FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

August 30, 2024

CACTUS CANYON QUARRIES, INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent,	CONTEST PROCEEDINGS Docket No. CENT 2023-0045 Citation No. 9678437; 10/25/2022 Docket No. CENT 2023-0046 Citation No. 9678438; 10/25/2022 Docket No. CENT 2023-0047 Citation No. 9678439; 10/25/2022 Docket No. CENT 2023-0048 Citation No. 9678440; 10/25/2022 Docket No. CENT 2023-0049 Citation No. 9678441; 10/25/2022 Docket No. CENT 2023-0050 Citation No. 9678442; 10/25/2022 Docket No. CENT 2023-0051 Citation No. 9678443; 10/25/2022 Docket No. CENT 2023-0052 Citation No. 9678444; 10/26/2022 Docket No. CENT 2023-0053 Citation No. 9678445; 10/26/2022 Docket No. CENT 2023-0054 Citation No. 9678446; 10/26/2022
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CACTUS CANYON QUARRIES, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2023-0089 A.C. No. 000568312 Mine: Fairland Plant & Qys Mine ID: 41-00009

DECISION AND ORDER

Appearances: Felix R. Marquez, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Secretary of Labor;

Jack "Andy" Carson, Esq., Marble Falls, Texas, for Cactus Canyon Quarries, Inc.

Witnesses: Neal Davis, Mine Safety and Health Inspector, for the Secretary of Labor;

Ty Fisher, Dallas Field Office Supervisor, for the Secretary of Labor;

Andy Carson, for Cactus Canyon Quarries, Inc.

Before: Judge Thomas P. McCarthy

These cases are before the undersigned upon ten notices of contest filed pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act"), and a Petition for the Assessment of Civil Penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The cases involve ten citations issued to Cactus Canyon Quarries, Inc. ("Cactus Canyon" or "Contestant") by the Secretary of Labor on October 25 and 26, 2022. The Secretary issued the citations for violations found at sites regulated as Mine ID 41-00009 and known as the Fairland Plant and Quarries.

I. CACTUS CANYON EXHIBITS

CC Exhibit 1: Dallas Field Manager Jurisdiction Order, Nov. 2, 2022;

CC Exhibit 2: Supplement to MSHA Form 7000-51, Mine Operator Identification Request [30 CFR §56.1000], Aug. 22, 2022;

CC Exhibit 3: Cactus Canyon's Notice of Permanent Closure of Operation, 41-00009 Fairland Plant, Aug. 11, 2022;

CC Exhibit 4: Requests Pursuant to Subdivision B.8 of the MSHA and OSHA Memorandum of Interagency Agreement [Mar. 29, 1979], Sept. 21, 2022;

CC Exhibit 5: San Antonio Field Manager Response to Form 7000-51, Aug. 31, 2022;

CC Exhibit 6: Dallas District Manager Jurisdiction Order, Dec. 9, 2022;

CC Exhibit 7: Jurisdictional Correspondence with Dallas District Manager, Nov. 16, 2022;

CC Exhibit 8: Jurisdictional Correspondence with Dallas District Manager Confirming Prior Conversations and Meetings with the Dallas District Manager, the Dallas Field Manager, Authorized Representative (AR) Davis, and AR Stanley, Dec. 21, 2022;

CC Exhibit 9:	Jurisdictional Order by the Dallas District Manager, Nov. 14, 2022;
CC Exhibit 10:	Series of Google Earth Views, Historic Aerial Photography, and Contemporary Photography of the Fairland Plant;
CC Exhibit 11:	Freedom of Information Act Request by Contestant, and Response by Dallas District Manager;
CC Exhibit 12:	[Attorney Carson's] Declaration - Mine Act Facts;
CC Exhibit 13:	[Attorney Carson's] Declaration - History of Fairland Plant;
CC Exhibit 14:	Andy Carson Affidavit - Clendennen Ranch Mine;
CC Exhibit 15:	Clendennen Ranch Mine Pictures, Bates No. 1 – 13;
CC Exhibit 16:	Clendennen Ranch Mine Pictures, Bates No. 14 – 23;
CC Exhibit 17:	Clendennen Ranch Mine Pictures, Bates No. 28 – 32;
CC Exhibit 18:	Workplace Exams, Bates No. 33 – 38;
CC Exhibit 19:	Clendennen Ranch Mine Pictures, Bates No. 39 – 47;
CC Exhibit 20:	Clendennen Ranch Mine Pictures, Bates No. 48 – 59;
CC Exhibit 21:	Fairland Plant Pictures, Bates No. 60 – 68;
CC Exhibit 22:	Fairland Plant Pictures, Bates No. 69 – 74;
CC Exhibit 23:	Neal Davis' Resume, Bates No. 75 – 84;
CC Exhibit 24:	Jurisdiction Questions from Ty Fisher;
CC Exhibit 25:	Pre-Inspection Notice;
CC Exhibit 26:	Google Earth Views of Stalite Mine [*Carolina Stalite* 734 F.2 1547];
CC Exhibit 27:	Stalite Mine Brochure, North Carolina;
CC Exhibit 28:	Google Earth Views of Scotia Bag Plant, [*Cranesville Aggregate* 878 F.3d 25];
CC Exhibit 29:	Google Earth Views of Thomas Hill Energy Center, [*Associated Electric Co-op,* 172 F.3d 1078];
CC Exhibit 30:	Secretary's Discovery Responses;
CC Exhibit 31:	Texas State Law Governing Extraction of Aggregates;
CC Exhibit 32:	Contest Petition;
CC Exhibit A:	Mine Act, 30 U.S.C. §801, 802, 803;
CC Exhibit B:	30 CFR §56.2;
CC Exhibit C:	30 CFR §46.2;
CC Exhibit D:	MSHA and OSHA Memorandum, Mar. 29, 1979;
CC Exhibit E:	MSHA Program Policy Manual I.3;

CC Exhibit F: Part 56 for Each of the Ten Citations at Issue and Program Policy Manual Provisions;

CC Exhibit G: Part 56 and Program Policy Manual Provisions;

CC Exhibit H: 30 U.S.C. §813, §814, and §815;

CC Exhibit I: *Herman v. Associated Elec. Coop.* 172 F.3d 1078 (8th Cir. 1999);

CC Exhibit J: *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984);

CC Exhibit K: *Cranesville Aggregate Companies,* 878 F3d 25 (2nd Cir. 2017);

CC Exhibit L: *Maxxim Rebuild Company, LLC v. FMSHRC*, 848 F.3d 737(6th Cir. 2017);

CC Exhibit M: *United Energy Services,* 35 F.3d 971 (4th Cir. 1994);

CC Exhibit N: *KC Transport*, 44 FMSHRC 211 (Apr. 2022);

CC Exhibit O: *The Creator's Stone*, 43 FMSHRC 241, 2021 WL 2895255, ALJ Moran, Apr. 2021 CENT 2020-0067;

CC Exhibit P: *Drillex, Inc.* 16 FMSHRC 2391 (Dec. 1994);

II. SECRETARY OF LABOR'S EXHIBITS

Sec'y Exhibit 1: Violation History Report for Mine ID 41-00009 (DOL00001-000002) Certified Violation History Report;

Sec'y Exhibit 2: Number CENT 2023-0089; and Contestant's Notice of Contest and Supplement (DOL Bates Numbers 00003–00016);

Sec'y Exhibit 3: MSHA Inspection Summary Report; and Regular Inspection Information, Closeout Conference (DOL Bates Number 00017–00019; and 00023);

Sec'y Exhibit 4: Legal Identity Report for Mine ID 41-00009 (DOL Bates Numbers 00020–00022);

Sec'y Exhibit 5: MSHA Inspection Report Checklist (DOL Bates Number 00024);

Sec'y Exhibit 6: Citation 9678437 and Citation/Order Documentation (DOL Bates Numbers 00025–00026);

Sec'y Exhibit 7: Citation 9678438 and Citation/Order Documentation (DOL Bates Numbers 00027– 00029);

Sec'y Exhibit 8: Citation 9678439 and Citation/Order Documentation (DOL Bates Numbers 00030–00033);

Sec'y Exhibit 9: Citation 9678440 and Citation/Order Documentation (DOL Bates Numbers 00034–00035);

Sec'y Exhibit 10: Citation 9678441 and Citation/Order Documentation (DOL Bates Numbers 00036–00038);

Sec'y Exhibit 11: Citation 9678442 and Citation/Order Documentation (DOL Bates Numbers 00039–00040);

Sec'y Exhibit 12: Citation 9678443 and Citation/Order Documentation (DOL Bates Numbers 00041–00042);

Sec'y Exhibit 13: Citation 9678444 and Citation/Order Documentation (DOL Bates Numbers 00043–00044);

Sec'y Exhibit 14: Citation 9678445 and Citation/Order Documentation (DOL Bates Numbers 00047–00048);

Sec'y Exhibit 15: Citation 9678446 and Citation/Order Documentation (DOL Bates Numbers 00045–00046);

Sec'y Exhibit 16: Daily Cover Sheets and General Field Notes (DOL Bates Numbers 00049–00067);

Sec'y Exhibit 17: MSHA Inspection 6890833 Photographs and Videos (DOL Bates Numbers 00068–00099; and 00100, 00101;

Sec'y Exhibit 18: Memorandum of Understanding between OSHA and MSHA; and MSHA Program Policy Manual–Vol. 1;

Sec'y Exhibit 19: MSHA/OSHA Jurisdiction Review.

III. BACKGROUND AND PROCEDURAL HISTORY

These cases come before this tribunal as part of a broader jurisdictional dispute between Cactus Canyon Quarries, Inc., and the Secretary of Labor. Jack "Andy" Carson is the President of Cactus Canyon, which runs a surface plant located at 7232 CR 120, Marble Falls, Burnet County, Texas ("Fairland Plant"), as well as a number of small, intermittent stone quarries or pits.[1] Cactus Canyon produces specialty, structural, dimensional stone for use primarily in the creation of terrazzo stone, which is "used in the industrial and construction industries for flooring, countertops, [and] walling in the building industry." Tr. at 485-86, 488.

Cactus Canyon asserts that the Fairland Plant is currently regulated by MSHA, while its quarries are regulated by OSHA as "borrow pits" under an interagency memorandum. Cactus Canyon desires for this jurisdictional arrangement to be reversed, and claims that MSHA should regulate its pits as intermittent stone mines and that OSHA should regulate the Fairland Plant, since no extraction or "milling" occurs at that alleged "finishing facility." The Secretary, in turn, asserts that the Fairland Plant is a surface mine under Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). An active surface "mine" is subject to unannounced inspections by the Mine Safety and Health Administration ("MSHA") on at least a semi-annual basis. 30 U.S.C. §§ 813(a), 820(e). Cactus Canyon contends that the Fairland Plant has ceased all mining operations and should no longer be classified as a "mine" or be subject to inspection under the Act.

[1] Mr. Carson is an attorney licensed in Texas and has appealed fines issued by MSHA on multiple occasions. In separate proceedings that commenced last year, Mr. Carson first raised the issue of whether the Fairland Plant was engaged in "milling" and thus subject to jurisdiction under the Act. On May 24, 2023, Administrative Law Judge Richard W. Manning issued an order and opinion finding that the Fairland Plant was a surface mine and upheld $375 worth of MSHA civil penalties.

On August 11, 2022, Cactus Canyon notified MSHA of the voluntary commencement of closure of operations at the Fairland Plant and Quarries (Mine ID 41-00009). CC Ex. 3. On or about that same date, Cactus Canyon filed ten "Mine ID requests" and asked MSHA to issue mine identification numbers for ten "intermittent dimension stone mines," including the Clendennen Ranch Mine. At the time of the April 2023 hearing, only two of Cactus Canyon's pits – Clendennen Ranch and Franklin North – were active, while the others had been temporarily idled. Tr. 64-65; CC Ex. 2. At the time of the hearing, only the Clendennen Ranch location was actively operational. *Id*. The Secretary alleges that mining activity had not ceased at that mine site. *See* Sec'y Exs. 1, 4. On September 21, 2022, Cactus Canyon requested that MSHA and OSHA conduct a jurisdictional review of its regulated facilities. CC Ex. 4.

On October 25 and 26, 2022, an authorized representative of the Secretary, inspector Neal Davis, conducted an EO1 regular inspection of the Fairland Plant and Clendennen Ranch Mine. Tr. 190-191, 283. Davis was accompanied by another MSHA representative, Dallas field office supervisor Ty Fisher, and a trainee named Curt Burnett. Tr. 45. Davis met with Carson and Cactus Canyon's office manager, Cactus Canyon's plant operator Bernardo, and Cactus Canyon's lead foreman Jesse. Tr. 45-47, 194. During a two-day inspection, Davis observed and documented ten alleged violations of the Act and issued ten citations to Cactus Canyon under Mine ID 41-00009. Sec'y Exs. 6-15; 30 U.S.C. §§ 801, *et seq*. Fisher accompanied Davis as part of a jurisdictional review requested by Mr. Carson. Tr. 51-53; s*ee* Exs. 5-9. According to Cactus Canyon, the MSHA representatives proceeded with the inspection even after they were advised that the Fairland Plant and Quarries had been permanently closed. *See* Not. of Contest at 2. Days later, Cactus Canyon filed a notice of contest in another proceeding seeking to compel MSHA to issue the previously requested mine identification numbers. Judge Paez dismissed that case on summary decision because the notice of contest failed to state a claim over which the Commission had jurisdiction. *See* Order of Dismissal, *Cactus Canyon Quarries, Inc*., 45 FMSHRC 384, slip op., No. CENT 2023-0068 (Feb. 14, 2023) (ALJ).

On November 22, 2022, Cactus Canyon filed 10 notices of contest and a request for an expedited hearing on each citation issued during MSHA's October 2022 inspections. On December 12, 2022, the Secretary filed her Answer to these contests, as well as a Response in Opposition to Contestant's Motion to Expedite. Cactus Canyon filed additional Motions to Consider the Expedited Request on December 20, 2022, and January 12 and 18, 2023. The Secretary filed an Amended Response in Opposition to the Request to Expedite on January 20, 2023.

The ten contest dockets and related civil penalty proceeding were assigned to the undersigned on January 13, 2023. On January 20, 2023, the undersigned held a conference call with the parties to discuss Cactus Canyon's then-pending request to expedite, which was denied in a written order on January 23, 2023, but a hearing was set in short order for early April 2023.

On January 24, 2023, Cactus Canyon filed a Motion for Summary Decision, requesting that five of these contest dockets be dismissed for lack of jurisdiction. That motion sought partial summary decision, and requested that Citations Nos. 9678440, 9678441, 9678442, 9678443 and 9678446 – all issued October 25-26, 2022 at Clendennen Ranch – be vacated because that intermittent mine has not been issued a valid mine identification number and because the Secretary

had not met her burden to prove that such mine is part of the Fairland Plant and Quarries (Mine ID 41-00009). On February 3, 2023, the Secretary filed a Response in Opposition to the Contestant's Motion.

On February 7, 2023, Cactus Canyon filed 1) a motion to consolidate, 2) a proposed order granting the motion to consolidate, and 3) a reply to the Secretary's February 3, 2023 Response.

On March 2, 2023, the Secretary filed a supplement to its Response in Opposition to the Motion for Summary Decision. The undersigned denied Cactus Canyon's motion in a written order dated March 7, 2023, holding that

> For the reasons set forth by Judge Paez in his February 14 order, this Court lacks jurisdiction to review Contestant's arguments involving MSHA's failure to issue mine identification numbers separate from Mine ID 41-00009. *See* Order of Dismissal, *Cactus Canyon Quarries, Inc*., 45 FMSHRC 384, slip op., No. CENT 2023-0068 (February 14, 2023) (ALJ). In addition, the parties' filings indicate that genuine issues of material fact exist as to whether the Fairland Plant and Quarries [were] engaged in active mining after its purported permanent closure on August 11, 2022, and whether the citations issued at the Clendennen Ranch intermittent mine on October 25-26, 2022, were validly issued as part of that mining. Cactus Canyon has therefore failed to make a "proper showing[] of the lack of a genuine, triable issue of material fact." *Lakeview Rock*, 33 FMSHRC at 2987. Accordingly, summary decision is inappropriate at this time. *The parties may advance their jurisdictional claims at hearing.* (italics added).

On March 7, 2023, Cactus Canyon filed a Supplemental Reply and Ruling Request. On March 14, 2023, Cactus Canyon filed a second Motion for Summary Decision. On March 16, 2023, Cactus Canyon filed a Motion to Reconsider the undersigned's denial of the first Motion for Summary Decision. Thereafter, a prehearing conference was held on March 30, 2023, during which Cactus Canyon's pending motions were denied. The parties were afforded a final opportunity to submit any pre-hearing stipulations to narrow the scope of testimony at the hearing. Ultimately, no stipulations of any kind were reached.

A hearing was held in the above matters on April 4-6, 2023. The undersigned heard testimony from Carson and MSHA representatives Davis and Fisher and admitted into evidence numerous documentary exhibits.

For the reasons that follow, the undersigned first concludes that MSHA possesses jurisdiction over both the Fairland Plant and Clendennen Ranch pit. Furthermore, the undersigned Orders that Citation Nos. 9678438, 9678439, 9678441, and 9678444 be **VACATED**, that Citation Nos. 9678437, 9678440, 9678442, 9678443, and 9678446 be **AFFIRMED**, and that Citation No. 9678445 be **AFFIRMED, AS MODIFIED**.

IV. JURISDICTION

a. Summary of Testimony Concerning Jurisdiction

On October 25 and 26, 2022, MSHA inspector Davis conducted an E01 inspection of Cactus Canyon's Fairland Plant and Clendennen Ranch "mine" or "pit" in Burnet County, Texas. Also on those dates, MSHA field supervisor Fisher conducted a parallel inspection in furtherance of a jurisdictional review requested by Cactus Canyon. *See* CC Exs. 4-9. Mr. Fisher inspected the Clendennen Ranch site to ensure that it qualified as a "mine" rather than as a "borrow pit" under the Act. Tr. 64. Fisher took photographs during this inspection, which were compiled and submitted within a jurisdictional report. Tr. 44, 48; Sec'y Ex. 19. In part because of Fisher's investigation, MSHA ultimately affirmed its past exercise of jurisdiction and concluded that the Fairland Plant and quarries constitute an integrated "mine" facility subject to regular inspections authorized by the Act. *Id*.

Mr. Carson provided testimony in support of Cactus Canyon's position that MSHA's jurisdiction does not extend to the Fairland Plant. Carson testified about the history of Cactus Canyon's operations at the Fairland Plant. Tr. 626. At the Fairland Plant, Cactus Canyon prepares processed dimensional stone to be used in terrazzo stone flooring. Tr. 557. Terrazzo floors are installed in a variety of settings, but most of the stone processed is used for flooring in schools and airports. Tr. 557. Cactus Canyon does not sell its processed stone chips directly to these customers, but rather distributes its product indirectly through a terrazzo stone contractor or distributor. Tr. 723-24. Carson describes the market for terrazzo stone chips as a "very narrow niche." Tr. 556. Terrazzo stone chips are sold in a variety of different sizes, ranging from "zero, one, two, three, and five." Tr. 556, 562. The Fairland Plant uses crushers and screens for sizing rock to produce three primary sizes of stone for terrazzo flooring: three-eighths, one-eighth, and one-sixteenth [of an inch]. Tr. 562-64.

Cactus Canyon receives partially processed dimensional stone from Mexico by rail and from within the state of Texas. Tr. 558. Occasionally, Cactus Canyon obtained dimensional stone from other states, including Maryland and Georgia. Tr. 738. Carson estimates that approximately one percent of his current sales derive from dimensional stone extracted from the Clendennen Ranch site. Tr. 592. However, 10 to 15 percent of its sales relate to dimensional stone extracted from one of its leased pits. Ex. 13. Historically, around 75 percent of the dimensional stone extracted from the Fairland Quarries has been sold to customers outside of the terrazzo stone industry. Tr. 594-595. However, that market has steadily decreased over time. *Id*.

Dimensional stone arrives at the Fairland Plant from various locations for the purpose of being resized to produce and sell terrazzo stone chips. Tr. 558. At hearing, Cactus Canyon maintains stockpiles of dolomitic marble, granite, and basalt. Tr. 555-556. Cactus Canyon offers as many as "35 or 36" color varieties of terrazzo chips to its customers. Tr. 555. Cactus Canyon obtains different colors of dimensional stone from domestic or Mexican sources or through extraction at one of its ten intermittent pits. For example, black dimensional stone is basaltic and is obtained from Vulcan Materials. Tr. 555. Yellow stone is either shipped by rail from Mexico or extracted from one of Cactus Canyon's intermittent pits, with approximately one-third of the active stockpiles having been obtained from the latter source. Tr. 610. Cactus Canyon creates its own

red terrazzo chips by heating yellow dimensional stone within a specially designed bucket, elevator-fed kiln, which changes the chemical composition of the rock so that any ferric impurities are accentuated and the rock transforms to an unnaturally attainable, red hue. Tr. 573, 576. The bucket elevator is operated approximately "15 or 20" times per year. Tr. 573. Mr. Carson explained that large stockpiles of dimensional stone are needed to ensure consistency in color, and that he maintains many different colors of dimensional stone to account for changing trends in customer color preferences. Tr. 557. For example, although gray stone was the most desirable at the time of the hearing, cream stone was in vogue a decade ago. *Id.*

Mr. Fisher provided extensive testimony about Cactus Canyon's operations at the Fairland Plant and Clendennen Ranch site. He described the chronology of processing dimensional stone extracted from Clendennen Ranch and transported to the Fairland Plant, as follows:

> If we start at the process where it begins at the quarry, say the Clendennen pit which is 3.1 miles away from the Fairland plant and quarries, there's an air track drill that has an air compressor that is bolted on behind it that would drill holes and then the holes will be loaded with explosives and there would be a blast. Then after that you have an excavator that removes and separates rock. There's also another excavator that has a rock pit or a rock camera that breaks the rock into smaller sizes. There was a couple of bobtail dump trucks that are loaded by also a front end loader that is up to that area and materials also dump through a grizzly, which is a set of rails on an angle and then it separates larger material from smaller material. From there other bobtail trucks haul that material or sometimes through the contractor hauls the material from the quarries to the plant. There's also material that comes in by rail from other mines and from Mexico. It is unloaded either from the bobtail trucks being dumped by the respecting piles that they need to go into per color and the rail cars are also unloaded. What I observed that there's a shelf of probably approximately three to four-inch thick of rock that is excavated. Then it is broken down into smaller sizes. The sizes that usually go, I believe, around six inch, give or take.

Tr. 68-69.

