

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 20, 2025

AMERICAN TRIPOLI,
Contestant

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

AMERICAN TRIPOLI,
Respondent

CONTEST PROCEEDINGS

Docket No. CENT 2025-0086
Order No. 9998012; 11/19/2024

Docket No. CENT 2024-0299
Citation/Order No. 9763504

Mine: MOSeneca Mfr LLC dba
American Tripoli
Mine ID: 23-00504

CIVIL PENALTY PROCEEDING

Docket No. CENT 2025-0117
A.C. No. 23-00504-606686

Mine: MOSeneca Mfr LLC dba
American Tripoli

DECISION AND ORDER GRANTING SUMMARY DECISION
ORDER TO PAY

In this consolidated docket, the Secretary of Labor (“Secretary”) filed a Motion for Summary Decision under Commission Rule 2700.67, which Respondent, American Tripoli, proceeding *pro se*, has opposed. As explained below, the Secretary’s Motion for Summary Decision is granted, Citation No. 9763504 and Order No. 9998012 are affirmed, and Respondent is ordered to pay a \$500.00 civil penalty for Citation No. 9763504.

BACKGROUND

The undisputed material facts are set forth below, but it is useful at the outset to identify the underlying discrimination action tied to the citation and order at issue in this consolidated

docket.¹ As the Commission recently summarized:

At the beginning of 2023, miner Robert Baumann worked at the MOSenecaMfr LLC mine. In March 2023, he was elected miner representative. On April 11-12, 2023, Complainant Baumann walked around with MSHA during an inspection, which yielded a section 104(b) withdrawal order. On April 17, 2023, American Tripoli terminated Baumann's employment. After Baumann's termination, he was unemployed for 62 days and collected unemployment benefits. Baumann has been employed with Cherokee County Road and Bridge since July 24, 2023.

On April 25, 2023, Complainant Baumann filed a discrimination complaint with [MSHA] and the Secretary of Labor brought a discrimination case on Baumann's behalf alleging discrimination and interference. A hearing was held by a Commission Administrative Law Judge [William B. Moran], and on May 23, 2024, [Judge Moran] issued a decision finding that American Tripoli had discriminated against Baumann in violation of section 105(c) of the Mine Act. [Judge Moran] ordered that American Tripoli pay a civil penalty in the amount of \$15,000.00 for the discrimination violation and \$17,500.00 for the interference violation. He also awarded backpay and interest to Baumann in the amount of \$10,552 plus interest accrued to the actual date of payment.

Order, Docket No. CENT 2023-0251-DM, at 2 (Aug. 22, 2024) (internal citations omitted). More specifically vis-à-vis the backpay award, Judge Moran ordered:

Regarding Complainant Robert Baumann, as set forth above, the Court awards damages in the amount of **\$9,920.00 in back wages** to him. The Court also awards interest on backpay in the amount of **\$632.00 through February 27, 2024, plus the additional interest accrued from that date to the actual date of payment, which date is presently unknown**, applying the *Arkansas-Carbona* formula for the additional interest. [American] Tripoli is **ORDERED** to pay these amounts to Mr. Baumann.

Decision and Order, Docket No. CENT 2023-0251-DM, at 51 (May 23, 2024) (ALJ Moran) (bold in the original).²

¹ This consolidated docket consists of CENT 2024-0299 (assigned to Respondent's contest of Citation No. 9763504); CENT 2025-0086 (assigned to Respondent's contest of Order No. 9998012, which order was issued under Section 104(b) of the Mine Act for Respondent's failure to abate Citation No. 9763504), and CENT 2025-0117 (the penalty docket containing only Citation No. 9763504 and its assessed penalty of \$147.00). On January 14, 2025, I issued an order granting the Secretary's unopposed Motion to Consolidate these three dockets.

² Judge Moran's Decision and Order is attached as Exhibit C to the Secretary's Motion for Summary Decision. *See also* 46 FMSHRC 339 (May 23, 2024) (ALJ).

As explained below, the citation and order involved in this consolidated docket were issued by MSHA in relation to Respondent's on-going failure to pay Mr. Baumann the backpay with interest award contained in Judge Moran's Decision and Order. At the time Citation No. 9763504 was issued, Judge Moran's Decision and Order was on review before the Commission in Docket No. CENT 2023-0251-DM.³ Critically, the Commission, in an order issued on August 22, 2024, denied American Tripoli's motion to stay enforcement of Judge Moran's Decision and Order during the pendency of review. Order, CENT 2023-0251-DM (Aug. 22, 2024).⁴ Order No. 9998012 was issued approximately three months after that denial on November 19, 2024, as Respondent still had not paid Mr. Baumann.

MOTION FOR SUMMARY DECISION

On January 13, 2025, in this consolidated docket, the Secretary filed a Motion for Summary Decision and a supporting Memorandum with Exhibits A – H.⁵ Respondent filed a *pro se* Response in Opposition with Attachments 1 – 8, on January 14, 2025.

On January 17, 2025, the Commission vacated its Directions for Review in CENT 2023-0251-DM and dismissed the review proceeding. Order, CENT 2023-0251-DM, at 2 (Jan. 17, 2025). On the same day, the Secretary filed a Notice to Supplement her supporting Memorandum in this consolidated docket; her Notice attached the Commission's order.

American Tripoli subsequently filed a Motion to Reconsider that dismissal with the Commission, which the Commission denied on February 12, 2025. Immediately after that denial, I informed the parties they would have 14 days within which to supplement their filings on the pending Motion for Summary Decision if desired.

On February 20, 2025, the Secretary (1) alerted via email that American Tripoli had filed a Petition for Review of the Commission's dismissal of the review proceeding in CENT 2023-0251-DM, as well as its subsequent refusal to reconsider that dismissal, with the United States Court of Appeals for the Eighth Circuit, and (2) sought an additional 14 days within which "to consider the Secretary's position on a supplemental brief [in the present motion] . . . given this change in procedural posture." Respondent opposed the request via email and, in the alternative,

³ Two Commissioners *sua sponte* directed review of Judge Moran's Decision and Order on June 18, 2024. CENT 2023-0251-DM, Direction for Review (June 18, 2024) (Commissioners Baker and Marvit). American Tripoli subsequently filed a Petition for Discretionary Review which was granted by Direction for Review issued on June 27, 2025. CENT 2023-0251-DM, Direction for Review (June 27, 2024) (Chair Jordan, Commissioners Rajkovich, Baker, and Marvit). The second Direction for Review combined the two directions and instructed American Tripoli to address "all issues raised in the June 18 direction for review and the June 21 petition for discretionary review." Dir. Rev. (June 27, 2024), at 1.

⁴ I review this Order in depth below in Discussion, Part B.

⁵ Exhibits E, F, and H were not clearly labelled, however, I deduced their intended Exhibit label based on placement within the larger filing.

requested both sides be given additional time to supplement their filings. I granted the extension applicable to both parties, and neither party subsequently filed a supplemental brief.

The Secretary's supporting Memorandum contained a Statement of Undisputed Material Facts. Secy's Mem. at 2-7 (¶¶ 1-36). Respondent made almost no effort in its Response in Opposition to controvert that Statement of Undisputed Material Facts. *See* Commission Rule 2700.67(d). Given Respondent's *pro se* status, I scrutinized the Response in Opposition closely to discern any materials facts potentially in dispute. There are none, as the dispute in this consolidated docket boils down to a legal question: whether Respondent was obligated to honor Judge Moran's Decision and Order to pay Mr. Baumann backpay with interest while Judge Moran's Decision and Order was on review before the Commission. Affirmance of Citation No. 9763504 and Order No. 9998012 in this consolidated docket turns on that question.

