERS	WEST 2023-0281- DM	Page 348
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05-30-25	SEC. OF LABOR O/B/O BREK PINKERTON v. RMC MINING DEVELOPMENT, LLC, a corporation, RUSS MYERS, an individual, AMERICAN MINING PROPERTIES, LLC, a corporation, and MATTHEW WAYN HEAD, an individual	WEST 2024-0114	Page 360
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**Review Was Not Granted or Denied During The Month Of**  
**May 2025**

# **COMMISSION ORDERS**

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

May, 7, 2025

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

P&K STONE, LLC

Docket No. CENT 2024-0295  
A.C. No. 41-05110-596692

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

## ORDER

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On July 26, 2024, the Commission received from P&K Stone, LLC (“P&K”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that on April 12, 2024, the U.S. Postal Service attempted delivery of the proposed penalty assessment, but the assessment was marked “forward expired” and returned to

MSHA. The proposed assessment became a final order of the Commission on May 13, 2024. On June 27, 2024, MSHA sent P&K a delinquency letter. In July 2024, MSHA received a partial payment in the amount of \$5,237 from P&K.

P&K requests that the Commission reopen the final orders associated with five citations set forth in the proposed assessment<sup>1</sup> because it did not have the opportunity to file a timely contest due to an “error in delivery.” It explains that after the inspection involving the citations closed on February 13, 2024, the proposed assessment was not delivered to the mine. Rather, on July 11, 2024, the proposed assessment arrived at P&K’s main office located in McKinney, Texas. The operator submits that prior to the arrival in July, P&K did not receive any other correspondence from MSHA indicating that the operator was delinquent or that the penalties had become final orders.

The Secretary opposes the motion to reopen. She explains that on April 4, 2024, MSHA sent the assessment to P&K’s address of record, located in Chico, Texas. On April 12, 2024, the U.S. Post Office attempted delivery but returned the assessment to MSHA because there was no change of address on file. The Secretary states that P&K filed a new address of record on May 6, 2024, indicating that its new address is in McKinney, Texas, and that the operator received the delinquency notice at this new address. The Secretary asserts that there was no “error in delivery” because MSHA delivered mail to the operator’s address of record. She further argues that P&K failed to adequately explain the fundamental issue of why the proposed assessment was not deliverable to its address of record.

The Commission has held that “[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time.” *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed within 30 days of the operator’s receipt of the delinquency notice. Thus, the motion to reopen was filed in a reasonable amount of time.

A movant’s good faith is relevant in determining whether the movant has demonstrated good cause to reopen a final assessment. *See, e.g., Rockwell Mining, LLC*, 45 FMSHRC 743, 745 (Aug. 2023) (reopening where movant acted in good faith by timely filing its request to reopen); *Brand Indus. Svcs, LLC*, 46 FMSHRC 431 (July 2024) (relying upon operator’s good faith in determining whether to reopen when operator took prompt ameliorative action). We note that the operator filed its change of address form with MSHA on May 6, well before it received the delinquency notice. In fact, the operator filed its change of address form only 24 days after MSHA attempted delivery of the assessment to the operator’s prior address.

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<sup>1</sup> The five citations include Citations Nos. 9748506, 9748508, 9748509, 9748510, and 9784512. MSHA applied P&K’s payment of \$5,237 against the penalties associated with Citation Nos. 9748508 and 9748510. However, the penalties set forth on the proposed assessment, excluding the penalties for five citations that P&K intended to contest, total the amount of \$5,237. We conclude that P&K’s partial payment does not moot its contest of the penalties associated with Citations Nos. 8748508 and 9748510 because it appears that the operator did not intend for its payment to be applied against those penalties.

Having reviewed P&K's request and the Secretary's response, we find that the operator's failure to timely contest the assessment was the result of mistake or excusable neglect. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chair

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

Commissioner Marvit, concurring:

I write to 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, 977 (Dec. 2024) (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the U.S. Post Office attempted delivery of the proposed order on April 12, 2024 and was then returned to MSHA. Therefore, there was no actual receipt of the notification as required under 30 U.S.C. § 815(a). While 30 C.F.R. § 100.8(a) deems service to be completed when assessments are "delivered" to the addresses of record for representative parties, here there was only attempted delivery. As such, in my opinion, the Commission's order did not become final under the language of section 105(a) on May 13,

2024. Given then that the operator updated its address in a reasonable amount of time, receipt of the notification occurred with the delivery of the delinquency notice, after which the operator timely contested. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority though I believe the Commission is not reopening the 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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May 21, 2025

SECRETARY OF LABOR, U.S.  
DEPARTMENT OF LABOR  
on behalf of GUILLERMO ORTIZ,  
Complainant,

v.

KILAUEA CRUSHERS,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2023-0281-DM  
MSHA No. RM-MD-2023-06

Mine: Estrella North Mine

**DECISION AND ORDER**

Appearances: Afroz Baig and Rose C. Meltzer, U.S. Department of Labor, Office of the Solicitor, 90 7th Street, Suite 3-700, San Francisco CA 94103

Charles P. Keller and Tyler V. Thomas, Snell & Wilmer, 1 East Washington Street, Suite 2700, Phoenix AZ 85004

Before: Judge Simonton

**I. INTRODUCTION**

This case is before me upon a complaint of discrimination filed by the Secretary of Labor on behalf of Guillermo Ortiz against Kilauea Crushers pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). The parties presented testimony and documentary evidence at a hearing held on December 10-12, 2024, in Phoenix, Arizona. Retired MSHA Special Investigator Daniel Scherer, Complainant Guillermo Ortiz, and former Kilauea employee Joseph Blake testified for the Secretary. Kilauea foreman Randolph “Randy” Anthes, current employee Antonio Johnson-Lewis, former Kilauea employees Brian Waldon, Jose Herrera, and Cody Tucker, assistant plant foreman Ryan McPhall, general manager Jim Nichols and owner Bill Nichols testified for the Respondent. After fully considering the testimony and evidence presented at hearing and the parties’ post-hearing briefs, I **DISMISS** this discrimination complaint.