> The dimensional stone is excavated by the excavator. There's one with a bucket on it that pulls it up off the ground after it's broken and blasted. It is broken down by a rock pick on another excavator, which is air percussion or hydraulic percussion, that is driven into the rock that breaks it into smaller pieces. The grizzly is just the steel structure with however wide the operator is requesting and the materials dump, the finer stuff falls through. The larger stuff slides down on the ankle into the pile on the other side [to] be scooped up and put into the pile of dimensional stone that is going to be shipped to the plant.

Tr. 71.

> Then [the dimensional stone] is dumped from the trucks with the corresponding pile per the color of the dimensional stone that it needs to be matched up to. Then

> the front end loader will be used to buck the pile up which is where he pushes that pile up onto the existing pile to make it match. From there, that rock when it is needed from whichever pile the color needs, and there could be piles there from 20 years ago, that's why some of those quarries do not need a mine ID is because there's still a lot of material and got 20 years' worth still sitting at the place.

Tr. 72.

According to Mr. Fisher,

> You can follow the rock to the plant and it is the plant that has specific color as Mr. Carson showed me at each one of the quarries. That's what he's mining is rock for certain colors. He does a very good job of keeping that consistent. He has to keep large piles on each quarry of the rock. He points those out to us. That's kind of how we know what the material is. And he doesn't want to ship those until he has a large enough quantity to maintain the color that he needs to keep his clientele happy so he can match up and then he ships that large quantity. There's no differentiation because if you have a smaller quantity, the color can change.

Tr. 70.

The dimensional stone that is extracted or imported is brought to the Fairland Plant, "sized," "crushed," and some of it "heated up to change the physical appearance and it is sold in commerce as a product." Tr 63. The Fairland Plant complex consists of multiple buildings, including "one building where they bag the larger bags, there's also an elevator next to it, bucket elevator, that brings product in, dumps it into the hopper to be dumped into bags." Tr. 55. The "Plant" consists of two plant buildings, designated as Plant Number 1 and Plant Number 2. Tr. 56. Both plants contain a series of "jaw crushers" and "gyro crushers." *Id.* After first passing through the jaw crusher,

> the material goes into some gyro crushers. There's two twin gyro crushers on each. And then from the gyro crushers, the material is taken up to a set of screens. And if the material, if it can be a long splinter or something that keeps recirculating back through the gyro crushers until it finally meets correct shape, cubicle shape that Mr. Carson is looking for. Then they continue on up to another set of screens and then, once again, that same process which recirculates until the product gets down to where Mr. Carson can use it.
>
> Then it goes into a bag house on number 1 or bagging area where there's machines where it dumps it in the bags are sealed and sewed up. On plant number 2 there's just a hopper at the end where the material is dumped into a dump truck, which is then the truck hauls it to wherever it needs to go.

Tr. 56.

If Cactus Canyon wishes to upgrade yellow dimensional stone into red terrazzo stone chips, it utilizes an on-site "kiln or cooker or roaster. There is a lot of names for it." Tr. 507. Fisher testified, as follows:

> [The] plant is used to turn yellow dimensional stone to red. I believe Andy said that he only does that for about a week once a year. (". . .") It was my understanding very few people inspect it, but it is in use so we did inspect it. And it feeds the baghouse where the bigger totes are filled with dimensional stone turned into terrazzo stone ready for shipment. Some of the totes I was told by Mr. Carson are up to 3,000 pounds. (". . .") [There is] a small hopper where a front end loader can dump material to feed that cooker, kiln, roaster, dryer that we spoke of where the yellow stone has turned red.

Tr. 508.

Following its jurisdictional review, MSHA takes the position that all ten of the intermittent extraction sites that Mr. Carson has previously requested a mine ID for represent one continuous mining operation integrated with the Fairland Plant. Tr. 62 ("The Fairland Plant [and quarries] is not a borrow pit. There is some quarries associated with it that I did not feel that meet the criteria of a borrow pit. They meet the criteria of a mine under the Mine Act"); CC Ex. 4. Mr. Carson agrees that the ten intermittent quarries operated by Cactus Canyon should be regulated by MSHA. Tr. 614 ("Well, I fully agree that they should be under mine safety jurisdiction. MSHA jurisdiction and transported to the mine. Based – the information that last existed and the information gathered from was provided all indications that these are under MSHA's jurisdiction and [MSHA] will regulate accordingly.") However, Cactus Canyon contests MSHA's ongoing exercise of jurisdiction over the Fairland Plant.

b. Findings of Fact and Conclusions of Law

i. The Fairland Plant is a Mine

An initial issue in this case is whether MSHA possessed jurisdiction to enter and inspect the Fairland Plant and Clendennen Ranch site on October 25 and 26, 2022.[2] The Secretary argues that

[2] In its brief, Cactus Canyon asserts, in barebones fashion, that inspector Davis' EO1 inspection and Fisher's inspection in furtherance of the jurisdictional review *requested by Carson* constitute unreasonable searches under the Fourth Amendment to the U.S. Constitution. As a general matter, searches in the exercise of MSHA's statutory mandate have been upheld under the Fourth Amendment. *See e.g., W. Oilfields Supply Co. v. Sec'y of Labor*, 946 F.3d 584, 590-91 (D.C. Cir. 2020) (holding that inspection of truck did not violate Fourth Amendment), cert. denied, 141 S. Ct. 552 (2020); *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317 (June 2016), aff'd, 875 F.3d 279 (6th Cir. 2017); *Donovan v. Dewey*, 452 U.S. 594 (1981). I find no reason to depart from this precedent here. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214-15 (1994) (holding that administrative agencies may pass on constitutional claims that arise from an issue within the agency's statutory grant of authority).

the Fairland Plant is subject to Mine Act jurisdiction because mineral milling takes place at the facility.[3] Cactus Canyon agrees that the Clendennen Ranch Mine is subject to MSHA's jurisdiction, but argues that that the nature of its operations at the Fairland Plant have changed such that the Fairland Plant no longer fits within the definition of "coal or other mine" under Section 3(h)(1) of the Act. 30 U.S.C. § 802(h)(1).[4] For the reasons that follow, the undersigned finds that Cactus Canyon engages in "milling" at the Fairland Plant and that MSHA properly asserted its jurisdiction by inspecting Cactus Canyon's Fairland Plant and Clendennen Ranch Mine and issuing the citations at issue. As explained below, the Fairland Plant "mills" dimensional stone and therefore meets the statutory definition of a "mine" pursuant to 30 U.S.C. § 802(h)(1)(C).

The Mine Act defines "mine" to include, in relevant part, "structures [and] facilities . . . used in . . . the milling of such minerals [extracted in nonliquid form]." 30 U.S.C. § 802(h)(1)(C). The Mine Act defines "coal or other mine" as

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground,
> (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 if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1).

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[3] Throughout the history of its operations, Cactus Canyon has acquiesced to MSHA's jurisdiction over the Fairland Plant and, as recently as last year, Cactus Canyon stipulated to MSHA's jurisdiction over the same. *See Cactus Canyon Quarries*, 44 FMSHRC 289 (April 2022) (ALJ). As noted, Cactus Canyon maintains in the instant proceeding that its historical operations have changed to such a degree that the facility should now be inspected by OSHA and not MSHA.

[4] The Secretary seeks to establish Mine Act jurisdiction over the Fairland Plant via subsection (C) of section 3(h)(1) of the Act, which, in pertinent part, defines a "coal or other mine" to include "structures, facilities, equipment, machines, [and] tools . . . used in … the milling of … minerals." 30 U.S.C. § 802(h)(1). Much of the Secretary's brief argues that the Fairland Plant is not a "borrow pit" and, as a result, does not qualify for the "borrow pit exception" to Mine Act jurisdiction in the MSHA-OSHA Interagency Agreement. Sec'y Br. 5-10. However, Cactus Canyon has not argued at any point in these proceedings that its intermittent pits qualify as borrow pits under the Act. Why the Secretary spent six pages and the majority of the analysis section of its brief discussing borrow pit-related case law is not clear, especially when Cactus Canyon has conceded that its pits should be regulated by MSHA. Tr. 615, Exs. 8, 14.

The Mine Act does not define the term "milling". When a statutory term is not expressly defined it should be accorded its commonly understood definition. *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994).[5] The question of whether certain facts satisfy the definition of "milling" for jurisdictional purposes is a question of law. *See, e.g.*, *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 676 (July 2002); *Drillex, Inc.*, 16 FMSHRC at 2395.

Although the Act does not define the term "milling," it does empower the Secretary to determine what constitutes mineral milling.[6] The Secretary first exercised this discretion in 1979 when it promulgated an interagency agreement between MSHA and the Occupational Safety and Health Administration ("OSHA"). MSHA and OSHA published this Agreement with the intention of delineating the agencies' respective responsibilities at mine sites and within certain mine-

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[5] In a recently issued, nonprecedential decision, another Commission Judge considered an analogous jurisdictional argument raised by Cactus Canyon. Based on Commission precedent, that judge conducted a detailed textual analysis of the word "milling" and found as follows:

> When a statutory term is not expressly defined it should be accorded its commonly understood definition. *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). In *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 674-675 (July 2002) the Commission, when analyzing the commonly understood definition of "milling" and related terms, stated the following:
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> > Within the industry, milling is defined as: "The grinding or crushing of ore. The term *may* include the operation of removing valueless or harmful constituents … while mill is defined as a "mineral treatment plant in which crushing, wet grinding, and further treatment of ore is conducted." . . . [*Dictionary of Mining, Mineral, and Related Terms* 344 (2d ed. 1997) ("*DMMRT*")] (emphasis added); *see also Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914 (Sept. 2001) (using *DMMRT* to determine usage in mining industry). The ordinary meaning of "to mill" is "to crush or grind (ore) in a mill," and the term "a mill" is defined as "a machine for crushing or comminuting some substance." *Webster's Third New Int'l Dictionary (Unabridged)* 1434 (1993); *see also Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1060 (Sept. 2000) ("Commission … look[s] to the ordinary meaning of terms not defined by statute").

See Cactus Canyon Quarries, Inc., 45 FMSHRC 384, No. CENT 2023-0010, 2023 WL 3790763, at *4 (May 24, 2023) (ALJ).

[6] The Commission has explained that "milling" "independently qualifies . . . [an] operation as a 'mine' within the meaning of the Act." *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). Moreover, the legislative history of the Act makes clear Congress intended "that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and . . . 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), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

adjacent areas. *See* 44 Fed. Reg. 22827–28 (Apr. 17, 1979). Courts and tribunals have often referenced and, at times, deferred to this Interagency Agreement in determining the scope of MSHA's jurisdiction. *See e.g.* CC Ex. J; *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552–53 (D.C. Cir. 1984) (finding the list of milling processes in the Agreement to be "relevant" to defining a "mine" for jurisdictional purposes, but "every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h). The jurisdictional line drawn by the statute rests upon the distinction, which is somewhat elusive, to say the least, between milling and preparation, on the one hand, and manufacturing, on the other. Classification as the former carries with it Mine Act coverage; classification as the latter results in Occupational Safety and Health Act regulation."); *see also In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 592 (5th Cir. 2000) (accepting as reasonable MSHA's interpretation of "milling" as laid out in the Interagency Agreement); *Jones Bros., Inc. v. Sec'y of Lab.*, 68 F.4th 289, 296–97 (6th Cir. 2023) (relying on definitions in the Interagency Agreement to distinguish between mines and borrow pits).

Appendix A to the Agreement identifies "milling" as a practice subject to MSHA's regulatory authority. 44 Fed. Reg. at 22829. Appendix A describes "milling" as a process "to effect a separation of the valuable minerals from the gangue constituents of the material mined" as well "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." 44 Fed. Reg. at 22829. Appendix A contains a list of "general definitions of milling processes for which MSHA has authority to regulate." This list includes the terms "crushing," "sizing," and "roasting." "Crushing" is defined as "the process used to reduce the size of mined materials into smaller, relatively coarse particles[,]" and "may be done in one or more stages, usually preparatory for the sequential stage of grinding, when concentration of ore is involved." 44 Fed. Reg. at 22829. "Sizing" is defined as "[t]he process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." 44 Fed. Reg. at 22829-22830. "Roasting" is defined as "the process of applying heat to mineral products to change their physical or chemical qualities for the purpose of improving their amenability to other milling processes." 44 Fed. Reg. at 22830

Only two pieces of documentary evidence introduced by Cactus Canyon speak directly to the classification of the Fairland Plant: 1) a request that MSHA confirm the closure of the Fairland Plant, and 2) an affidavit from Carson stating that the Fairland Plant no longer engages in mining. CC Exs. 3, 14. Both submissions are self-serving, and speak only to the fact that Carson *believes* that the Fairland Plant does not engage in mining, rather than providing any corroborative support for such opinion. Carson also testified that the Fairland Plant does not engage in "mining" or "milling" and stated that:

> separation of minerals from [gangue], or crude or ore. I think we've testified to that. There is no separation at the -- at the Fairland plant. We don't grind it. We're not looking for powder. We don't concentrate it. We don't wash it or dry it. We do -- the definition of roasting isn't -- isn't what we're doing -- we're applying the heat to change their physical or chemical qualities for purposes of proving -- improving their amenability to other milling processes.

Tr. 601.

Despite his vehement opposition to MSHA's attempted exercise of jurisdiction pursuant to the Act, Carson's descriptions of the work done at the Fairland Plant repeatedly referenced crushing and sizing, two terms used to define "milling" for purposes of MSHA jurisdiction. *See e.g.*, Tr. 81, 19-25. Carson's testimony makes clear that the Fairland Plant engages in both crushing and sizing. Carson described how Cactus Canyon remarkets material it has "crushed" that is too fine in diameter to be used in the terrazzo stone industry. Tr. 574. Further, although Mr. Carson frames the process as not actually constituting "crushing," he describes in detail a process by which stone is circulated through a closed circuit of machines and conveyor belts, screened by size, and, as needed, fed through a pair of "cone crushers" to reduce the stone to the appropriate size for use in terrazzo flooring. Tr. 565-566. He also described how this process is used to produce three sizes of stone as the rock passes a three-eighth screen, retained on a quarter, and a quarter to an eighth and an eighth to a sixteenth. Tr. 563, 570-571 ("The system is to produce as much material as you can that passes -- that's cubicle in shape and passes three-eighths of an inch and is retained on a quarter. That's our number two, or passes the quarter and is retained on one-eighth."). Finally, although Carson submits that the Fairland Plant does not engage in "roasting" when it upgrades yellow marble dimensional stone into red terrazzo stone chips, he nonetheless describes in detail how Cactus Canyon utilizes the strategic application of heat to accentuate the ferric impurities within the yellow marble to create a red-colored stone whose naturally occurring analog is too unstable and unworkable to be used in the production of terrazzo stone chips. Tr. 601-603.

The Secretary has presented extensive testimonial evidence that establishes that Cactus Canyon is engaged in milling. Fisher referenced the evidence collected in support of MSHA's jurisdictional review, and testified that dimensional stone is passed through a conveyer system where "the material goes into some gyro crushers (". . .") [and] keeps recirculating back through the gyro crushers until it finally meets correct shape, cubicle shape that Mr. Carson is looking for. Then they continue on up to another set of screens and then, once again, that same process which recirculates until the product gets down to where Mr. Carson can use it." Tr. 56. Further, Fisher testified that Cactus Canyon uses a "kiln" or "roaster" to upgrade yellow dimensional stone into red terrazzo stone chips "about a week once a year." Tr. 507-508.

The plain language of the Mine Act, especially when contextualized by the MSHA/OSHA Interagency Agreement, supports the conclusion that the Fairland Plant engages in milling and therefore falls squarely within the statutory definition of a mine.

First, I find that Cactus Canyon engages in milling through "crushing" at the Fairland Plant. As described in detail in *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 676 (July 2002), the mining industry's understanding of the terms "milling" and "mill," as well as the common dictionary definitions of "a mill" and "to mill" all contemplate the crushing of material. The Dictionary of Mining, Mineral, and Related Terms defines "crushing" as "size reduction into relatively course particles by stamps, crushers, or rolls." *See* DMMRT 135 (2d ed. 1997). The Interagency Agreement's definition of "crushing," *supra*, is almost identical to that of the DMMRT, but also includes a supplemental statement that "[c]rushing *may* be done in one or more stages, *usually* preparatory for the sequential stage of grinding, when concentration of ore is involved." Through his testimony, Carson asserted that Cactus Canyon's use of a series of

industrial crushers for the purpose of reducing the size of its dimensional stone does not actually amount to "crushing" as the term is used in the Interagency Agreement. Tr. 565-66. This assertion does not comport with a good-faith review of Commission case law and the definition of "crushing" found within the Interagency Agreement. Moreover, Cactus Canyon submits that the supplemental statement found within the Interagency Agreement modifies the definition of "crushing" to *require* that the act be preparatory to the sequential stage of grinding and concentration of ore. CC Br. 28-29. However, the supplemental statement says only that crushing "may" be done in one or more states and "usually" is preparatory for grinding when concentration of ore is involved.

Second, I find that Cactus Canyon engages in milling by "sizing" the material it processes at the Fairland Plant. In *State of AK Dept.of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014), the Commission cited the Interagency Agreement's inclusion of "sizing" in its list of milling processes and found that the operator "clearly engag[ed] in 'milling' under section (h)(1)" where it used a screen to separate material "based on size, with oversized rock separated out entirely." Here, like the operation at issue in *State of AK Dept.of Transp.,* the Fairland Plant screened material to separate that which was correctly sized from that which was still oversized. As opposed to the operation at issue in *State of AK Dept. of Transp*., which screened out oversized rock, wood and trash from the material it was extracting, Cactus Canyon passes its oversized dimensional stone

> into some gyro crushers. There's two twin gyro crushers on each. And then from the gyro crushers, the material is taken up to a set of screens. And if the material, if it can be a long splinter or something that keeps recirculating back through the gyro crushers until it finally meets correct shape, cubicle shape that Mr. Carson is looking for. Then they continue on up to another set of screens and then, once again, that same process which recirculates until the product gets down to where Mr. Carson can use it.

Tr. 56. As discussed *supra*, Cactus Canyon subjected oversized material to further "milling" by screening and crushing the material to produce a product that is less than 3/8 of an inch, but greater than 1/16 of an inch, and "cubicle in shape." Tr. 571. Given that Cactus Canyon crushed and screened rocks of various size to produce a product within prescribed size parameters, I find that it engaged in "sizing" material as that term is defined in the Interagency Agreement and Commission precedent.

Third, I find that Cactus Canyon engages in milling through "roasting" at the Fairland Plant. "Roasting" is "the process of applying heat to mineral products to change their physical or chemical qualities for the purpose of improving their amenability to other milling processes." 44 Fed. Reg. at 22830. Carson testified that Cactus Canyon creates a red variety of terrazzo chip by chemically modifying yellow marble dimensional stone. Tr. 573 ("This kiln in the small bucket elevator that -- he had that right, what you're doing is most yellow rock has fair -- if you have any chemistry background you have ferrous and ferric. It's how much oxygenated the iron is. And by heating it you change the iron component turns redder"; Tr. 575 ("At roughly 1,000 degrees you add -- I think you're either stripping an oxygen or adding an oxygen to an iron molecule."). While Carson attempted to walk back that testimony (Tr. 575-76), the record makes clear that Cactus

Canyon would not be able to sell red terrazzo chips without the utilization of heat to chemically modify the iron impurities found within his collection of yellow dimensional stone.

Finally, I find that the processes described above and utilized at the Fairland Plant fit within the Interagency Agreement's description of "milling" and Commission precedent that has found milling. Cactus Canyon has developed a unique production facility for the primary purpose of reducing dimensional stone to a certain specified size and shape so it can be sold, through a distributor, for use in terrazzo stone flooring. Carson testified that Cactus Canyon removes fines – material smaller than one sixteenth of an inch and thus unusable in terrazzo floors – for use either in the construction of Cactus Canyon's roadways or for sale in a secondary, less profitable market. Tr. 574, 663-664. The separation of valuable terrazzo stone material from fines generated during crushing and sizing is the type of process contemplated by the Interagency Agreement's definition of milling, i.e., a separation of the valuable minerals from materials that cannot be used in terrazzo flooring.[7]

In its brief, Cactus Canyon argues that the Fairland Plant is simply a "stone finishing" facility. CC Brief at 4. However, neither Carson's nor Fisher's testimony support this characterization. Stone finishing is expressly excluded from MSHA's jurisdiction, and is defined by the Agreement as occurring when "milling, as defined, is completed, and the stone is polished, engraved, or otherwise processed to obtain a finished product." 44 Fed. Reg. at 22830. Cactus Canyon offered no evidence that it polishes or engraves stone, and Carson testified that finishing occurs *after* it sells the stone and it is made into terrazzo flooring. Tr. 604 ("we're not further polishing or finishing that product. We're just getting it down to marketable size.").

Cactus Canyon next attempts to distinguish its activities at the Fairland Plant from the umbrella definition of "milling." More specifically, Cactus Canyon cites language referring to the "separation" of "valuable desired constituents" from "undesired contaminants," 44 Fed. Reg. at 22829, and asserts that the Fairland Plant does not engage in this activity. In his testimony, however, Carson described how dimensional stone is washed[8] and sorted when it arrives at the Fairland Plant to remove any contaminants or fragments of stone of an undesirable color. Tr. 568. In any event, as noted, the Commission has rejected the idea that the Mine Act "impose[s] upon the Secretary a technical definition of milling based on the separation of valuable from valueless materials" or that "such separation [i]s critical to the determination that 'milling' took place." *Watkins Eng'rs & Constructors*, 24 FMSHRC at 674. The processes at the Fairland Plant fall within the definitions of crushing and sizing, which are both identified by the Agreement and Commission precedent as processes that constitute milling. This is sufficient to establish MSHA's jurisdiction.

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[7] *Cf. Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 675 (July 2002), where the Commission stated that "[i]n enacting the Mine Act, Congress did not impose upon the Secretary a technical definition of milling based on the separation of valuable from valueless materials, nor in the Act's legislative history did it intimate that separation was critical to the determination that 'milling' took place."

[8] Compare Carson's unreliable testimony at Tr. 601 where he stated that Cactus Canyon does not wash the stone.

