September 2024

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 5, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. RAM ENTERPRISE, INC.	Docket No. WEST 2023-0351 A.C. No. 48-00152-573340

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 15, 2023, the Commission received from Ram Enterprise, Inc. ("Ram Enterprise") a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

In March of 2023, Ram Enterprise received a proposed penalty assessment from the Secretary. On April 26, 2023, the Secretary deemed the proposed assessment a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days.

Ram Enterprise seeks to reopen three citations, 9725542, 9725543 and 9725545, asserting that it had timely contested the citations in the proposed assessment.

In June 2023, it received a delinquent payment notice and contacted MSHA for an update on the pending contest hearing. It was told to contact the Denver District Office. On July 6, 2023, it emailed MSHA but did not receive a response. The Secretary does not oppose the request to reopen and confirms that the operator did in fact timely contest the proposed assessment.

Having reviewed Ram Enterprise's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the

Commission." 30 U.S.C. § 815(a). Here, Ram Enterprise notified the Secretary of the contest. This obviates any need to invoke Rule 60(b).

Accordingly, the operator's motion to reopen is moot, and 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/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 6, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. COOPER STONE, LLC	Docket No. CENT 2023-0056 A.C. No. 41-03401-566398

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 7, 2023, the Commission received from Cooper Stone, LLC ("Cooper Stone") a motion seeking to reopen a penalty assessment and relieve it from the Default Order entered against it.

On March 20, 2023, the Chief Administrative Law Judge issued an Order to Show Cause in response to Cooper Stone's perceived failure to answer the Secretary of Labor's January 17, 2023 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a default on April 20, 2023, when it appeared the operator had not filed an answer within 30 days.

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

Cooper Stone seeks to reopen this matter, claiming that negotiations with MSHA were ongoing when it received the default order and it mistakenly believed that no answer needed to be filed unless the parties failed to reach an agreement. Cooper Stone states that negotiations with MSHA began on February 2, 2023, and ended on May 30, 2023.

The Secretary opposes Cooper Stone's request to reopen the assessment, asserting that ignorance of the proper procedure is not a sufficient justification for reopening and may indicate an unreliable or inadequate internal processing system. She notes that both the Penalty Petition and Order to Show Cause explained the proper procedure, and that as an experienced operator

who had owned the relevant mine since 1992, Cooper Stone should have known how to proceed with penalty contests. The Secretary also asserts that Cooper Stone failed to adequately explain why the motion to reopen was filed four months after MSHA mailed a delinquency notification, and six months after the Show Cause Order was issued (and negotiations ended).

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).

However, we have also held that motions to reopen, regardless of merit, are only granted if they are filed within a reasonable time. *E.g.*, *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009). Motions filed within 30 days of an operator receiving notice that it failed to timely respond are presumptively considered to be filed within a reasonable amount of time. However, motions filed more than 30 days after such notification should include an explanation as to why the operator waited so long to file for reopening, and the lack of such explanation is grounds for the Commission to deny the motion. *Id.* at 1316-17. Here, Cooper Stone received the Judge's Order to Show Cause on March 20 and MSHA sent the operator a delinquency notice on July 5, yet the operator did not file its motion to reopen until November 7, 2023. Cooper Stone has given no explanation for this delay.

Additionally, while "mistake" may provide a basis for relief, we question whether the operator's mistaken belief in this instance was sufficiently reasonable or excusable to justify relief. Cooper Stone, an operator with over 30 years of experience, asserts that it believed an answer to the Petition was not required unless and until negotiations with MSHA ended. However, as the Secretary notes and Cooper Stone acknowledges, the proper procedure for responding to the Penalty Petition was explained in both the Petition and the Judge's Show Cause Order. Regardless, even if the operator's mistaken belief was potentially reasonable,

negotiations with MSHA ended on May 30, 2023, and the operator has failed to explain why it waited until November 7, 2023 to request that the proceeding be reopened.

Having reviewed Cooper Stone's request and the Secretary's response, we find that the operator has not demonstrated good cause for reopening the captioned proceeding. Accordingly, we deny Cooper Stone's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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September 6, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. FCI SAND OPERATIONS LLC	Docket No. CENT 2024-0018 A.C. No. 41-05429-569144

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 7, 2023, the Commission received from FCI Sand Operations LLC ("FCI Sand") a motion to reopen the above-captioned case. The motion stated that the relevant citations were issued to the operator in error, as the mine was under the control of a different operator at the time.

FCI Sand thereafter requested to withdraw its motion, stating that the relevant citations had been transferred to a different operator. The Secretary of Labor subsequently confirmed that the citations at issue had been removed from FCI Sand's records and would be reassessed to the appropriate party.

We hereby grant FCI Sand's motion to withdraw in Docket No. CENT 2024-0018. Accordingly, this case is dismissed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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September 6, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ASGCO MANUFACTURING INC.	Docket No. PENN 2024-0007 A.C. No. 36-10240-583649

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 31, 2023, the Commission received from ASGCO Manufacturing Inc. ("ASGCO") 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 of Labor does not oppose the motion to reopen, but notes that MSHA received full payment of the single citation at issue on November 10, 2023. The Secretary asserts that, because the operator has now paid the penalty it wished to reopen, there is no longer any issue for the Commission to decide.

Since it appears the penalty at issue in this motion to reopen has already been paid, ASGCO is hereby **ORDERED TO SHOW CAUSE** within 30 days of the date of this order why this case should not be dismissed. Any response should explain whether ASGCO still wishes to contest the penalty, and if so, why the penalty has since been paid.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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September 9, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. COOPER STONE, LLC	Docket No. CENT 2024-0017 A.C. No. 41-05051-570029

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 7, 2023, the Commission received from Cooper Stone, LLC ("Cooper Stone") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to Cooper Stone's address of record on January 23, 2023, and became a final order of the Commission on February 22, 2023.

Cooper Stone asserts that it never received the assessment paperwork because the mine office is in a "high crime" area, and that the operator has taken steps to address the issue by changing the operation's mailing address to the owner's home address. Cooper Stone explains that it emailed MSHA in April 2023 to request a status update on various citations, including those at issue, and to state that it wished to contest them. When MSHA's response made no reference to the citations at issue, the operator assumed they had been properly contested. Cooper Stone asserts that it learned the citations had not been properly contested on October 26, 2023, and moved to reopen the assessment the next day.

The Secretary opposes the motion. With respect to Cooper Stone's assertion that it never received the assessment, the Secretary notes that the assessment was successfully delivered to the operator's address of record on January 23, 2023.[1] She also notes that the operator indicated an intent to change its address of record to resolve mail delivery problems as far back as April 2021 (*Cooper Stone LLC*, 43 FMSHRC 515 (Dec. 2021)), and yet its address had not been updated as of December 15, 2023.[2] With respect to Cooper Stone's asserted belief the citations had been contested, the Secretary claims the operator should have known how to properly contest a proposed assessment, as Cooper Stone had been in operation for over 30 years and every assessment includes contest instructions. Finally, the Secretary asserts that Cooper Stone failed to explain why it only became aware of the issue in October 2023, six months after MSHA's April 10, 2023 delinquency notification. In light of these considerations, the Secretary alleges that Cooper Stone has shown an inadequate internal processing system and a lack of good faith, and has failed to justify reopening.

The Commission has long held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *See, e.g.*, *Pinnacle Mining Co. LLC*, 30 FMSHRC 1066, 1067 (Dec. 2008) (denying motion to reopen where an operator condoned a mail delivery system which predictably resulted in missed deadlines). Additionally, we have held that a repeated failure to update one's address of record would indicate an inadequate internal process. *ITAC*, 46 FMSHRC 80, 82 (Feb. 2024).

Here, Cooper Stone determined in April 2021 that it had systemic mail delivery issues that could likely be resolved by changing its mailing address, but still had not resolved the issue by January 2023 when the assessment at issue was delivered. In other words, *two* system inadequacies contributed to Cooper Stone's failure to timely contest the January 2023 assessment: the mail system itself, and the failure to correct it.[3] In light of this, Cooper Stone's

[1] USPS records indicate the assessment was signed for by "N Abrham," most likely the mine's Operations Manager Neil Abraham. *Sec'y Opp. Exs. B, C*.

[2] While the operator's address of record had not been updated as of the Secretary's filing (December 15, 2023), MSHA records show that the mine's legal address has since been changed to the owner's home address. The date on which this occurred is not in the record.

[3] We also agree with the Secretary that the operator's apparent ignorance of the proper procedure for contesting a proposed assessment *despite over 30 years of operation* may indicate further inadequacies with the operator's internal processing system.

assertion that it never received the assessment does not constitute good cause to reopen the final penalty.