## II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. Jurisdiction of this action is conferred upon the Federal Mine Safety and Health Review Commission pursuant to § 113 of the Act, 30 U.S.C. § 823.
2. The Administrative Law Judge has jurisdiction of this matter.
3. Guillermo Ortiz was a “Miner” as defined in the Mine Safety Act (the “Act”).
4. Kilauea Crushers, Inc., is an “Operator” as defined in the Act.
5. At all relevant times, Respondent’s Estrella North Plant was a crushed granite mine, the products of which enter commerce or the operations or products of which affect commerce, within the meaning of § 3(b) and § 4 of the Act, 30 U.S.C. §§ 802(b) and 803.
6. Ortiz was employed by Kilauea Crushers, Inc. (“Kilauea”) from August 29, 2018, to January 31, 2023.
7. Ortiz was working at the Estrella North mine (“Estrella”) on January 20, 2023.
8. Ortiz was working at the Estrella North mine (“Estrella”) on January 25, 2023.
9. For the majority of Mr. Ortiz’s employment with Respondent, he worked at the Estrella North Plant mine.
10. Mr. Ortiz was not in a management position with Respondent.
11. Respondent terminated Mr. Ortiz on January 31, 2023.
12. At the time of his termination, Ortiz’s rate of pay was \$27.00 per hour.
13. Ortiz began working at Martin Marietta Materials (“MMM”) on March 6, 2023.
14. Bill Nichols is the President of Kilauea and one of its owners.
15. Marcilline J. Nichols is the Vice President of Kilauea Crushers, Inc. and one of its owners.
16. Jim Nichols is a Manager at Kilauea.
17. Randy Anthes is a Foreman at Kilauea. At all relevant times, he was the Plant Foreman at Kilauea’s Estrella mine.

Tr. 8.

### III. ANALYSIS AND FINDINGS

Guillermo Ortiz began working at Kilauea as a haul truck driver in 2018. Tr. I-75, I-77. At the time of his termination, he was working as a plant operator, a position he had held since 2022. Tr. I-78-79. Throughout his tenure, he worked at several different plants around the mine, including the VSI and sand plants. Tr. I-81. He was supervised by mine foreman Randy Anthes. Tr. I-79.

As an operator, part of Ortiz's responsibilities included conducting a daily pre-shift inspection to examine the equipment for wear and tear and to ensure the plant was in good working condition. Tr. I-86-87, 159; Ex. A. Miners were required to fill out and initial an inspection sheet containing a checklist of items such as checking for guards. Tr. I-160, 162; Ex. A. In addition to the inspection sheet, Ortiz kept a personal notebook detailing his daily work at each facility. Tr. I-100; Ex. S-16. The pre-shift inspection took 30 to 45 minutes to complete and was conducted while the plant was locked out and tagged out. Tr. I-203, I-299-300.

Operators were also responsible for cleaning out spillage from underneath the plant's conveyor belts. Tr. I-162. This task can be accomplished using either a skid-steer or a shovel and is safe to perform while the plant is running as long as it is properly guarded. Tr. I-162-163, I-187, III-22. While Ortiz believed that a skid-steer made cleaning underneath an unguarded machine safe because the person cleaning would be farther away, other employees attested a skid-steer is not a safety device and should not be used around unguarded machinery. Tr. I-95, II-183, III-24-25. Although he did not need permission to use the skid-steer, Ortiz would ask Anthes over the radio about its availability. Tr. I-231. These requests were frequently denied, although other miners had access to the skid-steer when they needed it. Tr. I-205, II 67-69.

In his testimony, Ortiz said he did not feel comfortable raising concerns to management, because he suffered bullying and harassment for bringing up safety issues. Tr. I-146, I-143, I-287. He did not think that management cared about miner safety as miners were instructed to keep plants running while issues went uncorrected. Tr. I-146. Other miners also had been bullied and harassed for similar activities, including another miner, Jose Herrera. Tr. I-297. Former Kilauea employee Joseph Blake agreed that the work environment was hostile, safety complaints were not taken seriously, and employees were mocked for raising issues. Tr. II-32-33, II-40-41. Ortiz also alleged that Anthes acted unprofessionally over the radio, making sexual, racial, and other derogatory comments. Tr. I-144, I-146, I-149-150. This behavior was never reported to upper management. Tr. I-287. Blake again corroborated Ortiz's account regarding radio usage and Anthes's negative comments. Tr. II-52-54, II-57.

Anthes and other employees did not agree with this characterization of the radio usage and work culture at Kilauea. Anthes testified that he did not make the types of derogatory comments alleged by Ortiz and had never heard anything like that over the radio. Tr. II-166. Other employees, including general manager Jim Nichols, similarly had

not heard any type of negative language over the radio or witnessed any harassment or bullying. Tr. II-258-259, II-292-293, II-322-323, III-33. Herrera specifically testified he was not bullied or harassed while at Kilauea and said that any comments made over the radio were just joking around. Tr. III-33-34.

#### **A. January 20, 2023, Safety Complaint**

Ortiz was assigned to the VSI-1 plant as the plant operator on January 20, 2023, assisted by another miner who was working as the load operator. Tr. I-85-86. During the pre-shift inspection while the machine was locked out and tagged out, he found that the plant was missing two guards and there was spillage underneath the conveyor belt. Tr. I-86-88. There was no record of missing guards in the daily inspection sheet, completed by Ortiz, or in Ortiz's personal notebook. Ex. C, Ex. 16.

When Ortiz asked for a skid-steer over the radio, Anthes informed him he would need to use a shovel because it was unavailable. Tr. I-87-89. In response, Ortiz reported that he would keep the machine locked and tagged out, which Anthes said was unnecessary and cleaning could occur while the machine was running. Tr. I-91, I-215, I-234-235. Ortiz alleged he then notified Anthes that the plant did not have guards. Tr. I-92. Ortiz said that Anthes sounded angry. Tr. I-92. The plant was kept locked out while Ortiz and his coworker cleaned, which took approximately 45 minutes to an hour. Tr. I-92. The missing guards were not repaired. Tr. I-218-219.

