

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 22, 2018

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

v.

RAIN FOR RENT,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2017-0377  
A.C. No. 04-00156-434274 VVG

Mine: Natividad Plant

**DECISION**

Appearances: Isabella M. Finneman, Esq., Joshua Love, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California, for Petitioner;

Byron Walker, Esq., Jack Easterly, Esq., Tim Boe, Esq., Rose Law Firm, Little Rock, Arkansas, for Respondent.

Before: Judge Simonton

**I. INTRODUCTION**

This simplified proceeding is before me upon the Secretary of Labor’s petition for assessment of a civil penalty pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“the Act”).<sup>1</sup> The docket involves a single citation issued pursuant to Section 104(a) of the Act with a proposed penalty of \$116.00. The parties presented testimony and evidence regarding the citation at a hearing held in San Francisco, California, on May 15, 2018. Based upon the parties’ stipulations, my review of the entire record, my observation of the demeanor of the witnesses, and consideration of the parties’ legal arguments, I make the following findings and order.

**II. STIPULATIONS OF FACT**

The parties jointly filed the following stipulations of fact:

1. Respondent Rain for Rent is a contractor that provides temporary liquid handling solutions, including pumps, tanks, filtration and spill containment to different industries, including mine operators in the United States, Canada, and United Kingdom.

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<sup>1</sup> In this decision, the joint stipulations, transcript, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. S-#,” and “Ex. R-#,” respectively.

2. Respondent provided services to Lhoist North America of Arizona, Inc., which operates the Natividad Plant, MSHA I.D. No. 04-00156, in Monterey County, California.
3. This matter is subject to the jurisdiction of the Commission and the assigned judge.
4. The subject citation was properly served by a duly authorized representative on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance but not for the truthfulness or relevance of any statements asserted therein.
5. Respondent demonstrated good faith in abating the conditions noted in the subject citation.
6. The Rain for Rent company truck referenced in Citation No. 8785566 was parked on flat, level ground in the parking area of the mine office.
7. The MSHA inspector observed the alleged violation referenced in Citation No. 8785566 upon opening the truck door.
8. The MSHA inspector did not communicate with Rain for Rent or its representative before opening the door referenced in Citation No. 8785566.
9. The truck referenced in Citation No. 8785566 is marked with the Rain for Rent logo and related information on its exterior.
10. Respondent and its representatives cooperated with the Secretary during the inspection that resulted in the issuance of the subject citation.
11. Respondent demonstrated good faith in addressing the conditions noted in the subject citation.
12. The alleged violation in Citation No. 8785566 was terminated immediately after its issuance.

### **III. FINDINGS OF FACT**

The Natividad Plant is a limestone quarry and mill located in Monterey County, California, and operated by Lhoist North America of Arizona, Inc. (“Lhoist”). Prior to the inspection at issue, Lhoist contracted with Rain for Rent (“Respondent”) to pump an accumulation of rainwater out of the quarry pit. Jt. Stip. #2; Ex. S-6; Tr. 42. Rain for Rent employee Jaime Tejeda (“Tejeda”) visited the mine site several times to install the pump, perform maintenance and repairs, and replace the original pump with a larger model. Ex. S-7; Tr. 42-43. Tejeda signed in at the mine office on behalf of Rain for Rent upon each visit. *Id.*

On February 8, 2018, MSHA Inspector Nicholas Basich arrived at the Natividad Plant to begin the second day of a routine 11-day inspection.<sup>2</sup> Tr. 23. He entered the mine site by turning off of Old Stage Road into the mine driveway and proceeded approximately 400 feet to the mine office. Ex. S-2, S-3; Tr. 25. Basich checked in at the office and arranged to meet a Lhoist representative in the office parking lot to begin the inspection. Tr. 29-30. While waiting, Basich observed Tejada drive a flatbed truck into the parking lot, park, and enter the mine office. Tr. 30-31. The truck had a “Rain for Rent” insignia on its door and a Department of Transportation Number, and Basich concluded that Tejada intended to sign in and enter the quarry site. Jt. Stip. #9; Ex. S-5; Tr. 33-35. Basich noticed the truck rock back and forth once parked, which led him to believe that Tejada did not set the parking brake. *Id.* Basich approached the truck and, unable to see the brake through the truck’s windows, opened the driver side door for a better look. Tr. 32-33. He confirmed that the parking brake was not set and began to take photographs of the condition when Tejada exited the office and returned to the vehicle. Tr. 32-33, 35. Basich identified himself to Tejada as a MSHA inspector, stated that he was conducting an inspection of the truck based upon his belief that the parking brake was not set, and stated that the parking brake was in fact not set. Tr. 35-36. He issued Citation No. 8785566 alleging a violation of 30 C.F.R. § 56.14207:

The Ford F-550 Flatbed truck (Rain for Rent company truck), in a parked an unattended attended [*sic*] condition adjacent to the mine office at the mine, does not have the parking brake set. The truck is parked on flat, level ground with the transmission in park. The practice of not setting the parking brake when leaving a truck or mobile equipment unattended on a mine site exposes miners to the unplanned and unwarned movement of the vehicle/mobile equipment. No lost time injuries would be expected from the truck parked in this locate and in this condition. If the truck were parked on a slope or grade, serious potentially fatal crushing type injuries would be expected.