Furthermore, a party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely resond. *E.g.*, *Revelation Energy LLC*, 40 FMSHRC 375, 375-76 (Mar. 2018). We find that certain elements of Cooper Stone's explanation lack sufficient detail to justify reopening. First, the operator has failed to reconcile the owner's claim that he never received the assessment with documentation indicating that the assessment was signed for by the mine's operations manager. Second, the operator has not adequately explained how it ultimately learned that the assessment had not been properly contested, or why it did not become aware of the issue until six months after MSHA issued a delinquency notice.[4] *See Highland Mining Co.*, 31 FMSHRC 1313, 1317 (Nov. 2009) (motions filed more than 30 days after an operator receives a delinquency notice should include an explanation for the delay).

Having reviewed Cooper Stone's request and the Secretary's response, we find that the operator has not demonstrated good cause for reopening the captioned proceeding. Accordingly, we deny Cooper Stone's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

[4] Cooper Stone implies that between May and October it believed the assessment *had* been properly contested, because MSHA's May 26 response email made no mention of the relevant citations. However, we question whether it was reasonable for a mine operator of over 30 years' experience, who has been sent a delinquency notice indicating that an assessment has become final, to interpret a *non-response* to an *informal email* stating that an operator wishes to contest an assessment as confirmation that the assessment had been properly contested. This is particularly true where the email which contained MSHA's non-response regarding the citations at issue specifically noted that contest proceedings regarding other assessments would not begin until MSHA had received the proper paperwork.

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September 9, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. GEORGETOWN SAND & GRAVEL, INC.	Docket No. PENN 2024-0008 A.C. No. 36-05205-584939

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

ORDER

BY: Baker and Marvit, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 2, 2023, the Commission received from Georgetown Sand & Gravel, Inc. ("GS&G") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to the Post Office where the operator receives mail on September 23, 2023, and became a final order of the Commission on October 23, 2023.

GS&G asserts that it retrieved the proposed assessment from the Post Office on Monday, September 25, and filed its contest of the proposed penalty 30 days later on October 25. GS&G notes that it could not have retrieved the assessment earlier than September 25, because the mine does not operate on Saturdays and the Post Office is closed on Sundays. Finally, GS&G asserts that contrary to MSHA's usual practices, the assessment package was not sent via 'certified' mail. The Secretary opposes the motion to reopen. She primarily asserts that the operator has failed to explain why its contest was not timely filed or how the asserted non-certified delivery impacted GS&G's ability to timely process the assessment.[1]

An operator seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief. In addition to providing all known details, including relevant dates and persons involved, the operator must provide a clear explanation that accounts for the operator's failure to timely contest the assessment. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010). Here, GS&G has not explained why its contest was not timely. The operator has explained why the assessment was retrieved two days after it was delivered, but has not explained why a delay in *retrieving* the assessment resulted in a delay in *contesting* the assessment.

GS&G has not adequately justified its failure to timely contest the proposed assessment. Accordingly, GS&G's motion to reopen is DENIED WITHOUT PREJUDICE. This means we have denied the motion, but the operator may refile the motion with additional information.

We note that motions to reopen must be made no more than a year after the relevant order has become final. Fed. R. Civ. P. 60(c). Here, the proposed assessment became final on October 23, 2023. Accordingly, the one year period for filing any amended request to reopen the assessment expires on October 23, 2024.

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

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

[1] The Secretary does not expressly admit or deny GS&G's assertion that the assessment was sent via non-certified mail. We note that the requirement for the Secretary to send proposed assessments by cerified mail is not optional. 30 U.S.C. § 815(a).

Chair Jordan, dissenting:

I dissent from the majority's decision. I would find, based upon the asserted facts and pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a), that the proposed civil penalty assessment became a final order of the Commission on October 25, 2023. Accordingly, the operator's filing to contest the penalties with MSHA, on October 25, 2023, was timely submitted.

In the alternative, even assuming that the assessment became final on October 23, 2023, as my colleagues conclude, I would find that the operator has asserted a good cause reason for the late filing.

1. The assessment became a final order of the Commission on October 25, 2023.

Section 105(a) of the Mine Act requires that the Secretary issue proposed civil penalty assessments "by certified mail" and provides the operator "30 days from the *receipt* of the notification issued by the Secretary" to contest the civil penalties. 30 U.S.C. § 815(a) (emphasis added). Certified mail requires a signature from the recipient.[2] Therefore, according to the plain language of section 105(a), receipt of the proposed assessment is effective upon *signed* receipt.

Here, the record reflects that the proposed assessment was delivered to the operator's post office box on Saturday, September 23, 2023. The operator asserts and the Secretary's exhibit reflects that it received the assessment on Monday, September 25, 2023. Accordingly, the operator had until October 25, 2023, to timely contest the assessment. The Secretary improperly rejected the operator's attempt to contest the penalties on October 25.

The Secretary misconstrues the requirements of the Mine Act, and the operator's motion, when she contends that the operator fails to assert how the method of delivery contributed to GS&G's failure to contest within 30 days of the assessment's arrival. Sec'y Resp. at 6. GS&G's motion asserts that it believed that it had filed to contest the penalties "within the allowable timeframe" when it filed to contest within 30 days of its receipt of the assessment. Mot. at 2.

2. GS&G's motion asserts good cause for its failure to timely file.

Even assuming that the majority is correct, and receipt was effective pursuant to section 105(a) on September 23, 2023, I would find that the operator alleged a good cause reason for its subsequent late filing.

The operator's motion asserts that it believed that the assessment became a final order on October 25, 2023, because of the circumstances surrounding the receipt of the assessment. Mot. at 2 (asserting that the notice of contest was submitted "within the allowable timeframe"). GS&G further contends that the date of delivery, September 23, 2023, was a Saturday, a day the mine does not operate. Furthermore, the post office branch closes at 12:00 p.m. on Saturdays. Mot. at 1.

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[2] *Certified Mail – The Basics*, USPS (Aug. 2024), https://faq.usps.com/s/article/Certified-Mail-The-Basics.

Finally, GS&G asserts that the assessment was delivered without the "required [ ] signature of receipt." Mot. at 2.

Additionally, the mine operator filed this motion to reopen only eight days after MSHA rejected its attempt to contest the penalties. The Commission has held that an operator's good faith efforts militate in favor of reopening. *See, e.g.*, *Stone Zone*, 41 FMSHRC 272, 274 (June 2019) ("It is well recognized that a movant's good faith or lack thereof is an important factor in determining whether good cause exists to reopen a final order.")

Accordingly, I would conclude that the operator has sufficiently asserted that the dates and method of delivery, including the lack of signature service, created confusion regarding the date the notice of contest was due and the resulting delay in timely filing was the result of a good cause reason. The Commission has routinely granted motions to reopen alleging similar mistakes. *See, e.g.*, *Brand Industrial Services*, *LLC*, No. LAKE 2024-0155 (July 24, 2024) ("In finding good cause for its failure to timely contest, we rely upon the operator's attempt to file only five days after the filing deadline and upon the operator's prompt filing of a motion to reopen.").

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 19, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ALVARO SALDIVAR	
v.	Docket Nos. WEST 2022-0334 WEST 2023-0015
GRIMES ROCK, INC.	WEST 2023-0016

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: THE COMMISSION

These proceedings arise under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2018) ("Mine Act" or "Act").[1] On August 22, 2024, the Commission received from Grimes Rock, Incorporated ("Grimes") a motion to stay enforcement of the Administrative Law Judge's July 24, 2024 assessment of civil penalties after granting the Secretary of Labor's motion for summary decision. In the alternative, Grimes requests that the Commission permit it to deposit the amount of the civil penalty assessment in an escrow account while the case is on appeal.

The Secretary does not oppose a stay of the order to pay the penalty or the request to deposit the penalty amount in an interest-bearing escrow account, but only through the pendency of the proceeding before the Judge in the Saldivar temporary reinstatement case, Docket No.

[1] 30 U.S.C. § 815(c)(2) provides in pertinent part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

WEST 2021-0178-DM.[2] Sec'y Resp. at 2. However, the Secretary also provides documentation demonstrating that since filing its motion for stay, on August 29, 2024, Grimes paid the subject penalties in full. To date, the Commission has not received a request from Grimes to withdraw this motion.

In light of Grimes' recent payment of the penalties in the instant matter, we deny the operator's motion to stay payment of said penalties as moot. *See Riverton Investment Corp*., 31 FMSHRC 1067, 1067–68, (Oct. 2009) (denying motion to reopen as moot given operator's payment of penalty assessment).