Randy Anthes disputed Ortiz's account of these events, stating that Ortiz did not ask him to use a skid-steer or otherwise communicate to him that the plant was missing guards. Tr. II-154-156. If Anthes had known the area was missing guards, he would not have allowed cleaning before the guards were repaired. Tr. II-155-157. Anthes also was not aware Ortiz kept the plant locked out to clean and Ortiz did not need permission to do so. Tr. II-158-159.

#### **B. January 25, 2023, Safety Complaint**

On January 25, 2023, Ortiz worked with Jose Herrera at the VSI-2 plant. Ortiz testified that this plant, like the VSI-1 on January 20, was missing guards, which was not noted in the daily inspection sheet completed by Ortiz or in his personal notebook. Tr. I-95; Ex. B, Ex. 16. Concerned about the plant's moving parts, Ortiz testified he requested a skid-steer to clean with over the radio, which Anthes refused. Tr. I-94-95. He did not report the missing guards to Anthes at this time, because he believed Anthes was already aware. Tr. I-239-240.

As the machine ran and spillage accumulated, Ortiz notified Herrera that he wanted to lock out the plant to clean. Tr. I-95-96. Herrera told him the plant does not shut down once it starts. Tr. I-96, I-247-248. Unable to keep up with cleaning, however, Ortiz then radioed Anthes he was going to lock out the plant. Tr. I-96-97, I-246. Ortiz alleged Anthes became angry and questioned Ortiz about why he was shutting the plant down to clean when there was no reason to do so. Tr. I-97-98. Ortiz responded that he

was shutting down because the plant was not guarded. Tr. I-97. Herrera then left to speak with Anthes, and when he returned, he informed Ortiz that Anthes was mad at him for shutting down. Tr. I-96-97, I-249.

Jose Herrera, testifying for the Respondent, denied that the plant was missing guards, stating that he would never start a plant in that condition and Anthes never told them to run the plant without guards. Tr. III-23-24, III-28. He checked for guards on the VSI-2 during the pre-shift inspection and found they were all in place. Tr. III-11-15, III-28. During the shift, Ortiz did not voice any complaints to him about a missing guard or other safety concern, only communicating to Herrera that he wanted to lock out and tag out the VSI-2. Tr. III-28-29. Herrera stopped the plant to re-inspect it and confirmed that no guards were missing. Tr. III-29. As there was no safety reason to keep the plant locked out, he re-started the machine. Tr. III-30-31. He then helped Ortiz clean the spillage using shovels. Tr. III-31, 45. After this exchange, Herrera admitted he had been angry with Ortiz and spoke with Anthes in his office about what had occurred. Tr. III-32. He no longer wanted to work with Ortiz because he did not listen. Tr. III-32. He admitted he told Anthes that Ortiz was the person who shut down the plant. Tr. III-45.

Anthes described Herrera as “very upset,” informing him that he was tired of working with Ortiz, Ortiz would not help clean, and if he had to keep working with Ortiz, he would be looking for a new job. Tr. II-162-163, II-171. Safety issues were not brought up or discussed in the conversation, and Herrera did not mention that Ortiz had raised safety complaints. Tr. II-163. According to Anthes, Ortiz never raised any kind of safety concerns about the VSI plants prior to his termination. Tr. II-167. Anthes could not recall if Ortiz requested a skid-steer on January 25. Tr. II-160.

### **C. Ortiz’s Termination and Discrimination Complaint Investigation**

Anthes reported the conversation with Herrera to Jim Nichols. Tr. II-185. He explained that Herrera had come to his office, upset because Ortiz had not helped dig, and threatened to find a new job if he had to continue working with Ortiz. Tr. II-184-185. Anthes also explained to Nichols that Ortiz refused to dig with a shovel when a skid-steer was unavailable. Tr. II-182. Anthes did not make any recommendations to keep or terminate Ortiz, and after the phone call did not have any further conversations about Ortiz. Tr. II-164-165, II-184. He was not consulted when the decision to terminate was made. Tr. II-175.

Similar to Anthes, Jim Nichols, the general manager, and Bill Nichols, the mine’s owner, both testified that they were not aware of any safety complaints raised by Ortiz. Tr. II-22, II-25, II-237, II-244-245. After learning about the dispute between Herrera and Ortiz, Jim Nichols decided to recommend termination to Bill Nichols based on Ortiz’s “body of work,” lack of proper job fit, and unsatisfactory performance. Tr. II-243-244. He did not consult with Anthes or any other member of management during the decision-making process. Tr. II-244. Bill Nichols, who made the final decision on Ortiz’s termination, affirmed that Jim Nichols’s recommendations were not related to safety complaints and were solely based on productivity and work performance. Tr. II-22-24.

Jim Nichols terminated Ortiz on January 31, 2023, explaining that it was due to poor performance, in part for refusing to use the shovel to clean. Tr. I-104, I-252. Ortiz was surprised by the termination because he thought he had good work performance, as he had never received any written discipline and only a few instances of verbal discipline. Tr. I-106. Because Nichols said that the termination was based on what management had told him, Ortiz believed Anthes played a role in the decision. Tr. I-105, I-150. During his termination, Ortiz did not discuss the events that occurred at the VSI plants on January 20 and 25, only informing Jim Nichols that he thought Anthes was retaliating against him. Tr. II-247.

After his termination, Ortiz filed this discrimination complaint. Special Investigator Daniel Scherer conducted the investigation into Ortiz's complaint. Tr. I-25-27. He found that Ortiz engaged in protected activity twice, each time he requested to use the skid-steer because he believed the job was too dangerous due to unguarded equipment. Tr. I-49-50. Ortiz suffered adverse action when he was terminated shortly after making his complaints, which indicated to the inspector there was a nexus between the two events. Tr. I-50-51. Scherer interviewed three non-management employees from Kilauea as part of his investigation, who informed the inspector that Ortiz was a good employee. Tr. I-46, I-52, I-58. Kilauea management elected to submit position statements in lieu of interviews. Tr. I-48.