Cactus Canyon further argues that its quarries cannot represent one integrated facility with the Fairland Plant as the quarries are not immediately adjacent to the plant facilities. CC Br. at 12 ("The ALJ and Fisher were unconcerned that there was no physical proximity and operational integration of the quarry and the separation of desired from undesired quarried materials. The settled law is to the contrary."). However, the Commission has long recognized that a plain reading of the Mine Act does not require that the milling location be on or adjacent to an extraction area. *See Drillex, Inc.*, 16 FMSHRC at 2395 ("We conclude that Drillex engaged in both mineral extraction and milling, either of which independently qualifies its operation as a 'mine' within the meaning of the Act."). *See Sec'y of Labor v. National Cement Co. of Cal. Inc.*, 573 F.3d 788, 795 (D.C. Cir 2009) (Subsection (C) of the Act's definition of "mine" can reach facilities "not located within an extraction area."); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551-1552 (D.C. Cir. 1984) (The Act "does not require that . . . [structures and facilities used in milling] be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property where such extraction occurs."). The fact that the minerals were not extracted from the site where milling occurs is not relevant to the scope of MSHA's jurisdiction. Section 3(h)(1)'s statutory definition of the term "mine" includes both the "area of land from which minerals are extracted" and the facilities used in the milling of such minerals. The phrase "such minerals" used in section 3(h)(1)(C) refers back to the limitation placed on "minerals" in section 3(h)(1)(A): The term encompasses only those minerals "extracted in nonliquid form or, if in liquid form, . . . extracted with workers underground." Contrary to Cactus Canyon's assertion, *see* Resp. Br. 60, the use of the term "such minerals" cannot reasonably be read to impose a requirement that the minerals be milled in the same area of land where extraction occurred.

Cactus Canyon further points to MSHA standards defining other statutory terms to support its contention that milling must occur in the same area as extraction for the Mine Act to apply. First, Cactus Canyon highlights the definition of "mining operations" in 30 C.F.R. § 46.2, which encompasses certain activities occurring "at a mine." CC Ex. C. The definitions contained in that section, however, apply specifically to Part 46 training standards and are not relevant to the statutory definition of a mine.

Cactus Canyon also cites 30 C.F.R. § 56.2 in support of its argument that MSHA cannot possess jurisdiction over a "mill" unless that "mill" is located on an extraction site. CC Ex. B; CC Br. at 9. 30 C.F.R. § 56.2 states that a "[m]ill includes any ore mill, sampling works, concentrator, and any crushing, grinding, or screening plant used at, and in connection with, an excavation or mine." But this definition does not limit jurisdiction to extraction sites; it does not even limit a "mill" to "an excavation or mine." It defines a mill as "includ[ing]" a number of things used "at, and in connection with, an excavation or mine." The use of "includes" indicates that what follows is illustrative, not exhaustive. *See Am. Coal. Co. v. FMSHRC*, 796 F.3d 18, 25 (D.C. Cir. 2015) (interpreting the Mine Act's definition of "accident" and noting that "[t]he word 'includes' is usually a term of enlargement, and not of limitation") (*citing Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008)). The definition lists some things that are mills, but not all things that are mills—and does not bar determinations that a facility, *e.g.*, "used in . . . milling" is a mine under section 3(h)(1)(C). Additionally, the definition uses the disjunctive "or" in referring to "an excavation *or* mine," 30 C.F.R. § 56.2 (emphasis added), demonstrating that "mines" are not coextensive with excavations. In other words, 30 C.F.R. § 56.2 does not limit mills to extraction sites and acknowledges that the term "mine" covers more than extraction sites alone. Based on

the preceding analysis, I find that the lack of an extraction site, on, adjacent to, or appurtenant to the Fairland Plant does not limit or preclude MHSA's exercise of jurisdiction over the facility.

Cactus Canyon has also submitted a number of cases in support of its argument that the Fairland Plant is not a "mine," nor is it adjacent to, appurtenant to, or connected to an area of land where minerals are extracted from their natural deposits. *See* CC Exs. I to P; 30 U.S.C. § 802(h)(1)-(2). Cactus Canyon references most of these cases in its brief. CC Br. at 13, 34.

Cactus Canyon cites the Commission's decision in *KC Transport, Inc.*, 44 FMSHRC 211 (Apr. 2022) as representing a dispositive legal authority, but that decision does not support Cactus Canyon's position here. *See* CC Ex. N. In *KC Transport*, the Commission majority assessed whether a mine transport company's parking and repair facility fit within the statutory definition of a "mine" under the Act and held that such a facility was not included in the statutory definition of a mine unless it was located on or adjacent to the extraction site. *See id.* at 225. However, the Commission explicitly chose not to extend this holding to facilities that engage in "milling." *Id.* ("Our holding is that an independent repair, maintenance, or parking facility not located on or appurtenant to a mine site *and not engaged in any extraction, milling, preparation, or other activities* within the scope of subsection 3(h)(1)(A) is not a mine within the meaning of section 3(h) of the Mine Act.") (emphasis added). The Commission made repeated reference to the Sixth Circuit's decision in *Maxxim Rebuild Co., LLC v. FMSHRC*, 848 F.3d 737 (6th Cir. 2017), especially its holding that MSHA's jurisdiction under section 3(h)(1) extends to "locations and equipment that are part of or adjacent to extraction, *milling*, and preparation sites." 848 F.3d at 744 (emphasis added); CC Ex. L; *see* 44 FMSHRC at 225. Thus, the Fairland Plant and similar facilities engaged in milling stand in sharp contrast to the Commission's holding in *KC Transport.*[9]

Next, Cactus Canyon cites the Second Circuit's decision in *Sec'y of Lab. v. Cranesville Aggregate Companies, Inc.*, 878 F.3d 25 (2d Cir. 2017) in support of its position that Cactus Canyon's activities at the Fairland Plant should be overseen by OSHA, rather than MSHA. In that case, the Court stated the following:

> Cranesville also contends that, because the maintenance shop was located in Building 2 of the Bag Plant, in which mining equipment was repaired and stored, the entire Bag Plant is subject to MSHA jurisdiction. The ALJ agreed, concluding that the presence of the maintenance shop, in and of itself, was sufficient to bring the entire Bag Plant under MSHA authority. Both Cranesville and the ALJ give short shrift to the fact that the Secretary is authorized to consider the overall nature and characteristics of the Bag Plant in determining whether the Mine Act applies. Indeed, the Secretary does not dispute that MSHA, and not OSHA, has authority over the maintenance shop. Rather, the Secretary asserts that he is authorized to

[9] Furthermore, on August 1, 2023, the U.S. Court of Appeals for the D.C. Circuit vacated the Commission's decision in *KC Transport*. *See Sec'y of Lab. v. KC Transport, Inc.*, 77 F.4th 1022 (D.C. Cir. 2023). The D.C. Circuit rejected the Commission's interpretation of the statutory definition of a mine because it conflicted with Circuit precedent establishing that the Mine Act "extends beyond structures on extraction sites." *Id.* at 1031.

> distinguish between mining and non-mining activities. In fact, none of the alleged OSHA violations dealt with working conditions in the maintenance shop.
>
> The fact that one portion of the Bag Plant may be subject to MSHA does not defeat the reasonableness of the Secretary's determination as to the cited workplace conditions. As explicated above, because the Secretary has authority to distinguish between mining and non-mining activities for the purposes of enforcement, when the Secretary reasonably applies a functional analysis, the Secretary's determination as to which act governs is entitled to substantial deference.

878 F.3d at 35–36 (2d Cir. 2017) (internal citations omitted); CC Ex. K.

At the hearing, Mr. Carson opined that the *Cranesville* case "holds that if the bagging, even though [the Bag Plant] is located on the same facility, it came under OSHA jurisdiction, not mine safety because it was different and distinct, geographically and functionally distinct, from the milling operation which is another facility on this picture. It's another building." Tr. 608. Carson thus appears to be under the impression that *Cranesville* established a bright line rule for evaluating the delimitations of MSHA's jurisdiction at a facility with operations facially similar to Cactus Canyon's operations.

The undersigned disagrees with this interpretation. The *Cranesville* Court clearly held that the Mine Act does not "unambiguously speak to the issue of what is and is not included in mining operations," and thus deferred to the Secretary's reasonable interpretation that Cranesville's bag plant was subject to OSHA's jurisdiction, while the remainder of Cranesville's operations were subject to MSHA jurisdiction.[10] *Cranesville*, 878 F.3d at 34; *see* CC Ex. 28. The holding in *Cranesville* thus runs contrary to Cactus Canyon's position because the Secretary's interpretation that the Fairland Plant's operations are subject to MSHA's jurisdiction is similarly reasonable. *Id.*

[10] Carson also suggested that the Fourth Circuit's holding in *United Energy Servs., Inc. v. Fed. Mine Safety & Health Admin.*, 35 F.3d 971, 977 (4th Cir. 1994) supports his jurisdiction-related arguments. CC Ex. M. In that case, the Court held that

> Section 4(b)(1) of the OSH Act provides that the "working conditions of employees" are not subject to its provisions if another federal agency has "exercise[d][its] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). We have interpreted "working conditions," as that term is used in section 4(b)(1), to mean "the environmental area in which an employee customarily goes about his daily tasks." *Southern Ry. v. Occupational Safety & Health Review Comm'n,* 539 F.2d 335, 339 (4th Cir.), *cert. denied,* 429 U.S. 999 (1976). Because MSHA has prescribed regulations addressing the area on mine property in which United Energy's employees work, MSHA has preempted OSHA's jurisdiction.

Carson's reliance on this case is perplexing, as it represents an instance where MSHA preempted OSHA's jurisdiction through the exercise of its regulatory authority.

In any event, the Secretary's jurisdiction over Cactus Canyon's bag plant is not at issue in the instant case, and the undersigned need not consider MSHA's past exercise of jurisdiction over that facility here.[11]

Having fully considered Cactus Canyon's arguments to the contrary, I find that the Secretary has met her burden to establish MSHA's jurisdiction over the Fairland Plant and Quarries. For the foregoing reasons, the undersigned concludes that "milling" occurred at the Fairland Plant, and further finds that the Fairland Plant's operations engage in "crushing", "sizing", and "roasting." The undersigned further concludes that the Fairland Plant is a "mine" under the Mine Act. *See* 30 U.S.C. § 802(h)(1). For the reasons set forth below, the undersigned also finds that the products produced at the Fairland Plant affect commerce and, as such, are subject to regulation by MSHA pursuant to the Mine Act.

ii. *The Products of the Fairland Plant Affect Commerce*

Section 4 of the Mine Act states that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. Accordingly, for MSHA to possess the requisite jurisdiction to inspect the Fairland Plant, it must be established not only that the Fairland Plant was a "coal or other mine" under the Act, but also that the products of the Fairland Plant enter commerce or the operation or products of the Fairland Plant affect commerce. The Secretary contends that the products produced at the Fairland Plant affect interstate commerce. Sec'y Br. 3. Cactus Canyon argues that, although its products are sold "across North America, and occasionally the Middle East and Far East," because the dimensional stone delivered to and processed at the Fairland Plant has already entered commerce, the facility cannot be subject to Mine Act jurisdiction. CC Ex. 14; CC Br. 3.

The requirements of the Mine Act apply to every mine "the products of which enter commerce,

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[11] Another Commission Administrative Law Judge has found that MSHA's exercise of jurisdiction over Cactus Canyon's bag plant is proper, finding that

> Carson argues that the citations were issued in areas that have "no relationship in time, in function, or in location to any 'Working Place' or 'Mill.'" However, both the Mine Act and Interagency Agreement state that the Secretary "shall give due consideration to the convenience of administration resulting from the delegation to on Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." Here, the bagging and maintenance structures where the citations were issued were at the same physical establishment as the crushing plants and screens that were used for milling, i.e., the Fairland Plant. The Fairland Plant is located on one integrated piece of property.

Cactus Canyon Quarries, Inc., 45 FMSHRC 384, No. CENT 2023-0010, 2023 WL 3790763, at *8, n. 25 (May 24, 2023) (ALJ).

or the operations or products of which affect commerce."[12] 30 U.S.C. § 803. The Mine Act defines "commerce" to include trade "between a place in a State and any place outside thereof." 30 U.S.C. § 802(b). The Commission has recognized that "[b]ecause Congress, in the Mine Act, intended to exercise the full reach of its authority under the Commerce Clause, the Secretary has a minimal burden to show that . . . [a mine's] operations or products affect interstate commerce." *Jerry Ike Harless Towing, Inc. and Harless Inc.*, 16 FMSHRC 683 (Apr. 1994); *State of AK Dept.of Transp.*, 36 FMSHRC 2642, 2645 (Oct. 2014). Section 3(b) of the Mine Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof[.]" 30 U.S.C. § 802(b).

I find that the Fairland Plant's products affect "commerce" under the Act. Cactus Canyon purchases dimensional stone from multiple sources, including Mexico and throughout the United States, crushes and sizes that stone, and sells it "across North America and occasionally to the Middle East and Far East" to be made into terrazzo flooring. CC Ex. 14; Tr. 737. When testifying concerning the process of fielding and fulfilling customer orders, Carson stated that "we have everybody email us what it is they want." Tr. 738. In response to the undersigned's inquiry, Carson testified that some of the customers who email orders come from various states throughout the United States. Tr. 739. Thus, Cactus Canyon's terrazzo chips affect commerce, and Cactus Canyon is subject to the provisions of the Mine Act.

Cactus Canyon's argument that the Fairland Plant cannot be subject to Mine Act jurisdiction because the dimensional stone has already entered commerce is without merit. No provision in the Mine Act limits the statute's jurisdictional reach at the point where a product first enters the stream of commerce. Rather, section 4 provides that the Mine Act's reach is applicable to any mine "the operations or products of which affect commerce," language that the Commission has previously construed broadly. *See, e.g., Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 685–86 (Apr. 1994) ("Congress intended to exercise its authority to regulate interstate commerce to the maximum extent feasible when it enacted section 4 of the Mine Act." (internal quotations omitted)). Cactus Canyon's sale of the stone it mills to other states therefore affects commerce irrespective of whether that stone had ever affected commerce previously.

Cactus Canyon cites *Herman v. Associated Elec. Coop., Inc.,* 172 F.3d 1078 (8th Cir. 1998) for an apparent "bright line" jurisdictional rule "based upon where the output of the mine was processed into a marketable form." CC Br. 39; CC Exhibit I. In that case, the Eighth Circuit held that MSHA did not possess jurisdiction over an electric utility plant that bought crushed coal, then further crushed the coal and removed debris before burning it in its generator. Unlike Cactus Canyon's Fairland Plant, however, the utility plant in Herman was not "in the business of selling a raw or processed mineral product. An electric utility sells electricity. The coal was used as an end product at the plant, and hence the utility was the final consumer of the coal." *In re Kaiser Aluminum & Chem. Co*., 214 F.3d 586, 592–93 (5th Cir. 2000). In the instant case by contrast, Cactus Canyon is in the business of milling terrazzo stone chips that are in turn shipped to and sold

[12] "Any mining or milling that an entity engages in for its own use constitutes 'commerce' under section 4 of the Mine Act." *State of AK Dep't of Transp., supra*, 36 FMSHRC at 2645.

through a distributor for use in the construction of terrazzo stone floorings, primarily in schools and airports.

I conclude that Cactus Canyon engaged in milling and sold its milled products in interstate commerce. CC Ex. 14. The Act's definition of "commerce" includes "trade . . . between a place in a State and any place outside thereof[.]" 30 U.S.C. § 802(b). I therefore find that Cactus Canyon's sale of terrazzo stone produced at the Fairland Plant "affected commerce" under the Act.

Having determined that the Fairland Plant's products affect commerce, I find that the Secretary possessed and properly asserted its jurisdiction when it issued the ten citations evaluated below. I next evaluate whether the Secretary of Labor has carried her burden of proof, by a preponderance of the evidence, to establish a violation of each citation at issue.

V. PRINCIPLES OF LAW

a. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden to prove, by a preponderance of the evidence, that a violation of the Mine Act occurred. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is generally held strictly liable for violations that occur at its mine. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Nally & Hamilton Enters., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011). An operator may avoid liability by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge an operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

b. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g.*, *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially affected. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

c. Significant and Substantial Designation

A violation is properly designated as significant and substantial ("S&S") if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)); *see also Buck Creek Coal, Inc. v. MSHA,* 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498, 500 (Apr. 1988); *Youghiogheny & Ohio Coal Co*., 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The four elements required for an S&S finding are expressed as follows:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

An S&S determination must be based on the assumed continuation of normal mining operations. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease."). The Commission has held that the S&S inquiry considers "the violative conditions as they existed both prior to and at the time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016), *citing Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (Aug. 2014).

d. Negligence

Negligence is not defined in the Mine Act. The Commission has found "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (internal citations omitted). In determining whether an operator meets its duty of care under the cited standard, the

Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co*., 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), MSHA defines negligence by regulation in the civil penalty context as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to 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. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices . . .

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id*. The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id*.

Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and may find "high negligence," in spite of mitigating circumstances, or moderate

negligence, without identifying mitigating circumstances. *Brody*, 37 FMSHRC at 1701; *Mach Mining*, 809 F.3d at 1263-64. In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody*, 37 FMSHRC at 1701, (citing *Topper Coal Co.*, 20 FMSHRC 344, 350) (Apr. 1998). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances and may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

e. Penalty Assessment

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each criterion, but must provide an explanation for any substantial divergence from the proposed penalty from MSHA based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

VI. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

a. Initial Findings of Fact

The parties did not agree to any stipulation of facts in this case despite repeated suggestions by the undersigned during the prehearing process. Despite the absence of stipulations, Cactus Canyon has not meaningfully disputed the following assertions by the Secretary, and the undersigned thus incorporates them as fact for the purposes of these proceedings:

i. On October 25 and 26, 2022, Inspector Davis conducted a routine inspection at Cactus Canyon's Fairland Plant and Clendennen Ranch mine facilities, located at 7232 County Road 120, Marble Falls, Burnet County, Texas (Tr. 190, Sec'y Ex. 4);
ii. Davis joined MSHA in August 2019, and completed twenty-one months of training at the National Mine Health and Safety Academy in Beckley, Virginia (Tr. 187);
iii. Davis conducts approximately seventy-five to eighty inspections per year in his capacity as a MSHA inspector (Tr. 188);
iv. The majority of inspections conducted by Davis and other inspectors based in MSHA's Dallas Field Office occurred at dimensional stone mining operations (Tr. 188);
v. Prior to joining MSHA, Davis worked for twelve years at cement company Martin Marietta in Midlothian, Texas (Tr. 189);
vi. Davis served in various roles at Martin Marietta, including as a mill operator, "assistant safety," and as storeroom coordinator (Tr. 189);
vii. Davis also served twenty years in the U.S. Army (Tr. 189, CC. Ex. 23);
viii. During his inspections, Davis was at times accompanied by MSHA employees Ty Fisher and Curt Burnett (Tr. 190, 192);

ix. Davis, Fisher, and Burnett arrived at the entrance to the Fairland Plant operated by Cactus Canyon Quarries, Inc. in separate, government-issued vehicles (Tr. 191-92);
x. Davis and colleagues first met with a "Ms. Katelyn" who worked in the front office of the Fairland Plant facility, and then with Cactus Canyon foreman Jesse (Tr. 193-94);
xi. After fifteen or twenty minutes, Cactus Canyon president Carson arrived, and accompanied Davis for most of the two-day routine inspection (Tr. 194-96);
xii. Davis issued ten total citations in relation to the routine inspection of the Fairland Plant and Clendennen Ranch mine (Sec'y Exs. 6-15);
xiii. On October 25, 2022, Davis issued three citations for violations found at the Fairland Plant;
xiv. On October 25, 2022, Carson led Davis and colleagues to the Clendennen Ranch mine, where Davis issued four additional citations;
xv. Davis returned to the Fairland Plant on October 26, 2022, where he issued three final citations and concluded his investigation;
xvi. Approximately one month later, Davis delivered modifications for Citations 9678438 and 9678439 to "Ms. Katelyn," but these modifications were apparently not received by Carson.

b. Dismissed Citations

i. Citation No. 967844: The Secretary Did Not Establish That Cactus Canyon Violated 30 C.F.R. § 46.7(a)

In the instant case, Davis issued ten citations during the course of the regular inspection conducted on October 25 and 26, 2022. Sec'y Exs. 6-15. As an initial matter, the undersigned dismissed Citation No. 9678444 from the bench because it cited an incorrect legal standard at Section 9(C) of the Mine Citation/Order. Sec'y Ex. 13. Davis testified that he had intended to issue a citation related to record keeping under 30 C.F.R. § 46.9. Tr. 466.

However, Davis instead issued a citation pursuant to 30 C.F.R. § 46.7(a). Tr. 466-67. 30 C.F.R. 46.7(a) provides:

> (a) You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. This training must be provided before the miner performs the new task.

The undersigned vacated Citation 9678444 after Davis testified that the wrong legal standard was cited for Citation 9678444. Tr. 679. The Secretary did not move to amend the citation or oppose the undersigned's *sua sponte* dismissal of this citation during the hearing and acknowledged that she is not opposed to said dismissal in her post-hearing brief. Sec'y Br. at 19. Therefore, Citation No. 9678444 is **VACATED**.

ii. *Citation Nos. 9678438 and 9678439: The Secretary Has Not Established That Cactus Canyon Violated 30 C.F.R. § 56.14101(a)(2)*

Citation Nos. 9678438 and 9678439 are dismissed because the Secretary failed to carry her burden to prove, by a preponderance of the evidence, that the violations occurred, as cited. After issuing an initial citation relating to a damaged ladder (discussed below), Davis continued his inspection of the Fairland Plant facility. Davis next inspected various pieces of "mobile equipment" that were parked and ready for use in an outdoor parking area immediately south of the Fairland Plant, and ultimately issued two citations under 30 C.F.R. § 56.14101 for malfunctioning vehicle parking brakes or service brakes. Tr. 215-217. 30 C.F.R. § 56.14101 promulgates minimum operational capacity requirements for mobile equipment service and parking brakes, and states that

> (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.
>
> (2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

30 C.F.R. § 56.14101(a)(1)-(2).

Davis' testimony concerning whether each citation was issued for a malfunctioning service brake **or** a malfunctioning parking brake was internally inconsistent, and that testimony conflicts with the documentary evidence provided by the Secretary. The undersigned therefore **VACATES** Citation Nos. 9678438 and 9678439 for the reasons that follow.

The first of the two citations for "malfunctioning brakes," Citation No. 9678438, allegedly involved a faulty brake on an International S1700 dump haulage truck. Sec'y Ex. 7. Despite the undersigned's best attempts to seek clarification, the record is ultimately unclear as to whether it was the dump truck's service brake or parking brake that had allegedly malfunctioned.

Davis testified that he had requested that the equipment operator demonstrate the capabilities of the dump truck's service and parking brakes while the truck was under its typical workload. Tr. 215-16. Davis further testified that the equipment operator attempted three separate times to engage the dump truck's *service brake* while the vehicle was stationary on an incline. Tr. 216. Finally, Davis testified that, on all three occasions, the dump truck's *service* brake was unable to hold grade and slid down the incline. Tr. 216-217; Ex. 7. Davis found this malfunctioning brake to represent a safety hazard given that the dump truck is routinely used on inclined grades while hauling dimensional stone from on-site stockpiles to processing hoppers within the plant. *Id*.