Ex. S-4. Inspector Basich designated the citation non-S&S, unlikely to result in lost workdays, and the result of Rain for Rent’s moderate negligence. *Id.* The Secretary assessed a penalty of \$116.00. Rain for Rent quickly terminated the citation. Jt. Stip. #5, 11; Tr. 35, 95.

#### IV. DISPOSITION

Rain for Rent denies the validity of the citation on multiple grounds.<sup>3</sup> Respondent contends that MSHA lacked jurisdiction over the parking lot and its truck. It argues that the

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<sup>2</sup> Inspector Basich has worked as an MSHA Inspector for five years. Tr. 22. He worked in the heavy construction industry for 42 years prior to joining MSHA. *Id.* He has completed 21 weeks of MSHA training at Beckley Academy and has completed on the job training, special investigation training, and mobile equipment training. Tr. 23.

<sup>3</sup> As a preliminary matter the court denies Respondent’s request for a new hearing based on the Supreme Court’s recent decision in *Lucia v. Securities and Exchange Commission*, 135 S.Ct. 2044 (2018). *See* Respondent’s Post-Hearing Brief, at 21, n. 17. The full Commission unanimously ratified the appointment of its ALJs on April 3, 2018, more than a month prior to this hearing. Federal Mine Safety and Health Review Commission, *Commission Ratification*

parking lot is not a “mine” as defined by the Act. Respondent’s Post-Hearing Brief (“Resp. Br.”) at 8. It further argues that Tejada was not “performing services” at the mine at the time the citation was issued and was therefore not an “operator” as defined by the Act. *Id.* at 5. Rain for Rent also contends that Inspector Basich violated its Fourth Amendment rights when he entered the truck while Tejada was away from the vehicle in contravention of the regular and certain inspection procedures required by the Mine Act. Resp. Br. at 14; Respondent’s Reply to Secretary’s Post-Hearing Brief (“Resp. Rep.”) at 3. Rain for Rent also argues Basich’s denial of its walkaround rights pursuant to § 103(f) of the Mine Act resulted in actual prejudice and justifies vacatur of the citation in and of itself. Resp. Br. at 17. Finally, Respondent contests the fact of violation as well as the negligence and gravity designations in the citation. Resp. Br. at 12; Resp. Rep. at 2.

The Secretary contends that MSHA properly asserted jurisdiction over the lot and the truck. Secretary’s Post-Hearing Brief (“Sec’y Br.”) at 6. The Secretary further contends that the search of the truck was reasonable because § 103(a) grants MSHA Inspectors the right to enter and inspect the truck without providing advance notice. *Id.* at 4. The Secretary also argues that Rain for Rent was not denied its walkaround rights because Tejada returned to the truck and spoke with Inspector Basich while he was still conducting the inspection. *Id.*

For the reasons set forth below, I affirm the citation as written.

#### **A. Jurisdiction**

##### *The Office and Parking Lot*

The Mine Act provides that “[e]ach coal or other mine . . . and each operator of such mine . . . shall be subject to the provisions of this Act.” 30 U.S.C. § 803. Thus, in order to prove that MSHA had jurisdiction to issue the subject citation in this case, the Secretary must prove that the violation occurred at a “mine” and that the citation was issued to an “operator.”

The Act defines a “coal or other mine” as

- (A) an area of land from which minerals are extracted in nonliquid form . . .
- (B) private ways and roads appurtenant to such area, and
- (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, . . . or used in, or to

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*Notice*, <http://www.fmshrc.gov/about/news/commission-ratification-notice> (Apr. 3, 2018). Thus, this court was constitutionally appointed as required by *Lucia* and Respondent is not entitled to a new hearing. *See Lucia*, 135 S. Ct. at 2050; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010); *see also Jones Bros. Inc. v. FMSHRC*, No. 17-3483, *slid op.* at 11 (6th Cir. July 31, 2018).

be used in, the milling of such minerals, or the work of preparing coal or other minerals . . . .