UNDISPUTED MATERIAL FACTS

1. MoSenecaManufacturer Limited Liability Company, doing business as American Tripoli ("American Tripoli"), operates the MoSenecaMfr LLC dba American Tr mine and mill. Exhibit E to Sec'y Mot. for Sum. Dec. (Declaration of MSHA Field Office Supervisor Shawn Pratt), ¶ 6.
2. MoSenecaMfr LLC dba American Tr mine is an open pit surface mine located at or near 8000 S. 680 Rd., Peoria, Oklahoma (the "Mine"). Exhibit C to Sec'y Mot. for Sum. Dec. (Judge Moran Decision and Order in CENT 2023-0251-DM (May 23, 2024)), at 7, n.7 & 26 n.25; Exhibit E to Sec'y Mot. for Sum. Dec. (Declaration of MSHA Field Office Supervisor Shawn Pratt), ¶¶ 7, 11, 12, and Attachment A, at 2.
3. At all relevant times, American Tripoli operated a mill in Seneca, Missouri that processes tripoli taken from the Mine's quarry. Exhibit C to Sec'y Mot. for Sum. Dec. (Judge Moran Decision and Order in CENT 2023-0251-DM (May 23, 2024)), at 7, n.7; Exhibit E to Sec'y Mot. for Sum. Dec. (Declaration of MSHA Field Office Supervisor Shawn Pratt), ¶ 12, and Attachment B, at 7.
4. MoSenecaManufacturer Limited Liability Company is an active limited liability company in the State of Missouri. Exhibit E to Sec'y Mot. for Sum. Dec. (Declaration of MSHA Field Office Supervisor Shawn Pratt), ¶¶ 25-26; *see also id.* at Attachment C (limited liability company details form).
5. The Mine is in non-producing active status with MSHA. Exhibit E to Sec'y Mot. for Sum. Dec. (Declaration of MSHA Field Office Supervisor Shawn Pratt), ¶ 14.
6. In the last twenty-four months, American Tripoli has been issued 198 citations, 54 being significant and substantial, 17 as 104(d) orders and five as 104(b) orders. Exhibit H to Sec'y Mot. for Sum. Dec. (Certified Assessed Violation History Report).
7. American Tripoli reported between 10,000 and 20,000 working hours in the last four quarters of operation. Exhibit E to Sec'y Mot. for Sum. Dec. (Declaration of MSHA Field Office Supervisor Shawn Pratt), ¶ 16.

8. Since at least July 2024, at least one employee works for American Tripoli and continues to sell product and collect customer payments. Exhibit E to Sec’y Mot. for Sum. Dec. (Declaration of MSHA Field Office Supervisor Shawn Pratt), ¶¶ 17-20.
9. American Tripoli’s website indicates the business is open and is not for sale. Exhibit E to Sec’y Mot. for Sum. Dec. (Declaration of MSHA Field Office Supervisor Shawn Pratt), ¶¶ 21-24, and Attachment B, at 5.
10. American Tripoli values its revenue potential at \$100 million per year. Exhibit E to Sec’y Mot. for Sum. Dec. (Declaration of MSHA Field Office Supervisor Shawn Pratt), ¶ 23, and Attachment B, at 5.
11. Robert Baumann is a former miner at American Tripoli, who worked as a production supervisor at American Tripoli’s mill. Exhibit C to Sec’y Mot. for Sum. Dec. (Judge Moran Decision and Order in CENT 2023-0251-DM (May 23, 2024)), at 36.
12. On April 17, 2023, American Tripoli terminated Mr. Baumann after he requested pay during an MSHA shutdown. Exhibit C to Sec’y Mot. for Sum. Dec. (Judge Moran Decision and Order in CENT 2023-0251-DM (May 23, 2024)), at 36.
13. Mr. Baumann filed a timely complaint with MSHA under Section 105(c) of the Mine Act and his allegation of discrimination was investigated by MSHA. The Secretary subsequently filed a Complaint against American Tripoli alleging illegal discrimination and interference and seeking civil penalties and backpay for Mr. Baumann pursuant to Section 105(c) of the Mine Act. The matter was docketed at CENT 2023-0251-DM. Exhibit C to Sec’y Mot. for Sum. Dec. (Judge Moran Decision and Order in CENT 2023-0251-DM (May 23, 2024)), at 1.
14. The matter docketed at CENT 2023-0251 proceeded to a hearing before Administrative Law Judge William Moran. Exhibit C to Sec’y Mot. for Sum. Dec. (Judge Moran Decision and Order in CENT 2023-0251-DM (May 23, 2024)), at 2.
15. On May 23, 2024, Judge Moran issued a Decision and Order in CENT 2023-0251-DM, pursuant to 30 U.S.C. § 815(c)(2), finding that American Tripoli had violated Section 105(c) of the Mine Act. Exhibit C to Sec’y Mot. for Sum. Dec. (Judge Moran Decision and Order in CENT 2023-0251-DM (May 23, 2024)), at 50-51.
16. Pursuant to the Mine Act, Judge Moran’s Decision and Order required American Tripoli to, among other things, pay Mr. Baumann \$9,920.00 in backpay, plus \$632.00 in interest, with interest to continue to accrue until “the actual date of payment.” Exhibit C to Sec’y Mot. for Sum. Dec. (ALJ Moran Decision and Order in CENT 2023-0251-DM (May 23, 2024)), at 51.
17. Judge Moran’s Decision and Order stated that additional interest should be calculated according to “the *Arkansas-Carbona* formula.” Exhibit C to Sec’y Mot. for Sum. Dec. (Judge Moran Decision and Order in CENT 2023-0251-DM (May 23, 2024)), at 51. The *Arkansas-Carbona* formula derives from *Sec’y on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2053 (1983), which sets forth the following formula: “Amount of interest = The quarter's

net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x daily adjusted prime rate interest factor.”

18. American Tripoli did not pay Mr. Baumann the backpay plus interest amounts ordered by Judge Moran’s Decision and Order. Exhibit F to Sec’y Mot. for Sum. Dec. (Declaration of Robert Baumann), ¶ 7.⁶

19. On June 21, 2024, American Tripoli filed a Petition for Discretionary Review of Judge Moran’s Decision and Order, which the Commission accepted. Exhibit D to Sec’y Mot. for Sum. Dec. (Commission Order (Aug. 22, 2024)), at 2.

20. On June 26, 2024, American Tripoli filed a Motion to Stay enforcement of the backpay award while the matter was on review with the Commission. Exhibit D to Sec’y Mot. for Sum. Dec. (Commission Order (Aug. 22, 2024)), at 1.

21. On July 1, 2024, MSHA issued Citation No. 9763504 to American Tripoli for failure to comply with Judge Moran’s Decision and Order by failing to pay Mr. Baumann backpay plus interest as ordered. Exhibit A to Sec’y Mot. for Sum. Dec. (Citation No. 9763504), at 1.

22. Specifically, Citation No. 9763504 alleged:

The mine operator has refused to comply with an order promulgated pursuant to the Mine Act. FMSHRC ALJ William B. Moran ordered American Tripoli to pay Robert Baumann the damages in the amount of \$9,920.20 in back wages and also awards the interest on back pay in the amount of \$632.00 through February 27, 2024, plus the additional interest accrued from that date to the actual date of payment, which date is presently unknown, applying the Arkansas-Carbona formula for the additional interest. [American] Tripoli is ordered to pay these amounts to Mr. Baumann.

American Tripoli has not made the payments as ordered. This failure to comply with an order promulgated pursuant to the Mine Act is a violation of section 104(a) of the Act.

Exhibit A to Sec’y Mot. for Sum. Dec. (Citation No. 9763504), at 1.⁷

⁶ This Declaration was unsigned and undated as attached to the Secretary’s Memorandum. However, the record otherwise reflects that it has been Respondent’s consistent position that it was not obligated to pay Mr. Baumann at the time the citation and order at issue in this consolidated docket were issued by MSHA.

⁷ Judge Moran’s Decision and Order awarded back pay in the specific amount of \$9,920.00. Decision and Order, Docket No. CENT 2023-0251-DM, at 51 (May 23, 2024). In identifying that amount in Citation No. 9763504, MSHA appears to have inadvertently added 20 cents.