Citation 9678438 was initially issued as a violation of 56.14101(a)(1), stating that "the *service brake* would not hold the International S1700 dump haulage truck #24 with a typical load." Ex.

7. When Davis terminated the citation at 12:39 on October 25, 2022, he reported that the *service brake* was repaired and held on the grade. However, after final review, Davis modified the cited standard to 56.14101(a)(2), suggesting a violative condition related to a failure of the dump truck's *parking brake*, rather than its service brake. *Id.;* Tr. 218, 231-32. Davis acknowledged this change at the hearing, testifying that

> After reviewing the -- I kept reviewing the situation, (a)(2) talk about parking brakes holding on an incline. It fits that scenario better than -- that's talking about the service brake, which is the entire system. But the -- this situation was relying on the parking brake which was 56.14101(a)(2). It better fits that situation.

Tr. 231-32.

Counsel for the Secretary provides little clarity toward resolving the discrepancy. In her brief, the Secretary states that "Citation 9678438 was initially issued to CCQI as a violation of 56.14101(a)(2)[sic]. However, Davis testified that after final review, the cited standard was modified to 56.14101(a)(2)[sic] as better suited to match the violative condition since it was the parking brake that failed, not the service brake." Sec'y Post-hearing Brief at 14. This statement contradicted Davis' extensive testimony that it was the service brake of the dump truck that had malfunctioned. *See* Tr. 218-32.

Similarly, the undersigned cannot resolve whether Citation 9678439 was issued because a parking brake or a service brake allegedly malfunctioned. Davis first testified that, after inspecting the dump truck, he next inspected several other pieces of mobile equipment, including a Case 621B front-end loader. Tr. 232-34; Sec'y Ex. 8. Davis next testified that he requested that the equipment operator demonstrate the braking capabilities of this front-end loader while the vehicle was under a typical load. Tr. 234. Finally, Davis testified that the equipment operator navigated the loader down a two percent grade and attempted thrice to come to a complete stop using the vehicle's service brakes. Tr. 234-35. On each occasion, the vehicle rolled down the incline and could not come to a complete stop. *Id.* Davis issued a citation under 30 C.F.R § 56.14101(a)(1) for an inoperable service brake. Ex. 8. However, after Davis' final review in late November 2022, the citation was modified to represent a violation of 30 C.F.R. § 56.14101(a)(2) because it was apparently the parking brake that was out of service on this vehicle rather than the service brake. Ex. 8.

The modification of Citation No. 9678439 is perplexing, as Davis initially testified that it was the service brake of the front-end loader, rather than the parking brake, that had malfunctioned. Tr. 239 ("The hazard that's involved, Your Honor, was that if the service brakes failed on the incline, it can seriously injury [sic] personnel in front of it."). Davis later contradicted this testimony by testifying that this citation was terminated after "the truck was taken to the maintenance shop and basically they just tightened up on the parking brakes." Tr. 240.

The undersigned sought clarification as to whether the citation was issued for a malfunctioning service brake or parking brake, and Davis affirmed his initial testimony that Citation No. 968349 related to a malfunctioning service brake on the inspected front-end loader, while Citation No. 9678438 related to a malfunctioning parking brake on the inspected dump truck. Tr. 245. Yet,

despite Davis' testimony concerning Citation Nos. 9678438 and 9678439 being replete with references to the alleged deficiencies in the *service brakes* of the dump truck and front-end loader, **both** citations have now been modified into 30 C.F.R. § 56.14101(2) violations, suggesting that **both** vehicles were found, upon inspection, to have malfunctioning parking brakes. *See generally*, Tr. 219-45. Such is not supported by Davis' testimony, nor is the dearth of testimony concerning alleged violations for malfunctioning parking brakes ameliorated by any other evidence currently before me. In fact, the Secretary's non-testimonial evidence suggests that **both** citations concerned service brake violations. The Location/Photo Description for Citation No. 9678438 states that "International S1700 dump truck *service brake* would not hold on typical grade which it travels (Sec'y Ex. 17, DOL 00071) and the Location/Photo Description for Citation No. 9678439 states that "Case 621B front end loader *service brake* would not hold on to typical grade which it travels." Sec'y Ex. 17, DOL 00073 (emphasis added).

Confusingly, the Secretary specifically references the modification made to Citation No. 9678438 within her post-hearing brief, but her brief is silent as to the nearly contemporaneous modification made to Citation No. 9678438. The two citations were modified within twelve minutes of each other in late November 2022, and yet the Secretary has acted as if only one of these citations were ever modified. As an aside, the Secretary also argues in her brief that

> Davis correctly designated the gravity [of Citation No. 9678439] as significant and substantial based on the reasonable likelihood that the discreate [sic] hazard contributed created by the violative condition will result in an injury or illness of a reasonably serious nature. Davis considered the proximity of the front-end loader operating on inclines, near equipment and working miners could lead to serious injuries or a fatality.

Sec'y Br. at 15. The Secretary presents this argument concerning the assessed gravity level despite Davis' testimony that Citation No. 9678438 is not a significant and substantial violation because the citation has been modified to reduce the likelihood of injury or illness from 'reasonably unlikely' to 'unlikely.' Tr. 251 ("This one here is unlikely and this is non S and S. This is not an S&S"). In any event, the fact that the Secretary presented her case in chief without sufficient explanation or justification for the modification made to Citation No. 9678439.

It is not the undersigned's responsibility to rectify the aforementioned inconsistencies within the Secretary's case as it pertains to these two citations. The undersigned concludes that the Secretary has not met her burden to establish a violation of 30 C.F.R. § 56.14101(a) for either Citation No. 9678438 or 9678439. *See Doe Run Co*., 42 FMSHRC 521, 526 (2020); *Jim Walter Res., Inc*., 28 FMSHRC 983, 992 (Dec. 2006). Thus, Citation Nos. 9678438 and 9678439 are **VACATED**.

iii. *Citation No. 9678441: The Secretary Has Not Established That Cactus Canyon Violated 30 C.F.R. § 56.9300(a)*

As Davis continued his inspection on October 25, 2022, he left the Fairland Plant and visited the Clendennen Ranch pit where he observed that there was no berm located above an approximately twenty-five-foot section of the pit wall. Tr. 303-304. Davis testified that dump

trucks were active and had routinely been active in that area. Tr. 303. Davis observed tire tracks within ten feet of an unprotected area, where the drop-off was around ten feet in height.[13] Davis testified that Carson did not provide an explanation for the presence of tire tracks in that area other than that "[the dump trucks] shouldn't be going up there." Tr. 756. Carson countered that Davis only discovered one set of tire tracks, and believes that this set of tracks was created prior to the blast that opened the currently active pit at Clendennen Ranch. Tr. 654-56. Davis found that the absence of a berm exposed the dump truck operators and other equipment operators to potential injuries if a vehicle overturned. Ex. 17. Davis testified that, were a dump truck to overturn, it could cause injuries such as broken bones or injury to the head or back of the vehicle operator. Tr. 304-305. Cactus Canyon abated this alleged violation by constructing a berm using multiple on-site boulders. Tr. 753-54.

Davis ultimately issued a citation for the missing berm as a violation of 30 C.F.R. § 59.9300(a).[14] Ex. 10. Davis listed the likelihood of injury or illness as being 'reasonably likely,' and found that the injury or illness that could reasonably be expected was 'permanently disabling. Sec'y Ex. 10. In so finding, Davis considered the recent proximity of dump trucks to the un-bermed pit wall section, as evinced by tire tracks observed in the area. Tr. 420-21. Davis also found this violation to be significant and substantial, and assessed the negligence level as 'moderate' because the absence of the berm was apparently not reported to Carson. Tr. 305-06.

30 C.F.R. § 56.9300(a) requires that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." A "berm" is defined as "a pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway." 30 C.F.R. § 56.2. The Commission's decision in *Lakeview Rock Products*, 33 FMSHRC 2985 (Dec. 2011), identified three relevant inquiries for alleged violations of section 56.9300(a): (1) whether there was an established roadway, (2) whether "a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment," and (3) whether any berms or guardrails exist. *See Lakeview Rock Products, Inc*., 33 FMSHRC at 2988.

Cactus Canyon contests this citation under a theory that the area in proximity to the edge of the Clendennen Ranch pit does not qualify as a roadway pursuant to 30 C.F.R. § 56.9300(a). The Secretary disagrees, and contends that this path does, in fact, qualify as a roadway. Sec'y Br. at 16-17; Sec'y Ex. 10. The undersigned thus narrows his analysis primarily to the first *Lakeview*

[13] Davis testified that he initially issued a citation noting a drop of twenty-five-feet into the pit, but issued a modification the next day finding that the drop off was ten feet. Tr. 303-05. In fact, the citation originally stated that "the drop-off was approximately 20 feet." Sec'y Ex. 10. For reasons unknown, the Secretary referenced only the text of the unmodified citation in her post-hearing brief, rather than the modification issued on October 26, 2022 – the day after the citation was originally issued – or Davis' actual testimony at the hearing. CC Br. at 15.

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

element, s*ee* FMSHRC at 2988, although it is undisputed here that the cited area did not have a berm at the time of inspection. *See* Sec'y Ex. 10; CC Br. at 22. Furthermore, although the Secretary and Cactus Canyon initially disagreed as to the height of the drop off into the Clendennen Ranch pit, both parties have now agreed to that height being approximately ten feet.[15] Tr. 303-05. Cactus Canyon has not disputed that this ten-foot "drop-off exists," or is "of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment," and the undersigned credits Davis' testimony that such a drop-off presents an overturn risk that could result in broken bones or injury to the head or back of the vehicle operator. 30 C.F.R. § 56.9300(a); Tr. 304-305.

The Secretary and Cactus Canyon disagree as to whether the area in proximity to the edge of the pit constituted a "roadway" as set forth in Section 59.9300. Carson testified that the path observed by Davis was simply a cow path rather than a roadway. Tr. 651. By contrast, Davis testified that he observed tire tracks along this path, which led him to conclude that the path had been subjected to vehicle traffic and is thus a 'roadway' for the purposes of this citation. Tr. 754. Davis did not witness any dump trucks active along the purported roadway, but concluded that the tracks were from one or multiple dump trucks having driven through that area on more than one occasion. Tr. 756-57.

While the term "roadway" is not defined in Part 56 of the Secretary's regulations, the Commission has looked to the "common usage" and "a common-sense application of the standard to the facts" to determine whether a roadway exists. *Capitol Aggregates, Inc*., 4 FMSHRC 846, 846-47 (May 1982) (upholding the ALJ's determination that an elevated ramp used by a front-end loader to dump petroleum coke into a loading hopper is an "elevated roadway"). The Commission has generally found roadways to exist "where a vehicle commonly travels over a surface during the normal mining routine." *Black Beauty Coal Co.*, 34 FMSHRC at 1735; *see, e.g.*, *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 36 (Jan. 1981) (finding that an elevated bench used for haulage is a roadway); *Peabody Midwest Mining, LLC*, 762 F.3d at 615 (finding that a bench regularly used by service trucks during regular mining operations constitutes a roadway).

The undersigned has reviewed the photographs Inspector Davis took of the "roadway" at issue in Citation No. 9678441. Sec'y Ex. 17, DOL 00077-78, 00090-93. According to Davis, DOL 00090 depicts as follows:

> At that point right there he is correcting the berm situation. Immediately in front of him is the road that we traveled down. The front is the boneyard and the government vehicle and Mr. Carson's vehicle and the other down equipment was there. And direct to our rear is just a road -- travel road that continues on up to the pit.

Tr. 309. DOL 00091 and DOL 00092 show the drop off into the pit. Sec'y Ex. 17. The same single tire track is visible in each image, which Davis testified was from a dump truck backing up to the pit to be loaded by an excavator. *Id.*; Tr. 311-12. DOL 00093 portrays the berm constructed by Cactus Canyon after the issuance of Citation No. 9678441. Sec'y Ex. 17.

[15] After being questioned during the hearing, Carson clarified that the pit is structured with a four-foot drop off, a six-foot shelf, and then another four-foot drop off. Tr. 664-665. Carson claimed that Davis initially overestimated the depth of this drop off due to measuring at a diagonal. *Id*.

Cactus Canyon argued at the hearing and in its brief that the alleged roadway was a mere cow path and represents a travel way not used with sufficient frequency to constitute a roadway within the meaning of section 56.9300(a). Tr. 655-56; CC. Br. at 20. After hearing Davis' testimony and reviewing the photographs filed by the Secretary in support of that testimony, I find Cactus Canyon's argument persuasive. *See* Tr. 311-12; Sec'y Ex. 17. Although Davis testified to his belief that dump trucks had been active in the area, he did not actually witness these trucks operating in proximity to the twenty-five-foot long area above the "rim" of the pit. *See* Tr. 303-304. The only direct evidence that Davis pointed to in support of his conclusion that this section qualified as a 'roadway' is the single tire track for which photographs are provided at DOL 00091 and DOL 00092. Sec'y Ex. 17. Carson submits that the ribbed pattern of this tire track indicates that the track is from an excavator rather than a dump truck. CC Br. at 20. The Secretary's own photographs of Cactus Canyon's dump trucks reveal that these trucks are equipped with tires that are more similar in general appearance to those used in a personal vehicle rather than the ribbed tread equipped to the drive train of an excavator. Sec'y Ex. 17 at DOL 00084, 87. Thus, Davis' inference that the presence of a single ribbed tire track provides evidence that Cactus Canyon's dump trucks – which do not have ribbed tires – are routinely active in the twenty-five-foot stretch above the Clendennen Ranch pit is not supported by the record currently before me. Carson's evaluation that this track existed before the pit was blasted may or may not be accurate, but a single tire track, without more, is not sufficient evidence that vehicles commonly travel over this surface during the normal mining routine." *See Black Beauty Coal Co.*, 34 FMSHRC at 1735.

The undersigned finds that, given the inconclusive photographic evidence provided by the Secretary and the speculative nature of Davis' testimony about traffic patterns of dump trucks travelling to and from Clendennen Ranch, the Secretary has not established that the travel way at issue here constitutes a 'roadway' within the meaning of section 56.9300(a). *See Doe Run Co*., 42 FMSHRC 521, 526 (2020); *Jim Walter Res., Inc*., 28 FMSHRC 983, 992 (Dec. 2006). As the Secretary has not met her burden to prove the elements for a violation of 30 C.F.R. § 56.9300(a), Citation No. 9678441 is **VACATED**.

c. Affirmed Citations

iv. *Citation Number 9678437: The Secretary Has Established that Cactus Canyon Violated 30 C.F.R. § 56.11003*

Findings of Fact

During the inspection conducted at the Fairland Plant on October 25, 2022, Davis issued an initial citation – Citation No. 9678437 – after discovering and photographing a 6-foot, portable fiberglass ladder that was allegedly not maintained in good working condition. *See* Sec'y Exs. 6, 17. Davis testified that "[t]he first issue that I observed issuing the citation after we ran into a ladder, a fiberglass ladder that was cracked and busted. It was unserviceable leaning against the wall (". . ."). It was not used during that time frame, but it was – it has potential to be used." Tr. 199. According to Davis, the ladder had visible cracks on its side base panel and the bottom of one leg was also cracked, which could present a fall-related injury risk should the ladder collapse if a miner were to attempt to use the ladder. Tr. 202, 205. Several of the upper rungs of the ladder were also bent. Tr. 768. Although the ladder was not actively in use, the ladder was not tagged

as 'out of service' and was available for use, and Cactus Canyon employee "Jesse" was unsure when the ladder had last been used. Tr. 202, 209. The citation was terminated after the ladder was discarded in a trash bin.[16]

When issuing Citation Number 9678437, Davis determined the negligence level to be moderate given Carson's and Jesse's apparent lack of knowledge that the ladder had been damaged. Tr. 206-07. Concerning gravity, Davis found the likelihood of injury or illness as 'unlikely', and the injury or illness that could reasonably be expected as 'lost workdays or restricted duty.' Sec'y Ex. 6.

Violation

The Mine Act is a strict liability statute. So long as a regulation is sufficiently specific that a reasonably prudent person would have fair warning of what the regulation requires, then the due process requirements for notice are satisfied. *See Doe Run Co*., 42 FMSHRC 521, 527 (Aug. 2020) (applying reasonably prudent person test for broadly worded standards to determine whether violations occurred); *See also Cactus Canyon Quarries, Inc. v. Sec'y of Labor*, 953 F.3d 790, 792-94 (D.C. Cir. 2020); *Mach Mining*, LLC, 40 FMSHRC 1, 11-13 (Jan. 2018), aff'd, 748 Fed.Appx. 357, 2019 WL 275718 (D.C. Cir. 2019).

30 C.F.R. § 56.11003, which concerns the construction and maintenance of ladders, states that "[L]adders shall be of substantial construction and maintained in good condition." While the terms "substantial construction" and "good condition" are inherently subjective, the obvious crack in the right leg of the ladder, along with visibly bent upper rungs, would put a reasonably prudent person on notice that this ladder violated this safety standard. Indeed, Cactus Canyon concedes that the ladder at issue was damaged, and the only justification provided for not having taken the ladder out of service was a vague suggestion that the ladder was not in "that bad of shape," and was not located in a mine area. Tr. 689; CC Br. at 48.

Contrary to Catus Canyon's position, photographs taken during the course of the investigation corroborate the 'condition or practice' recorded in Citation No. 9678437, which states that "the side base panel and one of the bottom legs [of the ladder] was cracked." Sec'y Ex. 6. Certainly, the photographs collected by Davis in support of this citation corroborate his testimony that the ladder had been bent and cracked significantly, and Davis was justified in ordering that the ladder be taken out of service. Sec'y Ex. 17 at DOL 00068-70; Tr. 199. Based on the photographic evidence and Davis' testimony in support thereof, I agree that the ladder at issue here was not of

[16] The parties have provided conflicting accounts of the manner by which the ladder was discarded. Carson states that Davis instructed Cactus Canyon employees to destroy and discard the ladder (Tr. 689; CC. Brief at 48 (blank footnote omitted)), whereas Davis testified that the ladder was discarded in a nearby dumpster at Carson's direction (Tr. 770). The undersigned need not resolve the comparative credibility of each account, as a determination of who issued the directive to throw out the ladder is immaterial in determining whether the Secretary has carried her burden to establish that the ladder was defective pursuant to the cited legal standard.

substantial construction and had not been maintained in good condition. I therefore conclude that Cactus Canyon violated 30 C.F.R. § 56.11003 as alleged in Citation No. 9678437.

Gravity

Davis found the likelihood of injury or illness as 'unlikely', and the injury or illness that could reasonably be expected as 'lost workdays or restricted duty.' Sec'y Ex. 6. If the 6-foot ladder was used and a miner were to fall, Davis testified that the injury that could reasonably be expected was broken bones, a head injury, or a neck injury. Tr. 201.

There is no evidence that this ladder was used frequently or regularly. Indeed, the ladder was found in a little-travelled corner of the Fairland plant, was not actively in use, and foreman Jesse did not know when the ladder was last used. Tr. 201-02. Thus, I find it unlikely that an injury would occur from use of the ladder, even though it was not tagged out of service.

In these circumstances, given the relatively remote likelihood of an injury from a fall from the ladder should a miner happen to be in the area and have a need to use the ladder, I find that Davis' assessment of gravity as unlikely to result in an injury that could reasonably be expected as being 'lost workdays or restricted duty' is justified. *See* Sec'y Ex. 6. Accordingly, MSHA's gravity findings are AFFIRMED.

Negligence

The Secretary asserts that Cactus Canyon's conduct involved moderate negligence. Sec'y Ex. 6. The Secretary's post-hearing brief provides little discussion of gravity and negligence, but the limited discussion that is provided largely recapitulates Davis' testimony at the hearing.

Although placed in a low traffic area of the Fairland Plant, the structural damage to the ladder is obvious and would be immediately detected after a cursory visual inspection. Sec'y Ex. 17, DOL 00068-70. However, Davis determined the negligence level to be moderate given Carson and Jesse's apparent lack of knowledge that the ladder had been damaged. Tr. 206-07.

Cactus Canyon held a specific duty of care under 30 C.F.R. § 56.11003 to maintain any ladders at the Fairland Plant in good working condition. *See generally, U.S. Steel Corp.*, 6 FMSHRC at 1910. The Fairland Plant was constructed in the late 1960s, has been subject to MSHA jurisdiction since the promulgation of the Mine Act in 1977, and has operated under the same organizational president for a period exceeding thirty years. CC Ex. 13. Thus, Cactus Canyon and Carson should be intimately familiar with the Mine Act and the protective purposes of the myriad regulations requiring that working equipment – including ladders – be maintained in good working condition. *U.S. Steel Corp.*, 6 FMSHRC at 1910. Though Carson argued that the ladder at issue here was not in an area of the Fairland Plant where milling of dimensional stone actively takes place (Tr. 689), it was not hidden or otherwise difficult to detect, and was visibly damaged at the time of Davis' inspection. Sec'y Ex. 17 at DOL 00068-70. A reasonably prudent person familiar with the mining industry would readily understand that ladders must be properly maintained to lower the potential of injury to any miner using that equipment and would have taken action to either repair or replace

the ladder, which had visible cracks on its side base panel and a crack on the bottom of one leg. Tr. 205; *U.S. Steel Corp.*, 6 FMSHRC at 1910.

Although I have found that a reasonable person would have concluded that the damage to this ladder represented a violation of 30 C.F.R. § 56.11003, I also credit Davis' conclusion that neither Carson nor Jesse knew of the state of this ladder prior to Davis' October 25, 2022 inspection, and agree that Carson's lack of knowledge of the ladder's condition is a factor mitigating Cactus Canyon's level of negligence. Tr. 206-07. Considering the totality of the circumstances, the undersigned concludes that Cactus Canyon's conduct involved moderate negligence.

Penalty

For Citation No. 9678437, the Secretary proposed a regularly assessed penalty of $133.00, calculated from total points of $148.00 with a ten percent reduction for good faith. Sec'y Exs. 3, 6. It is well established that Com,mission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *See e.g. Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983). When assessing civil monetary penalties, a Commission ALJ must consider the following 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).