Kilauea represented that Ortiz was terminated for poor performance. Tr. I-46-47. Scherer did not find any support for the employer's position. Tr. I-52. Ortiz's personnel file did not contain any record of discipline and Kilauea did not provide other documentation related to the termination, such as employment policies, rules Ortiz allegedly violated, or disciplinary policies. Tr. I-39-40; Ex. S-7. Scherer represented that he had difficulty receiving this documentation, making several requests and involving his supervisor to encourage Kilauea to produce the necessary documents so he could complete his investigation. Tr. I-35-39; Ex. S-5, S-6, S-7. While there was a later opportunity to interview Kilauea management, Scherer chose not to do so, because they were only available after he had to submit his investigative file in accordance with statutory deadlines. Tr. I-62-63.

#### **D. Ortiz's Work History and Performance**

In addition to the safety complaints raised in January 2023, Ortiz expressed that he was retaliated against when he was unable to work a Saturday overtime shift due to a vacation in December 2022. Tr. I-198. The Friday prior to his vacation, Anthes notified Ortiz it was mandatory to work the next day, leading to an argument between the two. Tr. I-80-81. Ortiz felt that Anthes was mad at him based on his tone and reaction during the conversation. Tr. I-196. The dispute was resolved when Ortiz called the front office, who told him that he did not need to work on Saturday. Tr. I-81. Ortiz believed this dispute motivated Anthes's decision to terminate him, because Ortiz had escalated the issue to the front office. Tr. I-198.

Anthes did not have an issue with Ortiz taking vacation, but rather with the fact that he did not note on the employee leave calendar that he could not work that Saturday. Tr. II-136-137. The whole crew was expected to work overtime and it was common that employees would only be alerted the day before when overtime was necessary. Tr. II-137. When Ortiz told him he couldn't work Saturday, Anthes told him to call the front office, who granted Ortiz permission to have off. Tr. II-138-139. Anthes maintains that he did not retaliate against him. Tr. II-139.

While Ortiz was on vacation, Anthes moved him from the sand plant to the VSI plants, which Ortiz felt was retaliatory. Tr. I-82, I-200. Anthes, however, said the move resulted from equipment damage discovered in Ortiz's absence. Tr. II-143-144. Brian Waldon, Ortiz's replacement at the sand plant, found that the plant's bearings had not been greased in some time. Tr. II-284-285. Cody Tucker, the maintenance technician who repaired the machinery, replaced several bearings, two shaft couplers, a belt, and the filters located inside the baghouse. Tr. III-60. Tucker, ascribed the necessary repairs to Ortiz's lacking job performance, especially when compared to other plant operators. Tr. III-62. Repairs for the damage were costly. Ex. S, T, U. Once Ortiz was moved from the sand plant, it no longer had the same type of issues. Tr. II-153.

Prior to December, maintenance constantly repaired issues with Ortiz's machines at the sand plant, such as replacing the water pumps and compressors, because Ortiz failed to perform routine maintenance. Tr. III-56-57. When these issues were brought to Ortiz's attention, he became defensive and angry. Tr. III-59. Kilauea also identified other instances of damage attributable to Ortiz. Tr. I-353-354. While Ortiz was operating a loader, he damaged a conveyor's legs when he hit them with the loader's bucket. Tr. II-220. He also frequently failed to check the wear parts on the table inside the VSI, necessitating the replacement of the entire table. Tr. II-226-227. As the wear parts need to be inspected every four to five hours, Kilauea attests that the fault for this equipment failure rested with Ortiz. Tr. II-226.

Although Ortiz described his work performance as "excellent," the only witness who concurred with this assessment of his work performance was Blake, who could only address Ortiz's performance as a haul truck driver. Tr. II-82-83. Other employees found it lacking because he was not a team player, did not offer help to other miners, and was lazy. Tr. II-288-291. Management received complaints regarding Ortiz's failure to assist other employees or get all his work done. Tr. II-221. Two employees witnessed Ortiz leave his plant unsupervised while it was running, which is a safety hazard. Tr. II-291, II-306. Ortiz would not dig out until the spillage reached a point of panic. Tr. II-288-291. Ryan McPhall, the assistant plant foreman, had difficulty getting Ortiz to shovel, a task expected of everyone, and that Ortiz would argue when asked to do so. Tr. I-345. Jim Nichols moved Ortiz to different positions around the mine after receiving complaints about his refusal to work with others, coordinate properly, and his inability to perform maintenance in a timely manner. Tr. II-218, II-225-226, II-228-229.

Although Kilauea was unable to produce documentation demonstrating disciplinary action taken against Ortiz, Anthes testified that discipline would most often come in the

form of verbal discussions. Tr. II-274. Anthes and McPhall, as members of mine management, were permitted to administer discipline through counseling or verbal warning. Tr. I-316, II-116. Prior to Ortiz's termination, Anthes had talked to Ortiz about his failure to perform maintenance and discussed issues other employees had raised, including Ortiz's tendency to watch others work. Tr. II-118-119. McPhall, who also supervised Ortiz, described similar habits and attitudes. Tr. I-308. He had also verbally disciplined Ortiz for failing to grease the bearings on one of the plants and then lying about it. Tr. I-346.

#### IV. DISPOSITION

Section 105(c)(1) of the Mine Act provides that a miner shall not be discharged or otherwise discriminated against because they have made a complaint regarding an alleged safety or health violation. 30 U.S.C. § 815(c)(1). It specifically states: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine."