23. The abatement date for Citation No. 9763504 was set by MSHA at July 5, 2024. Exhibit A to Sec’y Mot. for Sum. Dec. (Citation No. 9763504), at 1.
24. The Gravity for Citation No. 9763504 was indicated by MSHA as “No Likelihood,” and “No Lost Workdays” and “No” to Significant and Substantial. Exhibit A to Sec’y Mot. for Sum. Dec. (Citation No. 9763504), at 1.
25. The Negligence for Citation 9763504 was indicated by MSHA as “Moderate.” Exhibit A to Sec’y Mot. for Sum. Dec. (Citation No. 9763504), at 1.
26. The Number of Persons Affected for Citation No. 9763504 was indicated by MSHA as 001. Exhibit A to Sec’y Mot. for Sum. Dec. (Citation No. 9763504), at 1.
27. On July 8, 2024, MSHA extended the abatement date for Citation No. 9763504 to July 23, 2024, providing “Due to the pending Motion to Stay [before the Commission], in docket 2023-0251, this extension is granted until July 23, 2024.” Exhibit A to Sec’y Mot. for Sum. Dec. (Citation No. 9763504 and modifications), at 2.
28. On August 19, 2024, MSHA extended the abatement date for Citation No. 9763504 again, this time to September 3, 2024, providing: “Due to the pending Motion to Stay [before the Commission], in docket 2023-0251, this extension is granted until September 3, 2024.” Exhibit A to Sec’y Mot. for Sum. Dec. (Citation No. 9763504 and modifications), at 3.⁸
29. On August 22, 2024, the Commission issued a 3:2 Order denying American Tripoli’s Motion to Stay enforcement of the backpay award while Judge Moran’s Decision and Order was on review before the Commission. Exhibit D to Sec’y Mot. for Sum. Dec. (Commission Order (Aug. 22, 2024)). Three Commissioners voted to deny the motion, *id.* at 1-7, and two Commissioners dissented, *id.* at 8-9.
30. After receipt of the Commission’s Order of August 22, 2024, denying the Motion to Stay enforcement of the backpay award, American Tripoli did not pay Mr. Baumann the backpay plus interest amounts ordered by Judge Moran’s Decision and Order. Exhibit F to Sec’y Mot. for Sum. Dec. (Declaration of Robert Baumann), ¶ 7.
31. The MSHA Office of Assessments assessed a penalty of \$147.00 for Citation No. 9763504. Exhibit G to Sec’y Mot. for Sum. Dec. (Petition for Assessment filed in CENT 2025-0013), at 3, and Exhibit A.⁹

⁸ The Secretary clarified the second modification to Citation No. 9763504 was mislabeled as 9763504-03; only two modifications were issued. Sec’y Mem. at 6, n.3.

⁹ At the time the penalty for Citation No. 9763504 was assessed, that citation was contained in Docket CENT 2025-0013. Citation No. 9763504 was subsequently reassigned to CENT 2025-0117, and CENT 2025-0117 was consolidated with the two related contest dockets. *See supra.* n. 1.

32. On November 19, 2024, MSHA issued Order No. 9998012 for failure to abate Citation No. 9763504. Exhibit B to Sec’y Mot. for Sum. Dec. (Order No. 9998012).
33. Order No. 9998012 states: “The condition described in [C]itation 9763504 has not been corrected. MosenecaManufacturer LLC d/b/a American Tripoli has not complied with the order promulgated pursuant to the Mine Act.” Exhibit B to Sec’y Mot. for Sum. Dec. (Order No. 9998012).
34. As of November 19, 2024, American Tripoli had not paid Mr. Baumann the backpay plus interest amounts ordered by Judge Moran’s Decision and Order. Exhibit F to Sec’y Mot. for Sum. Dec. (Declaration of Robert Baumann), ¶ 7.¹⁰
35. MSHA determined that the abatement date for Citation No. 9763504 should not be further extended. Exhibit E to Sec’y Mot. for Sum. Dec. (Declaration of MSHA Field Office Supervisor Shawn Pratt), ¶¶ 29-30.
36. To date, American Tripoli has not paid Mr. Baumann the backpay plus interest amounts ordered by Judge Moran’s Decision and Order. Exhibit F to Sec’y Mot. for Sum. Dec. (Declaration of Robert Baumann), ¶ 7.
37. As of January 13, 2025 (i.e., the date the present Motion for Summary Decision was filed), the amount of backpay plus interest owed to Mr. Baumann totaled \$11,313.86. Exhibit C to Sec’y Mot. for Sum. Dec. (Judge Moran Decision and Order in CENT 2023-0251-DM (May 23, 2024)), at 50-51, plus application of the *Arkansas-Carbona Co.* formula set forth *supra* ¶ 17.

DISCUSSION

A. Standard for Summary Decision

Commission Procedural Rule 67(b) provides: “A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). The Commission has long described summary decision as an extraordinary procedure and has analogized it to summary judgment under Fed. R. Civ. P. 56. *Ken American Resources, Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Summary decision should not be granted “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.” *Ken American*, 38 FMSHRC at 1947 (internal quotation omitted).

¹⁰ In its Response in Opposition, at 9, Respondent offers a 6-bullet “Timeline of Key MSHA Actions,” all of which post-date issuance of Order No. 9998012. I take judicial notice that Order No. 9998012 led to closure and to on-going discussions between Respondent and MSHA regarding modifications to the order. I also find these events to be irrelevant to the pending Motion for Summary Decision.

In *Ken American*, the Commission reviewed the basic summary decision mechanism:

If the moving party carries its burden of showing that there is no genuine dispute as to material fact and that the movant is entitled to judgment as a matter of law, then the burden shifts to the non-movant to establish a genuine dispute as to material fact. If the moving party fails to meet its burden, then summary decision must be denied, regardless of the sufficiency of the opposition. Even the absence of an opposition does not entitle the movant to summary decision, if the motion is not adequately supported. In determining the universe of material facts and whether such facts are undisputed, the Judge should not rely solely on the parties' claims, but should conduct an independent review of the record.

38 FMSHRC at 1946 (internal citations and quotations omitted). In reviewing the record on summary decision, a Judge must evaluate the evidence in “the light most favorable to . . . the party opposing the motion.” *Id.* at 1946 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962)). Additionally, any “inferences to be drawn from the underlying facts contained in [the underlying] materials must be viewed in the light most favorable to the party opposing the motion.” *Id.* (quoting *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (brackets original)). In considering a motion for summary decision, a Judge’s “role is limited to a determination of whether a case can be decided without the need to resolve any factual disputes,” and may not engage in fact-finding beyond the undisputed facts established by the record or weigh the evidence. *West Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015) (internal citations omitted).

B. The Commission Order Denying Stay of Enforcement

It is necessary to review the Commission’s order denying American Tripoli’s Motion for Stay of enforcement in some depth, as that order influences my analysis of the underlying legal question presented by the pending Motion for Summary Decision.¹¹

1. Procedural History Preceding the Order

After Judge Moran issued his Decision and Order on May 23, 2024, the Commission issued two Directions for Review. The first was issued *sua sponte* on June 18, 2024. Three days later, on June 21, 2024, American Tripoli filed a Petition for Discretionary Review. After that, on June 26, 2024, American Tripoli filed a “Motion to Stay Effect of ALJ’s Decision to Prevent Threatened MSHA Enforcement” (hereinafter “Motion for Stay”). On June 27, 2024, the Commission issued the second Direction for Review granting American Tripoli’s Petition for Discretionary Review and consolidating the two directions. Four days later, on July 1, 2024, MSHA issued Citation No. 9763504.

¹¹ At various points in her Memorandum, the Secretary asserts the Commission “ordered” Respondent to pay Mr. Baumann, citing the Commission’s order denying stay. *See* Sec’y Mem. at 2, 20 (proposed PSOF ¶ 20). While I agree that such was the practical impact of the Commission’s order, *see infra*, I find the Secretary’s characterization to be overstated.

In its Motion for Stay (filed June 26, 2024), American Tripoli had represented:

MSHA, through its trial counsel, has advised that even though the case is on appeal, it expects American Tripoli to pay damages to Mr. Baumann at this time. MSHA has said that American Tripoli need not pay civil penalties to MSHA while the appeal is pending but that it must pay damages to Mr. Baumann.

MSHA, through its trial counsel, threatened that if American Tripoli does not make this payment to Mr. Baumann, it will issue a citation and/or order against American Tripoli that could result in closure of the mine.