The undersigned has considered Cactus Canyon's history of previous violations, the size of its business, the operator's moderate negligence, the relatively minor gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notice of the violation. As discussed above, this violation is non-significant and substantial, is 'unlikely' to result in an injury causing 'lost workdays or restricted duty, and was the result of Cactus Canyon's moderate negligence. Additionally, Cactus Canyon has a minimal violation history, with no recorded violations of 30 C.F.R. § 56.11003 within the twelve months[17] preceding the issuance of Citation No. 9678437 and only one citation in total was issued by MSHA during the twelve months preceding Davis' inspection. Sec'y Exs. 1, 6. Cactus Canyon is a relatively small operation and employs 17 total employees, with as many as six of those employees working in the intermittent quarries at a given time. CC Ex. 13 at 4. Neither party presented evidence specifically relating to whether payment of the proposed penalty would affect Cactus Canyon's ability to stay in business and successfully continue its business operations, and it is generally presumed that a civil penalty *will not* impact an operator's capacity to stay in business absent that operator submitting financial

[17] Cactus Canyon was cited for two separate alleged violations of 30 C.F.R. § 56.11003(c) in November 2020, but both citations were subsequently vacated during proceedings before another Commission ALJ. Tr. 701-02. The undersigned will disregard those two vacated citations in my calculation of the appropriate penalty for the citation at issue here.

documents leading to a contrary interpretation. *John Richards Constr*., 39 FMSHRC 959, 965 (May 2017) (recognizing presumption of no adverse effect absent proof that imposition of penalties would adversely affect operator's ability to continue in business) In light of these factors, the undersigned finds that an assessed penalty of $133.00 penalty is appropriate, will not affect Cactus Canyon's ability to continue in business, and is therefore AFFIRMED.

v. *Citation Number 9678440: The Secretary Has Established that The Secretary Violated 30 C.F.R. § 56.14100(b)*

Findings of Fact

As noted, on October 25, 2022, following the conclusion of the initial inspection at the Fairland Plant, Carson led Davis and colleagues approximately three miles away to the Clendennen Ranch pit. Tr. 284. After arriving at Clendennen Ranch, Davis noticed "that workers were working at the pit. They had several things going on. They had the two excavators running, a dump truck going, and had a person walking on the -- on the pit floor, basically. Had individual foot traffic walking." Tr. 288-87. Davis first inspected a Komatsu PC200 Excavator, which he observed to have a missing driver-side mirror. Tr. 288-90; Sec'y Ex. 9. Davis explained that a missing driver-side mirror could obscure the operator's view to the rear of the excavator if he were to pivot the excavator arm to the left (counterclockwise). Tr. 760-62. The excavator was located at a fixed location within the quarry pit so that the operator could remove overburden for placement into loading trucks. Tr. 759. Davis estimated that the "boom" of the excavator arm is capable of pivoting on a 360-degree swivel, with a reach radius of fifteen to twenty-five feet. Tr. 761-63. The excavator was not tagged out of service and was actively in use at the time of the investigation. Tr. 288. Davis observed the excavator pivoting both clockwise and counterclockwise while preparing to load overburden. Tr. 763.

After inspecting the excavator, Davis issued a citation for a violation of 30 C.F.R. § 56.14100(b). Sec'y Ex. 9. Davis opined that the absence of a driver-side mirror exposes miners to injuries from a collision or "crushing" hazard by reducing the operator's field of vision to the rear of the equipment. Tr. 291. As Davis put it,

> without having a driver's side mirror the operator don't know -- would not know who's come up from this rear. Could be personnel or equipment. He needed -- need to observe his rearview mirror before he moved anything to -- need to be in operation . . .") the rearview mirror -- it protects people behind him. And also what he can observe movement from this rear. He has a -- the dump truck proceeds down there. If he come down, you know, to -- if he knows the dump truck is too far he won't -- I mean, that way he can control his equipment.

Tr. 759-60.

Davis designated the risk of injury or illness as 'unlikely' and the injury or illness that could reasonably be expected as 'lost workdays or restricted duty'. Tr. 292; Ex. 9. Davis testified that his evaluation of gravity was because the equipment being in a standalone position, with a single operator, and in use only during daylight hours. (Tr. 292). Davis assessed the negligence level as 'moderate' given that Carson and the foreman had no apparent knowledge of the missing mirror,

which was not reported by the employee operating the equipment at the time of the inspection. Tr. 292, 297. Cactus Canyon corrected this violation on the same date as Davis' inspection by affixing a replacement mirror acquired from an on-site "boneyard" to the driver's side door assembly of the excavator. Tr. 300.

Violation

The Secretary alleges that a violation of 30 C.F.R. § 56.14100(b), which provides that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The language of section 56.14100(b) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Palmer Coking Coal Co.*, 22 FMSHRC 887, 891 (July 2000) (ALJ). A violation of the standard requires a finding that (1) there was a defect in the equipment, (2) the cited defect affected safety and (3) the defect was not corrected in a timely manner to prevent the creation of a hazard. *Meyer Aggregate LLC*, 38 FMSHRC 2596, 2605 (Oct. 2016) (ALJ). Whether a defect is repaired in a timely manner depends on "when the defect occurred and when the operator knew or should have known of its existence." *Northern Ill. Serv. Co.*, 37 FMSHRC 1514, 1538 (July 2015) (citing *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001)).

The undersigned finds that the lack of a driver-side mirror affected the potential safe use of the excavator in use at the Clendennen Ranch pit. The undersigned credits Carson's testimony that this excavator remained in the pit while preparing to load a dump truck, and that an approaching dump truck might not be visible even if both side mirrors were present, as the layout of Clendennen Ranch requires that the dump truck approach the "passenger" side of the excavator at a perpendicular angle. Tr. 660-61. However, I also credit Davis' testimony that the excavator could be operated in reverse, and that side mirrors could be used to check a rear blind spot, which would aid in safely operating the machine in motion. *See* Tr. 759-60. While the Secretary did not address the "timely" element of the standard, the excavator was being operated at the time of inspection, and the absence of a mirror was a violation of Section 56.14100 and should have been discovered and corrected during pre-operational checks.

In addition, I find that adequate notice was provided to Cactus Canyon about the requirements of the standard because 30 C.F.R. § 56.14100 contains sufficiently specific language such that a reasonably prudent person familiar with the conditions the standard intends to address would have recognized that a broken or missing side mirror on an excavator actively in use contravenes the standard. Side mirrors are a nearly universal safety feature on both personal and commercial vehicles and serve to prevent the obvious safety hazard created by a risk of collisions with vehicles, persons, or stationary objects due to a decreased field of vision.

Carson suggests that the citation should be vacated and argues as follows:

> There was no possible exposure to a collision hazard situation. This excavator is not a "loader" as cited.[18] The excavator never operates in a pit with other mobile

[18] The undersigned notes that Citation 9678440 specifically identifies the equipment in question as being a "Komatsu PC200 Excavator". Sec'y Ex. 9.

> equipment except the boulder truck can be safely staged and protected by a berm from being in a hazardous situation. There is nothing around the excavator when it is moving. It is slow and makes a lot of noise and has a motion alarm in both directions. There was no likelihood of the outcome set forth in the citation. This citation should be vacated. These events could never happen and the mirror is useless to the operator because the cab is always turned to the direction of travel before traveling.

CC. Br. at 52 (blank footnote omitted).

Despite Carson's suggestion, nothing in 30 C.F.R. § 56.14100(b) or the Mine Act obviates an operator's responsibility to comport with mandatory safety standards simply because the operator subjectively believes that compliance with that standard is unnecessary. I find that a reasonably prudent person familiar with the standard would realize that a side mirror should be in place to ensure safe vehicle travel and operation around the mine and the lack of a side mirror represents a defect that affects clear vision and safe travel and operation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014). Missing or damaged side mirrors thus must be repaired in a timely matter to prevent accidents, and Cactus Canyon violated 30 C.F.R. § 56.14100(b) when it chose not to do so. Thus, the Secretary has met her burden to establish a violation of the legal standard delineated in this citation.

Gravity

The undersigned further finds that Davis' gravity-related findings are appropriate under these facts. Davis designated Citation No. 9678440 as non-significant and substantial (non-S&S). Sec'y Ex. 9. Further, Davis concluded that the likelihood of injury or illness was 'unlikely,' and the injury or illness that could reasonably be expected was 'lost workdays or restricted duty.' *Id*. The undersigned has credited Carson's testimony that the equipment operator is not generally required to utilize the excavator's left-side mirror because of the approach angle of dump trucks waiting to be loaded by the excavator. *See* Tr. 660-61. The specific nature of Cactus Canyon's operations at Clendennen Ranch, including its small-scale, three-man crew, and the fact that this excavator is used only by a single operator, from a standalone position, during daylight hours, leads the undersigned to conclude that the risk of a collision exacerbated by a missing mirror is relatively 'unlikely.' *See* Tr. 676. Given the limited foot traffic in the area, the undersigned also is persuaded that Davis' assessment that the injury or illness that could reasonably be expected is 'lost workdays or restricted duty' was reasonable and appropriate under the circumstances. Therefore, the undersigned affirms MSHA's gravity designation.

Negligence

The lack of a driver-side mirror is a readily identifiable defect that should have been corrected by Cactus Canyon prior to Davis' inspection, and a reasonably prudent person would have corrected this deficiency. The language of section 56.14100(b) does not specifically describe a mine operator's obligation to replace an excavator's missing side mirror should that mirror "go missing." *See* 30 C.F.R. § 56.14100(b). However, as stated above, a reasonably prudent person

familiar with the breadth of this standard would realize that a side mirror should be in place to ensure safe vehicle travel and operation around the mine and the lack of a side mirror represents a defect that affects clear vision and safe travel and operation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014).

Although a reasonably prudent miner would have replaced the mirror, the undersigned credits Carson's assertion that he was not aware that the mirror was missing given that the employee who operates this equipment had not reported the deficiency. Tr. 292, 297. Carson's apparent lack of awareness represents a factor mitigating Cactus Canyon's level of negligence, and the undersigned therefore affirms MSHA's moderate negligence designation. *See* Sec'y Ex. 9.

Penalty

The Secretary proposes a $133.00 penalty amount calculated from total points of $148.00, with a ten percent reduction for good faith. Sec'y Exs. 3, 9. As stated above, a Commission ALJ must consider the following 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).

Here, the undersigned has again considered Cactus Canyon's history of previous violations, the size of its business, the operator's moderate negligence, the relatively minor gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notice of the violation. As discussed above, this violation is non-significant and substantial, is 'unlikely' to result in an injury causing 'lost workdays or restricted duty,' and was the result of Cactus Canyon's moderate negligence. Additionally, Cactus Canyon has a minimal violation history, with no recorded violations of 30 C.F.R. § 56.14100 within the twelve months preceding the issuance of Citation No. 9678440 and only one citation in total was issued by MSHA during the twelve months preceding Davis' inspection. Sec'y Exs. 1, 9.

As with the preceding citation, the Secretary proposed the minimum statutory penalty amount available for this citation and, in accordance with my above analysis, I conclude that this assessed penalty will not affect Cactus Canyon's ability to continue in business. *See John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (recognizing presumption of no adverse effect absent proof that imposition of penalties would adversely affect operator's ability to continue in business) In light of the aforementioned factors, the undersigned finds that a penalty of the $133.00 penalty is appropriate and is therefore assessed.

vi. *Citation Number 9678442: The Secretary Established That Cactus Canyon Violated 30 C.F.R. § 56.14100(c)*

Findings of Fact

On October 25, 2022, Davis inspected a John Deere 544E front-end loader located at the Clendennen Ranch pit. Ex. 11. Davis testified as follows:

> I conducted an inspection on the John Deere front-end loader. Upon inspecting the front-end loader, I observed the brake lights [were] not working. And this condition violated a pattern in the 30 CFR. Therefore, I [wrote]a citation on this. As we'll see in the other picture [DOL 00094] that you see other mobile equipment that travel the same area failed to warn the equipment that he's braking could expose others to collision hazards.

Tr. 319. Davis concluded that the malfunctioning brake lights presented a collision hazard. Tr. 319-20. Accordingly, Davis issued Citation No. 9678442 for a violation of 30 C.F.R. § 56.14100, which concerns examination, correction, and record keeping related to safety defects. Sec'y Ex. 11.

Davis concluded that the likelihood of a collision was low because the front-end loader was only operated during daylight hours, but he testified that "[the equipment operator] should still be able to warn others of his braking." *Id*. Davis found there to be a low likelihood of a collision ultimately occurring due to the limited human and vehicle traffic in the area and assessed the risk of injury or illness as being 'unlikely.' Tr. 320. Given the risk of injury to a miner in the event of a vehicle collision caused by the front-end loader's inability to give a visible braking warning to other mobile equipment traffic, Davis assessed the injury or illness that could reasonably be expected as 'lost workdays or restricted duty.' *Id*. Davis assessed the negligence level as 'moderate' because the vehicle operator did not report the faulty brake lights to either Carson or the site foreman. Tr. 320-21.

Violation

Carson conceded that the brake lights on this front-end loader were not operational, testifying that

> We talked about the brake, the use of the loader up at the Clendennen mine and I had testimony that we don't load trucks with it. So with respect to the brake light citation ending in 42, it's just, that is not how it's used. I explained it was used to move the Grizzly around and when it's being used there's no other vehicle to be running into it from behind. Nevertheless, I acknowledged the brake light didn't work. I just think I would argue that it's no likelihood versus unlikely, because it -- it wasn't working and I don't think there's any chance anybody ever had that happen, being overtaken by an excavator is not going to happen. And there's only one truck out there so I'm not sure what would hit it, but if the mere fact that a brake light isn't -- isn't working, if that's enough to be a citation, then I guess that's the case.

Tr. 700-01.

Carson's acknowledgement that the loader's brake lights were defective, and his further acknowledgement that this defect had not yet been corrected at the time of inspection, is in itself an admission that Cactus Canyon violated 30 C.F.R. § 56.14100(b).[19] 30 C.F.R. § 56.14100(b) requires that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The malfunctioning brake lights would have been readily apparent to any employee or other observer at Clendennen Ranch and yet had not been repaired at the time of inspection, nor had this defect been brought to the attention of Carson or the site foreman so that the repair process could be initiated. Tr. 320-21.

Davis, however, did not issue a citation for a violation of 30 C.F.R. § 56.14100(b), but rather for a violation of 30 C.F.R. § 56.14100(c). *See* Ex. 11. 30 C.F.R. § 56.14100(c) provides:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

30 C.F.R. § 56.14100(c).

The above makes clear that comparatively more is required to establish a violation of section 30 C.F.R. § 56.14100(c) than that of 56.14100(b). Section 56.14100(b) requires that the Secretary merely establish that the "equipment, machinery, [or] tools" in question were in some way defective, and that the defect in some way affects safety, while Section 56.14100(c) requires two additional showings: (1) that the defective equipment was not taken out of or tagged out of service,

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[19] The language of section 56.14100(b) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Palmer Coking Coal Co.*, 22 FMSHRC 887, 891 (July 2000) (ALJ). Because of this inherent pliability, Commission ALJs have frequently affirmed citations issued under 30 C.F.R. § 56.14100(b) for operating vehicles with defective brake lights or headlights. For example, one ALJ concluded that "inoperable brake lights clearly affect the safety of the truck, as any vehicle traveling behind the large truck would not realize that it was coming to a stop and would easily hit the back of the truck." *Boart Longyear Co.*, 34 FMSHRC 2715, 2718–19 (2012)(ALJ). ALJs have also affirmed the Secretary's interpretation that broken brake lights are a defect affecting safety that must be timely repaired to prevent a hazard. *See e.g., Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 355 (Feb. 2011) (ALJ); *Palmer Coking Coal Co.*, 22 FMSHRC 887, 892 (July 2000) (ALJ); *Barrett Paving Materials, Inc.*, 15 FMSHRC 1999, 2007-08 (Sept. 1993) (ALJ). Commission ALJs has also consistently affirmed the Secretary's interpretation that broken headlights are a defect affecting safety and must be timely repaired under the standard. *Apex Quarry, LLC*, 36 FMSHRC 211, 220-21 (Jan. 2014) (ALJ); *Florida Rock Industries, Inc.*, 34 FMSHRC 745, 761-62 (Mar. 2012) (ALJ); *Freeman Rock, Inc.*, 28 FMSHRC 354 (May 2006) (ALJ); *Walker Stone Co.*, 20 FMSHRC 1225, 1226 (Oct. 1998) (ALJ); *Bob Bak Construction*, 19 FMSHRC 582, 604-05 (Mar. 1997) (ALJ).

and (2) that the defect(s) "make continued operation hazardous to persons." After careful review, the undersigned finds that the Secretary has met her burden to make this additional showing.

Here, Citation No. 9678442 alleges that

> the brake lights of the John Deere 544E front-end loader unit 6535 did not function. The loader is used as needed to load trucks. The loader is exposed to other mobile equipment traffic. Using the loader in this condition exposed the loader operator to collision injuries by not being able to give a visible braking warning.

Sec'y Ex. 11. In support of this assessment, Davis testified that "upon inspecting the front-end loader I observed the brake lights was not working. And this condition violated a pattern in the 30 CFR. Therefore, I written a citation on this." Tr. 319. I credit this testimony, as well as Davis' subsequent testimony that, at the time that Davis issued this citation, the loader was located in an active work area at Clendennen Ranch and had not yet been tagged out of service. Tr. 380-81. Davis' testimony is corroborated by the Secretary's photographic evidence that shows that the loader in question was not relocated to an out of service area, nor had it been tagged out of service in anticipation of repairs. Tr. 394-96; Sec'y Ex. 17 at DOL 00094. I thus find that the Secretary has thus met her initial burden to establish that the defective front-end loader had not been removed from service. *See* 30 C.F.R. § 56.14100(c).

Regarding whether continued operation of this front-end loader without first repairing its defective brake lights would be "hazardous to persons," Davis testified that any vehicle present at Clendennen Ranch – including another piece of mobile equipment or a vehicle visiting the site from the Fairland Plant – could present a collision risk if that equipment or vehicle were to follow or attempt to overtake a front-end loader lacking operational rear brake lights. *See* Tr. 396-97. Davis specifically identified that two excavators and a dump truck were actively in use when he inspected Clendennen Ranch, and that a dump truck can be operated at a sufficient speed to overtake the front-end loader while both vehicles are in motion. Tr. 397-98. The undersigned credits this portion of Davis' testimony as well. *Id*. Carson testified that the front-end loader is not used in proximity to the dump truck, but the Secretary's photographic evidence rebuts this assertion, with one image showing the front-end loader in the foreground and a dump truck in the background located, at most, a few yards away. Sec'y Ex. 17 at DOL 00094.

Davis' testimony establishes that the continued operation of the loader would be hazardous to the limited number of people working in the vicinity of the Clendennen Ranch pit, and the Secretary has thus met her evidentiary burden to make this additional showing required to establish a violation of Section 56.14100(c).

Gravity

Davis testified that the loader's malfunctioning brake lights were 'unlikely' to cause an injury to a miner, and further acknowledged that there was a limited likelihood that a collision – and a consequent collision-related injury – would be caused as a result of the loader's defective brake lights. Tr. 319-20. Davis thus found the likelihood of injury or illness as being 'unlikely', and the

injury or illness that could reasonably be expected as being 'lost workdays or restricted duty.' Sec'y Ex. 11.

The understand affirms MSHA's gravity finding given (1) Davis' assertion that the risk of a collision occurring as a result of these defective brake light is relatively low, and (2) that mining operations at Clendennen Ranch only occur in daylight conditions. *See* Tr. 292. I further find that Davis' assessment of gravity as unlikely to result in an injury that could reasonably be expected as being 'lost workdays or restricted duty' is justified on this record. *See* Sec'y Ex. 11. Accordingly, MSHA's gravity finding is AFFIRMED.

Negligence

Under 30 C.F.R. § 56.14100(c), a mine operation bears the burden of maintaining equipment in good working order, and a reasonable person familiar with the mining industry would have either repaired these defective brake light immediately or tagged the loader out of service until repair efforts could be undertaken. *See U.S. Steel Corp.*, 6 FMSHRC at 1910. Cactus Canyon breached its duty of care to correct this hazardous condition when it neither repaired the defective brake lights nor tagged the loader out of service until repairs were completed. *See* 30 C.F.R. § 100.3(d). Davis assessed the injury or illness that could reasonably be expected as 'lost workdays or restricted duty.' *Id*. Davis assessed the negligence level as 'moderate' because the vehicle operator did not report the faulty brake lights to either Carson or the site foreman. Tr. 320-21. Carson and the site foreman's lack of awareness of the violative condition represents a factor mitigating Cactus Canyon's level of negligence, and the undersigned affirms the Secretary's moderate negligence finding.

Penalty

For Citation No. 9678442, the Secretary proposed a regularly assessed penalty of $133.00, calculated from total points of $148.00 with a ten percent reduction for good faith. Sec'y Exs. 3, 11. The undersigned has considered Cactus Canyon's history of previous violations, the size of its business, the operator's moderate negligence, the relatively minor gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notice of the violation. As discussed above, this violation is non-significant and substantial, is 'unlikely' to result in an injury causing 'lost workdays or restricted duty,' and was the result of Cactus Canyon's moderate negligence. Additionally, Cactus Canyon has a minimal violation history, with no recorded violations of 30 C.F.R. § 56.14100(c) within the twelve months preceding the issuance of Citation No. 9678442 and only one citation in total was issued by MSHA during the twelve months preceding Davis' inspection. Sec'y Exs. 1, 11. Based on these factors and under the totality of the circumstances, the undersigned assesses a $133.00 penalty.

vii. *Citation No. 9678443: The Secretary Has Established That Cactus Canyon Violated 30 C.F.R. § 56.14103(b), And That This Violation Was Significant and Substantial*

Findings of Fact

On October 25, 2022, while still at the Clendennen Ranch pit, Davis continued inspecting the John Deere front-end loader ("unit 6535") and observed that the glass in the front and side windshield was cracked. Sec'y Exs. 12, 17 at DOL 00095-96. Davis testified that the damaged windshield had a "starburst effect" from the sunlight angles, and described the damaged windshield as having sharp, raised edges that ran across its center in the direct line of the equipment operator's vision. Tr. 328. Davis further found that the damaged windshield exposed the loader operator to cuts, bruises, and other bodily injury. Tr. 328-29. Davis specifically testified as follows:

> The gravity I took -- I went reasonable I can due to observe windshield has starburst effect had several different -- the windshield, like, is getting ready to pop out. And due to if it pop out the cuts and bruises would happen and it could be a possibility could have permanent disabling. If the -- if the windshield hit the right piece at the right time. So therefore, I went with designation substantial due to the defective glass position was in.

Tr. 328.

Davis issued a citation for a violation of 30 C.F.R. 56.14103(b). Sec'y Ex. 12. Before terminating the citation, Davis ordered that the damaged windshield be replaced because of his concern that, if the windshield was not totally replaced, the equipment operator would not be protected from airborne rock fragments. Tr. 773.