30 U.S.C. § 802(h) (1). The Secretary has interpreted subsection (A) of this definition to refer to “extraction areas and everything within their boundaries.” *See Sec’y of Labor v. Nat’l Cement Co. of Cal.*, 573 F.3d 788, 793 (D.C. Cir. July 2009). He interprets subsection (B) to include roads but not the vehicles on them, while (C) reaches equipment including vehicles, tools, and other property used in mining but not located within an extraction area. *Id.* at 795. This interpretation has been accepted by the D.C. Circuit. *Id.* (holding that the Secretary’s interpretation of subsection B is reasonable as part of the Mine Act’s overall enforcement scheme). The Commission has applied subsection (C) to find that jurisdiction existed over a warehouse located one mile from the closest extraction site because it was a “facilit[y] . . . used in mining.” *Jim Walter Res., Inc.*, 22 FMSHRC 21 (Jan. 2000). The Commission has also affirmed MSHA’s jurisdiction over various “equipment . . . used in mining,” including trucks and conveyors used in the screening process but located on a public road, *State of Alaska, Dep’t of Transp.*, 36 FMSHRC 2642, 2647 (Oct. 2014); a dragline being assembled at a site one mile from where coal was being mined, *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 2000 WL 1682492 (Nov. 2000); and a garage adjacent to an asphalt plant and used for mining work, *W.J. Bokus Industries, Inc.*, 16 FMSHRC 704 (Apr. 1994). The recent Sixth Circuit case *Maxxim Rebuild* suggests that application of subsection (C) may be limited to locations in or adjacent to a working mine. *Maxxim Rebuild v. FMSHRC*, 848 F.3d 737, 740 (6th Cir. 2017).

The legislative history of the Act indicates that the intention of Congress was that “what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 95-181, at 14 (1977). Accordingly, the Commission has construed Section 3(h) (1) broadly in favor of Mine Act coverage. *See, e.g., State of Alaska, Dep’t of Transp.*, 36 FMSHRC 2642, 2647 (Oct. 2014); *Calmat Co. of Ariz.*, 27 FMSHRC 617, 622, 624 (Sept. 2005).

I find that the Plant office and the parking lot were “facilit[ies] used in the work of” mining in accordance with subsection (C). The Natividad Plant is a working mine. The office and parking lot are located on mine property and adjacent to the Plant’s active extraction sites. Ex. S-1, S-2; Tr. 26. Lhoist directed mining operations out of the office and kept paperwork and examination records there. Tr. 30. The parking lot serviced the office and was adjacent to the Plant’s primary plant crusher. Tr. 30, 64-65, 79. Miners, contractors, and vendors parked their professional vehicles in the lot to sign in and receive authorization to enter the mine site to perform work. Tr. 30, 79. The office and parking lot are thus geographically and functionally related to the mining process at Natividad Plant and are subject to MSHA jurisdiction under the Act.

Respondent contends that the Secretary’s assertion of jurisdiction over the office and parking lot is inconsistent with the structure and purpose of subsections (B) and (C) because the Secretary has taken conflicting stances on his inspection policy. Resp. Br. at 8. It contends that Inspector Basich put forth two novel interpretations of MSHA’s jurisdiction over parking lots at hearing to improperly include the lot at issue. *See* Resp. Br. at 9. Respondent contends that these interpretations, which it nicknamed the “doing business test” and “lease test,” would lead

to absurd results that would permit MSHA to assert jurisdiction over miners' vehicles in parking lots located away from the mine or in lots adjacent to but not affiliated with the mine. *Id.* at 9-10. Rain for Rent similarly claims that the Secretary's interpretation necessarily and inappropriately extends his jurisdiction over any private vehicles located in the parking lot.<sup>4</sup> Resp. Br. at 12.

Respondent's hypothetical scenarios contain material facts that are not present in the instant case and are therefore of minimal relevance to its disposition. *See Nat'l Cement Co.*, 573 F.3d 788, 796 (D.C. Cir. July 2009) ("The theoretical possibility that an agency might someday abuse its authority is of limited relevance in determining whether the agency's interpretation of a congressional delegation is reasonable"). Here the Secretary reasonably applied the plain language of subsection (C) to assert jurisdiction over the parking lot in question. The parking lot is on Natividad Plant property, adjacent to active extraction sites, and used for mine-related purposes. Likewise, the Secretary did not assert jurisdiction over any private vehicles in this case, and Inspector Basich took reasonable steps to demonstrate that it was not his intent to do so. He testified that the truck was clearly labeled as a Rain for Rent vehicle, and Tejada drove it on behalf of Rain for Rent to the parking lot with the intent to perform professional services at the mine. Jt. Stip. #9; Ex. S-5, S-7; Tr. 33-35.

The parking lot is a facility used in the mining process and is subject to the jurisdiction of the Act.