For more than forty years, the Commission has utilized the *Pasula-Robinette* framework to adjudicate claims of discrimination brought under section 105(c) of the Mine Act. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799–2800 (Oct. 1980), *rev'd on other grounds sub nom; Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castile Coal Co.*, 3 FMSHRC 805, 817–18 (Apr. 1981). Under the traditional *Pasula-Robinette* framework, a miner alleging discrimination establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that (1) the complainant engaged in protected activity, and (2) the adverse action complained of was motivated in any part by the protected activity. *Jayson Turner v. Nat'l Cement Co.*, 33 FMSHRC 1059, 1064 (May 2011); *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817–18. If a miner establishes a *prima facie* case, the operator can then rebut the case "by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSHRC at 1064. If the operator cannot rebut the *prima facie* case, it can nevertheless defend affirmatively by proving that although part of its motivation was unlawful, the adverse action was also motivated by the miner's unprotected activity, *and* it would have taken the adverse action against the miner for the unprotected activity alone. *Id.*; *Pasula*, 2 FMSHRC at 2799–2800.

A miner has engaged in protected activity if they (1) have "filed or made a complaint under or *related to* this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) are "the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) have "instituted or caused to be instituted any proceeding under or related to this Act or has testified or is

about to testify in any such proceeding;” or (4) have “exercised on behalf of himself or others . . . any statutory right afforded by this Act.” 30 U.S.C. § 815(c)(1) (emphasis added).

In *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021), the Ninth Circuit abrogated the *Pasula-Robinette* framework, traditionally used to adjudicate discrimination claims brought under section 105(c) of the Mine Act. The Ninth Circuit noted that section 105(c) of the Mine Act uses the term “because of” four times—each time without any modifiers—and concluded that it thus plainly incorporates a “but-for” causation standard. *Id.* at 1210. Accordingly, “[s]ection 105(c)’s unambiguous text requires a miner asserting a discrimination claim under Section 105(c) to prove but-for causation.” *Id.* at 1211.

The “but for” causation standard, as applied to discrimination cases, has been articulated in the following manner: complainant must show that (1) he engaged in what is known as “protected activity” (i.e., “the exercise of statutory rights”); and (2) that the adverse action complained of (here the Complainant’s termination) was “because” of that protected activity. In other words, in cases ultimately subject to Ninth Circuit review the Complainant must show that his employer would not have taken the adverse action against him, “but for” the protected activity he engaged in. *Thomas v. CalPortland Co.*, 43 FMSHRC 314 (June 2021) (ALJ) (decision on remand applying but-for standard), pet. for rev. filed Dec. 29, 2021; see also *Sec’y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 302–303 (June 2021).

Whether a perceived hazard is actually unsafe is not determinative of the protected status of a complaint. *Sec’y of Labor obo McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986 (2001); *Consolidation Coal Co. v. Marshall*, 663 F.2d at 1215. Provided that a miner has a good faith belief that a safety hazard exists, they are protected in bringing their concern to the operator. *Robinette*, 3 FMSHRC 803; *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989). A “good faith belief simply means [an] honest belief that a hazard exists.” *Id.* While Ortiz appears to hold a misconception that it is safe to use a skid-steer to clean underneath an unguarded plant, he believed that he needed to either use a skid-steer or lock out the plant to safely clean under the VSI plants on January 20 and 25, 2023. I find that this constitutes two instances of protected activity.

“Adverse action,” as defined by the Commission, is “an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship” and is decided on a case-by-case basis. *Sec’y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012); *Sec’y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2 (Aug. 1984). Termination has long been considered an adverse action. *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 32p (Apr. 1998). Therefore, Ortiz suffered an adverse action when he was terminated from his employment at Kilauea on January 31, 2023.

In evaluating whether a causal connection exists between the protected activity and the adverse action, the Commission looks to four factors: “(1) the mine operator’s

knowledge of the protected activity; (2) the mine operator's hostility or 'animus' toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner." *Cumberland River Coal Co.*, 712 F.3d 311, 318 (6th Cir. 2013); *see also Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–2512 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The timing of the adverse action occurred in close temporal proximity to each instance of protected activity: Ortiz was terminated on January 31, eleven days after the protected activity occurring on January 20 and six days after the protected activity occurring on January 25. This is enough to demonstrate a causal connection between the protected activity and adverse action. I find that the Secretary established a prima facie case of discrimination.

The burden of production now shifts to the Respondent to rebut the prima facie case of discrimination by articulating a legitimate non-discriminatory reason for the Complainant's termination. This can be achieved by either producing evidence that no protected activity occurred or that the adverse action was not motivated by the protected activity.

Kilauea argues that no protected activity occurred because Ortiz's initial discrimination statement only references retaliation arising from the vacation dispute and not from workplace safety issues. However, this argument is unavailing because I have already found that there was protected activity, as discussed above. Alternatively, Kilauea argues that Ortiz was fired not for protected activity, but for unrelated performance issues that occurred throughout his employment. I find that Anthes only relayed information concerning a personal dispute between Herrera and Ortiz to the decisionmakers in Ortiz's termination, Jim and Bill Nichols, who were not aware of any safety-related complaints. The only factors Kilauea considered in the termination were related to Ortiz's work history, as evidenced by the extensive testimony related to equipment damage attributed to Ortiz, his reputation, and his work habits. Accordingly, I find that Kilauea has met the burden of production and established a sufficient rebuttal to the prima facie case of discrimination.

The Secretary alleges that Kilauea's reasoning for Ortiz's termination shifted several times throughout the litigation. Six explanations for Ortiz's termination were provided, including the neglected condition of the sand plant discovered during Ortiz's vacation, other damage to equipment occurring at unknown times, Ortiz's failure to maintain the plant and his refusal to use a shovel to prevent Herrera from quitting, Ortiz's "body of work," and, finally, other productivity concerns. The Secretary claims that there is no factual support for any of these reasons, as there are no notes contained in Ortiz's personnel file detailing any discipline or performance concerns, and Kilauea never investigated the equipment damage to determine who caused it when multiple miners work at each plant. Further, Kilauea had never previously terminated a miner because another employee refused to work with them. The Secretary argues that these "shifting justifications" demonstrate that Ortiz's termination was pretextual.