Davis listed the risk of injury or illness as 'reasonably likely' and found the injury or illness that could reasonably be expected to be permanently disabling. Sec'y Ex. 12. Regarding his decision to designate this alleged violation of 56.14103(b) as significant and substantial, Davis testified that "[t]he consideration I took, based on the window and the glass itself, and the window's position, what would -- what would happen if that glass was to fall out? And that determine me why I went with S&S." Tr. 329. When asked why he designated the injury or illness that could reasonably be expected as 'permanently disabling,' Davis first testified that "severe cuts, broken bones, laceration, or permanent loss of a finger or something" could occur if a miner were to come into contact with broken glass. Tr. 329. Then Davis elaborated that:

> I chose permanent disablement due to the condition of the windshield. It was ready the pop, Your Honor. Then -- by then pop and thinking about all that heavy glass falling on a person as he's driving, his hands and arm right there by that windshield. And I went permanent disabled that -- that it could permanently disable his hand while he's driving the vehicle if he got hit." Tr. 330. Davis found a negligence level of 'moderate' because of "Mr. Carson saying he wasn't aware of it. But looking at it, I don't think I got the whole truth, the whole situation about how long that the windshield was damaged.

Tr. 329.

Davis assessed the negligence level as moderate given Carson's representation that he was unaware of the condition of the windshield prior to its discovery during Davis' inspection. Sec'y Ex. 12; Tr. 330.

Violation

For Citation No. 9678443, the Secretary charges Cactus Canyon with a violation of 30 C.F.R. § 56.14103. Section 56.14103 sets requirement for "operators' stations," as follows:

a) If windows are provided on operators' stations of self-propelled mobile equipment, the windows shall be made of safety glass or material with equivalent safety characteristics. The windows shall be maintained to provide visibility for safe operation.

b) If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.

c) The operator's stations of self-propelled mobile equipment shall—
    1. Be free of materials that could create a hazard to persons by impairing the safe operation of the equipment; and
    2. Not be modified, in a manner that obscures visibility necessary for safe operation.

30 C.F.R. § 56.14103(a)-(c).

The Secretary alleges that the damaged front and side windshield discovered during Davis' investigation was a violation of 30 C.F.R. § 56.14103(b) because the glass was damaged to a sufficient degree to both obscure the equipment operator's vision and present a risk of cut-related injuries to the equipment operator. Sec'y Ex. 12; Tr. 328-330.

Carson, both on brief and during the hearing, asserted that this citation should be vacated because Davis refused to terminate the citation until Cactus Canyon had attempted to replace the front and side windshields of the front-end loader. CC Br. at 56-57; Tr. 666-68. However, the citation was not issued for the absence of windshields that Davis ordered removed, but for hazardous conditions in the existing windshields at the time of inspection. *See* Sec'y Ex. 12. Thus, the arguments for vacating this citation are unavailing.

The Secretary submitted multiple photographs of the broken front and side windshield glass of the front-end loader. Sec'y Ex. 12, DOL 00095-96. These photographs, and Davis' testimony in support thereof, carry the Secretary's burden of proof by a preponderance of the evidence to establish that the damaged windshield with a starburst effect obscured visibility necessary for safe

operation and created a collision hazard and a hazard that the broken glass with ragged edges would pop out and injure the operator. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001); *Sec'y of Labor v. Small Mine Development, LLC*, 36 FMSHRC 246, 264 (January 2014)(ALJ).

Gravity and Significant and Substantial Finding

A violation is significant and substantial if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981)). The Commission has long implemented a four-step analysis in evaluating whether a violation qualifies as significant and substantial. In *Mathies*, the Commission enumerated the four steps required for a finding of S&S as follows:

> (1) the underlying violation of a mandatory safety standard;
> (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation;
> (3) a reasonable likelihood that the hazard contributed to will result in an injury; and
> (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC at 3-4.

More recently, the Commission restated *Mathies* Step 2 in terms of finding that "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). More recently still, the Commission proposed a refined S&S analysis, holding that the four elements required for an S&S finding are as follows:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)). Notably, an S&S determination is based on the facts existing at the time of citation issuance and assumes normal mining operations will continue. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012) ("[t]he [S&S] evaluation is made in consideration of the length of time that the violative [berm] condition existed prior to the citation and the time it would have existed if normal mining operations had continued.").

Additionally – though not argued in significant fashion here – redundant safety measures are not to be considered in determining whether a violation is S&S. *See Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *Secretary of Labor v. Acha Construction, LLC*, 38 FMSHRC 3025, 3032 (Dec. 28, 2016)(ALJ)(determining berm standard violation to be S&S after refusing to consider equipment's rollover protection and seatbelts because they were redundant safety measures).

In the instant matter, Step 1 of the Commission's significant and substantial analysis is satisfied based on my finding that the damaged windshield glass constituted a violation of 30 C.F.R. § 56.14103(b).

As to Step 2 of the modified *Mathies* test, the discrete safety hazard contributed to by the violation of 30 C.F.R. § 56.14103(b) is straightforward. *See Newtown Energy*, 38 FMSHRC at 2038. As held by the Commission, "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id*. The purpose of 56.14103(b) is to protect miners from collisions while operating equipment with an obscured field of vision caused by damaged glass, and to protect miners from other hazards because of the damaged glass that has not been removed. The presence of damaged glass with a starburst effect impeding vision for the front-end loader operator stood at odds with these purposes and contributed to the foregoing discrete safety hazards. *See Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383. Thus, step 2 of the modified *Mathies* test is met here.

Turning to the third and fourth modified *Mathies* steps, the final inquiry in the S&S analysis is whether the discrete hazard(s) identified in Step 2 would be reasonably likely to result in an injury and whether there is a reasonable likelihood that the injury would be of a reasonably serious nature. *See Newtown Energy*, 38 FMSHRC at 2038. In the context of Citation No. 9678443, the question becomes whether (1) the damaged front and side windshield of the front-end loader presented a reasonable risk of collision or other injury to the equipment operator, and (2) whether any resulting injury would be reasonably serious in nature. *Id.*

I consider first whether the Secretary has established that it is reasonably likely that the front-end loader operator would suffer an injury from a collision because of obscured vision due the damaged windshield. Carson submits on brief that such an injury is unlikely, arguing that:

> Vision was not alleged to be obscured. Starburst affects are not the same as obscuring vision (". . .") When questioned about the hazard, AR Davis testified that there were large rocks falling off the back of the bucket when the loader was being used to load trucks. When confronted with the actual use, of the hazard became small rocks falling off the back of the bucket when removing fines from beneath

> the grizzly. Moving the grizzly is a 5 minute job that occurs at most twice a week. The absence of a windshield creates no exposure to rocks jumping out of the bucket. Any magically flying rocks would be deflected by the grizzly. There would be no other equipment moving when the grizzly was being moved. No other mining work is conducted by the loader. This order and the citation should be vacated because the windshield was not obscured and not dangerous. When it was removed to came out in one piece without breaking as he feared.

CC Br. at 56-57.

As an initial matter, Carson's assertion that "vision was not alleged to be obscured" is incorrect. The citation specifically alleges that "[t]here were raised sharp edges that ran from the right side across to the left side and up the center of the windshield *in the direct line of the operator's vision*. Sunlight from angles could create a starburst effect *momentarily impairing the operator's vision*." Sec'y Ex. 12 (emphasis added). However, I credit Carson's reasoning that the actual use of the front-end loader presents a low likelihood of laceration injuries resulting from any prospective further damage to the loader's front or side windshield. CC Br. 56, Tr. 667. Davis testified concerning the risk of further damage to the front-end loader, stating:

> the gravity I took -- I went reasonable I can due to observe windshield has starburst effect had several different -- the windshield, like, is getting ready to pop out. And due to if it pop out the cuts and bruises would happen and it could be a possibility could have permanent disabling. If the -- if the windshield hit the right piece at the right time. So therefore, I went with designation substantial due to the defective glass position was in.

Tr. 328. While Davis was evidently concerned that airborne rocks at Clendennen Ranch could further damage either windshield and increase the risk of injury to the equipment operator, the Secretary has presented insufficient evidence that any small rocks or fines encountered while relocating the grizzly might become airborne and strike either windshield with sufficient force to result in further cracking or offset within that windshield. *See* Tr. 328. The Secretary has also not established that, at the time of Davis' inspection, the windshield was damaged in such a manner as to create a reasonable risk of laceration injuries to the loader operator. While Citation No. 9678443 describes the cracks in the windshield as being "sharp" and "raised", this description is not supported by the photographic evidence provided by the Secretary, which show extensive cracking in both the front and side windshields, but no visible transverse offset of any portion of either windshield, nor any surface visibly sharp enough to cause a laceration injury. Sec'y Ex. 17, DOL 00095-96, *see Peabody Midwest Mining,* 42 FMSHRC at 383.

Davis testified that any employee operating the front-end loader would be exposed to a heightened risk of serious injury or lacerations if the front or side windshield were to "pop out", and that these raised, jagged edges placed the equipment operator at a heightened level of experiencing a laceration or other cut-related injury. Tr. 328. However, prior to terminating this citation, both the front and side windshields were each removed in one single piece without shattering or experiencing any further cracking, suggesting that neither windshield was actually "ready to pop out" at the time of Davis' inspection. Tr. 667. Given this record, the undersigned

concludes that the Secretary has not proven a reasonable likelihood of the equipment operation experiencing a laceration, or that any resulting laceration would constitute an injury of a reasonably serious nature. *Newtown Energy*, 38 FMSHRC at 2038.

The Secretary has established a reasonable likelihood of injury to the front-end loader operator as a result of an obscured field of vision caused by a "starburst effect" in the cracked windshield. After evaluating the respective positions of both parties, the undersigned finds that Davis' testimony – although difficult to follow at times – is persuasive. *See* Tr. 326-33. Davis testified that he noticed a starburst effect in each windshield, and further testified that he took the reduced field of vision into consideration when issuing this citation. Tr. 328, 391. Davis' testimony is corroborated by the photographs provided by the Secretary, which make plain that the operator's visibility through the front and side windshields would have been significantly obscured during operation of the front-end loader. Sec'y Ex. 17, DOL 00095-96. The undersigned finds that this obscured field of vision would significantly heighten the likelihood of the equipment operator experiencing a collision with equipment, other vehicles, or debris, either through a resulting decrease in the level of visibility of nearby vehicles or persons when loading larger materials into dump trucks at Clendennen Ranch, or through reduced visibility when moving the grizzly to different areas of the active pit. Had Davis not intervened on the date of inspection, the equipment operator would have faced an ongoing, significant risk of injury as a consequence of this reduced field of vision, and any such injury resulting from a vehicular collision would likely require medical evaluation or treatment and be "reasonably serious [in] nature." *Peabody Midwest Mining,* 42 FMSHRC at 383. In consideration of the foregoing, the undersigned finds that the Secretary has met her burden under steps 3 and 4 of the refined *Mathies* test.

Although I have upheld the Secretary's significant and substantial finding, I conclude that it is more appropriate to designate the injury or illness that could reasonably be expected as 'lost workdays or restricted duty' rather than 'permanently disabling'. *See* Sec'y Ex. 12. It is certainly possible that a collision at an open pit site such as Clendennen Ranch could result in substantial injury, as even low speed vehicular collisions can result in persistent, life-altering injuries to those involved. However, the Secretary has not presented sufficient evidence that one could reasonably expect a permanently disabling injury to occur under these facts. The Secretary has not submitted documentary or testimonial evidence concerning the expected severity of any injury that a front-end loader operator might experience in the event of vehicular collision with other mobile equipment, and Davis' testimony in support of his gravity assessment focused on potential injuries resulting from a laceration, rather than the injuries that might result in the event resulting from obscured vision. Tr. 329; Sec'y Ex. 12.

In sum, I find that the violation of section 56.9300(a) occurred as alleged by the Secretary. I further conclude that that the collision-related hazards created by the violation were reasonably likely to result in an injury of a reasonably serious nature. I therefore find that the violation of Section 30 C.F.R. § 56.14103(b) was properly designated as significant and substantial, but reduce the injury or illness that can reasonably be expected to 'lost workdays or restricted duty'.

Negligence

Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to 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. The failure to exercise a high standard of care constitutes negligence. 30 C.F.R. § 100.3(d). The two broken windshields described above represented an obvious defect that presented a discrete safety hazard from collision-related injuries. A reasonably prudent miner would recognize that damaged windows on mobile equipment are likely to "obscure visibility necessary for safe operation, or create a hazard to the equipment operator", and would have ordered that the windows be replaced or removed before continuing to operate this front-end loader. 30 C.F.R. § 56.14103(b); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910. Cactus Canyon violated its duty of care when it failed to remove or replace the two damaged windshield that presented visible, obvious hazards to the equipment operator. *Id.* However, I credit Carson's testimony that he was unaware that the front-end loader was damaged prior to Davis' inspection on October 25, 2022. Tr. 666-68; 30 C.F.R. § 100.3(d). Carson's apparent lack of awareness of the violative condition represents a factor mitigating Cactus Canyon's level of negligence, and the undersigned therefore affirms the Secretary's moderate negligence finding.

Penalty

For Citation No. 9678443, MSHA has proposed a penalty amount of $204.00 in accordance with single penalty assessment criteria at 30 § C.F.R. 100.3, with a proposed ten percent good faith reduction to $183.00. The Act requires that, when assessing civil monetary penalties, a Commission ALJ must consider the following 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 contrast to the preceding two citations, MSHA found Citation No. 9678443 to be a significant and substantial violation, a finding upheld by the undersigned *supra*. Despite the heightened severity of this offense, several factors represent mitigating considerations that weigh in Cactus Canyon's favor. The undersigned credits Carson's representation that he was unaware that the windshields were broken prior to Davis' inspection of the Clendennen Ranch pit and has found moderate negligence. *See* Tr. 330. Further, Cactus Canyon's minimal history of previous violations and modest scale of options weigh against increasing the penalty amount that has already been proposed by the Secretary. 30 U.S.C. § 820(i); *see* Sec'y Ex. 12.

Having considered these factors, the undersigned finds the $183.00 penalty proposed by the Secretary is appropriate and is therefore AFFIRMED.

viii. *Citation No. 9678445: The Secretary Has Established that Cactus Canyon Violated 30 C.F.R. § 50.30-1(g)(3)*

Findings of Fact

On October 26, 2022, Davis returned to the Fairland Plant to conclude his investigation. He reviewed myriad paper records, including a Quarterly Employment Report, MSHA Form 7000-2. Sec'y Ex. 14. Davis discovered that the number of employees and employee hours submitted in the quarterly report were incorrect. Tr. 268; Ex. 16. More specifically, Davis found that the hours submitted in Code 03 for strip, open pit, or quarry miners, who had worked in Quarter 3 of 2022, were not reported accurately. Ex. 14. Davis testified that:

> He reported for the third quarter 2022, a strip 3,718 hours. Then it turned around and quarter 2, he reported 1459, cut in half. And the quarter previously before that was 1,349. And the fourth quarter was 1,238. So he based it with the same number of personnel that it just went down tremendously in an hour, it was just not reported right.

Tr. 268.

Davis issued a citation alleging a violation of 30 C.F.R. § 50.30-1(g)(3).[20] Considering that this citation relates only to the correct completion of paperwork, Davis listed the risk of injury or illness as 'no likelihood,' and the injury or illness that could reasonably be expected as 'no lost workdays.' Sec'y Ex. 14. Davis listed the negligence level as 'low' because the records were filed timely and readily provided at Davis' request. Tr. 270.

Davis credibly testified that Carson later informed him that he misreported quarterly work hours because he was "trying to reflect the Fairland plant [is] not with the quarries." Tr. 272. Davis further credibly testified as follows:

> You got citation 9678445, which is on the quarterly report violation. Based on this condition and practice, the normal employee and employee hours didn't -- wasn't correct. And based on the – for the third quarter 2022. The hours submitted on the code 3 was not reported with accuracy. And how I determined it wasn't reported with accuracy, based on the number of personnel Mr. Carson said he had at the plant and based on the number of personnel that's working for the Fairland plant wasn't matching. And when I asked him, he said he did it on purpose. So I said, why would you do that, you know, you did on purpose? He said, Well, see, it got us some attention. Well, it got us attention. So based on this one, I cited -- I cited him on the standard of 50.30-1(g)(3) for accuracy.

Tr. 264-65.

[20] The Secretary states the incorrect legal standard in her brief. Davis issued a citation for an alleged violation of 30 C.F.R. 50.30-1(g)(3), not "56.30-1(g)(3)". Sec'y Br. at 19-20; Sec'y Ex. 13.

Davis further testified as follows:

> [A]s soon as I saw those hours and I questioned Mr. Carson about it. And I asked Mr. Carson, I said, these look like these are not reported accurate. He said, They're not. Straight from his mouth he said, They're not. And he said, the reason being, he wanted to explain how he conclude to these hours. And I said, no, you're going to have to update those hours according to the number of hours worked for this mine site. So basically, he did submit it on time, but it's just not -- he did not report it with accuracy.

Tr. 270. Carson acknowledged as much during the hearing and in his post-hearing brief by stating that he intentionally recorded quarterly work hours in an inaccurate manner because he did not believe that the Fairland Plant should be classified as a mine. Tr. 677-78; CC Br. at 58.

Violation

30 C.F.R. § 50.30-1 requires, in part, that

> (3) Total employee-hours worked during the quarter: Show the total hours worked by all employees during the quarter covered. Include all time where the employee was actually on duty, but exclude vacation, holiday, sick leave, and all other off-duty time, even though paid for. Make certain that each overtime hour is reported as one hour, and not as the overtime pay multiple for an hour of work. The hours reported should be obtained from payroll or other time records. If actual hours are not available, they may be estimated on the basis of scheduled hours. Make certain not to include hours paid but not worked.

30 C.F.R. § 50.30-1(g)(3). As set forth above, section 50.30-1(g)(3) requires each employer under the Mine Act to report total hours worked by all employees. *Id*. Carson admitted that he intentionally violated this standard because of his position that MSHA did not have jurisdiction over the Fairland Plant. Tr. 677-78. This admission, along with Davis' extensive testimony, carry the Secretary's burden of proof by a preponderance of the evidence. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

Gravity

Given that a violation of 30 C.F.R. § 50.30-1 represents a "paperwork violation", the undersigned affirms Davis' finding that the risk of injury or illness applicable under these facts is 'no likelihood,' and the injury or illness that could reasonably be expected is 'no lost workdays.'

Negligence

As noted, Carson admitted to misreporting quarterly paperwork required under the Act. Tr. 677-78. The requirements for compliance with 30 C.F.R. § 50.30-1(g)(3) are both straightforward and easily achieved, requiring nothing more than accurately reporting total employee work hours,

save for certain enumerated exclusions. A reasonably prudent person familiar with the mining industry would endeavor to comply with this regulation by accurately recording employee work and leave hours and maintaining these records for MSHA's potential review. *See FMC Wyoming Corp.,* 11 FMSHRC 1622, 1629. Cactus Canyon breached its duty of care under 30 C.F.R. § 50.30-1(g)(3) when Carson intentionally recorded inaccurate employee work hours in a dishonest attempt to "make a point" to MSHA concerning his dissatisfaction with MSHA's proper exercise of its jurisdiction over the Fairland Plant. *See id.*

Carson suggests that this intentional misfiling of paperwork was justified because he had previously told MSHA that the Fairland Plant had ceased operation, despite the fact that the Fairland Plant was actively in operation as of the date of Davis' routine inspection. *See id.* Carson's brazenness in intentionally misrepresenting work hours for Cactus Canyon's employees, as well as his cavalier acknowledgement that he intends to continue misfiling quarterly work reports in the future (Tr. 272), leads the undersigned to conclude that a finding of 'high negligence' is appropriate under these circumstances. *See Brody*, 37 FMSHRC at 1701. The undersigned therefore modifies the assessed negligence level for Citation No. 9678445 to 'high negligence.'

Penalty

For this citation, MSHA proposed a $133.00 penalty. As with Citation Nos. 9678437 and 9678440, the Secretary proposes the minimum statutory penalty amount available for this citation, and the minimum statutory amount available in 2022 more generally. See 30 C.F.R. § 100.3(g), Table XIV (2022) (Considering the 10% good faith abatement reduction). In contrast to those two citations, however, Cactus Canyon's conduct in relation to this citation was highly negligent in nature. Given my finding of high negligence based on Carson's admission that he intentionally misreported mine employee work hours and that he intended to continue to do so in the future, and in order to effectively deter such misconduct, I find a penalty of $325.00 to be more appropriate in these circumstances. I find that this increased penalty is appropriate even in light of Cactus Canyon's relatively modest scale of operations, and that it will not affect Cactus Canyon's ability to remain in business.

Accordingly, the undersigned MODIFIES this citation to reflect a 'high' level of negligence, and to raise the proposed penalty amount to $325.00. The citation is otherwise AFFIRMED, as issued.

ix. Citation Number 9678446: The Secretary Has Established that Cactus Canyon Violated 30 C.F.R. § 56.18002(a), And That This Violation Was Significant and Substantial

Findings of Fact

Davis issued another paperwork-related citation for inadequate workplace examinations at the end of his return visit to the Fairland Plant on October 26, 2022. Sec'y Ex. 15. More specifically, Davis issued a citation for a violation of 30 C.F.R. § 56.18002(a), which provides:

a) A competent person designated by the operator shall examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health.

    1) The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.

    2) Conditions noted by the person conducting the examination that may present an imminent danger shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

In the condition or practice section of Citation 9678446, Davis alleged:

> A competent person designated by the mine operator was not examining the quarry pit at least once every shift for conditions which could adversely affect safety or health. This was evident from the obvious safety violations found during this inspection. Some of the hazards were for failure to install and maintain berms, correct serious mobile defects, and other visible conditions. On shift examination is necessary to identify safety and health problems so repaired [sic] and/or corrections can be started without delay.

Sec'y Ex. 15.

During his inspection, Davis discovered that the requisite workplace examinations had not been conducted at the Clendennen Ranch pit during the seven-day period prior to October 26, 2022, and that there was not documentation of the examinations having been completed on multiple other dates prior to that seven-day period. Tr. 339. Davis found the likelihood of injury or illness to be 'reasonably likely' and found the injury or illness that could reasonably be expected to be 'permanently disabling.' Sec'y Ex. 15. Davis assessed the negligence level as 'moderate' given Carson's representation that he was unaware the workplace examinations were not being documented for the Clendennen Ranch. Tr. 339-40. In support of this assessment, Davis testified that

> the lead man of the Clendennen Ranch pit supposed to conduct those things daily. And supposed to turn them in daily, but he wasn't doing it. (". . .") Mr. Carson was upset. He said that, you know, those guys supposed to be turning those in. And then at the Fairland pit [plant] they was doing it. But at the Clendennen pit they was not.

Tr. 339.