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

[2] The Commission has held that a party seeking a stay must make an adequate showing with respect to the four factors set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958): (1) a likelihood that the moving party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *Secretary on behalf of Price and Vacha v. Jim Walter Res., Inc*., 9 FMSHRC 1312 (Aug. 1987); *Sec'y ex rel. Saldivar v. Grimes Rock, Inc.*, 44 FMSHRC 725 (Aug. 2022); *UMWA on behalf of Franks & Hoy v. Emerald Coal Res., LP*, 35 FMSHRC 2373, 2374 (Aug. 2013). The Commission made clear that a stay constitutes "extraordinary relief." *Id.* We note that Grimes did not address the required factors.

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September 25, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. SE 2024-0023 A.C. No. 08-01453-578347
GARCIA MINING COMPANY, LLC	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 20, 2023, the Commission received from Garcia Mining Company, LLC ("Garcia") 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).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 12, 2023, and became a final order of the Commission on July 12, 2023.

Garcia asserts that it timely contested the proposed penalty assessment on June 14, 2023, two days after receipt of the assessment. The operator provided email evidence showing that Counsel's office submitted its contest directly to MSHA's Civil Penalty Office via email on that date.[1] Nevertheless, Garcia learned that the assessment had not been docketed by MSHA as contested when it received a delinquency notice dated August 28, 2023. On September 22, 2023, Counsel notified MSHA that it had received a delinquency notice in spite of its timely filed contest and requested that the Penalty Office reopen the assessment. On October 4, 2023, MSHA informed Counsel for Garcia that it would have to file a motion to reopen. Garcia's motion to reopen was filed on October 20, 2023. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA's regulations at 30 C.F.R. § 100.7 and the Commission's procedural rules. The Secretary further suggests that the operator's motion be dismissed as moot.

Having reviewed Garcia's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the

[1] Garcia also timely contested the underlying citations, which have been docketed by the Commission and assigned to a Commission Administrative Law Judge.

operator timely contested the proposed assessment. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, Garcia notified the Secretary of the contest. This obviates any need to invoke Rule 60(b). *See Chad Buus, Employed By U.S. Steel - Minnesota Ore Operations*, 46 FMSHRC 86, 86-87 (Feb. 2024); *San Benito Supply*, 40 FMSHRC 346, 346–47 (Mar. 2018). Accordingly, the operator's motion to reopen is moot, and 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/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Moshe Z. Marvit
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ADMINISTRATIVE LAW JUDGE DECISIONS

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September 12, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner, v. GMS MINE REPAIR & MAINTENANCE, INC., Respondent v. GRIMES ROCK, INC.	CIVIL PENALTY PROCEEDING Docket No. VA 2023-0021 A.C. No. 44-04856-570503 Mine: Buchanan Mine #1

SUMMARY DECISION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against GMS Mine Repair & Maintenance, Incorporated ("GMS"), an independent contractor performing services at Buchanan Mine #1 ("Buchanan Mine"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of $9,979.00 for an alleged violation of a safeguard requiring adherence to the block light signals controlling all rail mounted traffic in Buchanan Mine.

The parties initiated this action by filing cross-motions for summary decision on September 29, 2023. The Secretary filed a Motion for Summary Decision ("Secretary's Motion"); a Memorandum in Support of Summary Decision ("Secretary's Memorandum"), with attached Exhibits A and B; a Response to GMS's Motion and Memorandum in Support for Summary Decision ("Secretary's Response"); and Joint Stipulations of Undisputed Fact, with attached Exhibits A through D.

GMS filed a Motion for Summary Decision ("GMS's Motion"); a Memorandum of Points and Authorities Supporting Respondent's Motion for Summary Decision ("GMS's Memorandum"), with attached Exhibits A through D; and a Response to Petitioner's Motion for Summary Decision ("GMS's Response").

The cross-motions were denied for the reason that the Joint Stipulations formed an insufficient basis upon which the undersigned could resolve the issues at hand, and additional development of the record was deemed necessary. Order Den. Cross-Mot. for Summ. Dec. at 2. Subsequently, the hearing scheduled for March 5, 2024, was cancelled upon the parties refiling of their Joint Stipulations, with attached Joint Exhibits 1 through 8, on February 23, 2024; and filing of their renewed cross-motions for summary decision, along with Supplemental Joint Stipulations, with attached Joint Exhibit 9, on March 4, 2024.

I. Legal Standard for Summary Decision

Pursuant to Commission Rule 67(b), "[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.

It is well settled that summary decision is an extraordinary measure and the Commission has analogized it to Rule 56 of the Federal Rules of Civil Procedure, which the Supreme Court has construed to authorize summary judgment only "upon proper showings of the lack of a genuine, triable issue of material fact." *Hanson Aggs. New York, Inc.,* 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted). When considering a motion for summary decision, the Commission has noted that "the Supreme Court has stated that 'we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion,' and that 'the inferences to be 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.* at 9 (quoting *Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962)). Moreover, Commission Judges should not grant motions for summary decision "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.,* 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.,* 21 F.3d 52, 55 (4th Cir. 1994)); see *Scott v. Harris,* 550 U.S. 372, 380 (2007) (holding that there is no genuine issue for trial unless a rational trier of fact could find for the nonmoving party).

Based on a thorough review of the documents filed by the parties, I find that there is no genuine issue as to any material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law, affirm the Citation, and assess a penalty against GMS.

II. Factual Background

GMS is an independent contractor performing services at Buchanan Mine, a large multi-unit underground coal mine. Jt. Stips. 3, 4, 25. The mine contains approximately 80 rail mounted vehicles that regularly travel on its underground haulage track system. Jt. Ex. 3. The rail traffic

on this transportation system is controlled by a block light system that coordinates usage of tracks to prevent vehicular collisions. Jt. Stip. 12.

The underlying Safeguard No. 8202825 was issued at Buchanan Mine to the then production-operator, Consolidation Coal Company ("Consol"). Jt. Stips. 10, 11. By 2018, when GMS began performing services in Buchanan Mine, control of the mine had been transferred to the current production-operator, Buchanan Minerals, LLC ("Buchanan"). GMS Mem. at 2. The Safeguard requires that all rail mounted vehicle operators at the mine adhere to the block light signal procedures controlling traffic on the underground rail transportation system, and notes that previous failures to do so had resulted in head-on collisions and injuries to miners. Jt. Stips. 11, 12; Jt. Ex. 3.

On September 21, 2022, MSHA Inspector John Hughes conducted a regular E01 inspection of Buchanan Mine. Jt. Stip. 17. During his inspection, Hughes was informed by Buchanan's representative that an accident had occurred on August 15, in which a head-on collision of two manbuses was caused by one vehicle operator's failure to change the block lights from green to red before continuing through an intersection. Jt. Stip. 18; Jt. Ex. 1. Consequently, Hughes issued 104(a) Citation No. 8312039 to GMS, alleging a "significant and substantial" violation of 30 C.F.R. § 75.1403, under Safeguard No. 8202825, for an accident that had "occurred," resulting in "lost workdays or restricted duty" injuries, and was due to GMS's "moderate" negligence. Jt. Stips. 19, 21; Jt. Ex. 1. The "Condition or Practice" is described as follows:

> The block light system being used at this mine to control the safe movement of rail equipment was not being followed at this mine site on August 15, 2022. The failure to follow the block light system caused an accident where two manbuses, transporting miners and going in opposite directions collided head on along the trackway. The accident resulted in two miners receiving serious injuries and lost time.

Jt. Stip. 20. Hughes terminated the Citation the same day after GMS retrained the contract miner on safe operation of manbuses and use of the block light system. Jt. Ex. 1.

III. Statement of Undisputed Facts

A. Joint Stipulations

1. Buchanan Minerals, LLC is the production-operator of Buchanan Mine #1.

2. At all times relevant to these proceedings, Buchanan Mine #1 is a "mine," as defined in section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. On August 15, 2022, Respondent GMS was an independent contractor performing services at Buchanan Mine #1 and was, therefore, an "operator" at that mine, as the term "operator" is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

4. As an independent contractor, while performing services at the Buchanan Mine #1, GMS is subject to the jurisdiction of the Mine Act.

5. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges, pursuant to sections 105 and 113 of the Mine Act.

6. Payment of the total proposed penalty of $9,979.00 in this matter will not affect GMS's ability to continue in business.

7. The individual whose name appears in Block 22 of the citation in contest was acting in an official capacity and as an authorized representative of the Secretary when the citation was issued.

8. Citation No. 8312039 was issued and served by an authorized representative of the Secretary to an agent of GMS at the date, time, and place stated in the citation.

9. Exhibit "A" attached to the Secretary's Petition in Docket No. VA 2023-0021 contains an authentic copy of Citation No. 8312039, with all modifications or abatements, if any.