#### *Rain for Rent's Operator Status*

Rain for Rent also argues that it was not an "operator" subject to the Act because Tejada was not "performing services" at the mine when the citation issued. Resp. Br. at 5. Section 3(d) defines an "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). The Commission has held that the independent contractor language of Section 3(d) "covers any independent contractor performing more than *de minimis* services at a mine."<sup>5</sup> *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1267-1270, 1276-79 (Oct. 2010) (Company

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<sup>4</sup> Respondent notes that its inability to conduct discovery in this matter prevented it from determining where Inspector Basich discerned MSHA policy prohibiting the inspection of personal vehicles. Resp. Br. at 11, n. 6. The court acknowledges that simplified proceedings limited discovery as required by 29 C.F.R. § 2700.100(b)(5). This does not amount to a deprivation of due process rights that Respondent alleges. The legal questions presented in this case and my findings are in no way dependent on Respondent's inability to depose Inspector Basich. Respondent had the opportunity to ask the Inspector about MSHA policy at hearing, and indeed did so. Tr. 91.

<sup>5</sup> Previous Commission cases applied a two-prong test addressing the independent contractor's "proximity to the extraction process and the extent of its presence at the mine." *Otis Elevator Co.*, 11 FMSHRC 1896, 1902 (Oct. 1989); *see also Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir.1985). However, the D.C. Circuit explicitly rejected this approach in its review of the *Otis Elevator* decision, and no Circuit Court has applied the test since. *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990) ("Section 3(d) does not extend only to certain "independent contractor[s] performing services ... at [a] mine"; by its terms, it extends

that prepared permit application and maps contained therein for a mine was an independent contractor “performing services” at the mine).

The Commission has interpreted the language of § 3(d) to include a wide array of services that need not be performed on mine property as long as the services are related to the mine site and its operations. *Joy Techs., Inc.*, 17 FMSHRC 303, 307-08 (Mar. 1995) (Contractor that sold a continuous miner machine to a mine and performed maintenance services at the mine site on four occasions was an operator because its work was more than *de minimis* and essential to extraction at the mine); *Thompson Electric, Inc.*, 39 FMSHRC 1228 (June 8, 2017) (ALJ) (Contractor that provided electric services but was never present at the mine site for more than 5 consecutive days was an operator because the contractor was performing maintenance of mine equipment on mine property); *Agapito Assocs., Inc.*, 34 FMSHRC 3465 (Dec. 2012) (ALJ) (Consulting company that performed services remotely and spent only 27 days on mine site over a 12-year period and provided analysis of potential for retreat mining was an operator because its work influenced the mine’s roof control plan).

I find that Rain for Rent is an “operator” under the Act. Rain for Rent was performing ongoing services at the Natividad Plant that were related to the mine and its extraction process. *See Musser Eng’g*, 32 FMSHRC at 1269; *Joy Techs.*, 17 FMSHRC at 307-08; *Agapito Assocs., Inc.*, 34 FMSHRC at 3465. Respondent has an MSHA Mine Contractor Identification Number and contracted with Lhoist to pump floodwater out of the Natividad Plant’s quarry pit. *Jt. Stip. #2*; *Tr.* 42-43. Lhoist was unable to extract lime from the quarry while water accumulated in the pit and Rain for Rent’s services therefore facilitated the extraction process.

Rain for Rent’s presence at the mine was also more than *de minimis*. Prior to the inspection at issue Tejada drove the cited truck onto mine property on multiple occasions to install, repair, and replace a water pump on the mine site. *Ex. S-7*; *Tr.* 42-43. On the day of the citation, Tejada parked the truck in the office parking lot with the intent to enter the mine site to perform those same services. *Id.* Lhoist’s sign in sheets show that Tejada remained at the mine site for nearly two hours after signing in. *Ex. S-7*. Rain for Rent therefore contracted to perform more than *de minimis* services directly related to mine operations at the Natividad Plant at the time of the inspection.

Rain for Rent’s contention that Tejada was not “performing services” because he had not yet signed in and entered the mine site at the time of the citation unduly narrows the scope of § 3(d). *See Agapito Assocs., Inc.*, 34 FMSHRC at 3470 (“[T]he totality of the work’ performed upon the pertinent project, not just the work relating to the underlying citations, ‘must be considered on the jurisdiction issue”) citing *Musser Eng’g Inc.*, 32 FMSHRC at 1269. Rain for Rent was performing pumping services for Lhoist and Tejada was an employee of Rain for Rent tasked with performing those services. Tejada’s work on behalf of Rain for Rent entailed entering the Plant office to sign in and make his presence known on the site. The mere fact that

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to “any independent contractor performing services ... at [a] mine.”); *see also N. Ill. Steel Supply Co. v. Sec’y of Labor*, 294 F.3d 844, 848-49 (7th Cir. 2002); *Joy Techs., Inc. v. Sec’y of Labor*, 99 F.3d 991, 999-1000 (10th Cir. 1996). Commissioner Cohen in *Musser* stated that a test based on the text of the statute is more appropriate and that the Commission’s older precedent “merits reexamination.” *Musser*, 32 FMSHRC at 1267 n.10.