Violation

30 C.F.R. § 56.18002(a) provides that "a competent person designated by the operator shall examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health." In 2017, MSHA adopted new safety standards requiring that mine operators examine and record conditions that may adversely affect safety or health. *See Examinations of Working Places in Metal and Nonmetal Mines*, 82 Fed. Reg. 7680, 7682 (Jan. 23, 2017). The following year, MSHA amended these requirements to allow examinations to occur before or as miners begin work. *Examinations of Working Places in Metal and Nonmetal Mines*, 83 Fed. Reg. 15,055 (Apr. 9, 2018)(codified at 30 C.F.R. §§ 56.18002(a)–(c), 57.18002(a)–(c)). The Commission has specified that "the term 'competent person' must contemplate a person capable of recognizing hazards that are known by the operator to be present in a work area or the presence of which is predictable in the view of a reasonably prudent person familiar with the mining industry." *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1629 (Sept. 1989).

To prove a violation of 30 C.F.R. § 56.18002(a), the Secretary must show that a designated competent person did not conduct any such examinations either on the shift during which the inspection was conducted or did not perform any such examinations during a specifically identified prior shift. *Cemex Construction Materials, Atlantic, LLC,* 38 FMSHRC 827 (Apr. 2016). The Commission has determined that a mine operator must conduct "adequate" exams of any working place pursuant to 30 C.F.R. § 56.18002(a). 38 FMSHRC at 1625-29. The Commission further defined such adequate exams as those which would identify all hazards which a reasonably prudent examiner would recognize. *Id.* The Commission has also held that section 56.18002(a) contains not only a "competent person" requirement, but also requires that a workplace examination be conducted "adequately," i.e. conducted "to the level of a meaningful examination" as opposed to "only examining] the workplace to standard of care slightly surpassing not conducting the examination at all." *Sec'y of Labor v. Sunbelt Rentals, Inc.; Lvr, Inc.; and Roanoke Cement Co., LLC*, 38 FMSHRC 1619, 1625-26 (July 2016).

The undersigned specifically inquired whether any records existed to challenge Davis' testimony that Cactus Canyon had been out of compliance with 30 C.F.R. § 56.18002(a) for at least seven days preceding October 26, 2022. Carson provided the following response:

ALJ McCarthy:	Yeah, it's a timesheet. It's a timesheet. Where is a workplace examination that says there are safety hazards here?
Carson:	Well, right above, if you go down to where the guys do it, E, meant that he was working with an excavator and above it it says, "guards, pollution controls, walkways," it has all the stuff you're supposed to look at. I have -- I think I have a better form now. But this was our -- this is -- they're all responsible for it and we check them and say, are you paying attention?

Tr. 673.

Thus, Carson expects his employees to "all [be] responsible for [pre-shift examinations]." Tr. 673. While Carson did not designate an individual competent person to examine the Clendennen Ranch pit "at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health," each of the three employees assigned to that location *could have* qualified as a 'competent person' had the examinations actually been conducted. *See* 30 C.F.R. § 56.18002(a). However, Cactus Canyon itself does not claim that the requisite pre-shift examinations were conducted during the seven days preceding October 26, 2022, but merely that Carson expects his employees to be generally attuned to safety conditions after a work shift has already commenced. *See* Tr. 673.

Even if Cactus Canyon had claimed to have conducted the required examinations, the only paperwork that Carson provided to Davis concerning the Clendennen Ranch site were timesheets for two of his employees, and Carson readily admitted that he did not have documentation of completed workplace examinations for the time period at issue here. Therefore, it is clear that Cactus Canyon was not in compliance with the requirements of 30 C.F.R. § 56.18002(a), and the Secretary has carried her burden to establish a violation of the legal standard cited for Citation No. 9678446.

Gravity and Significant and Substantial Finding

As stated above, the Secretary has carried her burden to establish that Cactus Canyon violated 30 C.F.R. § 56.18002(a). For the reasons that follow, the Secretary has also met her burden to establish that this violation was appropriately cited as significant and substantial violation. As fully set forth above, the Commission's refined S&S analysis framework requires a showing that:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC at 383.

Step 1 of this refined test has been resolved through my finding that Cactus Canyon did not conduct and subsequently document any pre-shift examinations at the Clendennen Ranch pit during the seven-day period preceding October 26, 2022. *See* C.F.R. § 56.18002(a). The text of Section 56.18002(a) is not permissive in nature and represents a mandatory safety standard. *See Signal Peak Energy, LLC*, 37 FMSHRC 470, 479 (Mar. 2015). Since I have found a violation, Step 1 of the *Mathies/Peabody* test resolves itself in the Secretary's favor. *See Peabody Midwest Mining, LLC*, 42 FMSHRC at 382-83.

Step 2 of the refined *Mathies* analysis focuses on the extent to which the violation contributes to a particular hazard, and the Commission has found that this step is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 (Aug. 2016) (citing *Knox Creek Coal Corp*., 811 F.3d at 163). Thus, step two of the *Mathies* test involves a two-part analysis: 1) identification of

the hazard created by the violation of the safety standard; and 2) "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC at 2038.

"[T]he pertinent requirements of 30 C.F.R. § 57.18002 are three-fold: (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator. *FMC Wyoming Corp.,* 11 FMSHRC 1622, 1628 (Sept. 1989). The Commission has instructed that "the starting point for determining the hazard is the actual cited section" and is found "in terms of the prospective danger the cited safety standard is intended to prevent." *Newtown*, 38 FMSHRC at 2038. 30 C.F.R. § 57.18002 was promulgated with the aspiration that requiring regular inspections for health or safety hazards prior to the beginning of a work shift would allow a mine operator to discover and address those hazards, and thereby mitigate the risks to miners that could potentially flow from exposure to those hazards. Unlike most safety standards, section 56.18002 does not have one particular hazard associated with it. Rather, the purpose of section 56.18002 is to detect and prevent "conditions which may adversely affect safety or health." 30 C.F.R. § 56.18002. Section 56.18002(a) creates inspection requirements in the hope that mine examiners will discover any and all safety or health hazards present at a mine site before miners are exposed to those hazards.

Cactus Canyon's failure to conduct adequate workplace examinations of the Clendennen Ranch site placed its employees at risk in innumerable ways, as did its failure to initiate prompt corrective action of readily visible conditions that might affect a miner's safety, including the conditions described within Citation Nos. 9678441 and 9678443, which increased the risk of harm to Cactus Canyon miners. *See* Sec'y Exs. 10, 12. The undersigned finds that Cactus Canyon's failure to conduct the required work site examinations directly contributed to the perpetuation of multiple discrete safety hazards at the Clendennen Ranch pit. *See Peabody Midwest Mining, LLC*, 42 FMSHRC at 383. Among these discrete hazards was the heightened risk of collision related injuries created by the damaged front and side windshields in a Komatsu front-end loader, which the undersigned has already found sufficient to support a significant and substantial finding for Citation No. 9678443. Accordingly, the undersigned finds that the second refined *Mathies* factor is satisfied.

Turning to the third and fourth modified *Mathies* steps, the final inquiry in the S&S analysis is whether the discrete hazards identified in Step 2 would be reasonably likely to result in an injury of a reasonably serious nature. *See Newtown Energy*, 38 FMSHRC at 2038. The third step of the Mathies analysis is "primarily concerned with gravity," and whether the hazard identified in step two "would be reasonably likely to result in injury." *Newtown Energy*, 38 FMSHRC 2037. As noted, the fourth Mathies factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. Thus, the relevant inquiry "is not whether it is likely that the hazard … would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest Mining, LLC v. Fed Mine Safety & Health Rev. Comm'n*, 762 F.3d 611, 616 (7th Cir. 2014).

At the time that Davis conducted his inspection of Clendennen Ranch on October 25, 2022, multiple readily identifiable safety hazards were present that could have and should have been documented and addressed during a daily workplace examination. *See FMC Wyoming Corp.,* 11 FMSHRC at 1628. Given Cactus Canyon's failure to conduct a daily workplace examination on October 25, 2022 – or any daily workplace examination for a period of at least seven days prior to October 25, 2022 – multiple cited hazards went undocumented, including the damaged windshield glass on the unit 6535 front end loader that was reasonable likely to result in a collision, as well as hazards resulting from damaged brake lights on that same front-end loader and a missing driver side window on an on-site excavator. As described in detail in the analysis pertaining to Citation No. 9678443, Cactus Canyon's failure to repair or replace the damaged glass windshields presented a risk of permanently disabling injury from collision with persons, vehicles, or other objects because of obscured vision, and also the risk of injury from bodily contact with broken glass. The undersigned has concluded above that Cactus Canyon's failure to address the collision hazard supported an S&S finding for that citation. Had Cactus Canyon conducted and documented the required workplace examinations, it is likely that it would have discovered and could have corrected the violative condition described in Citation No. 9678443. Consistent with my reasoning in upholding Citation No. 9678443, the undersigned similarly finds here that Cactus Canyon's failure to conduct the required daily workplace examinations contributed to the ongoing presence of a collision "hazard that would be reasonably likely to cause an injury of a reasonable serious nature." *Peabody Midwest Mining, LLC*, 42 FMSHRC at 383. The undersigned therefore finds that the Secretary has carried her burden to establish that Cactus Canyon's violation of 30 C.F.R. § 56.18002(a) was appropriately assessed as significant and substantial in nature.

Davis listed the risk of injury or illness as being 'reasonably likely,' and the injury or illness that could reasonably be expected as being 'permanently disabling.' Sec'y Ex. 15. Davis based his findings on, among other things, the presence of multiple alleged safety violations that could have been discovered upon a proper inspection of the Clendennen Ranch. Tr. 338-39. Davis' testimony that the alleged violations discovered at Clendennen Ranch could have been addressed had Cactus Canyon abided by its inspection obligations was particularly persuasive. *See* Tr. 339. However, as with Citation No. 9678443, the undersigned finds that the injury or illness that could reasonably be expected should be reduced to 'lost workdays or restricted duty'.

Negligence

Mine operators owe a general duty of care under 30 C.F.R. § 56.18002(a) to ensure that daily workplace examinations are conducted so that hazardous workplace conditions can be identified and addressed. A reasonably prudent person familiar with the mining industry would ensure that this duty is met by properly designating a competent person or persons to conduct daily workplace examinations to ensure the documentation of conditions that adversely affect safety and health prior to sending miners into danger before each working shift. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. Cactus Canyon violated this duty when a competent person failed to, for at least seven days preceding October 26, 2022, conduct or document the workplace examinations mandated by 30 C.F.R. § 56.18002(a). Had a competent person conducted these workplace examinations, it is likely that the hazards cited by Davis at Clendennen Ranch would have already been identified and addressed, perhaps eliminating Davis' need to issue any citations during his inspection of that facility. *See* 30 C.F.R. § 100.3(d). As to Cactus Canyon's negligence level as

it pertains to this citation, Davis assessed the negligence level as 'moderate' given Carson's representation that he was unaware that the workplace examinations were not being documented for the Clendennen Ranch. Tr. 339-40. The undersigned disagrees. Carson was a hands-on operator, who claims to have designated all employees as competent persons under the standard. He should have known, particularly after 7 days, that workplace examinations were not being conducted at the Clennenden Ranch. Accordingly, I find Cactus Canyon's negligence level to be high under the totality of the circumstances.

Penalty

As it did with Citation No. 9678443, MSHA determined Citation No. 9678446 to be a significant and substantial violation. Both findings have been upheld by the undersigned. The undersigned has also upheld MSHA's comparatively higher gravity assessment, which determined Cactus Canyon's violative conduct to create a reasonable likelihood of a permanently disabling injury. *See* Sec'y Ex. 15. In addition, I have found Cactus Canyon's negligence level to be high, not moderate, because Carson should have known, after 7 days, that workplace examinations were not being conducted by competent persons. Although Cactus Canyon has a minimal history of previous violations and modest scale of operations, I find that a $335 penalty instead of the $183 dollar penalty proposed by the Secretary, will not affect Respondent's ability to remain in business and should be assessed against Respondent for the S&S, high negligence violation. weigh against increasing the penalty amount proposed by the Secretary.

Total Penalty

In sum, the undersigned has affirmed Citation Nos. 9678437, 9678440, and 9678442 as issued, and Citation Nos. 9678443, 967844, and 9678446, as modified. Cactus Canyon is thus ordered to pay a total penalty amount of $1,242.00, consistent with the terms of the order provided at the conclusion of this written decision.

As a final matter, the undersigned now turns to Cactus Canyon's pending "request to withdraw," which is denied for the reasons set forth below.

VII. Denial of Motion for Recusal

Cactus Canyon requests that the undersigned withdraw from further consideration of this matter on grounds of personal bias or other disqualification under Rule 81(b). See 29 C.F.R. §2700.81(b). The initial decision of withdrawal lies with the judge. A judge who declines to withdraw is required to make a ruling on the record regarding the request, stating the grounds for his denial, and if the hearing has been completed, the judge shall proceed with issuance of his decision, unless the Commission stays further proceedings upon the granting of a petition for interlocutory review. 29 C.F.R. §2700.81(c). If the Commission does grant a petition for interlocutory review, it will evaluate the decision of the judge not to withdraw on an abuse of discretion standard. *Big Horn Calcium Co.*, 12 FMSHRC 1493 (Aug. 1990).

Cactus Canyon's Request to Withdraw is denied. After careful consideration of precedent, the undersigned finds that the affidavit evidence in support of the request and the statements and actions cited by Cactus Canyon do not provide sufficient evidence of antagonism, bias, or prejudice so as to warrant the undersigned's recusal. As further explained below, rulings adverse to Cactus Canyon cannot serve as sufficient evidence of bias or prejudice, absent additional showing of deep-seated favoritism or antagonism that would make fair judgment impossible. Additionally, it is the role of a judge to be an active participant in the proceedings, not merely a neutral arbiter. Asking questions that clarify a witness's testimony, restricting counsel from pursuing duplicative or wasteful lines of questioning or testimony, and demonstrating sternness in maintaining efficiency and control during adjudication are duties within the authority and discretion of the judge presiding over just and orderly proceedings. Such actions alone do not suffice as showings of bias or prejudice that would "lead[] a detached observer to conclude that a fair and impartial hearing is unlikely[.]" *Liteky v. United States*, 510 U.S. 540, 564 (1994).

The general principle set forth by the United States Supreme Court governing recusal on grounds of prejudice or bias is whether "a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely[.]". *Liteky v. United States*, 510 U.S. 540, 564 (1994). This principle, while broadly underpinning analyses of whether a judge has shown bias or prejudice sufficient to warrant recusal, is opaque and can be clarified by more specific principles governing the kind of evidence typically sufficient to support a showing of judicial bias or prejudice.

The administrative law judge, as central trier of fact in an administrative proceeding, "is an active participant in the adjudicatory process and has a duty to conduct proceedings in an orderly manner so as to elicit the truth and obtain a just result." *Medusa Cement Co.*, 20 FMSHRC 144, 148 (Feb. 1998) (quoting *Secretary of Labor o/b/o Clarke v. T.P. Mining, Inc.*, 7 FMSHRC 989, 993 (July 1985). The Commission has found that a wide range of actions taken by a judge in an administrative proceeding are insufficient to warrant recusal on the basis of bias or prejudice. For example, actions taken to actively and efficiently manage the proceeding do not suffice and fall within the discretion of the judge. *See Medusa Cement*, 20 FMSHRC at 150 ("[M]ere active participation by the judge does not create prejudice[.]") (quoting *Deary v. City of Gloucester*, 9 F.3d 191, 194-95 (1st Cir. 1993)).

It is expected that judges engage with case materials and ask questions to clarify issues being litigated to promote the understanding of the parties involved. It is also expected that "judges listen closely, read carefully and research thoroughly, before issuing a reasoned, well-thought-out and impartial decision." *See e.g.*, *Pocahontas Coal*, 36 FMSHRC, 3322, 3324 (Dec. 2014) (ALJ). Asking a party to produce evidence for comment by the opposing party may narrow the issues, promote understanding of them, and streamline proceedings. *Id.* Active participation may extend to admonishing counsel, reframing leading questions, or posing questions to witnesses to create a more comprehensive record. *Medusa Cement*, 20 FMSHRC at 150 (citing *Liteky*, 510 U.S. at 556; *United States v. Olmstead*, 832 F.2d 642, 648 (1st Cir. 1987)). Evidence presented that a judge performed actions such as these are not sufficient alone for disqualifying a judge.

The duty to promote clarity and efficiency extends to record testimony and evidence presented during the hearing. Thus, it is not an abuse of discretion to request that counsel stop repetitive,

irrelevant, or hypothetical questioning of witnesses at trial. *Medusa Cement*, 20 FMSHRC at 150 (citing *Desjardins v. Van Buren Comm. Hops.,* 969 1280, 1282 (1st Cir. 1992)). "[E]ncouraging counsel to move forward, forbidding counsel from eliciting duplicative testimony, or halting what the court perceive[s] to be a waste of time, [are] firmly within the discretion of the trial judge." *Deary*, 9 F.3d at 195, citing *United States v. Paz Uribe*, 891 F.2d 396, 400 (1st Cir. 1989).

A central limiting principle circumscribing a judge's discretion is that judicial participation should not prevent parties from fully developing their case. Judges must adjudicate, but not litigate cases. *Lonnie Jones v. D&R Contractors*, 8 FMSHRC 1045, 1053 (July 1986); *see also Pocahontas Coal v. Secretary of Labor, MSHA*, 36 FMSHRC 3322, 3323 (Dec. 2014) (ALJ). While Commission judges are afforded "considerable leeway . . . in regulating the course of a hearing and in developing a complete and adequate record," a judge's participation should not "substantially hinder the parties in the presentation of their evidence and deny them their right to a fair and impartial hearing." *Secretary of Labor v. Canterbury Coal Co.*, 1 FMSHRC 1311-12, 1314 (Sept. 1979). This evaluation often requires an ad hoc, birds-eye assessment of the case to determine whether "in intent or appearance . . . [a party has] been slighted or somehow been put at a disadvantage" by a judge's active interventions in the case, sufficient to deny due process. *Pocahontas Coal*, 36 FMSHRC at 3324 (ALJ).

Not every intervention by a judge that slights a party or places them at a disadvantage can serve as grounds for arguing bias or prejudice sufficient to disqualify a judge. "Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky*, 510 U.S. at 555, citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Just because a judge—informed by observations made while observing proceedings and engaging with case materials—rules upon a motion or issues an order or decision adverse to a party does not make a judge biased or prejudiced against that party. To disqualify a judge for bias or prejudice allegedly evidenced through a judicial ruling or opinion, there must be a showing of "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555-56.

The *Liteky* standard sets an extremely high bar to establish that a judge is prejudiced or biased, absent additional, plain remarks to that effect. While temperate language is laudatory, there is no rule preventing a judge from admonishing counsel when necessary; in fact, when done in the service of the efficient and fair conduct of proceedings, the judge may have a specific obligation to admonish counsel. *T.P. Mining*, 7 FMSHRC at 993, citing *Cromling v. Pittsburg & Lake Erie R.R. Co.*, 327 F.2d 142, 152 (3d. Cir. 1963).

General expressions of frustration or irritation during trial proceedings also are generally insufficient to show bias or prejudice warranting disqualification. Justice Scalia explained this in *Liteky,* as follows:

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible …. *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction,

> annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

510 U.S. at 555-56.

Adversarial administrative proceedings are innately processes of tension that judges are meant to manage and exert control over. *Deary*, 9 F.3d at 195-96. Admonishments of counsel and general friction between judge and counsel are insufficient evidence of prejudice by themselves. "Although any display by the judge of unwarranted irritation or displeasure directed towards counsel ought to be avoided, friction between the court and counsel does not constitute pervasive bias." *Id*., citing *Arthur Pierson & Co. v. Provimi Veal Corp.*, 887 F.2d 837, 839 (7th Cir. 1989). *See also Medusa Cement*, 20 FMSHRC at 150 (quoting same concept regarding friction between court and counsel from *Arthur Pierson & Co.*, 887 F.2d at 839). The expectations in litigation contemplate civility and respect—not necessarily benevolence.

Applying these principles to the allegations of bias at issue, there is no basis for concluding that Cactus Canyon was denied due process or prevented from presenting a full case before this tribunal during the April 2023 hearing. In fact, just the opposite conclusion is warranted, as the undersigned gave Cactus Canyon every opportunity to try its case as it wished. Cactus Canyon, represented pro se by attorney Carson, was given a full and fair opportunity to present its case. Carson was allowed to testify, ad nauseum, in narrative fashion. For example, the undersigned allowed Carson to explore lines of questioning concerning MSHA's decision not to issue a separate mine identification number for Clendennen Ranch, a decision that is not subject to administrative review by this tribunal. Tr. 156-61. The undersigned further allowed Carson to provide, with limited interruption for clarifying questions, a testimonial narrative that spanned almost the entirety of the third day of these proceedings. Indeed, a full 163 of the 782 pages of the transcript for this case document Carson's presentation of his case in chief on his own accord, without being constrained by the traditional direct examination format wherein an attorney questions a witness (or witnesses) with a series of nonleading questions. *See generally*, Tr. 554-717.

The allegations raised by Cactus Canyon as purported evidence of personal bias or prejudice largely concern judicial rulings on evidence, testimony, or jurisdiction, or involve active participation and management of the proceedings by interrupting counsel or witnesses to ask clarifying questions, limit repetitive testimony or questioning, or admonish counsel, where appropriate. Even when the ability of Cactus Canyon to pursue lines of questioning was limited, these redirections were followed by statements encouraging counsel to either move on, explain the relevance of a line of questioning, or focus on a new issue rather than one already asked and answered.

In sum, based on a thorough review of the allegations made by Cactus Canyon in its Request to Withdraw, there is insufficient evidence of any deep-seated antagonism, prejudice, or favoritism sufficient to warrant recusal of the undersigned. Furthermore, Cactus Canyon had a full opportunity to present and develop its case within the normal evidentiary and procedural confines of an adversarial proceeding. The Request to Withdraw is **DENIED.**

Counsel for Cactus Canyon's allegations regarding the undersigned's character and integrity are discussed below. They cross the line into unethical, unprofessional conduct by a member of the Commission bar and merit a recommendation for sanctions before the Commission and the Texas bar where counsel is licensed to practice law.

VIII. Recommendation for Attorney Discipline and Sanctions

Attorney Carson's allegations seeking to impugn the undersigned's qualifications and integrity are sanctionable and are hereby referred for disciplinary action within the Commission under Commission Procedural Rule 80, and with the Office of the General Counsel of the State Bar of Texas for conduct violative of Texas Disciplinary Rule of Professional Conduct 8.02.