10. On February 5, 2013, Consolidation Coal Company was the production-operator of the Buchanan Mine #1.

11. On February 5, 2013, the Mine Safety and Health Administration ("MSHA") issued Safeguard No. 8202805 to Consolidation Coal Company at the Buchanan Mine #1.

12. Safeguard No. 8202805 "require[s] all rail mounted equipment at this mine site to follow the block light system which has been installed to control the rail traffic and a clear right of way along the track haulage system."

13. Buchanan Minerals, LLC and GMS entered into a labor services agreement on June 21, 2018, for GMS to provide labor services at the Buchanan Mine #1.

14. The labor services agreement between GMS and Buchanan Minerals contains provisions which contractually obligate GMS to adhere to mandatory safety and health standards.

15. GMS provides site-specific safety training and/or its annual refresher safety training to GMS personnel who perform services at the Buchanan Mine #1 under the mine's approved training plan, and based upon materials provided by Buchanan Mine #1.

16. The site-specific safety training provided by GMS under Buchanan Mine #1's approved training plan includes a block light system training, which does not specifically mention any safeguard, but which may include training on conditions or practices covered by any existing safeguard.

17. On September 21, 2022, MSHA conducted a regular quarterly (E01) inspection of the Buchanan Mine #1.

18. During the September 2022 inspection, Buchanan Minerals representative, Rex Penn, described an August 15, 2022, accident to the MSHA inspector conducting the September inspection.

19. On September 21, 2022, MSHA issued Citation No. 8312039, alleging that GMS violated a notice to provide safeguard, Safeguard No. 8202805, which was issued February 5, 2013.

20. The Condition or Practice, as described in Box 8 of Citation No. 8312039, is true and accurate and states: "The block light system being used at this mine to control the safe movement of rail equipment was not being followed at this mine site on August 15, 2022. The failure to follow the block light system caused an accident where two manbuses, transporting miners and going in opposite directions collided head on along the trackway. The accident resulted in two miners receiving serious injuries and lost time."

21. Citation No. 8312039 was properly evaluated as having occurred, lost workdays or restricted duty, moderate negligence, and significant and substantial.

22. On August 15, 2022, the "miner who failed to follow the block system" who is referenced in Box 17, the Action to Terminate Citation No. 8312039, was a miner employed by GMS.

23. The parties stipulate that, if Safeguard No. 8202805 is both (1) valid and (2) enforceable against GMS, then the circumstances underlying Citation No. 8312039 constitute a violation of Safeguard No. 8202805.

24. Prior to the September 21, 2022, issuance of Citation No. 8312039, neither MSHA nor any authorized representative of the Secretary provided GMS with a written or electronic copy of Safeguard No. 8202805, or advised GMS verbally of Safeguard No. 8202805.

25. In the previous calendar year, GMS worked over 1,000,000 total hours across all mines, and is a large operator.

26. GMS's history of previous violations reflects 16 total violations at all mines that were paid, finally adjudicated, or became final orders of the Commission in the 15 months preceding the day before the issuance of Citation No. 8312039.

27. The documents included in the Joint Exhibits submitted by the parties are true and authentic copies of the documents they purport to depict.

28. The documents included in the Joint Exhibits submitted by the parties are admissible as evidence.

Jt. Stips. at 1-3.

B. Supplemental Joint Stipulations

1. The "miner who failed to follow the block light system" referenced in Citation No. 8312039, completed site-specific experienced miner training through GMS on October 20, 2021, at which time he began working at Buchanan Mine #1.

2. That site-specific experienced miner training, conducted by GMS with materials provided by Buchanan Mine #1, included a block light system training, but did not specifically reference Safeguard No. 8202805 or any other safeguard.

3. Because annual refresher safety training occurs at Buchanan Mine #1 every October, the "miner who failed to follow the block light system" did not participate in annual refresher safety training before the August 15, 2022, accident.

4. The site-specific experienced miner training was the last time the "miner who failed to follow the block light system" received block light system training before the August 15, 2022, accident.

5. The Supplemental Joint Exhibit submitted by the parties is a true and authentic copy of the document it purports to depict.

6. The Supplemental Joint Exhibit submitted by the parties is admissible as evidence.

Suppl. Jt. Stips. at 1.

IV. Findings of Fact and Conclusions of Law

The Secretary maintains that she is entitled to summary decision because safeguards issued at a mine are binding upon contractors, that Safeguard No. 8202805 is valid and enforceable, and that GMS violated the Safeguard when its employee, operating a vehicle on the track haulage system, failed to change the block lights and collided with another vehicle. Sec'y Mem. at 5, 7-8. Additionally, in her Response, the Secretary contends that collateral estoppel does not apply to this matter because the case upon which GMS relies is distinguishable upon several grounds, and a decision of an administrative law judge is not binding upon other judges. Sec'y Resp. at 1-3; see *GMS Mine Repair & Maint., Inc*., 42 FMSHRC 135 (Feb. 2020) (ALJ) ("*GMS I*").

GMS contends that collateral estoppel precludes relitigating the issues already adjudicated in *GMS I*, that Safeguard No. 8202805 is invalid because it fails to fix a time for compliance, and that it is unenforceable against GMS because the independent contractor was never served written notice of the Safeguard by MSHA. GMS Mem. at 1.

A. Collateral Estoppel

According to GMS, relying upon the outcome in *GMS I*, the collateral estoppel doctrine precludes re-adjudicating the two issues raised in this case: first, the validity of the Safeguard where it does not fix a time for compliance and, second, the enforceability of the Safeguard where MSHA has not served a written copy upon the independent contractor. GMS Mem. at 1.

The Secretary, on the other hand, rejects the application of the doctrine because there are significant factual differences between the two cases, and the decision in *GMS I* was based upon multiple grounds, some of which are beyond the inquiry in the instant matter. Sec'y Resp. at 1-2.

Although administrative law judge decisions are not binding precedent, the Commission has recognized that the collateral estoppel doctrine may preclude a party from relitigating issues of fact or law already litigated and determined in a prior suit. *BethEnergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992). Collateral estoppel applies where the same issue of fact or law has actually been litigated between the same parties, the determination is a valid and final judgement, and the determination is essential to the judgement in the prior preceding. *Id*.; *Intell. Ventures I LLC v. Cap. One Fin. Corp.*, 937 F.3d 1359, 1371 (Fed. Cir. 2019); *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004). A determination is "essential" only when the final outcome hinges upon it. *Bobby v. Bies*, 556 U.S. 825, 835 (2009). However, "where the court in the prior suit has determined two [or more] issues, [any] of which could independently support the result, then neither determination is considered essential to the judgement." *Intell. Ventures,* 937 F.3d at 1372; citing *In re Microsoft*, 355 F.3d at 328.

Collateral estoppel does not apply in instances where the issues are not identical because there has been a change in controlling facts between the two cases. *BethEnergy*, 14 FMSHRC at 26, citing *Montana v. United States*, 440 U.S. 147, 158-59 (1979). Different controlling facts, in effect, create a new issue in a latter case that was not litigated and adjudicated in the former case. *BethEnergy*, 14 FMSHRC at 26. Collateral estoppel requires "that the precise issues involved in the second action were actually and necessarily decided in the first." *Frederick G. Bradley*, 4 FMSHRC 982, 990 (June 1982).

While there is some commonality between *GMS I* and this case, in that the independent contractor is the same and was not served written notice of the safeguards by MSHA in either circumstance, the alleged violations occurred in different mines, and challenges to the facial validity of the respective safeguards are necessarily different because the safety concerns involved different aspects of the underground transportation systems. Moreover, while the two cases present a common question as to whether a safeguard is enforceable against an independent contractor that has not been provided written notice by MSHA, *GMS I* was not a valid and final judgement of the Commission and, therefore, is not binding precedent in this proceeding.

Furthermore, *assuming arguendo,* that issues in the two cases were identical, collateral estoppel would not apply because neither the determination as to the validity nor the determination as to the enforceability of the safeguard was essential to the former decision, and the outcome in *GMS I* was based upon several alternative grounds in addition to validity and enforceability.[1] Therefore, there is no preclusive effect on the issues in the present case.

[1] In *GMS I*, the safeguard notice was also found to be facially invalid because it failed to identify the targeted hazard and specific remedy, and it was determined to be inapplicable to the conditions for which MSHA had cited the independent contractor. See *GMS I*, 42 FMSHRC at 143-45.

B. Validity of the Safeguard

GMS challenges the facial validity of Safeguard No. 8202805 because it lacks a declarative statement fixing a time for compliance. GMS Mem. at 7. The Secretary, while not disputing that a safeguard must necessarily specify when it becomes effective, contends that the "Termination Due Date" and "Time" on the Safeguard set the time it goes into effect. Sec'y Mem. at 7.