Tejeda had not yet signed in does not alter the professional nature of his visit or otherwise diminish Rain for Rent's status as an operator. *See Musser Eng'g*, 32 FMSHRC at 1269 (holding that even services performed away from mine property are considered to be performed at a mine if those services "relate to the mine"). The court declines to limit the jurisdictional reach of § 3(d) based upon down-to-the-minute actions of contractor employees on mine property when the purpose of their presence is to perform services directly related to the extraction process.

Rain for Rent's claim that the Secretary's interpretation would improperly subject contractor vehicles on mine property for purely personal reasons to liability under the Act is unfounded and irrelevant to the facts surrounding the alleged violation. Resp. Br. at 7. Tejeda's truck was a business vehicle and Basich took clear and reasonable investigatory steps to reasonably conclude that the truck was at the mine on behalf of Rain for Rent and that he was therefore authorized to inspect it. Tr. 31-35, 73, 92. He credibly testified that the truck had a "Rain for Rent" decal and a Department of Transportation Number. Tr. 31-35. Basich observed Tejeda exit the truck and enter the mine office, and concluded that Tejeda intended to enter the extraction site. *Id.*

Accordingly, I find that MSHA has jurisdiction over Rain for Rent's employee and truck.

#### **B. Fourth Amendment Considerations**

Inspector Basich's search of Respondent's truck in Tejeda's absence complied with the Act's regular and certain inspection procedures provided by § 103(a) and approved by the Supreme Court.

The Supreme Court has held that the general inspection program of warrantless inspections authorized by § 103(a) of the Mine Act does not violate the Fourth Amendment. *Donovan v. Dewey*, 452 U.S. 594, 605 (1981). The dangerous nature of mining and ease with which health or safety hazards can be concealed upon advance notice of an inspection indicate that a warrant requirement would significantly frustrate the purposes of the Act. *Id.* at 603. The Court found that in light of these factors, the Mine Act's warrantless inspection program was a constitutionally adequate substitute for the Fourth Amendment's warrant requirement because it notified operators of regular and frequent searches, outlined what health and safety standards must be met to comply with the Act, curtailed the extent of government searches, and prohibited forcible entry by requiring the Secretary to file a civil action when denied entry onto a mining facility. *Id.* at 605. All mine owners and operators should thus be aware and even expect continuous and frequent inspections without a warrant or probable cause. *Id.*

The Commission thus held that a deprivation of §103(f) walkaround rights during an inspection does not violate the regular and certain inspection procedure provided for by the Mine Act in violation of the Fourth Amendment because no advance notice is required to conduct an inspection. *SCP Investments, LLC ("SCP P")*, 31 FMSHRC 821, 837 (Aug. 2009) (holding that the failure of an MSHA inspector to permit a representative of the operator to accompany him on an inspection "does not curtail the inspector's right to enter and inspect the mine"); *see also Big Ridge, Inc.*, 36 FMSHRC 1677, 1725-26 (June 2014) (ALJ); *DJB Welding Corp.*, 32 FMSHRC 728, 731, 32 (June 2010) (ALJ). Section 103(a) provides MSHA Inspectors with a right of entry



to, through, or upon any coal or other mine for the purpose of conducting an inspection without giving advance notice, and includes the “the right to use any investigatory technique reasonably related to the discovery of violations, so long as it is employed with reasonable limits and in a reasonable manner.” *DJB Welding Corp.*, 32 FMSHRC at 731-32.

In *DJB Welding*, the court held that an MSHA Inspector’s entry into a contractor’s welding truck without notice or permission was reasonable because the truck was a work vehicle that could present hazardous conditions on the mine site. *Id.* The search was thus an acceptable investigatory technique that was reasonably related to enforcement of the Act. *Id.*

Much like the welding truck in *DJB Welding*, Inspector Basich’s search of the truck was part of a routine inspection conducted at Natividad plant. The truck was a work vehicle located on mine property and owned by a contractor performing work on the mine site, and could have presented hazardous conditions on the site. Section 103(a) thus granted Inspector Basich the right to enter the truck to inspect for potential violations without providing advanced notice to the driver or waiting for him to return to the vehicle. Rain for Rent is an MSHA-registered contractor and has been subject to MSHA inspections in the past; it should have a reasonable expectation that regular inspections of its equipment could occur. *Dewey*, 452 U.S. at 603; cf. *Big Ridge, Inc.*, 36 FMSHRC 1677, 1726 (June 2014) (ALJ).