Mot. for Stay, at 2 (¶¶ 4, 5).¹² The Secretary’s Response in Opposition, filed on July 8, 2024, acknowledged that the Secretary had informed American Tripoli that “it needed to comply with [Judge Moran’s] order to pay [Mr.] Baumann.” Sec’y Resp. in Opp., at 2. As the Secretary also noted, Citation No. 9763503—issued in the interim on July 1, 2024, for American Tripoli’s failure to pay Mr. Baumann—set an abatement date of 10 a.m. on July 5, 2024; the Secretary represented that she planned to extend the time for abatement. *Id.* at 2-3.¹³

In its Motion for Stay, American Tripoli argued: “MSHA’s position that American Tripoli must pay damages to Mr. Baumann while this case is pending on appeal is contrary to law.” Motion for Stay, at 2 (¶ 6). Citing Section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1), American Tripoli contended: “The ALJ’s decision is . . . not a final order of the Commission because review has been directed. As a result, payment to MSHA and Mr. Baumann is not due until this matter becomes a final order.” Motion for Stay, at 3 (¶ 7). American Tripoli voiced its concern that it would be “shut down by an enforcement action” and argued it should not be required to pay Mr. Baumann while Judge Moran’s Decision and Order was on review just “to avoid this type of action by MSHA.” *Id.* (¶ 8). It asked the Commission to “stay the effect” of Judge Moran’s Decision and Order “until the appeal in this matter is concluded.” *Id.*

In opposition, the Secretary argued that, while Judge Moran’s Decision and Order was admittedly not final, such did not mean it was unenforceable. Sec’y Resp. in Opp., at 3.¹⁴ Citing, *inter alia*, *Coleman v. Tollefson*, 575 U.S. 532 (2015), and *Maness v. Meyers*, 419 U.S. 449 (1975), the Secretary invoked the general legal precept that, unless a stay is issued, an order is enforceable while it is on review. Sec’y Resp. in Opp., at 3-4. *See e.g.*, *Maness*, 419 U.S. at 458 (“We begin with the basic proposition that all orders and judgments of courts must be complied

¹² Judge Moran’s Decision and Order had ordered American Tripoli pay two civil penalties. I understand American Tripoli’s reference to “damages” throughout its Motion for Stay to refer to the backpay award.

¹³ Abatement was twice extended while American Tripoli’s Motion for Stay was pending before the Commission. Undisputed Facts ¶¶ 27, 28.

¹⁴ The Decision and Order is now final as the Commission dismissed its review proceeding on January 17, 2025.

with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.”). The Secretary then argued that American Tripoli had not carried its burden to meet the *Virginia Petroleum* factors used by the Commission to assess the propriety of a stay of enforcement (i.e., likelihood of prevailing on the merits; irreparable harm to the requesting party if stay is denied; adverse effect on party not seeking the stay; and public interest). See *Sec’y on behalf of Price and Vacha v. Jim Walter Res., Inc.*, 9 FMSHRC 1312, 1312 (Aug 1987) (citing *Virginia Petroleum Jobbers Assoc. v. Fed. Power Comm’n*, 259 F.2d 921 (D.C. Cir. 1958)). Throughout her response, the Secretary cited *Sec’y on behalf of Saldivar v. Grimes Rock, Inc.*, 44 FMSHRC 725 (Aug. 2022) (denying operator’s motion for stay under the *Virginia Petroleum* factors in the context of Commission appeal taken from an order granting a motion to enforce temporary reinstatement).¹⁵

American Tripoli replied, contending the Secretary was confusing temporary reinstatement orders with a decision and order issued by an ALJ after a hearing on the merits held in a discrimination case, and further arguing that any notion of “comply now – litigate later” built into the Mine Act applied only to enforcement actions designed to protect miner health and safety. Reply at 1-2 (¶¶ 1-2). It contended these two categories of cases (i.e., temporary reinstatement and enforcement actions) “have no bearing” on a situation where the underlying decision on appeal involves a discrimination claim decided after a hearing on the merits. *Id.* at 2 (¶ 2). American Tripoli argued that, under Section 113(d)(1) of the Mine Act, such a decision is not final until 40 days have elapsed from issuance or the Commission denies review. *Id.* at 2 (¶¶ 3, 5). American Tripoli then contended that because Judge Moran’s Decision and Order was not final—and would not be final until the Commission finished its then-pending review—it should not bear the burden of proving the *Virginia Petroleum* factors; instead, the Secretary should have to explain “why she is attempting to enforce” a non-final order.” *Id.* at 3 (¶ 7). In the alternative, American Tripoli offered a modicum of argument on the *Virginia Petroleum* factors, including:

[I]f payment is made to Mr. Baumann and this Commission reverses [Judge Moran’s Decision and Order], there is no procedural mechanism to get the money back. How would [American Tripoli] force Mr. Baumann to return the money? This is why[,] practically, payment is not due when there is not a final order.

The failure of Mr. Baumann to return the money and American Tripoli being left with no administrative remedy to pursue the money is an adverse effect that also is against the public interest, as [American Tripoli] would be forced to try and institute a civil suit against Mr. Baumann to return [the] money.

Id. at 3 (¶ 8b, 8c). Finally, American Tripoli contended that because the backpay award “will continue to accrue interest while the appeal is pending,” Mr. Baumann could “enforce his rights”

¹⁵ Commission Rule 2700.45(f), applicable to temporary reinstatement proceedings, provides, in pertinent part: “[t]he filing of a petition [for Review of Temporary Reinstatement Order] shall not stay the effect of the Judge’s order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances.”

to backpay “once there is a final order by this Commission.” *Id.* at 4 (¶ 8d).

2. *The Commission’s 3:2 Order Denying Stay*

On August 22, 2024, the Commission issued a 3:2 Order denying American Tripoli’s Motion for Stay. Order, CENT 2023-0251-DM (Aug. 22, 2024). The majority (Chair Jordan and Commissioners Baker and Marvit) confirmed that “[a]s with all Commission cases considering a motion for stay, requests for a stay of a Judge’s award of monetary damages pending appeal of a section 105(c) merits’ decision are considered on a case-by-case basis and are also analyzed under *Virginia Petroleum*.” *Id.* at 3-4 & n. 4 (majority). The majority also stressed the “remedial goal of [S]ection 105(c)” which is to “restore the victim of illegal discrimination to the situation he would have occupied but for the discrimination.” *Id.* at 4 (citations omitted).

The majority then addressed each *Virginia Petroleum* factor. It found the first factor (likelihood of prevailing on appeal) unmet as American Tripoli had merely alleged that Judge Moran made “a number of errors” and such allegation was insufficient. *Id.* at 4-5. As the majority explained, “even if errors are found, it is not clear that said errors would necessarily be fatal to the Judge’s ultimate finding of discrimination or his award of backpay.” *Id.* at 4.

On the second factor (irreparable harm to the requesting party if stay is denied), the majority explained:

The Commission has recognized that “[e]conomic loss does not, in and of itself, constitute irreparable harm.” [*Sec’y on behalf of*] *Franks & Hoy v. Emeral Coal Resources, Inc.*], 35 FMSHRC [2373,] 2374 [(Aug. 2013)] . . . The Commission has also noted that an operator can seek reimbursement from a complainant in the event the Commission overturns the Judge’s finding of discrimination. *Franks & Hoy*, 35 FMSHRC at 2374; *see also* . . . *Virginia Petroleum*, 259 F.2d at 925 (“The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.”); *In re NTE Connecticut, LLC*, 26 F.4th 980, 990 (D.C. Cir. 2022) (reasoning that “in most circumstances financial harms can be remedied through subsequent legal action.”).

...

Here, the operator *has been ordered* to pay [Mr.] Baumann \$10,552. However, case law dictates that economic loss alone is insufficient to establish irreparable harm. Additionally, American Tripoli has not alleged that paying [Mr.] Baumann the \$10,522 would lead to the extinction of its business. Thus, the operator has not demonstrated irreparable harm.

Id. at 5-6 (emphasis added).

On the third factor (adverse effect on party not seeking stay), the majority agreed with the Secretary that American Tripoli had not demonstrated that a stay would not adversely affect Mr.