Section 75.1403-1(b) provides that "the authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act." 30 C.F.R. §75.1403-1(b).

The "Condition or Practice" on Safeguard No. 8202805, issued February 5, 2013, at 9:05 am, is as follows:

> The block light system is not being followed at this mine site. The track mounted manbuses are proceeding along the track haulage way without assurance that the manbus has the right of way or a clear road. During today's inspection upon leaving the manbus station and traveling the 3 East Main track line the outgoing manbus with one management person and one MSHA coal mine inspector onboard was met by [an] incoming manbus. The outgoing manbus had the right of way by turning the block light red at 8 Right but had no way of knowing that the incoming manbus was approaching in the same block. This is a large multi-unit mine with approximately 80 rail vehicles that regularly and frequently travel this set of tracks, which includes six mechanized mining units and a long wall. The rail traffic at this mine site is controlled by the block light system. Previous failures to follow the system have result[ed] in head on collisions and injured miners. This is a notice to provide a safeguard requiring all rail mounted equipment at this mine site to follow the block light system which has been installed to control the rail traffic and a clear right of way along the track haulage system. The safeguard is also placing the operator on notice that failure to follow the block light system will result in more stringent enforcement acts by MSHA. This condition or practice has recently been cited on more than one occasion under existing Safeguard No. 7331400.
>
> Standard 75.1403 was cited 41 times in two years at mine 4404856 (41 to the operator, 0 to a contractor).

Jt. Ex. 3. The Safeguard provides a Termination Due Date and Time of February 5, 2013, at 9:30 am. The Safeguard was actually terminated earlier at 9:10 am, after "the operator of the manbus encountered during today's inspection was instructed by the Assistant Mine Foreman on the block light system." Jt. Ex. 3.

At the time that Safeguard No. 8202805 was issued, Buchanan Mine's underground rail transportation system had already been operating under the block light traffic control system with Safeguard No. 7331400 in effect, and previous failures to adhere to the block light signal procedures had caused head-on collisions and miner injuries. Safeguard No. 8202805 reinforced the safety requirement in previously issued Safeguard No. 7331400, and placed the operator on notice that future violations of the mine's block light traffic protocol would result in "more stringent enforcement" actions by MSHA. It is wholly apparent, under the particular circumstances in this case, that the designated "Termination Due Date" and "Time" on Safeguard No. 8202805, February 5, 2013, at 9:30 am, gave Consol 25 minutes in which to achieve compliance before MSHA's enhanced enforcement of future violations was put in place. Any other reading of the Safeguard cuts against the reason for issuing it in the first place, reinforcement of MSHA's efforts to eliminate vehicle operators being "asleep at the switch." Accordingly, I find that the enhanced enforcement scheme of Safeguard No. 8202805 went into effect at 9:30 am. The Safeguard, therefore, is valid.

C. Enforceability of the Safeguard

GMS, also relying on the finding in *GMS I*, challenges the Secretary's authority to enforce Safeguard No. 8202805 against GMS by arguing that, under section 75.1403-1(b), a safeguard is not binding upon an independent contractor performing services in a mine unless MSHA has served it written notice of the safeguard. GMS Mem. at 5-6; see *GMS I*, 42 FMSHRC 135. The Secretary takes the contrary position that once a safeguard notice has been served upon a production-operator at a mine, it is binding upon all independent contractors operating at that mine. Sec'y Mem. at 5-6, 11. Furthermore, the Secretary argues, providing a safeguard notice to a production-operator effectively provides notice to independent contractors, as the operator is required to train miners on safety regulations and procedures, and requiring MSHA to issue written safeguards to every independent contractor operating in a mine is wholly untenable. Sec'y Mem. at 11-13.

Although MSHA never served a written copy of the Safeguard upon GMS, Buchanan advised GMS of the mine's approved training plan and made training materials available, which GMS used to provide site-specific and annual refresher training to GMS personnel who were working in the mine, including block light traffic control procedures. Jt. Stips. 15, 16, 24. Moreover, GMS was contractually obligated by its labor services agreement with Buchanan to adhere to mandatory safety and health standards applicable to the mine's operations. Jt. Stips. 13, 14.

Production-operators of mines are vested with authority over control of operations, including staffing and training, and written notice by MSHA to operators, under section 75.1403-1(b), imposes upon them the responsibilities to ensure that all working miners are adequately informed of, trained on, and compliant with mine-specific safeguards, as well as mandatory safety standards. Additionally, production-operators are in the best position to know the composition of their workforce, whereas MSHA is only made aware of contractor services by production-operators' quarterly reporting. GMS Resp. at 5; see 30 C.F.R. §§ 50.30, 50.30-1. Furthermore, regulations addressing both new miner and annual refresher training, identically worded in pertinent part, require that they include instruction on "the procedures for riding on

and in mine conveyances; the controls in effect for the transportation of miners and materials; and the use of the mine communication systems, warning signals, and directional signs." See 30 C.F.R. §§ 48.5(b)(3), 48.8(b)(2). In order to ensure compliance, it would be highly impractical to require MSHA to timely serve written notice of safeguards upon every independent contractor brought into the mines, on an as-needed basis, especially because contractors are not in charge of the mines, they are supplemental to the permanent workforce, and they are transient. Consequently, the only reasonable reading of the notice component of section 75.1403-1(b) is its plain language - - that MSHA advise the mine operator in writing of a safeguard. In this way, MSHA recognizes production-operators' autonomy in controlling operations in their mines, in accordance with law and regulation, and places solely upon them the burden of achieving compliance.

In this matter, Buchanan satisfied its responsibility, upon bringing GMS contract workers into its mine, to ensure that all working miners adhered to the safety requirements of the Safeguard. In finding proper written notice of Safeguard No. 8202805 to Buchanan by MSHA, and adequate training of its contract employees on the Safeguard's safety requirements by GMS, I find that GMS had constructive notice of Safeguard No. 8202805 from Buchanan, and that it is enforceable against GMS.

D. Violation of the Safeguard

The parties have stipulated that if Safeguard No. 8202805 is valid and enforceable against GMS, the circumstances underlying Citation No. 8312039 constitute a violation of the Safeguard. Jt. Stip. 23. The parties have also stipulated to the occurrence of a significant and substantial violation that resulted in lost-workday or restricted-duty injuries, and was caused by GMS's moderate negligence. Jt. Stip. 21. Having determined that Safeguard No. 8202805 is both valid and enforceable against GMS, I conclude that GMS violated the Safeguard, and sustain the Secretary's gravity and negligence designations.

V. Penalty

While the Secretary has proposed a regularly assessed civil penalty of $9,979.00, the Judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). See *Sellersburg Stone Co.,* 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that GMS is a large operator, with no prior violations of section 75.1403 in the 15 months prior to this violation, and that it had an overall violation history that is a mitigating factor in assessing an appropriate penalty. Jt. Stips. 25, 26; Jt. Ex. 8. I also find that the proposed penalty will not affect GMS's ability to continue in business, and that GMS demonstrated good faith in achieving rapid compliance after notice of the violation. Jt. Stip. 6; Jt. Ex. 1. The remaining criteria involve consideration of the gravity and negligence of the violation. I have found that the violation was significant and substantial, that it resulted in an accident that caused lost-workday or restricted-duty injuries, and that GMS's negligence was

moderate. Accordingly, I find that a penalty of $9,979.00, as proposed by the Secretary, is appropriate.

VI. Order

ACCORDINGLY, the Secretary's Renewed Motion for Summary Decision is **GRANTED**, Respondent's Renewed Motion for Summary Decision is **DENIED**, and it is **ORDERED** that GMS Mine Repair & Maintenance, Incorporated **PAY** a civil penalty of $9,979.00 within 30 days of the date of this Decision.[2]

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 30, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner, v. NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2017-0224-M A.C. No. 21-00831-434118 Docket No. LAKE 2017-0248-M A.C. No. 21-00831-435608 Mine: Northshore Mining Company
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner, v. MATTHEW ZIMMER, employed by, NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0141-M A.C. No. 21-00831-457528 A Mine: Northshore Mining Company
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner, v. ROGER PETERSON, employed by, NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0146-M A.C. No. 21-00831-457527 A Mine: Northshore Mining Company

DECISION UPON REMAND

These cases are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor (the "Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Mine Act" or "the Act"). The four dockets involve a citation and order issued to Northshore Mining Company ("Northshore") and two 110(c) enforcement actions against individuals. 30 U.S.C. § 820(c). However, the only issue before me is the penalty amount to be assessed for Order No. 8897220, which is the subject of docket number LAKE 2017-0248. For reasons set forth below, I assess a penalty of $100,000.00.