Furthermore, Basich’s decision to open the door was reasonably related to determining whether Rain for Rent violated § 56.14207 of the Act. Basich testified that he noticed the Rain for Rent truck rock back and forth in a manner that suggested the parking brake was not set. Tr. 33-35. He opened the door in furtherance of this investigation because he could not observe the parking brake through the window or in any other manner. Tr. 32-33. This investigatory technique was reasonable and necessary to determine whether the truck presented a hazardous condition. There was nothing irregular or uncertain about Inspector Basich’s inspection of the truck that would run afoul of the Supreme Court’s decision in *Dewey*, require a warrant, or otherwise violate Rain for Rent’s Fourth Amendment rights.

I reject Respondent’s argument that Inspector Basich’s search deprived Respondent of its claimed right to refuse an inspection based on jurisdictional grounds pursuant to §108(a)(1)(D).<sup>6</sup> Section 108(a)(1)(D) does not expressly confer operators the right to refuse an inspection but prohibits forcible entry and requires that the Secretary file a civil action in federal court when a mine owner refuses entry onto a mine site or to mine equipment. *See Dewey*, 452 U.S. at 604.

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<sup>6</sup> Section 108(a)(1)(D) states in relevant part:

The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principle office, whenever such operator or his agent...refuses to permit the inspection of a coal or other mine...”

30 U.S.C. § 818(f).

The prohibition of forcible entry is not necessarily the same as the granted right to deny an inspection. That the Act authorizes the Secretary to issue a citation to any operator that refuses or interferes with an inspection indicates that MSHA's right of entry under § 103(a) is to be construed broadly and that an operator's refusal or interference with an MSHA inspection is forbidden and a "dereliction of [operators'] duty under the Act." *Topper Coal Co.*, 17 FMSHRC 945, 948 (June 1995) (ALJ) citing *Waukesha Lime & Stone Co.*, 3 FMSHRC 1708 (July 1981).

Nor does the language of § 103(f) suggest that walkaround rights entail an operator's right to deny entry. That provision requires that an Inspector give an operator the opportunity to accompany an inspection for the purpose of "aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. § 813(f). Thus, walkaround rights by their very definition entail participation in an inspection, not refusal. *Cf. SCP I*, 31 FMSHRC at 832 ("There is nothing in either section 103(f) or the remainder of the Mine Act that indicates that an operator would have the extraordinary power to essentially nullify an inspection by refusing to participate in it") (emphasis added).

Respondent's interpretation would also curtail the Secretary's right of entry by requiring inspectors to provide notice to operators and contractors before each inspection in order to allow them the opportunity to refuse entry. *SCP I*, 31 FMSHRC at 837, 842 ("There is no language in section 103(a) that makes the inspector's right to enter the mine, or to conduct an inspection and cite conditions that violate mandatory standards, contingent upon...compliance with...section 103(f)"). Such a requirement is contrary to the language in § 103(a) prohibiting advance notice and would frustrate the objectives of the Act by affording operators the opportunity to address perceived safety violations before allowing entry. *See Dewey*, 452 U.S. at 603. To grant all operators subject to a Mine Act inspection the right to refuse entry would subjugate the § 103(a) inspection program to the operator's perceived right to deny inspections and require advance notice be provided to operators to the detriment of the Mine Act's enforcement goals.

As a result, Respondent's interpretation would essentially render any violation of § 103(f) walkaround rights a *per se* violation of the Fourth Amendment and nullify otherwise valid enforcement actions in contravention of Commission precedent and § 103(f) itself. 30 U.S.C. § 813(f) ("Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter"). As noted above, the Commission and its judges have consistently held that even the arbitrary denial of § 103(f) walkaround rights is not a violation of the Fourth Amendment's protections against warrantless searches. *See SCP I*, 31 FMSHRC at 841-842 (opn. of Comm'r Jordan); *Big Ridge, Inc.*, 36 FMSHRC at 1725-26; *DJB Welding*, 32 FMSHRC at 731-32. I decline to limit the Act's constitutionally approved general inspection program in such a drastic manner.

Accordingly, the inspection at issue did not violate Rain for Rent's Fourth Amendment Rights.

### **C. Section 103(f) Walkaround Rights**

I next turn to whether Inspector Basich violated § 103(f) when he began his inspection of the truck in Tejada's absence. Section 103(f) states in relevant part:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine... Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

30 U.S.C. § 813(f).

Section 103(f) is a qualified right and the Commission has recognized a crucial substantive difference between the absence of walkaround participation that is not intended to vitiate any citations and penalties, and the unauthorized denial of such walkaround rights. *SCP Invs., LLC* (“*SCP I*”), 31 FMSHRC 821, 831-32, (Aug. 2009) (Inspector arbitrarily denied operator’s walkaround rights when he refused to allow the mine owner onto the mine site because he had not received new miner training); *Big Ridge, Inc.*, 36 FMSHRC 1677 (June 2014) (ALJ) (Inspector arbitrarily denied operator’s walkaround rights because he did not permit mine representative to call for additional representatives to accompany three different teams performing an impact inspection in different areas). The denial of walkaround rights in itself is not sufficient to merit vacatur. *SCP I*, 31 FMSHRC at 834. Commission judges must determine (1) whether the operator’s walkaround rights were denied arbitrarily and (2) the effect of that denial on the operator’s case to determine the proper remedy. *SCP I*, 31 FMSHRC at 821, 827, 829, 830-31; *see also DJB Welding*, 32 FMSHRC at 734.