Baumann. *Id.* at 6. Drawing explicitly on Section 105(c)'s remedial goal, the majority explained: "American Tripoli fails to put forth any substantive reason why a stay would not adversely affect [Mr.] Baumann at this time *or why [Mr.] Baumann would not need his backpay award right away.*" *Id.* (emphasis added).

On the fourth factor (public interest), the majority first observed that "American Tripoli's assertions regarding its inability to recover the backpay wages and [Mr.] Baumann's suspected future failure to return the money [are] purely speculative," and further, that American Tripoli had failed to offer any reason why a stay of enforcement would be in the public interest. *Id.* at 6. The majority observed that because Congress intended miners to "play an active part in the enforcement of the [Mine] Act," and because Congress recognized miners must be "protected against . . . discrimination which they might suffer as a result of their participation," S. Rep. No. 95-181, at 35 (1977), a stay "would have a chilling effect on other miners at the operator's mine who are aware that [Mr.] Baumann lost his job after taking an active role in safety, contrary to the operator's instructions," – an outcome that would "clearly run[] counter to the public's interest and Congress' intent." *Id.* at 6-7.

Toward the end of its analysis, the majority firmly rejected American Tripoli's argument that Judge Moran's Decision and Order was unenforceable because it was not a final order of the Commission under Section 113(d)(1). *Id.* at 7. As the majority explained:

Interpreting the Mine Act as to require a final, fully adjudicated order on the complaint, before a Judge's order of backpay can be enforced, would be inconsistent with the expressed intent of Congress. In the Senate Report that accompanied the Mine Act, Congress recognized that "complaining miners [] may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Cobra Nat. Res. v. FMSHRC*, 742 F.3d 82, 84 (4th Cir. 2014). Complainant Baumann lost 62 days of employment, and a Judge has ordered that he be made whole. *Staying the order would prolong any financial hardship suffered by the miner.*

Id. (emphasis added).

Commissioners Althen and Rajkovich dissented—not because they would have found the *Virginia Petroleum* factors met in favor of a stay, but because they concluded Judge Moran's Decision and Order was not a final order under Section 113(d)(1), and opined that "payment of a backpay award is not due unless and until the order requiring payment becomes a final order of the Commission." Order, at 8 (dissent). They explained their reasoning as follows:

A Judge's decision on the merits of a discrimination complaint is not final upon issuance. . . . Rather, [that] decision 'shall become a final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission.' [Section 113(d)(1)] Here, the Judge's decision has been appealed and is currently before the Commission on review. Based on [Section 113(d)(1)], the Judge's order has not become final, and the Commission has yet to issue a decision. The question of

whether American Tripoli engaged in discrimination—and whether the complainant is therefore entitled to a backpay award— is not yet resolved.

. . . [t]he Commission has held that temporary reinstatement payments may be enforced even when an order is on appeal. *See* [*Grimes Rock, Inc.*, 44 FMSHRC 725]. However, we have also clearly established that backpay and temporary reinstatement are separate mechanisms with different underlying principles. *North Fork Coal Corp.*, 33 FMSHRC 589, 592-93 (Mar. 2011). The purpose of temporary reinstatement is to allow a miner to earn a living while the discrimination complaint is pending, while backpay is designed to make the miner whole after it has been established that discrimination occurred. *Id.* Temporary reinstatement sustains a miner until there is a final order, at which point any appropriate backpay comes into play. *See* [Section 105(c)(2)] (providing for miners to be temporarily reinstated “pending final order on the complaint”).

As a practical matter, this distinction means that any concerns regarding a miner’s financial status while a merits complaint is pending should be addressed through temporary reinstatement, rather than by requiring pre-payment of a final award to which the complainant may not ultimately be entitled. Additionally, interest would accrue on the backpay award during the pendency of the appeal, so complainants who succeed on appeal are ultimately compensated for the ‘delay’ in awaiting a final order.

Id. at 8-9 (footnotes omitted). In a footnote, they (1) noted that the stay in *Franks & Hoy* “was initially granted on a temporary basis” and (2) stated their belief that the stay issue in *Franks & Hoy* had been “wrongly decided.” *Id.* at 8 n.2.

3. *Relevance of the Commission’s Denial of Stay*

It is significant for purposes of the pending Motion for Summary Decision that the Commission, which operates as an appellate-style review body under Section 113(d)(2), *see e.g.*, 30 U.S.C. § 823(d)(2); Commission Procedural Rules Subpart H (Review by the Commission), entertains requests for stay of enforcement during the pendency of Commission review.¹⁶ The stay mechanism, as reinforced by the *Virginia Petroleum* factors, assumes that the decision on review is enforceable; otherwise, stay would be unnecessary.

This understanding of the stay mechanism is in full accord with the “basic proposition” reviewed by the United States Supreme Court in *Maness*, 419 U.S. at 458: “all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply

¹⁶ Section 113(d)(1) provides, in relevant part, that administrative law judges appointed by the Commission “to hear matters under [the Mine Act], and make a determination upon, any proceeding instituted before the Commission . . . shall make a decision which constitutes his final disposition” and “shall not be assigned to prepare a recommended decision under [the Mine Act].” 30 U.S.C. § 823(d)(1).

promptly with the order pending appeal.” *See also id.* at 459 (“The orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.”) (internal quotation omitted); *Coleman*, 575 U.S. at 539 (“Unless a court issues a stay, a trial court’s judgment (say, dismissing a case) normally takes effect despite a pending appeal.”)¹⁷

The Commission’s Order denying American Tripoli’s Motion for Stay in CENT 2023-0251-DM must be read against this backdrop. The majority was aware that MSHA had notified American Tripoli it would issue a citation and potentially an order that could result in closure of the mine “if [American Tripoli] did not pay the ordered backpay.” Order, at 2 (majority). The majority’s reasoning on the *Virginia Petroleum* factors appears to assume that, in the absence of a stay, Judge Moran’s Decision and Order was—and would remain—enforceable. *See id.* at 5 (acknowledging and rejecting American Tripoli’s contention it would suffer harm were it to pay Mr. Baumann and have no procedural mechanism to recover its money because even substantial economic loss does not by itself constitute irreparable harm), and citing *Franks & Hoy*, 35 FMSHRC at 2374, for the proposition that “The Commission has also noted that an operator can seek reimbursement from a complainant in the event the Commission overturn’s the Judge’s finding of discrimination”); *id.* at 6 (“American Tripoli has not alleged that paying [Mr.] Baumann the \$10,522 would lead to the extinction of its business”); *id.* (agreeing with the Secretary that “it is common sense that for [Mr.] Baumann to continue to go unpaid is to experience an adverse effect” and noting American Tripoli’s failure to identify any substantial reason why “[Mr.] Baumann would not need his backpay award right away”); *id.* (deeming American Tripoli’s assertions regarding inability to recover the backpay and Mr. Baumann’s future failure to return it to be “purely speculative” and recognizing that “staying enforcement of the Judge’s order would have a chilling effect on other miners”); *id.* at 7 (“[Mr.] Baumann lost 62 days of employment, and a Judge has ordered that he be made whole. Staying the order would prolong any financial hardship suffered by the miner.”).

It is also telling that the Commission understood *Franks & Hoy*, 35 FMSHRC at 2374, to be directly on-point. In that case, an ALJ held a hearing in a discrimination proceeding under Section 105(c) and later issued a decision finding the operator had discriminated against the two complaining miners. *Id.* at 2373; *see also* 2013 WL 3865337 (June 3, 2013) (underlying ALJ decision). The operator filed a petition for discretionary review; it also filed two separate motions to stay enforcement of the ALJ’s decision. 35 FMSHRC at 2373-74. The first motion complained that the ALJ’s deadline for taking certain remedial measures (originally 10 days, later extended to 30), conflicted with the operator’s right to seek Commission review. *Id.* at

¹⁷ The Supreme Court in *Maness* and *Coleman* refers to “courts” which are different than administrative adjudicatory bodies; additionally, I acknowledge that these two cases involve highly particularized settings. *See Maness*, 419 U.S. 449 (assessing contempt in the context of good faith belief in incrimination under the Fifth Amendment); *Coleman*, 575 U.S. 532 (assessing whether dismissal of third lawsuit then on appeal counted as “third strike” under federal *in forma pauperis* statute). Nonetheless, the Supreme Court’s articulation of this “basic proposition” reinforces the assumption underlying the stay mechanism: i.e., that a decision presently undergoing review is enforceable; otherwise, stay would be unnecessary.