PROCEDURAL HISTORY & BACKGROUND

These matters were originally before former Commission Judge Margaret Miller. In her February 13, 2019 decision on the merits, Judge Miller found, among other things, that, with regard to Order No. 8897220[1], Northshore violated section 56.11002 of the Secretary's regulations, and that the violation was a result of Northshore's reckless disregard and unwarrantable failure to comply. *Northshore Mining Co. et al.*, 41 FMSHRC 50 (Feb. 2019) (ALJ). Although the Secretary designated the order as "flagrant" and proposed a specially assessed penalty of $130,200.00, Judge Miller found that violation was not flagrant within the meaning of the Act and assessed a penalty of $60,000.00. *Id*. at 69, 77.

Following the filing of petitions for discretionary review by both parties, the Commission affirmed Judge Miller's findings regarding reckless disregard and unwarrantable failure, as well as her determination that the violation was not flagrant. *Northshore Mining Co. et al.*, 43 FMSHRC 1 (Jan. 2021).

On appeal, the Eighth Circuit Court of Appeals ("Eighth Circuit") denied Northshore's petition for review of the Commission's conclusions on reckless disregard and unwarrantable failure, but granted the Secretary's cross-petition for review of the Commission's conclusions on the flagrant designation, and reversed the Commission's decision affirming Judge Miller's deletion of the flagrant designation. *Northshore Mining, et al. v. Sec'y of Labor*, 46 F.4th 718, 739 (8th Cir. 2022). The court remanded the matter to the Commission "for consideration of whether the penalty amount for [the flagrant violation described in Order No. 8897220] should be reassessed." *Id*.

On May 30, 2024, the Commission remanded the matter to the Office of the Chief Administrative Law Judge for consideration of the issue described by the Eighth Circuit. On August 5, 2024, the Commission's Chief Administrative Law Judge assigned the dockets to this court.

I encouraged the parties to settle this matter by agreeing to an appropriate penalty. They were unable to do so. On August 21, 2024, I ordered the parties to file briefs in support of their respective positions on the penalty to be assessed for Order No. 8897220. On September 12, 2024, the parties filed their briefs.

[1] The Secretary issued Order No. 8897220 under section 104(d)(1) of the Act for a violation of section 56.11002, which requires that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided." 30 C.F.R. § 56.11002. The body of the order states, in pertinent part, that the subject elevated walkway was not of substantial construction and was not maintained in good condition, which resulted in a failure of the walkway.

PARTIES' ARGUMENTS

The Secretary argues that, given the Eighth Circuit's holding that Order No. 8897220 is a flagrant violation, the originally proposed specially assessed penalty of $130,200.00 should be assessed. Sec'y Br. 1. As support, she cites the Commission's recognition that it is Congress's intent that a "flagrant penalty . . . be severe enough to target ''bad actors' who fail to take their safety responsibilities seriously…'" Sec'y Br. 2 (citing *Northshore Mining, et al*., 43 FMSHRC 1, 11 (Jan 2021) (citing 152 Cong. Rec. S4619 (daily Ed. May 16, 2000) (statement of Sen. Michael Enzi)). Here, despite Northshore management's knowledge that the outer walkways were structurally inadequate and unsafe, Northshore made no efforts to make repairs or post warnings, and instead allowed miners to access the area. Sec'y Br. 2. Moreover, the Secretary's proposed penalty is significantly less than both the statutory maximum for flagrant violations and the projected cost of repairs. Sec'y Br. 2-3. Further reduction of the penalty would thwart "Congress's intention that flagrant violations carry stiff enough penalties to encourage compliance" and incentivize "other operators to weigh the cost of litigation against the cost of correcting known hazards." Sec'y Br. 3-4.

In addition, the Secretary agues that Judge Miller's factual findings regarding the statutory penalty factors support the proposed penalty. Sec'y Br. 3. The Secretary points to Judge Miller's findings regarding the gravity and negligence of the violation, and specifically her determination that the violation was S&S, could result in serious injuries, and was a result of Northshore's reckless disregard and unwarrantable failure to comply with the regulation. Sec'y Br. 3. Further, the Secretary notes that Northshore stipulated that the penalty will not affect its ability to continue in business. Sec'y Br. 4.

Moreover, the Secretary asserts that Judge Miller identified hazards created by the violation and determined that those hazards were reasonably expected to cause death or serious body injury.[2] Sec'y Br. 4. The Secretary emphasizes that the Eighth Circuit found that substantial evidence supported Judge Miller's findings on those hazards, and that the hazards in fact caused a serious injury to a miner. Sec'y Br. 4.

Finally, the Secretary notes that Judge Miller's originally assessed penalty was 88% of the maximum penalty allowed for non-flagrant violations. Sec'y Br. 4. If this court assesses a flagrant penalty using the same percentage of the maximum penalty allowed for flagrant violations, the amount would be much higher than the Secretary's proposed penalty of $130,200.00. Sec'y Br. 4.

Northshore argues that Judge Miller's original penalty assessment of $60,000.00 for Order No. 8897220 should be upheld. It asserts that the Act and the Secretary's own penalty regulations do not require a particular amount be assessed for a flagrant violation and, rather, afford the judge "latitude to assess a penalty amount that . . . is appropriate." NS Br. 9. Here, the

[2] The Secretary also notes that Judge Miller considered and rejected Northshore's assertion that its fall protection policy lessened the injury expected. Sec'y Br. 4.

Secretary offered no evidentiary basis for the proposed specially assessed penalty.[3] NS Br. 9-10. Although Judge Miller deleted the flagrant designation, she properly considered each of the statutory penalty criteria and declined to assess even the maximum penalty for non-flagrant violations. NS Br. 11-12. Finally, Northshore argues that, had Judge Miller fully considered certain evidence, her gravity and negligence determinations may have been affected, which could have in turn affected the size of the assessed penalty. NS Br. 12-14.

DISCUSSION

Section 110(i) of the Mine Act states that "[i]n assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i). Commission judges assess penalties de novo pursuant to section 110(i) and are not bound by the Secretary's proposed assessments or Part 100 regulations governing those proposed assessments. *Solar Sources Mining, LLC*, 43 FMSHRC 367 (Aug. 2021). Moreover, although Commission judges are required to explain significant deviations from the Secretary's proposed regular assessments, the same is not true with special assessments. *Solar Sources Mining, LLC*, 42 FMSHRC 181, 197-199 (Mar. 2020). In addition, the Commission has cautioned its judges to "avoid the unconscious effect" of "anchoring" their decision to the Secretary's proposed special assessments, and to, instead, assess penalties that are "commensurate only with the actual factual findings after hearing." *Id.* at 197-199 n.25.

Here, the Secretary proposed a specially assessed penalty of $130,200.00 for Order No. 8897220. In her decision on the merits Judge Miller specifically noted that the Secretary's originally proposed penalty of $130,200 was "based upon a finding that the violation was flagrant[.]" In assessing a penalty of $60,000.00 Judge Miller determined that the Secretary had not met her burden with regard to the flagrant finding and stated the following regarding the statutory penalty criteria:

> However, there is a violation of the mandatory standard, the violation is S&S and unwarrantable. In addressing those issues, I addressed the negligence of the operator and agree that the mine engaged in a reckless disregard of the mandatory standard. I have also addressed the gravity of the violation and found it to be a serious violation that would result in death or serious bodily injury. I have also considered the history of assessed violations. . . . The violation was abated in good faith. The mine has not raised the ability to pay. Northshore is considered a large mine operator. Based upon my findings, I assess a penalty of $60,000 for this violation.

[3] Northshore cites multiple Commission ALJ decisions for the general proposition that judges may reject specially assessed penalties where the Secretary fails to provide adequate bases for the proposed special assessment. NS Br. 10-11.

41 FMSHRC at 77 (internal citation omitted). Neither the Commission nor the Eighth Circuit disturbed Judge Miller's findings on the statutory penalty factors. Accordingly, the only issue before me is the impact of the Eighth Circuit's determination that the violation was flagrant on Judge Miller's originally assessed penalty of $60,000.00.

In its decision remanding this matter back to the Commission, the Eighth Circuit acknowledged that the purpose of the Mine Act "was to create a graduated penalty scheme through which MSHA would levy heftier fines for more egregious conduct by mine operators." 46 F.4th at 732. The court went on to explain that the Mine Improvement and New Emergency Response Act ("the MINER Act"), among other things, amended the penalty section of the Mine Act and added the "flagrant" designation, which was meant for "the most serious type of violation." *Id*.

Given that flagrant violations are the most serious type of violation in the graduated penalty scheme created by the Mine Act, it stands to reason that the penalty assessed for a flagrant violation will generally be larger than the penalty assessed for an identical violation that does not have a flagrant designation.