However, substantial evidence supports the Respondent's position that Ortiz was terminated for poor work performance. Jim Nichols, after receiving complaints about Ortiz's work performance, transferred Ortiz to different plants several times in an attempt to find a good fit. Multiple witnesses for the Respondent who observed Ortiz's performance as a plant operator consistently testified that Ortiz was lazy and that he did not keep up with cleaning or maintenance, damaging equipment and machinery through negligence and causing expensive repairs. Further Anthes and McPhall both testified that they talked to Ortiz about problems with his work performance prior to his termination. I credit the Respondent's witness testimony that Ortiz's work performance was unsatisfactory.

The parties also dispute whether Anthes had knowledge of Ortiz's safety complaints. On both January 20 and January 25, Ortiz claims to have informed Anthes over the radio that he had to lock out and tag out the plant because it was missing guards, which made Anthes angry. Conversely, Anthes asserts that he did not know about the missing guards and if he had known, he would not have instructed an employee to run a machine without guards. Examining the evidence, the daily inspection sheets and Ortiz's work notebook do not reflect that the plants were missing guards. Jose Herrera, who directly observed the VSI-2's condition on January 25 and specifically checked for guards twice, asserts that guards were in place and that Ortiz never communicated to him any safety complaints. Further, each of the Respondent's witnesses testified that they would not operate a plant that was missing guards, had never been ordered to run a plant with missing guards, and would repair or replace the guards before starting the plant. Other than Ortiz's unsupported assertions there are no indicia that Anthes had knowledge of Ortiz's safety complaints.

Even assuming that Anthes knew of Ortiz's protected activity and that knowledge could be imputed to the decisionmakers Bill and Jim Nichols, the evidence does not suggest that Ortiz's protected activity was even a factor in his termination. Both Herrera and Anthes testified that the conversation in Anthes's office that occurred on January 25 concerned Herrera's refusal to continue working with Ortiz due to his work habits. The conversation in the office, and the issues Anthes subsequently brought to Jim Nichols did not concern safety or other forms of protected activity. Bill and Jim Nichols each stated they were not aware of any safety complaints and only considered productivity and work performance when deciding to terminate Ortiz. The Secretary has not met the

burden of proving that but for Ortiz's protected activity, he would not have been terminated.

## V. ORDER

Accordingly, it is **ORDERED** that the complaint of discrimination is hereby **DISMISSED**.

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge  
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May 30, 2025

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of BREK PINKERTON,  
Complainant,

v.

RMC MINING DEVELOPMENT, LLC, a  
corporation, RUSS MYERS, an  
individual, AMERICAN MINING  
PROPERTIES, LLC, a corporation, and  
MATTHEW WAYN HEAD, an individual,  
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2024-0114  
MSHA No. RM-MD-2024-01

Mine: Harquahala Mine

## **DEFAULT DECISION** **& ORDER ON RELIEF**

This case is before me upon a complaint of discrimination filed by the Secretary of Labor (the “Secretary”) on behalf Brek Pinkerton against RMC Mining Development, LLC (“RMC”), American Mining Properties, LLC (“AMP”), Russ Myers, and Matthew Wayn Head (collectively, the “Respondents”)<sup>1</sup>, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On April 25, 2025, the Secretary filed a Motion for Default Judgement (the “Motion”). For reasons set forth below, the Secretary’s Motion is **GRANTED** and the Respondents are **ORDERED** to comply with the terms of relief discussed herein.

The Secretary, in her Motion, asserts that the Respondents, despite contesting the alleged 105(c) violation, have refused to participate in this litigation. Specifically, the Secretary avers that Respondent RMC has not responded to discovery propounded in July 2024 and has twice failed to appear for deposition testimony for which subpoenas were issued by this court. Further, the remaining Respondents, i.e., AMP, Myers and Head, have refused to file an Answer to the Secretary’s Second Amended Discrimination Complaint or respond to this court’s March 20, 2025, Order to Show Cause for failing to timely file an Answer. Accordingly, the Secretary moves the court to enter an order of default judgement requiring the Respondents to pay back pay plus interest, consequential damages, compensatory damages, and a civil monetary penalty. Further, the Motion moves the court to order other non-monetary relief.

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<sup>1</sup> RMC was originally the only respondent in this matter. On November 21, 2024, I granted the Secretary’s Motion to Amend the Complaint to add AMP, Myers and Head as respondents.

The Respondents did not file an opposition to the Secretary's Motion.

This case presents the court with an unusual situation where the Respondents have failed to meaningfully participate in the litigation<sup>2</sup> despite being given several opportunities to do so. Although the Respondents' failures are many, for the purposes of this order I focus on their failures to respond to two orders to show cause.

On August 21, 2024, prior to the addition of AMP, Myers and Head as respondents, I issued an order in which I stated my expectation that RMC would respond directly and promptly to any communications initiated by the Secretary. RMC failed to do so. Moreover, RMC repeatedly failed to respond to communications from the court. Consequently, on October 2, 2024, I issued an Order to Show Cause requiring RMC to demonstrate why sanctions up to and including a default order should not be entered. RMC did not respond to the Order to Show Cause.

Subsequently, after AMP, Myers and Head were added to this matter, the Respondents failed to file an Answer to the Secretary's Second Amended Discrimination Complaint. As a result, on March 6, 2025, I issued an Order to Show Cause requiring the Respondents to provide an explanation for their failure to file an Answer and informing them that not doing so may result in sanctions up to and including default judgement. The Respondents again failed to respond to the Order to Show Cause.

The Commission's procedural rules state that "[w]hen a party fails to comply with an order of an ALJ or these rules . . . an order to show cause shall be directed to the party before the entry of any order of default[.]" 29 C.F.R. § 2700.66. The Commission has "observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted." *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995)

Here, the Respondents failed to comply with court orders, did not respond to multiple orders to show cause, and did not respond to the Secretary's Motion for Default Judgement. Accordingly, I find that RMC, AMP, Myers and Head are in **DEFAULT** and the allegations included in the Secretary's Second Amended Discrimination Complaint filed with the court on November 26, 2024, are deemed to be true and are incorporated as findings of fact in this decision.<sup>3</sup> As a result, I find that the Respondents violated Section 105(c) as alleged. I now turn my attention to the question of relief.