In *SCP I*, the Commission found that the inspector arbitrarily denied the mine owner his walkaround rights but remanded the case to permit the Judge to determine the effect of a deprivation of walkaround rights on the operator’s ability to present its defense. *SCP I*, 31 FMSHRC at 822. Two members of the Commission suggested that the second step of the analysis should entail an exclusionary hearing to determine what prejudice, if any, resulted from the violation of walkaround rights and exclude evidence accordingly. *Id.* at 822, 834. One Commissioner suggested that the Judge retained discretion at hearing to determine the proper civil penalty with the consideration that a violation of walkaround rights may have affected the mine’s ability to present evidence relevant to its case. *Id.* at 839-40. The fourth and final Commissioner found that the exclusion of the operator from the inspection had no effect on the trial of the case. *Id.* at 842-43.

Consequently, subsequent ALJ decisions have diverged on whether the deprivation of an operator’s walkaround rights may merit vacatur or necessarily precludes it in favor of applying the exclusionary rule. *See SCP Invs., LLC* (“*SCP IP*”), 32 FMSHRC 119, 128-29 (Jan. 2010) (ALJ) (holding that a violation of § 103(f) rights is *per se* prejudicial and vacating citations based upon improper denial of walkaround rights “on due process, abuse of discretion and/or prejudice grounds); *DJB Welding*, 32 FMSHRC at 734-36 (holding that an operator’s abuse of discretion in denying walkaround rights provides a sufficient basis for vacating the citations); *contra Big Ridge Inc.*, 36 FMSHRC at 1735-36 (holding that the Commission requires a showing that denial

of § 103(f) walkaround rights actually prejudiced the preparation or presentation of operator's defense and applying the exclusionary rule accordingly).

I find that Rain for Rent was not arbitrarily denied the opportunity to exercise its walkaround rights. Section § 103(f) requires that operators be given the opportunity to accompany an inspector during the inspection, and Tejada was given that opportunity upon his return. 30 U.S.C. § 813(f). Mr. Tejada returned to the truck a few minutes into the inspection while Basich was still taking photographs of the unset parking brake. Tr. 35-36. Basich identified himself to Tejada as an MSHA inspector, explained his authority over the vehicle, and explained why he was inspecting the truck. *Id.* Tejada was permitted and able to observe the violative condition and was present when the citation was issued and abated. Tr. 35, 95. Tejada therefore had sufficient opportunity to view the alleged violation, open a dialogue with Inspector Basich regarding the inspection, and offer mitigating circumstances prior to and after the issuance of the citation in accordance with § 103(f). *Id.* I find this opportunity sufficient under § 103(f).

Even assuming *arguendo* that Inspector Basich arbitrarily denied Rain for Rent its walkaround rights, the facts do not merit vacatur or the exclusion of evidence derived from the search.

Inspector Basich did not abuse his discretion in beginning the inspection without Tejada. The Commission has found an abuse of discretion "when there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *SCP II*, 32 FMSHRC at 128-29. As discussed above, Basich inspection and entry into the truck in Tejada's absence to determine whether it presented safety hazards was a lawful exercise of his § 103(a) right of entry. The inspection was well within MSHA's authority because it was part of a routine inspection conducted to enforce the safety and health provisions of the Act. It was further based upon Inspector Basich's reasonable belief that the truck's back and forth motion while parked indicated that the brake was not set in violation of the Act. Basich's actions were therefore supported by evidence and based on a proper understanding of MSHA's right of entry granted pursuant to § 103(a) of the Act.

Respondent argues that Basich abused his discretion because he did not make every reasonable effort to wait for Tejada's return before inspecting the truck. Resp. Br. at 19. I disagree. Basich took reasonable steps to discover the violation before exercising his right of entry when he looked into the windows. He had no obligation under the Act to wait for Tejada's return to open the truck door. An inspector has broad discretion on how to approach an inspection, and an inspector's decision not to delay an inspection is not a *per se* abuse of discretion. *DJB Welding*, 32 FMSHRC at 735. Even if Basich's decision to conduct an inspection initially deprived Rain for Rent of its walkaround rights, he nonetheless had the right to inspect the truck and gave Tejada the opportunity to view the scope of the alleged violation only minutes later. *See SCP I*, 31 FMSHRC at 887, 842.