2374. The Commission granted that motion in part, extending the ALJ’s deadline. Notably, in its order, the Commission acknowledged that the operator had sought a stay of enforcement “until such time as there is a final Commission determination in th[e] matter.” *Id.* Having not yet ruled on the operator’s petition for review, the Commission stated that, if review was granted, the Commission “would then decide whether a further stay was appropriate under the applicable standard for a stay pending review.” *Id.*

The Commission in *Franks & Hoy* subsequently directed review after which the operator submitted a second motion for stay. *Id.* Addressing that motion, the Commission acknowledged the ALJ’s order had, *inter alia*, obligated the operator to pay both miners a specified backpay amount plus interest. *Id.* The Commission denied the motion for stay, finding three of the *Virginia Petroleum* factors unmet. Specifically, the Commission saw “no irreparable harm to [the operator] should it prevail” on review, because “[e]conomic loss does not, in and of itself, constitute irreparable harm” and because the operator “*can seek reimbursement from the two miners in the event the Commission overturns the judge’s decision.*” *Id.* (emphasis added). The Commission “discern[ed] no public interest in issuing a stay . . . To the contrary, the remedial measures ordered by the judge are fully consistent with the public interest, expressed in the Mine Act, in minimizing the harm to miners from actions which may have been discriminatory.” *Id.* at 2375.¹⁸ To be clear, review of the ALJ’s underlying order was ongoing at the time the Commission denied the second motion for stay in *Franks & Hoy*, 35 FMSHRC 2373, and that case did *not* involve temporary reinstatement nor make any reference to the mechanism of temporary reinstatement.

Two Commissioners dissented from the Order denying American Tripoli’s Motion for Stay in CENT 2023-0251-DM, but their conclusion and analysis was exactly that—a dissent. The majority firmly rejected American Tripoli’s argument that Section 113(d)(1) should be read to preclude enforcement of a non-final order issued by an ALJ “prior to the Commission’s resolution of the merits case on appeal.” *Compare* Order, at 7 (majority), with *id.* at 9 (dissent). The majority understood *Franks & Hoy*, 35 FMSHRC 2373, to be directly on-point and cited it favorably. *Compare* Order, at 3, 5 (majority), with *id.* at 8 n.2 (dissent) (characterizing *Franks & Hoy*, 35 FMSHRC 2373, as “wrongly decided”). The majority did *not* draw the distinction pressed by the dissent between payments made in the temporary reinstatement context and backpay in a discrimination claim decided after a hearing on the merits. These are important distinctions because, in opposing the Secretary’s Motion for Summary Decision, Respondent is

¹⁸ On the third *Virginia Petroleum* factor, the Commission reasoned that leaving reprimands in the miners’ file during the pendency of review would “adversely affect the miners.” *Id.* at 2374. The Commission made no reference to backpay in relation to this factor.

clearly seeking to draw support for his position from the views embraced by the dissenting Commissioners.¹⁹

C. Respondent's Legal Argument Against Summary Decision²⁰

In its Response in Opposition to the Secretary's Motion, Respondent identifies four cases: *North Fork Coal Corp.*, 33 FMSHRC 589 (March 2011); *Franks & Hoy*, 35 FMSHRC 2373 (which I just reviewed at length); *Martinka Coal Co.*, 15 FMSHRC 2452 (Dec. 1993); and *Loper Bright Enterprises v. Sec'y of Commerce*, 603 U.S. 369 (2024).²¹ Resp's Opp., at 7-9. For each case, Respondent offers a one or two sentence capture of the "Key Legal Principle" plus a thumbnail "Summary." Respondent offers little by way of argument or application of these four cases to the pending Motion. Nonetheless, I address each case below based on my understanding of his central concerns.

From *Loper Bright*, Respondent posits that "[a]gencies must rely on explicit statutory authority for enforcement actions, as judicial deference to agency interpretations under *Chevron*

¹⁹ I take judicial notice that American Tripoli, on November 1, 2024, filed a "Motion to Cease and Desist Enforcement Actions Pending Final Judgment" with the Commission in CENT 2023-0251-DM, and that the Commission issued an order on November 22, 2024, asking American Tripoli to submit copies of the cases cited in that motion (which the Commission had been unable to identify), and subsequently issued an order on December 23, 2024, requiring American Tripoli to show cause why the Commission should not vacate its two Directions for Review and dismiss the proceedings for American Tripoli's failure to comply with the Commission's Order of November 22, 2024.

²⁰ In its Response in Opposition, Respondent seeks to shift attention away from the legal issue at the center of the Secretary's Motion for Summary Decision to what Respondent characterizes as "significant procedural concerns." Resp. Opp., at 2. I address Respondent's concern that the Secretary omitted critical context from the present Motion and that MSHA has engaged in a form of "overreach" to the extent those concerns relate to the citation and order at issue in this consolidated docket. *See infra*. Respondent's other concerns are not well-taken, however. First, I see no issue with fairness vis-à-vis the present Motion. The Secretary filed a Motion for Summary Decision (a "dispositive motion"), and Commission Procedural Rule 67 does not require consultation for such. *See id.* at 2-3; *see also* Commission Procedural Rule 10(c). Second, the Secretary's Motion and supporting materials do not strike me as excessive, "disproportionate to the issues at hand," or designed to create "procedural imbalance." *Id.* at 3. Third, as to the Secretary's purported "failure to respond in good faith" to Respondent's inquiries and concerns involving the backpay award, *id.* at 4-5, I note that Respondent's "legal precedents" and concerns with MSHA's authority are being addressed as part of this contested Motion. It is the Secretary's legal position that explains much of opposing counsel's behavior toward Respondent and the packaging of the pending Motion. I appreciate Respondent is proceeding *pro se*, but to avoid summary decision, he must address the pending Motion head-on, not simply complain about the Secretary's behavior while intoning his own good faith.

²¹ Respondent provided the following citation for *Loper Bright*: 598 U.S. (2024). It is obviously referring to the Supreme Court's recent decision in *Loper Bright* reported at 603 U.S. 369.

[*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] is no longer automatic,” and argues that *Loper* “significantly weakens MSHA’s ability to enforce backpay during appeals without explicit statutory support.” Resp. Opp., at 8-9. As the Secretary notes, however, Section 104(a) of the Mine Act authorizes her to issue a citation for non-compliance with “any . . . order, promulgated pursuant to [the Mine Act],” 30 U.S.C. § 814(a) (emphasis added), not just “final” orders. Sec’y Mem. at 8 & n.5. Judge Moran’s Decision and Order undisputedly qualifies as an “order” promulgated pursuant to the Mine Act and, as explained above, a majority of the Commission rejected that such “order” must be final under Section 113(d)(1) before it is enforceable by the Secretary. Thus, the Secretary’s authority to issue the citation and order at issue in this consolidated docket, as well as her “interpretation” of that authority, is rooted in the explicit and plain language of the Mine Act, not in any form of judicial deference to an interpretation of an ambiguous statute espoused by the Secretary. Accordingly, *Loper Bright* does not support Respondent’s position.

Respondent characterizes *Martinka*, 15 FMSHRC 2452, as a case in which the Commission “upheld MSHA’s jurisdiction over an inactive site but emphasized that enforcement actions must be proportional to the risks involved” and ruled that MSHA “cannot impose burdensome restrictions or interfere with activities unrelated to safety or health, such as financial or liquidation decisions.” Resp. Opp., at 8. In *Martinka*, the Commission upheld two Section 104(b) withdrawal orders, finding the ALJ’s decision to be based on substantial evidence; the operator had argued that “the inspector should have extended the abatement time because [the operator] had made diligent, good faith abatement efforts.” *Id.* at 2454, 2456. This case, which involved orders issued for unabated accumulations and various problems with belt rollers in operation at an active mine, has nothing to do with MSHA jurisdiction over inactive sites or burdensome restrictions related to finance or liquidation. I fail to see how *Martinka* supports Respondent’s position.