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<sup>2</sup> Among other things, in addition to the various failures discussed herein, Respondent RMC was late to file the original answer in this matter, and late in filing its response to an order to show cause issued on March 26, 2024. Moreover, Respondent Myers failed to appear at a scheduled deposition and failed to appear on a conference call ordered by the court.

<sup>3</sup> The first set of numbered paragraphs of the Secretary's Second Amended Discrimination Complaint, i.e., paragraphs 1 through 12, address, among other things, the Commission's jurisdiction over this matter, the authority upon which the action was brought, the relationship of the Respondents to this matter, the protected activity Pinkerton engaged in, and the adverse action Pinkerton would not have suffered but for his protected activities.

Section 105(c)(2) of the Act sets forth the relief available to victims of discrimination as follows:

The Commission shall have authority . . . to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

30 U.S.C. § 815(c)(2). The Secretary seeks several forms of relief in this matter. I address each below.

### ***Back Pay***

The Mine Act explicitly contemplates an award of back pay and interest when a violation of Section 105(c) occurs. 30 U.S.C. § 815(c)(2). Here, the Secretary asserts that Pinkerton is owed \$5,168.00 in back pay and interest for the period between September 25, 2023 and October 13, 2023 when miners were withdrawn under a 104(g) order, \$4,579.20<sup>4</sup> in back pay and interest for the period after he was terminated until he started his new job, and \$31,353.48 in back pay and interest for the difference in wages earned at his new job and what he would have earned at RMC had he not been unlawfully terminated. Sec’y Mot. 5-6, 9-11. The Secretary provided the declaration of Lee Hughes, an MSHA Special Investigator, as support for how the amounts were calculated. Hughes Decl. ¶¶ 3 and 5, Exs. A and C. I incorporate Hughes’s calculations in this decision. The Respondents, having been found in default and not opposing the Secretary’s Motion, are **ORDERED** to pay Pinkerton a total of \$41,100.68 in back pay and interest.<sup>5</sup>

### ***Consequential Damages***

The Commission and its judges have awarded relief in the form of consequential damages for losses stemming from unlawful discrimination. *E.g.*, *Amos Hicks v. Cobra Mining*, 14 FMSHRC 50 (Jan. 1992) and *Sec’y of Labor on behalf of Groves v. Con-ag, Inc.*, 39 FMSHRC 1811 (Sept. 2017) (ALJ). The Secretary seeks damages for costs associated with mileage Pinkerton would not have incurred but for his unlawful termination. Sec’y Mot. 5, 12. Special Investigator Hughes’s declaration explains how the Secretary calculated a consequential damages award of \$13,497.00. Hughes Decl. ¶ 4, Ex. B. I incorporate Hughes’s calculations in this decision. The Respondents, having been found in default and not opposing the Secretary’s Motion, are **ORDERED** to pay Pinkerton a total of \$13,497.00 in consequential damages

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<sup>4</sup> The amount in the Secretary’s Motion differs from the amount calculated by Hughes and included in Exhibit A of his declaration. I rely on the amount calculated by Hughes and included in his declaration.

<sup>5</sup> The amount of back pay and interest sought by the Secretary in her Motion differs from the amount calculated by Hughes and included in his declaration. In arriving at the total amount ordered here, I rely on the amounts calculated by Hughes and included in Exhibits A and C of his declaration.

stemming from mileage that otherwise would not have been incurred but for the unlawful discrimination.

### ***Compensatory Damages***

The Secretary asserts that, although “the Commission has never specifically decided whether emotional distress damages may be awarded[,]” the Act’s language empowers the agency to award such. Sec’y Mot. 12-13.

The Secretary is correct that the Commission has never directly addressed the issue of compensatory damages.<sup>6</sup> However, and as noted by the Secretary, Commission judges have approved settlement agreements in which the parties agreed to compensatory damages,<sup>7</sup> and at least one judge has acknowledged the potential for damages “for ‘pain and suffering and inconvenience.’” See *Justice v. Rockwell Mining, LLC*, 40 FMSHRC 1582 (Dec. 2018) (ALJ) (noting the Commission’s broad remedial authority to craft relief “suitable to the facts of each [105(c)] case[,]” and not ruling out the “possibility of another appropriate remedy[.]”).

Although compensatory damages are not explicitly mentioned in the Act, Section 105(c)(2), under which this proceeding was brought, grants the court authority “to take such affirmative action to abate the violation *as the Commission deems appropriate, including, but not limited to*, the rehiring or reinstatement of the miner to his former position with back pay and

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<sup>6</sup> Multiple Commission judges, citing a lack of authority, have declined to award compensatory damages for emotional distress/pain and suffering in discrimination cases. *E.g.*, *Casebolt v. Falcon Coal Co.*, 6 FMSHRC 485 (Feb. 1984) (ALJ) (“[A]ll I can say is that life is unfair but that I find no warrant in the statute or precedent for an award of damages for pain and suffering.”); *Bewak v. Alaska Mechanical, Inc.*, 33 FMSHRC 2337 (Sept. 2011) (ALJ) (“There is no authority or precedent for awarding compensatory damages for damage to reputation and/or pain and suffering.”); *Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037 (Sept. 2015) (ALJ) and *Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337 (Oct. 2015) (ALJ) in both of which the ALJ stated that “[s]ome damages are not recognized for relief under the Mine Act. For example, there is no authority or precedent for awarding compensatory damages for damage to reputation and/or pain and suffering”; See *Sec’y of Labor on behalf of Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435 (June 2016) (ALJ) (stating that “[t]he court expresses no opinion as to whether emotional distress damages may ever be awarded under the Act, absent any concrete injury or financial loss[.]” while at the same time finding that the facts of the case were not of “the sort of exceptional circumstances that might merit such an award.”). However, I am not bound by the decisions of other Commission ALJs.