Nor did the hypothetical denial result in actual prejudice meriting the exclusion of any evidence derived from the inspection. *See Big Ridge*, 34 FMSHRC at 1736-37. Actual prejudice occurs when an operator can show that the denial of the walkaround rights resulted in its inability

to observe the condition as cited in order to prepare or present its defense on the merits before the Commission. *Id.* (citations omitted). Tejada returned to the truck while the inspection was ongoing and the violative condition still existed. Tr. 35-36, 95. He observed the violative condition unchanged from when Inspector Basich first opened the door and was present when the citation was abated. Respondent does not identify, and the court does not conceive of any procedural, jurisdictional, or substantive challenges that were lost or adversely affected because Tejada was not present at the precise moment Basich opened the door to the truck. Tejada's short absence therefore did not actually prejudice Rain for Rent's ability to argue its case before this court.

For the reasons explained above, I find that Rain for Rent was not arbitrarily denied an opportunity to accompany Inspector Basich on his search of the truck.

#### **D. Citation No. 8785566**

Rain for Rent also challenges the fact of violation, gravity, and negligence designations of the citation. Resp. Rep. at 2.

##### *The Violation*

Inspector Basich issued Citation No. 8785566 for a violation of 30 C.F.R. § 56.14207. That standard provides that “[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.” 30 C.F.R. § 56.14207.

The Secretary has proven that Rain for Rent violated the standard. The truck was “mobile equipment” as defined by the regulation. *Cortez Gold Mines*, 16 FMSHRC 148, 156 (Jan. 1994) (ALJ Morris) (“Mobile equipment” includes F-150 pickup truck). Mr. Tejada parked the truck and did not set the parking brake before leaving the truck to enter the mine office. Tr. 38. Inspector Basich provided photographs clearly indicating that the parking brake was not set when the truck was parked and left unattended. Ex. S-5.

Respondent contends that the vehicle was not unattended because the driver was ten yards away and could see the vehicle through the Plant's office windows. Resp. Br. at 12. This argument fails. Commission precedent has found vehicles to be “unattended” for the purposes of section 56.14207 when a miner is not behind the wheel of the vehicle and cannot control the mobile equipment. *See Blanchard Machinery Co.*, 38 FMSHRC 1786, 1794 (July 2016) (ALJ) (deferring to the Secretary's reasonable interpretation); *Knife River Constr.*, 36 FMSHRC 2176, 2181 (Aug. 2014) (ALJ). Here, there is no question that Mr. Tejada could not control the truck while in the mine office.

Accordingly, I affirm the violation of section 56.14207.

### Negligence

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

The Commission and its judges are not bound to apply the part 100 regulations that govern MSHA’s determinations addressing the proposal of civil penalties. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016), citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–03 (Aug. 2015). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would have taken under the same circumstances. *Id.* Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically.” *Id.*; see also *Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

I find Rain for Rent to be moderately negligent. Inspector Basich testified that Tejada was unaware that he violated the standard. Tr. 40. Section 56.14207 is a Rule to Live By Standard. Tr. 35-37. Rain for Rent is a registered mine contractor and is required to train its employees on the importance of the Rules to Live By standards. *Id.* Although the truck was on level ground and the violative condition did not pose a serious threat of injury, Tejada should have known that failure to set the parking brake upon parking and exiting the vehicle constituted a safety violation.

I affirm the moderate negligence designation.

### Gravity

The Commission has stated that gravity is to be approached “holistically,” focusing on factors including the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected. *Consol. Penn. Coal Co.*, 39 FMSHRC 1893, 1902-03 (Oct. 2017); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016).

Inspector Basich testified that the violation was unlikely to result in lost workdays because the truck was parked on level ground with the engine off and the transmission in the parked position. Tr. 38-39. Even if the truck were to pop out of the park position, it was unlikely to roll a significant distance or gain sufficient speed to cause an injury. Tr. 39. Thus,

the worst possible injury would be bruising or contact with a miner's foot. *Id.* I credit Inspector Basich's testimony and affirm the designation.

## V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the 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).

Rain for Rent's violation history is minimal. Ex. S-8. The Secretary assessed the statutory minimum penalty and Rain for Rent does not contend that the penalty is disproportionate to its business or would affect its ability to continue in business. I discussed the negligence and gravity of the violation in more detail above. I found the violation to be non-S&S and unlikely to result in lost workdays and the result of Rain for Rent's moderate negligence. Rain for Rent quickly abated the citation after being notified of its existence. Jt. Stip. #5, 11; Tr. 95. I assess a penalty of **\$116.00**.

## VI. ORDER

The Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of **\$116.00** within 30 days of the date of this decision.<sup>7</sup>



David P. Simonton  
Administrative Law Judge

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<sup>7</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

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