A violation is "flagrant" when it involves a "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). At the time in question, flagrant violations could be assessed penalties as high as approximately $250,000.00. *Id.,* 30 C.F.R. § 100.5(e) (2016).

In reversing the Commission and finding that Order No. 8897220 involved a flagrant violation, the Eighth Circuit considered the three "key" terms in the Act's definition of "flagrant" – "(1) 'reckless,' (2) 'known violation,' and (3) 'reasonably could have been expected to cause ... death or serious bodily injury.'" 46 F.4th at 735. A brief review of the court's analysis of those terms as relevant to Order No. 8897220 is helpful to understand the seriousness of the violation.

First, in finding that substantial evidence supported the determination that Northshore acted "recklessly," the Eighth Circuit rejected the Commission's assertion that an operator is "reckless" when it consciously or deliberately disregards a safety issue. *Id*. Rather, it explained that "designating a violation as flagrant does not require burying or hiding evidence of wrongdoing[,]" as the Commission would have required, and that "Northshore's unjustified declination to begin repairing or even planning to repair the dangerous walkways suffice[d]" for purposes of establishing that Northshore acted recklessly. *Id*. Further, it specifically noted that neither the existence of a fall protection policy, nor the hiring of an engineering firm to inspect the walkways, both of which the Commission relied upon as substantial evidence to support deletion of the flagrant designation, were actually efforts to fix the violation, i.e., the poor condition of the subject walkway. *Id*.

Second, in finding that substantial evidence supported the determination that Northshore knew it was violating the regulation, the court pointed to Judge Miller's findings that there were work orders dating back to 2013 detailing concerns about walkways, that the engineering firm hired by Northshore had recommended that the walkway be restricted, that some of the

walkways had not been reinforced with steel plates like others had, and that mine mangers, employees and engineers testified that the relevant walkway was not being maintained in a safe condition. *Id*.

Third, and finally, in finding that substantial evidence supported the determination that the violation was reasonably expected to cause death or serious bodily injury, the court pointed to Judge Miller's findings regarding the multiple hazards created by the violation and her determination that a serious injury was likely even if Northshore's fall protection policy was taken into consideration. *Id*. at 735-736.

Although it is clear that a considerable penalty is warranted for the flagrant violation at issue in Order No. 8897220, I am troubled by the lack of transparency on the Secretary's part regarding how she arrived at the proposed specially assessed penalty of $130,200.00. In other matters before this court the Secretary, as part of the petition for assessment of a specially assessed penalty and in addition to the special assessment narrative findings, has often provided a special assessment "worksheet," which a judge could use to understand how the Secretary calculated the proposed special assessment, including how the Secretary weighed the pertinent factors. As far as the court can determine, no such document was filed the Commission, or accepted into evidence at hearing, nor was any methodology for calculating the penalty discussed at hearing or in the Secretary's post hearing brief. In *Solar Sources Mining, LLC*, the Commission alluded to the latitude Commission judges have when assessing a final penalty where the Secretary proposed a specially assessed penalty. 42 FMSHRC 181, 197-199 (Mar. 2020).[4] As a consequence, I have not relied upon the Secretary's proposed "special assessment" in determining an appropriate penalty to assess in this case. Instead, in arriving at a final penalty, I have relied on Judge Miller's findings on the statutory penalty criteria, 41 FMSHRC at 60-66, 76-77, and the Eighth Circuit's findings regarding the flagrant violation.

Having reviewed Judge Miller's findings on the statutory penalty criteria and given the Eighth Circuit's determination that the violation was flagrant, I find that a substantial penalty, greater than that which was originally assessed by Judge Miller, is appropriate. Accordingly, I assess a penalty of $100,000.00 for Order No. 8897220. The amount reflects this court's acknowledgement of Judge Miller's findings on the statutory penalty criteria and the Eighth

[4] Judge Miller has declined to adopt proposed specially assessed penalties where the Secretary's support for such was lacking. *Freeport McMoRan Morenci, Inc.*, 35 FMSHRC 172, 181 (Jan. 2013) (ALJ).

Circuit's determination that the violation was flagrant, a designation Congress reserved for the most serious type of violation in the Mine Act's graduated penalty scheme.

ORDER

Northshore Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of $100,000.00 within 40 days of the date of this decision.[5]

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

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[5] In addition to remanding to the Commission the issue discussed herein, the Eighth Circuit also denied Northshore's petition for review of the Commission's conclusion on reckless disregard and unwarrantable failure as relevant to Citation No. 8897219 at issue in LAKE 2017-0224, and reinstated Judge Miller's penalty assessments for individual liability in docket numbers LAKE 2018-0141 and LAKE 2018-0146. As a result, Judge Miller's penalty assessments on those issues are final, i.e., $60,000.00 for Citation No. 8897219, $4,000.00 for Matthew Zimmer, and $4,000.00 for Roger Peterson. If Northshore, Mr. Zimmer and Mr. Peterson have not yet paid those penalties, they are **ORDERED TO PAY** the Secretary of Labor those amounts within 40 days of the date of this decision. All payments ordered in this decision (check or money orders) should be sent to U.S. Department of Labor, Mine Safety and Health Administration, Payment Office, P.O. Box 790390, St. Louis, MO. 63179-0390; Electronic payments can be applied via https://www.pay.gov/public/form/start/67564508 Please include Docket Number & A.C. Numbers with payment.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 6, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of ALVARO SALDIVAR, Complainant v. GRIMES ROCK, INC., Respondent	APPLICATION FOR TEMPORARY REINSTATEMENT Docket No. WEST 2021-0178-DM MSHA Case No: WE MD 21-06 Grimes Rock, Inc. Mine ID: 04-05432

ORDER DENYING MOTION FOR CONSEQUENTIAL DAMAGES

On November 28, 2023, the Commission issued a decision in this case affirming in part and reversing in part orders issued by former Commission Judge Margaret Miller and remanding other matters for further determination. 45 FMSHRC 947 (Nov. 2023).[1]

Following Grimes Rock's unsuccessful appeal to the Ninth Circuit Court of Appeals, the Commission, by order dated July 23, 2024, confirmed that I retain jurisdiction over this matter and can proceed on remand pursuant to the Commission's instructions in the November 28, 2023 decision. The Commission's instructions on remand require a "recalculation of the temporary reinstatement amount owed between the date the Judge issued the order of enforcement and the date her merits decision became final" and "a determination of any remaining temporary reinstatement payments and interest owed as well as a determination on whether consequential damages are appropriate." 45 FMSHRC at 961.

On August 5, 2024, I ordered the parties to file briefs by September 10, 2024 on the remanded issues and to suggest possible resolution of those issues. At the time I issued that order, I had not yet carefully studied the Secretary's motion for consequential damages filed on August 25, 2022 or Grimes Rock's opposition to the motion filed on September 7, 2022.[2] However, having since had an opportunity to review the motion and opposition, I find that the

[1] The Commission affirmed the Judge's January 7, 2022 order denying the operator's motion to toll temporary reinstatement and her June 17, 2022 order enforcing temporary reinstatement.

[2] The Secretary's motion also asked for interest on the amount not timely paid by Grimes Rock to Saldivar. Grimes Rock opposed the motion for the payment of interest. However, in its November 28, 2023 decision, the Commission resolved the issue of whether interest is due and remanded to me the responsibility to calculate the amount of the interest owed. That issue remains before me and is not addressed in this order.

filings are comprehensive and provide all that is needed for me to rule on the motion. Accordingly, I conclude that the issue of consequential damages has been fully briefed by the parties and that further briefing on the subject is unnecessary and will not be helpful. For the reasons set forth below, the Secretary's motion for consequential damages is **DENIED**.

SUMMARY OF THE PARTIES' ARGUMENTS

The Secretary, in her motion, asserts that the complainant, Alvaro Saldivar, incurred certain consequential damages because Grimes Rock failed to timely pay temporary economic reinstatement amounts due under orders issued by former Commission Judge Miller. Sec'y Mot. 1. She argues that, in addition to miners who suffer discrimination, miners awarded temporary reinstatement are entitled to "make-whole" remedies, such as consequential damages, even when there is no finding of discrimination in the related case on the merits. Sec'y Mot. 6-7. In making this argument, the Secretary relies on the legislative history of the Mine Act (the "Act") and Congress's statement that temporary reinstatement is an "'essential protection for complaining miners who may not be in a position to suffer even a short period of unemployment or reduced income pending the resolution'" of their complaint. Sec'y Mot. 7 (citing S. Rep. No. 95-181, at 37).