<sup>7</sup> *E.g.*, *Sec’y of Labor on behalf of Young v. F&E Erection Co.*, 16 FMSHRC 2122 (Oct. 1994) (ALJ) (Granting a motion to approve settlement and directing payment of damages for “pain and suffering and emotional distress.”); *Sec’y of Labor on behalf of DeLong v. Bruce Young d/b/a BNA Trucking and Yogo, Inc.*, 18 FMSHRC 31 (Jan. 1996) (ALJ); *Sec’y of Labor on behalf of Howard v. Bruce Young and Yogo, Inc.*, 18 FMSHRC 1054 (June 1996) (ALJ).

interest.” 30 U.S.C. § 815(c)(2) (emphasis added).<sup>8</sup> This “broad remedial charge” grants Commission judges “considerable discretion in fashioning remedies appropriate to varied and diverse circumstances.” *Sec’y of Labor on behalf of Rieke v. Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1257-1258 (July 1997) (quoting *Sec’y of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142 (Feb. 1982)). Indeed, the Commission has stated that, unless there are compelling reasons to not do so, “the full measure of relief should be granted” to victims of discrimination. *Sec’y of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (Dec. 1983) (quoting *Sec’y of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (Jan. 1982)).

Given the broad language of Section 105(c)(2), the Commission’s recognition of its judges’ considerable discretion to fashion appropriate relief, and the Respondents’ failure to participate in this litigation or in any way object to the Secretary’s requested relief, I find that compensatory damages are appropriate. Here, the Secretary seeks \$75,000.00 in emotional distress damages stemming from severe trauma Pinkerton suffered due to the “nature of the discrimination.” Sec’y Mot. 13. The Respondents, having been found in default and not opposing the Secretary’s Motion, are **ORDERED** to pay Pinkerton a total of \$75,000.00 in compensatory damages due to emotional distress he suffered as a result of the discrimination.

### *Non-Monetary Relief*

The Secretary moves for several forms of non-monetary relief. Sec’y Mot. 14-16. Given that the Respondents have been found in default and have not opposed the Secretary’s Motion, I enter the following orders:

- The Respondents are **ORDERED** to immediately expunge Pinkerton’s employment record of all references to the circumstances involved in this matter, including that he was terminated.
- The Respondents are **ORDERED** to immediately provide a neutral job reference to Pinkerton’s potential employers, if requested, stating his job title, job responsibilities, period of employment, and salary.
- It is **ORDERED** that, within 30 calendar days of commencing any business subject to the MSH Act or employing any employee subject to the MSH Act, the Respondents and their officers, managers, supervisors, human resources staff, and forepersons are to receive comprehensive Miners’ Rights and Responsibilities training under the Federal Mine Safety and Health Act of 1977, and provide this training to all miners on an annual basis.
- It is **ORDERED** that, immediately upon commencing any business subject to the MSH Act or employing any employee subject to the MSH Act, the Respondents must announce at any safety meeting that any Respondent holds that all of its employees can raise any safety issue with MSHA by calling 1-800-746-1553 in addition to the company’s normal reporting procedures

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<sup>8</sup> The Secretary argues that federal district courts regularly award compensatory damages under the Occupational Safety and Health Act, 29 U.S.C. § 660(c), which contains language similar to that of the Mine Act’s anti-retaliation provisions. Sec’y Mot. 12-13.

- It is **ORDERED** that, immediately upon commencing any business subject to the MSH Act or employing any employee subject to the MSH Act, the Respondents must include in any employee handbook, safety manual, and/or orientation material the following statement, which must be provided to all employees, including management officials and executive leadership:

You have a right to:

1. File or make a complaint of an alleged danger or safety or health violation to a Federal or State agency, a mine operator, an operator's agent or a miner's representative.
  2. Participate in proceedings under the Act such as: testifying, assisting, or participating in any proceeding instituted under the Act, or filing a complaint with the Federal Mine Safety and Health Review Commission.
  3. Refuse to work if you have not been provided with the required health and safety training, including all relevant site-specific training.
  4. Object and refuse to work if you have a good faith, reasonable belief that a specific working condition is unsafe.
  5. This includes a supervisor's instruction to engage in or work under conditions that you have a good faith, reasonable belief to be unsafe.  
NOTE: You must notify the operator of the condition and give them an opportunity to address the situation.
  6. Exercise any statutory rights afforded by the Act.
- It is **ORDERED** that, immediately upon commencing any business subject to the MSH Act or employing any employee subject to the MSH Act, the Respondents must publish on any website or other public-facing recruitment and onboarding materials created language that encourages miners to raise safety concerns within the company to MSHA without fear of retaliation.

### ***Civil Penalty***

The Secretary seeks a \$30,000.00 civil penalty from the Respondents. 29 C.F.R. § 2700.44. Special Investigator Hughes's declaration states that the penalty amount was arrived at "using criteria required by regulation and based on additional information" possessed by MSHA's office of Assessment. Hughes Decl. ¶ 6. The Respondents, having been found in default and not opposing the Secretary's Motion, are **ORDERED** to pay the Secretary a civil penalty of \$30,000.00.

## ORDER

For the reasons set forth above, I find that the Respondents are in **DEFAULT**. The Secretary's Motion for Default Judgement is **GRANTED**. The Respondents are **ORDERED** to pay Brek Pinkerton a sum of \$129,597.68<sup>9</sup> for back pay and interest, consequential damages and compensatory damages. Further, the Respondents are **ORDERED** to comply with the non-monetary relief items discussed above. Finally, the Respondents are **ORDERED** to pay the Secretary a civil penalty of \$30,000.00. The Respondents are **ORDERED** to make the payments to Pinkerton and the Secretary within 30 days of the date of this decision.

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

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<sup>9</sup> \$41,100.68 (back pay and interest) + \$13,497.00 (consequential damages) + \$75,000.00 (compensatory damages) = \$129,597.68