Respondent cites *Franks & Hoy* and *North Fork* to distinguish payments in temporary reinstatement from backpay ordered in discrimination cases decided on the merits but, in so doing, vastly overstates what those two cases offer vis-à-vis that known distinction. For *Franks & Hoy*, Respondent states: “The Commission ruled that concerns about a miner’s financial status during litigation are appropriately addressed through temporary reinstatement, not premature backpay enforcement.” Resp. Opp., at 8. The Commission ruled no such thing; temporary reinstatement was not referred to in that case at all. *See* 33 FMSHRC 2373; *see also supra*.

From *North Fork*, 33 FMSHRC 589, Respondent derives the following two principles:

- Temporary reinstatement serves to preserve a miner’s livelihood while litigation is on-going, whereas backpay compensates the miner only after a final determination of liability for discrimination.
- Enforcing backpay during an appeal undermines the procedural safeguards of the Mine Act, which ensure operators can fully contest claims before financial penalties are enforced.

Resp. Opp., at 7. These principles are overstated. While the Commission in *North Fork* did review the differences between temporary reinstatement—more specifically, money paid as economic temporary reinstatement in lieu of physical temporary reinstatement—and backpay, it said nothing explicit about “procedural safeguards” or enforcement of an underlying backpay order during appeal. Respondent appears to be over-reading this case in an effort to breathe life into the citation to *North Fork* offered by the two Commissioners who dissented from the Commission’s order denying stay in CENT 2023-0251-DM. In the end, Respondent cannot make *North Fork* stand for more than it actually does.²²

In *North Fork*, an ALJ had ordered a terminated miner to be temporarily reinstated by the operator, after which the Secretary, miner, and operator (each represented by counsel) crafted an economic restatement agreement. 33 FMSHRC at 590. The terms of that agreement were set forth in a supplemental order issued by the ALJ. *Id.* After investigation, the Secretary informed the ALJ she would not file a Section 105(c)(2) complaint on the miner’s behalf and the ALJ then dissolved his order of temporary reinstatement and dismissed the temporary reinstatement proceeding. *Id.* The miner, through counsel, subsequently filed his own complaint under Section 105(c)(3), after which the Secretary and the miner petitioned the Commission to review the order dissolving temporary reinstatement. *Id.* The Commission granted review and subsequently reversed the ALJ’s decision dissolving temporary reinstatement, holding that a “miner’s right to temporary reinstatement continues until the Commission issues a final order on the merits of the miner’s allegations of discrimination, whether that order be issued under” Section 105(c)(2) or (c)(3). *Id.* The operator then requested that the Commission either reconsider its decision or stay its decision pending federal court review.

The Commission first addressed the operator’s request for reconsideration, in which the operator had also asked the Commission to modify the economic restatement it had ordered. *Id.* at 591. The operator had learned during the merits hearing on discrimination that the miner had been continuously working other mining jobs since his termination and argued that providing full economic reinstatement under such circumstances would conflict with the intent of temporary reinstatement and go beyond what was needed to put the miner in the “same economic position he would have been in” had he not been terminated. *Id.* After rejecting the miner’s argument that the modification request was governed solely by the economic reinstatement agreement, the Commission addressed the operator’s request that the miner’s other earnings be used to offset the amount owed in economic reinstatement. *Id.* at 592. Such was the context in which the Commission reviewed the difference between payments in temporary reinstatement and payments in backpay:

North Fork confuses the legal principles that apply to back pay awards if and when the miner succeeds in his discrimination complaint on the merits, with the legal principles governing the wholly separate temporary reinstatement proceeding.

²² Commissioners Althen and Rajkovich did not overread *North Fork* in similar fashion; rather, they supported their position by moving beyond *North Fork*. See Order, CENT 2023-0251-DM, at 8 (dissent, citing *North Fork*).

With regard to the former, the Commission has noted that the provision for back pay and other remedies in section 105(c) awarded *once it has been established that a miner was discriminated against*, is modeled after the remedial provisions of the National Labor Relations Act . . . Under that statute, concepts of offset and the duty to mitigate damages are routinely applied to back pay awards, and the Commission has incorporated those concepts in computing back pay awards under section 105(c). . . . We have recognized that back pay is designed to make the miner as nearly whole as possible for the losses he or she has suffered between the time the miner was discriminated against and the time his or her claim of discrimination was upheld. . . . *If the miner does not prevail, the miner is due no award.*

In contrast, . . . the purpose of temporary reinstatement is to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard. . . . The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits. The issue of back pay usually does not arise since the miner is not compensated for the earlier period of time between termination and the judge's order temporarily reinstating him or her. Conversely, if the operator chooses to pay the miner while foregoing the miner's labor, 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.

Consequently, we reject the notion that the considerations which shape back pay award amounts, also apply, as a matter of law, to the economic reinstatement order before us. Unlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements. The agreement which formed the basis of the judge's order was arrived at after negotiations between the parties. Moreover, we are cognizant of the fact that it was North Fork's decision to offer economic reinstatement in lieu of actual reinstatement that gave rise to the retroactive pay relief that North Fork now seeks to challenge. . . . [I]t was North Fork that proposed economic reinstatement and nothing would have prevented North Fork . . . from negotiating an agreement that adjusted payments to [the miner] in the event he obtained alternative employment during the period of temporary relief.

Id. at 592-93 (emphasis added). *See also id.* at 600 (Commissioner Cohen concurring in part and dissenting in part) (“The majority’s opinion establishes that the principles applicable to temporary reinstatement are different from an award of backpay.”) From there, the Commission analyzed the amount owed in economic reinstatement under three different time periods, allowing the operator to offset the amount earned by the miner between the ALJ’s order dissolving the temporary reinstatement and the Commission’s subsequent reversal of that

dissolution.” *Id.* at 593-596; *see also id.* at 600 (Commissioner Cohen dissenting from the offset).²³

Thus, the Commission in *North Fork* did indeed differentiate payments in temporary reinstatement from backpay awards; they are undeniably tied to different mechanisms. One must go beyond *North Fork*, however, to contend that this distinction means that a non-final award of backpay cannot be enforced before the Commission resolves a pending appeal from that award. I read the majority portion of the Commission’s order denying American Tripoli’s Motion for Stay in CENT 2023-0251-DM to reject that reading. Furthermore, were an operator in Respondent’s position to pay the backpay award only to have the Commission later reverse the underlying decision on the merits, the operator *can* seek to recover the monies, even if it does not like the mechanism it may be forced to use (i.e., a lawsuit). It is the policy of the Mine Act to favor the miner’s financial situation in such a situation over that of the operator who—it must be noted—has already been found to have engaged in discrimination against the miner by an ALJ. If the ALJ’s finding of discrimination is in error, such error must be remedied through the mechanism of an appeal. During the pendency of any appeal, if the Commission does not issue a stay of enforcement, the underlying order remains in effect.

Thus, I hold that, as a matter of law, Judge Moran’s Decision and Order was enforceable when it was issued, and because the Commission denied American Tripoli’s Motion for Stay, that Decision and Order remained enforceable during the pendency of the Commission’s related review. I turn now to the application of this legal ruling to the present Motion for Summary Decision.

D. Application

1. Citation No. 9763504

Citation No. 9763504 was issued on July 1, 2024, for Respondent’s failure to pay Mr. Baumann the backpay ordered by Judge Moran on May 23, 2024. Undisputed Fact ¶ 21. Judge Moran’s Decision and Order was an “order” under Section 104(a), and the undisputed facts establish that the citation was issued in writing, described the violation, cited the order violated, and set forth a reasonable time for abatement. Undisputed Fact ¶¶ 22-23. Thus, I affirm the validity of Citation No. 9763504.