Grimes Rock, in its opposition, argues that because the issue of consequential damages was not raised before Judge Miller, the Secretary waived and/or forfeited any right to consequential damages and, as a result, the Commission does not have authority to consider the request for consequential damages. Grimes Opp'n 7-10. In addition, Grimes Rock argues that, because Saldivar failed to mitigate any alleged damages, Grimes Rock is not obligated to pay consequential damages. Grimes Opp'n 11. Specifically, Grimes Rock asserts that Saldivar failed to mitigate his damages by (1) deliberately choosing to not seek modification of the order approving temporary economic reinstatement so as to avoid Judge Miller questioning his credibility due to his incarcerations, which would have adversely affected his discrimination case, and (2) not making reasonable efforts to find employment after being discharged from his other job.[3] Grimes Opp'n 12-14. Finally, Grimes Rock argues that nothing in the Act's legislative history supports an absolute right to economic reinstatement, especially when a miner is unavailable to work due to his own choices. Grimes Opp'n 15-16. Here, Grimes Rock paid Saldivar exactly what was owed under the settlement agreement, and it was Saldivar, through his own misconduct, who created the financial woes for which he now seeks damages. Grimes Opp'n 16-17.

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[3] Given my analysis and findings below, I do not reach the question of mitigation of damages. However, it is worth noting that, in the context of temporary economic reinstatement, such as is the case here "there is no right for the operator to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim." *North Fork Coal Corp*., 33 FMSHRC 589, 593 (Mar. 2011). In response to my August 15, 2024 order to provide information, the Secretary confirmed that Grimes Rock's payment of $12,533.94 satisfied its temporary economic reinstatement payment obligations through June 17, 2022, excluding interest and possible consequential damages. Given my findings and conclusions, only the issue of interest remains for the period up to and including June 17, 2022. Accordingly, Grimes Rock's arguments regarding mitigation of damages need not be addressed.

ANALYSIS

The Act grants the Commission authority "to require a person *committing a violation* of . . . [Section 105(c)(2)] 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) (emphasis added). In *Sec'y of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126 (Feb. 1982) the Commission explained that "this broad remedial charge was designed not only to deter *illegal retaliation* but also to restore the employee, as nearly as possible, to the situation he would have occupied *but for the discrimination*." (citing *Sec'y of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1 (Jan. 1982) (emphasis added)). Pursuant to this history, the Commission and its judges have awarded relief in the form consequential damages to miners for losses stemming from unlawful discrimination. *E.g.*, *Amos Hicks v. Cobra Mining*, 14 FMSHRC 50 (Jan. 1992) (remanding case to judge for recalculation of consequential damages related to repossession of a truck the miner could not make payments on after he was discriminatorily discharged) and *Sec'y of Labor on behalf of Groves v. Con-ag, Inc.*, 39 FMSHRC 1811 (Sept. 2017) (ALJ) (awarding damages for late fees on car payment incurred due to loss of income stemming from discriminatory discharge).

Notably, but not surprisingly, consequential damages have only been awarded in Commission proceedings following an affirmative finding of discrimination in the underlying merits case. Requiring a finding of discrimination in order to award consequential damages is in harmony with both the language of the Act, which requires a "violation" of 105(c)(2), i.e., a finding of discrimination, as well as the legislative history, which states that "[i]t is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of *the discriminatory conduct* including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for *any special damages sustained as a result of the discrimination.*" S. Rep. No. 95-181, at 37 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978) (emphasis added).

Although the Commission possess broad remedial authority following a finding of discrimination in a merits proceeding, the Act does not grant the Commission the same range of remedies in a temporary reinstatement proceeding. Rather, in the context of temporary reinstatement, the Act provides only for "the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2); *See Sec'y of Labor on behalf of Garcia v. Veris Gold U.S.A., Inc.*, 36 FMSHRC 2365 (Aug. 2014) (ALJ).[4] A review of Commission case law reveals no instance in which consequential damages have been awarded in a temporary

[4] In *Garcia*, Judge Simonton noted the "differing scopes of relief provided for within Section 105(c)(2)" and found that, although an "expansive range of remedies" is available in a discrimination case on the merits upon a finding of unlawful discrimination, temporary reinstatement itself is the "sole remedy directly provided for by the Mine Act" in a temporary reinstatement proceeding. 36 FMSHRC at 2368. I agree with Judge Simonton's reasoning.

reinstatement proceeding absent a finding of discrimination in a related merits case.[5] In light of this analysis, I hold that, as a general matter, consequential damages are only available where a violation of Section 105(c) is proven in the merits case.

I find that the Act does not authorize an award of consequential damages in this case. On June 17, 2022, Judge Miller issued her decision in the merits case finding that the Secretary had "failed to prove a violation of section 105(c) of the Mine Act." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 473 (June 2022) (ALJ). Although the parties appealed the temporary reinstatement case to the Commission, Judge Miller's decision on the merits was not appealed by either party and, accordingly, became a final decision of the Commission 40 days after its issuance. *Sec'y of Labor on behalf of Hargis v. Vulcan Constr. Materials, LLC*, 46 FMSHRC __, No. SE 2021-0163 et al. (Aug. 29, 2024). Consequently, because there was no violation of Section 105(c), and given my holding that consequential damages are only available where a violation of Section 105(c) is proven in the merits proceeding, I find that an award of consequential damages in this temporary reinstatement proceeding is not appropriate.

Even if an award of consequential damages were appropriate, it would be virtually impossible to calculate here. The Secretary's principal argument in her motion is that Saldivar "incurred consequential damages" because he did not receive temporary economic payments in a timely manner.[6] Sec'y Mot. 4. The Secretary agrees that she must prove that the requested consequential damages were caused by Grimes Rock's "wrongdoing." Sec'y Mot. 7. However, Saldivar was incarcerated approximately 32% of time between the date Judge Miller issued the order approving temporary economic reinstatement and when she ultimately terminated his reinstatement, albeit prematurely, in her decision dismissing the merits case on June 17, 2022.[7] Temporary economic reinstatement payments were tolled during periods of Saldivar's incarceration. As a result, Saldivar's loss of income during those periods of tolling was a result of his own actions rather than any wrongdoing by Grimes Rock. It would be nearly impossible to determine whether the consequential damages that the Secretary is seeking were the result of the

[5] In its November 28, 2023 decision in this matter the Commission stated that "[i]f a miner prevails on the merits of the [discrimination] complaint, and the Judge finds that the operator violated the Mine Act, only then does the Judge consider remedies for the violation." 45 FMSHRC at 953.

[6] In her motion, the Secretary seeks consequential damages for the following items: Interest on late and missing child support payments, late rent fees, repossession of his vehicle, suspension of cell phone service, rental insurance suspension, and car insurance cancellation. Sec'y Mot. 4.

[7] This percentage was calculated by counting the days that Saldivar was entitled to temporary economic reinstatement and the days that he was incarcerated and then calculating the percentage of the time that he was incarcerated. Consistent with the Commission's November 23, 2023 decision in this matter, I recognize that Grimes Rock may be required to pay additional temporary economic reinstatement, as well as interest on those payments, for the time period after Judge Miller issued her decision on the merits, but before that decision became final.

wrongdoing of Grimes Rock, the actions of Saldivar, or a combination of both. Nevertheless, the primary reason for my denial of consequential damages is as set forth above.

Finally, Grimes Rock makes an important point concerning the Secretary's failure to raise the issue of potential consequential damages before Judge Miller. It argues that the Secretary and Saldivar waived, and therefore forfeited, any claimed right to consequential damages because the Secretary failed to establish good cause for not raising the consequential damages issue before Judge Miller. Grimes Opp'n 9-10. The Commission's procedural rules make clear that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the Judge had not been afforded an opportunity to pass." 30 C.F.R. § 2700.70(d). Even if consequential damages were available, I might well find that the Secretary, by waiting more than two months after Judge Miller issued her decision dismissing the discrimination case to file the motion for consequential damages, waived any right Saldivar may have had to such damages, and that the cursory reason offered for the delay, i.e., "mostly because Grimes stopped paying near the end of the ligation before" Judge Miller, Sec'y Mot. 8, does not establish good cause. Nevertheless, the Commission in its November 28, 2023 decision ordered me to determine whether "consequential damages are appropriate." 45 FMSHRC at 961.[8]

ORDER

For the reasons set forth above, the Secretary's motion for consequential damages is **DENIED**.

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

[8] I note that former Commissioner Althen, in his dissent in the Commission's November 28, 2023 decision, agreed with the argument presented by Grimes Rock. 45 FMSHRC at 977-79. However, I am bound by the Commission's majority decision on this issue and it was remanded to me for resolution. As a consequence, I find that I have jurisdiction to make the findings included in this order.

Distribution: (Via email and First Class Mail)

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