²³ The Commission next addressed *North Fork*’s request for a stay of enforcement of the Commission’s decision pending federal court review and split 2:2. *Id.* at 596-598 & n.8. The majority rejected *North Fork*’s assertion of irreparable harm (i.e., that it would be “unlikely to recover the payments should the company succeed on appeal”), stating: “There is nothing in the Mine Act which contemplates that such miners would be expected to repay the amounts paid them pursuant to their reinstatement orders; indeed, that would run counter to the very spirit of the provision, which is to provide immediate relief to complaining miners while they wait for their cases to be decided,” and “economic loss does not, in and of itself, constitute irreparable harm.” *Id.* at 597.

Citation 9763504 was assessed a penalty of \$147.00 by MSHA,²⁴ and Respondent has represented that it “does not dispute the \$147 penalty.” Resp. Opp., at 2. Commission ALJs assess civil penalties *de novo* for violations of the Mine Act. Section 110(i) of the Act delegates to the Commission the “authority to assess all civil penalties” provided in Mine Act, 30 U.S.C. § 820(i), and delegates the duty of proposing penalties to the Secretary. *Id.* at §§ 815(a), 820(a). Section 110(i) requires, that “in assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria: [1] the operator’s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.” 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Once factual findings on the statutory penalty criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, bounded by proper consideration of the statutory criteria and the Mine Act’s deterrent purposes. *Sellersburg Stone Co.*, 5 FMSHRC at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising discretion to determine the amount of a penalty, the Commission has recognized that an ALJ is not bound by the penalty proposed by the Secretary. *See e.g., Hidden Splendor Res.*, 36 FMSHRC 3099, 3101 (Dec. 2014).

In making a negligence determination, I am not required to apply the definitions of Part 100, may evaluate negligence from the starting point of a traditional negligence analysis, and may consider “the totality of the circumstances holistically.” *Consol Pennsylvania Coal Co.*, 41 FMSHRC 803, 823 (Dec. 2019) (quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2105)).

The undisputed facts show that (1) in the last 24 months, Respondent has been issued 198 citations, 54 of which were considered by MSHA to be “Significant and Substantial,” 17 as 104(d) orders and five as 104(b) orders; (2) Respondent reported between 10,000 and 20,000 working hours in the last four quarters of operation; (3) since at least July 2024, at least one employee works for Respondent, continuing to sell product and collect customer payments, (4) Respondent’s website indicates the business is open and is not for sale; and (5) Respondent values its revenue potential at \$100 million per year. Undisputed Facts ¶¶ 6-10. Respondent is a small operator with a rather disproportionately large violation history; it is not in bankruptcy or inactive status although its operations appear to have largely ceased and the filings before me certainly speak to Respondent’s on-going financial hardship. The gravity of the violation is low in that Mr. Baumann was not working for Respondent when Citation No. 9763504 was issued and the citation does not involve a safety issue facing any on-site miners.

I find that a reasonably prudent operator familiar with the obligations imposed by the Mine Act would follow “the basic proposition” that an order issued by an ALJ with jurisdiction and authority over a Section 105(c) discrimination proceeding is to be complied with promptly,

²⁴ The Citation was evaluated as “No Likelihood” of injury or illness, “No Lost Workdays,” Non-S&S, 01 Number of Persons Affected, and Moderate negligence. Undisputed Facts ¶¶ 24-26.

and if the operator believes such order to be in error, to pursue an appeal before the Commission, but to also comply with that order in the absence of a stay of enforcement issued by the Commission. Even assuming there was a period of time during which Respondent was uncertain as to enforceability of the obligation to pay the backpay award in light of the Commission's grant of two Directions for Review, to persist in non-payment after the Commission denied a stay was negligent. Thus, I find the negligence level here is appropriately considered to be moderate.

I am, however, particularly concerned in this situation with the statutory criteria that accounts for the "demonstrated good faith of the person charged with attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i). *See Maness*, 419 U.S. at 459 ("The orderly and expeditious administration of justice . . . requires that 'an order issued by [an entity] with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings"). Respondent's refusal to pay the backpay award to Mr. Baumann while pursuing his right to assign error to Judge Moran's Decision and Order flouts the authority of the Commission and undermines the remedial policy of the Mine Act to encourage miners to "play an active role in the enforcement of the Act" and protect them against "discrimination which they might suffer as a result of their participation." S.Rep. No 95-181, at 35 (1977). That Respondent has not yet paid the backpay award—after all that has transpired since the Commission denied a stay of enforcement on August 22, 2024—strongly suggests that Respondent was never acting in good faith to achieve rapid compliance with Citation No. 9763504. While Respondent was entitled to vigorously pursue his right to appeal Judge Moran's Decision and Order, it must do so within the framework of the Mine Act and the Commission's procedures, which include the stay mechanism.

Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Mine Act, I assess a penalty of \$500 for Citation No. 9763504. This amount is the result of my independent determination of the statutory criteria and my concern with "demonstrated good faith" under Section 110(i) in this unique situation.

2. *Order No. 9998012*

Order No. 9998012 was issued on November 19, 2024, for failure to abate Citation No. 9763504, i.e., because Respondent had still not paid Mr. Baumann the backpay ordered by Judge Moran. Undisputed Fact ¶ 32-34. An order under Section 104(b) is authorized when the Secretary finds (1) "a violation described in a citation issued pursuant to [Section 104(a)] has not been totally abated within the period of time as originally fixed therein or as subsequently extended," and (2) "that the period of time for the abatement should not be further extended." 30 U.S.C. § 814(b). The Secretary bears the burden, as the proponent of a Section 104(b) order, to prove by a preponderance of the evidence that the violation has not been abated within the time-period originally fixed or as subsequently extended. *Hibbing Taconite Co.*, 38 FMSHRC 393, 397 (March 2016).

Here, the undisputed facts show that Order No. 9998012 was validly issued. The abatement date for Citation 9763504 was extended to September 3, 2024, by Modification 9763504-03, Undisputed Fact ¶ 28, and MSHA determined that the abatement date for Citation No. 9763504 should not be further extended. Undisputed Fact ¶ 35. Moreover, Modification

9763504-03 specifically stated: “Due to the pending Motion to Stay filed in docket CENT 2023-0251, this extension is granted until September 3, 2024.” Undisputed Fact ¶ 28. Thus, it was known to Respondent that the Commission’s disposition of the then-pending Motion for Stay would be instrumental to the on-going dispute over enforceability of the backpay award, yet Respondent did not pay Mr. Baumann the backpay and interest due between August 22, 2024 (the date of the Commission’s Order denying the stay) and November 19, 2024 (the date of Order No. 9998012).


In ruling on the present Motion for Summary Decision, I carefully reviewed Respondent’s Response in Opposition, the Attachments 1-8 thereto, and Respondent’s four Requests for Relief.²⁵ I appreciate that Respondent has experienced the consequences of Order No. 9998012 as negative, but perceive no overreach by MSHA, *id.* at 4 (“Overreach Beyond Safety”), 5 (“Threats and Intimidation”), nor an effort by the Secretary to purposefully omit “critical context” providing a “fuller picture of Respondent’s compliance and challenges,” *id.* at 3-4, from her Motion and supporting Memorandum.

ORDER

I hereby **GRANT** the Secretary’s Motion for Summary Decision and enter Summary Decision under Commission Rule 2700.67 for the Secretary in this consolidated docket, CENT 2024-0299, CENT 2025-0086, and CENT 2025-0117.

I **ORDER** that Citation No. 9763504 and Order No. 9998012 be **AFFIRMED**, and that the two related contest dockets, CENT 2024-0299 and CENT 2025-0086, be **DISMISSED**.

I further **ORDER** that, in penalty docket CENT 2025-0117, Respondent pay a total penalty of \$500.00 for Citation No. 9763504 within 30 days of the date of this Order.²⁶


John Kent Lewis
Administrative Law Judge

²⁵ Specifically, Respondent asked that I deny the Secretary’s Motion, “[r]ecognize and address the procedural deficiencies and substantive issues raised by Respondent,” “[s]crutinize MSHA’s actions for bias, overreach, and harassment,” and “[r]equire the Secretary to engage in good-faith efforts to address Respondent’s legitimate concerns and procedural challenges.” Resp. Opp., at 9-10.

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

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