Carson has made repeated claims about the integrity of a judge of the Commission with apparent reckless disregard for the truth. There is a lack of evidence providing support for the veracity of these claims beyond Carson's own suspicions or his dissatisfaction with the outcome of these proceedings. Although the line between strong, zealous language used to advocate for one's claims and language that is unprofessional and in violation of ethical rules of attorney conduct is not the most defined or exact in federal case law, both the scope of Texas's relevant Disciplinary Rule of Professional Conduct (Rule 8.02) and federal case law examining such conduct demonstrate that the accusations made by Carson as to the undersigned's integrity transcend the identification of perceived errors in or disagreements with judicial rulings and warrant a recommendation for sanctions. Upon this recommendation, Carson may be compelled to produce evidence substantiating the egregious claims he has made, and an inability to produce probative evidence in support will establish that such claims were made with reckless disregard for the truth and violate Texas Disciplinary Rule of Professional Conduct 8.02.

Procedures for recommending disciplinary proceedings for individuals practicing before the Commission are governed by Commission Procedural Rule 80. All "[i]ndividuals practicing before the Commission or before Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States." 29 C.F.R. §2700.80(a). According to this standard, Rule 8.02 of the Texas Disciplinary Rules of Professional Conduct is binding on Carson, a pro se litigant barred in Texas, during his time practicing before Commission judges. Rule 8.02 provides:

> A lawyer [barred in Texas] shall not make a statement that the lawyer knows to be false *or with reckless disregard as to its truth or falsity* concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Texas Disciplinary Rules of Professional Conduct Rule 8.02 (emphasis added). Black's Law Dictionary defines "reckless disregard" as "conscious indifference to the consequences of an act." *See* Definition for the word '*Disregard*', BLACK'S LAW DICTIONARY (11th ed. 2019). When specifically discussing reckless disregard in the context of statements made about another (e.g., a defamation claim), the defendant's intent for harm is judged against a standard of "reckless disregard for truth." *Id.*

The decision to impose sanctions for accusations made within court proceedings about a judge straddles a varied line between the adversarial, but permissible, and the sanctionable. On the one hand, language can be strong and provocative without crossing the line "separat[ing] permissible zealous advocacy from impermissible and sanctionable personal opinion." *In re Brizinova*, 565 B.R. 488, 509 (Bankr. E.D.N.Y. 2017). Statements regarding contentious subjects may feature rhetorical flourishes which, while impassioned and forceful, may not necessarily cross the line of frivolity, recklessness, or sanctionable conduct. *Id.* As a result of the myriad ways that language can be subjectively perceived, courts typically reserve "[t]he imposition of sanctions or other harsh consequences based on the use of strong and offensive language by counsel . . . for the most extreme situations." *Id.* at 507.

Forceful language almost certainly crosses the line from contentiously offensive to sanctionable when the inflammatory remarks are made in bad faith. Statements evince bad faith when recklessly used to make frivolous arguments, stoke personal animosity, or disparage judicial conduct when devoid of substance or merit. *See In re Brizinova*, 565 B.R. at 507-08 (citing *In re 60 East 80th Street Equities*, *Inc. v. Sapir*, 218 F.3d 109 (2d Cir. 2000); *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2005). Such bad faith statements, made with little or no evidence to substantiate them, are treated as more clearly sanctionable. Their frivolity underscores the uselessness that such inflammatory language has in a formal administrative proceeding, contrary to judicial norms of professionalism and civility.

As emphasized by the specific Disciplinary Rule of Professional Conduct in the Texas bar and several other state bars, the frivolous use of provocative language which aims to impugn the integrity and character of a judge typically provides a one-way ticket to Sanction-Town. Judges are agents of the courts or tribunals for which they serve. Thus, courts or tribunals are sensitive to accusations attacking judicial character because they inherently attack the dignity and character of the court or tribunal by implication. *See United States v. Nolen*, 472 F.3d 362, 374 (5th Cir. 2006) (equating frivolous attacks on the character of a judge for an official ruling to be a direct attack on the institution of the court [tribunal] by implication).

While claims as to the correctness of a judge's rulings can fall within permissible bounds of advocacy, allegations made by counsel against a judge's character or ethical standards have been found presumptively false or made with reckless disregard for the truth. *Nolen*, 472 F.3d at 372 (affirming district judge's position that "*any* accusation that a judge lied about his reasons for a ruling would be regarded as presumptively false or made with reckless disregard for the truth"). According to *Nolen*, a Fifth Circuit case invoking Rule 8.02 of the Texas Disciplinary Rules of Professional Conduct, "[a]llegations that a judge has mishandled a trial are beyond the reach of Rule 8.02, but allegations of judicial 'dishonesty' are not." *Id.* at 374. Making claims that a judge has lied, provided false reasoning for a judicial ruling, or acted with unethical or inappropriate motives, without the evidence or support necessary to substantiate those claims, impugns the integrity of both the judge and tribunal and are found to be frivolous, made in bad faith, and contrary to Texas Disciplinary Rules of Professional Conduct 8.02. *Id.*[21]

[21] By contrast, sanctions against an attorney were reversed by the Fifth Circuit in *United States v. Brown,* 72 F.3d 25 (5th Cir. 1995), a jury trial. The court found that the attorney's claims alleging a judge's personal bias and prejudice were inferences of bias based on the judge's actions in trial,

Frivolous attacks directed against a judge's integrity have typically fit into the category of sanctionable conduct under professional rules analogous to Texas Disciplinary Rule of Professional Conduct 8.02, with sanctions that include revocation of an attorney's *pro hac vice* privileges to practice in a certain jurisdiction. For example, sanctions for an attorney practicing in Texas were upheld in *Nolen* for statements that a federal judge had given false justifications for temporarily appointing additional counsel for a defendant thought to be originally aided by ineffective counsel. 472 F.3d at 372-73. Despite the court's recognition that the complainant's belief about the judge's alleged lack of honesty may have been in good faith, the lack of any "compelling indicia of any mendacity" in the comments cited from the judge led the court to uphold sanctions for impugning the integrity of a judge with at least "reckless disregard for the truth." *Id.* at 373.

As noted, *Nolen* placed the burden on the moving party to prove that provocative allegations regarding a judge's integrity, or lack thereof, were non-frivolous. *Id.* That burden was not met, and sanctions were imposed for frivolous accusations pertaining to the judge's character. *Id.* Impugning the integrity of a judge, thereby implicating the integrity of the court, is indeed a risky business, which federal tribunals treat seriously and impose a high standard of substantiation when evaluating evidence presented that a judge has acted with personal bias or prejudice. In *United States v. Cooper*, a case from the District of Rhode Island, a lawyer suffered suspension of *pro hac vice* privileges when an affidavit submitted alleging personal bias and prejudice, although claimed to be in good faith, "contain[ed] little more than a series of misstatements of fact and unsubstantiated, false and conclusory allegations, made under oath, which constitute a scurrilous, personal attack upon the integrity of this Court." 669 F. Supp. 38, 39 (D.R.I. 1987).

In addition to failing to present sufficient evidence to support accusations and avoid a conclusion of sanctionable frivolity, relying upon misrepresentations of the record to support claims impugning the character of the judge will also warrant sanctions. In *In re Liotti*, the Fourth Circuit publicly admonished an attorney who made misrepresentations about the record, including allegations without factual support in the record, the presentation of unrelated portions of the transcript as a related conversation, and the failure to disclose certain admissions of witnesses, to claim that a district judge had suppressed a relevant piece of evidence. 667 F.3d 419 (4th Cir.

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rather than claims attacking the judge's integrity or honesty. The attorney in *Brown* relied upon in-court observations of the trial judge to make his arguments, claiming the judge "appeared not to be interested in anything that the defendant testified to," "seemed to have a mission of belittling, castigating, and otherwise discrediting defense counsel," and "gave—by gesture—by facial expression—and by oral comments—the impression that he favored the government and disfavored the defendant[.]" *Id.* at 27. While these claims certainly use strong language to argue judicial prejudice, the Fifth Circuit held such claims to be more similar to "complaints about how judicial conduct may have affected the decision of the jury in the context of an adverse proceeding." *Id.* at 28. The court found that sanctions under professional responsibility standards for claims impugning the integrity of the court, are meant to address "false or reckless statements questioning judicial qualifications or integrity (usually allegations of dishonesty or corruption)" as opposed to an attorney's typical freedom to challenge perceptions of court partiality when just and substantiated. *Id.* at 29.

2011). While the court acknowledged the ability of attorneys to zealously argue facts in the record to support their claims, clear misrepresentations of the record, even if created through "a troublesome pattern of carelessness" as opposed to intentional fabrication, warrant at least some form of discipline. *Id.* at 430.

Courts have also foregone lenity for parties representing themselves pro se, particularly a licensed attorney, who is already subject to professional responsibility obligations. In *Fleming v. United States*, the Fifth Circuit cautioned a licensed attorney as pro se litigant to cease use of "intemperate and abusive language . . . [and] ad hominem attacks on federal judges "to avoid future sanctions from the court under the professional standards of conduct. 162 Fed. Appx. 383, 386 (5th Cir. 2006).

The pro se claims by attorney Carson in the Request to Withdraw generally fall into two categories. On the one hand, Carson points to several rulings, questions, and decisions made by the undersigned as evidence of personal bias or disqualification. These claims essentially aim to relitigate various decisions made on procedural and evidentiary issues and witness testimony, and more appropriately belong in a petition for discretionary review under an abuse of discretion standard, rather than a request to withdraw.

Category 1 - Less egregious allegations on procedural rulings motions or evidentiary issues

Cactus Canyon's counsel has shown impudence and strident lack of respect and professionalism for Commission procedure and decorum. For example, he calls the obligation to file a motion to compel "nonsense," when a motion to compel is the precise mechanism afforded by regulation in instances where a dispute arises following one party's request for production during the discovery period. Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 6; 29 C.F.R. §§ 2700.58(c), 59.

The following, non-exhaustive collection of examples serves to highlight Carson's attempts to relitigate, often in a frivolous or nonsensical fashion, procedural matters already resolved before this tribunal:

Example 1(A)

> *"Only personal bias or other disqualifications explains* Judge McCarthy's disregard of this mandatory sanction under [FRCP 37(c)(1)] and under the common law and embrace of this tainted evidence to unearth the very first explanation of the Secretary's Mine Act jurisdiction case, which the Court then announces as compelling."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 6. In actuality, the Court made no proclamation as to whether any yet to be entered evidence was compelling, and simply highlighted (Tr. 14-18) that the parties' prior interactions made plain that the issue of MSHA's jurisdiction was likely to arise at trial and, with the exception of evidence withheld under claim of privilege, that the Secretary had produced evidence related to its jurisdictional review conducted *at the request of Carson.*

Example 1(B)

> "The Judge admitted a complete lack of experience when jurisdictional facts not stipulated (P.9, L.22-23) and at the 2nd prehearing conference *displayed an obvious desire to please the Secretary.* Whatever the reason, personal bias or other disqualification resulted in Judge McCarthy building the Secretary's entire case for jurisdiction at trial on the basis of unqualified and undisclosed opinions about why OSHAct did not apply."

Cactus Canyon 29 C.F.R. § 2700.81(b) Req. Withdraw, 7 n. 6. It should go without saying that the actions referred to during the second prehearing conference, during which the undersigned asked District Manager O'Dell "to convey his regards to the Sec./Asst. Sec. of Labor that the DM was to meet the first day of trial instead of participating as the Secretary's representative," represent an extension of pleasantries on the part of the undersigned, and are not evidence of favoritism or personal bias. Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 7 n. 6. Yet, this cannot go without saying, as Attorney Carson has suggested that the undersigned's expression of well wishes to a public servant not involved in these proceedings is inherently biased in nature and to Cactus Canyon's detriment.

Example 1(C)

> "[T]he ALJ showed personal bias by delaying rulings, then ruling the Secretary could make a case by pleadings alone and denied the motions on this procedural ground."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 8. First, Carson's suggestion that the undersigned delayed rulings in these matters is without merit. The ten contest dockets captioned above were assigned to the undersigned on January 13, 2023, while Penalty Docket CENT 2023-0089 was assigned on March 13, 2023. The undersigned issued an order denying Cactus Canyon's Motion for Summary Decision on March 13, 2023, and a separate order denying Cactus Canyon's Motion to Reconsider and scheduling a hearing date on March 23, 2023. The hearings in these matters then commenced on April 4, 2023. A total timespan of less than four months from ALJ assignment to the conclusion of a hearing on the merits is not an undue delay. *See generally, Telecommunications Research Action v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984).

Second, at no no point during the prehearing process did the undersigned rule that the Secretary could carry her burden of proof "by pleadings alone, and Carson's assertion to the contrary is a misapprehension of the procedural history of this case. What the undersigned did rule, in denying Cactus Canyon's motion for summary decision, is that the parties' filings presented genuine issues of material fact exist as to whether 'mining' occurred at the Fairland Plant and Quarries after its purported permanent closure on August 11, 2022. Order Denying Mot. for Sum. Dec. at 3. In denying Cactus Canyon's motion for summary decision, the undersigned did not make any finding in favor of the Secretary, nor did I find that the Secretary could proceed to hearing under a less burdensome standard of proof. *Id*. Indeed, the undersigned reiterated in the early stages of the hearing that it is the Secretary who carries the burden of proof in these proceedings. *See e.g.,* Tr.

143 ("Mr. Marquez, you have the burden to prove that this material entered or affected commerce.").

Example 1(D)

> "Judge McCarthy *abrogated his duty* to reduce the issues when they [motions for summary decision] were denied. However the very same time Judge McCarthy chastised Cactus Canyon pursuing issue reduction by motions and filings in this case. *This hypocrisy demonstrates personal bias or other disqualification.*"

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 8-9. Carson makes no reference to the specific duty that the undersigned allegedly failed to undertake, nor does he point to any instance in the record where the undersigned failed to abide by his duties as an Administrative Law Judge. Granting a meritless motion for summary decision is not a form of mandatory relief in Commission proceedings, but Carson appears to argue as if it were. *See* 29 C.F.R. §§ 2700.55, 67. Contrary to Carson's position, it is not an ALJ's duty to grant a motion for summary decision in furtherance of some nebulously defined duty to "narrow the issues," and motions for summary decision may 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).

Example 1(E)

> "Demonstrating *incredible personal bias or other disqualification*, at the hearing, Judge McCarthy *sua sponte* reversed the Orders and transformed the denials to be on the merits of Cactus' case."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 9. The Court made no such reversal, and instead reminded Carson (Tr. 117, 133-34) that the issues before the Court at hearing are restricted to "whether the Fairland Plant and Quarries was engaged in active mining after its purported permanent closure on August 11, 2022, and whether the citations issued at the Clendennen Ranch intermittent mine on October 25-26, 2022, were validly issued as part of that mining." Order Denying Mot. for Sum. Dec. at 3.

Example 1(F)

> "Judge McCarthy is shown above to have displayed time and again *his personal bias or other disqualification in this matter*: from the prehearing conferences to the Orders of 3/13 and 3/23; from the one-sided limitation of Mine Act cross examination (that was reversed for Judge McCarthy's examination). *Judge McCarthy repeatedly changed positions on relevancy and irrelevancy to suit his prejudice that any MSHA theory will work to keep jurisdiction from OSHA*. Trial testimony that should not have been admitted, was given credence as if pled from the beginning of the case and explored in Discovery and utilized for the summary decision motions."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 19-20. Though couched as presenting evidence of bias, Carson simply rehashes procedural arguments previously raised by Cactus Canyon in its Motion for Summary Decision and subsequent Motion for Reconsideration, arguments that Carson was free to, but ultimately did not, submit in a motion for discretionary review. In any event, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky, 510 U.S. at 555.

Category 2 – Sanctionable, bad-faith allegations concerning the character and integrity of the Administrative Law Judge

While the foregoing Category 1 claims toss the label of "personal bias" around freely and risk frivolity without direct support, a second category of more egregious claims regarding the character of the undersigned clearly trigger eligibility for sanctions under Commission Procedural Rule 80 and Fifth Circuit precedent applying Texas Disciplinary Rules of Professional Conduct 8.02. This second category of allegations extends beyond an attempt to circumstantially build an argument for inferring personal bias that would warrant recusal. Instead, these claims play carelessly with fire, lobbing allegations about the integrity and ethical character of a Commission judge in a bad-faith effort to see if any will catch alight.

Below is a selection of the most egregious character-based allegations which Carson sets forth in his Request to Withdraw. Italic emphasis has been added to highlight particularly relevant, strident, or sanctionable language.

Cactus Canyon makes specific claims regarding interruption of witness testimony, specific rulings on evidence or procedure, or other events proffered to support allegations of prejudice or bias. Listed below are allegations that expressly allege that the undersigned has, inter alia, shown favoritism; abrogated his duty to reduce issues for litigation; acted in pure bad-faith; pre-decided the merits of the case; coached witnesses and revised testimony; interrupted to fabricate facts, fabricate false recollection, or aid and abet false testimony; made false statements or actively sabotaged Cactus Canyon's case; actively created the Secretary's claims of jurisdiction; and repeatedly failed to enforce the rules against the Secretary. These unsubstantiated allegations extend well beyond support for an argument of personal bias or prejudice and directly and spuriously attack the undersigned's reputation, integrity, and competence as a federal adjudicator.

The cumulative audacity of such unsupported aspersions as to the undersigned's integrity or competence as a federal adjudicator warrant an appropriate and deterrent sanction from the Commission and the Texas bar under Texas Disciplinary Rule of Professional Conduct 8.02. Consider the following:

Example 2(A)

> "Over 24 years of FMSFRC [sic] trials and 42 years of trying cases to judges in state and federal court, not once in counsel's experience has a Judge repeatedly interrupted cross-examination of the proponent with the burden of proof *with bad faith inquiries* and demands that the cross-examining party identify and provide evidence of the [sic] substance of the cross examiner's theories and defenses.

> Likewise, never has a Judge interrupted to change a witness answer, or to restate the witness answer *in a light more favorable to the position of the party* with the burden of proof."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 10. As a frequent practitioner before the Commission with "over 24 years" of experience in hearings before Commission Administrative Law Judges, Carson should be aware that among the many core functions of Commission ALJs are the "regulat[ion] of the course of the hearing and dispos[ition] of procedural requests or similar matters." 29 C.F.R. § 2700.55(e), (g). The undersigned considers the dutiful effectuation of these core responsibilities to be of paramount importance and, when and where appropriate, will interject to either ask questions to clarify a witness's testimony or restrict counsel from pursuing duplicative or wasteful lines of questioning or testimony. Such actions do not amount to bias, nor do they evince "[d]ishonesty of belief, purpose, or motive." *Liteky v. United States*, 510 U.S. at 564; *See* Definition for the phrase '*Bad Faith*', BLACK'S LAW DICTIONARY (12th ed. 2024). In the 24 total "examples" provided by Cactus Canyon in its request to withdraw, no attempt is made to identify the actual, regulatorily defined role of a Commission ALJ. *See* Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 10-19; 29 C.F.R. § 2700.55. Nor does Cactus Canyon identify where or how the undersigned "demand[ed] that the cross-examining party identify and provide evidence of the substance of the cross examiner's theories and defenses" or "restate[d] the witness answer in a light more favorable to the position of the party with the burden of proof." Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 10. Indeed, Cactus Canyon makes almost no citations to regulation, statute, or controlling case law in the entirety of its 24-page submission. *See generally*, Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw. Instead, Cactus Canyon throws around vague references of "bad faith" without any attempt to define the appropriate standard of judicial conduct, or how the undersigned allegedly derogated from that duty.

Example 2(B)

> "Under the circumstances, Judge McCarthy's interruption to ask if Cactus contended that the Clendennen Ranch Mine was a mine [sic] is *unquestionably malicious and intentional, with no justification what-so-ever*[sic]. This disrupted[sic] of the cross examination of critical Mine Act jurisdiction issue previously briefed in Cactus' Prehearing Report (copy attached). *This was not Judge McCarthy's mistake or inadvertence, it was intentional and bad faith*. *Only personal bias or some other disqualification due to a personal trait like bias* would explain this critical interruption to bring up as unsettled Cactus' position on the Clendennen Ranch Mine."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 11. In actuality, the undersigned's "interruption" was entirely justified and an appropriate exercise of discretion in regulating the course of the hearing. *See* 29 C.F.R. § 2700.55(e). It is perplexing that Carson believes that this interruption was at all to the detriment of Cactus Canyon, because asking Carson to confirm whether Cactus Canyon views Clendennen Ranch to be a mine rather than a borrow pit aided the undersigned in fully understanding and thoughtfully considering Carson's jurisdiction-related line of questioning. *See* Tr. 102.

Example 2(C)

With regard to the foregoing, Carson also alleges:

> "*This biased behavior and bullying made the Secretary's witnesses comfortable to continue the numerous intensional* [sic] *or reckless misrepresentations about jurisdiction that was alleged* in subdivisions 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 28, and 29 of the Notice of Contest (record and Ex. 32). These jurisdictional misrepresentations were announced by the ALJ as conclusive. Judge MCCarthy [sic] should withdraw and allow an unbiased set of eyes review a very complete record."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 20. Carson thus accuses the undersigned of acting in bad faith in the interest of the Secretary and bullying Cactus Canyon (and Carson) on the Secretary's behalf. *Id*. at 20. Putting the temerity of this allegation aside, Cactus Canyon does not cite anywhere in the almost 800-page transcript where "these jurisdictional misrepresentations were announced by the ALJ as conclusive." Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 20. The absence of a citation is telling, as the undersigned *did not* at any point announce that the Secretary can carry its burden concerning the issue of jurisdiction solely by referencing the allegations contained in the citations themselves. *See* Sec'y Exs. 6-15. Rather, the undersigned specifically identified that the Secretary carries the burden to establish that MSHA's attempted exercise of jurisdiction over the Fairland Plant and Quarries was proper. *See e.g.,* Tr. 143 ("Mr. Marquez, you have the burden to prove that this material entered or affected commerce.").

Example 2(D)

Carson goes even further, claiming that the undersigned intentionally sought to buttress the Secretary's case-in-chief.

> "Judge McCarthy interrupted *to fabricate false recollection* about 2 different mirror citations."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 17. In fact, the undersigned intervened on Cactus Canyon's behalf to clarify Davis' confusing testimony concerning whether he had inspected and subsequently cited one or multiple front-end loaders. Tr. 405.

Example 2(E)

Carson also makes multiple allegations that the undersigned spoke for or coached the Secretary's witnesses, including:

> "The secretary did not ask for a trial amendment, instead the *ALJ put words in Fisher's mouth* p.135, l.7-15 in order to assume away the jurisdictional conclusion."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 7 n. 7. The undersigned did not "put words in Fisher's mouth," and instead merely restated Fisher's prior testimony on the issue of whether MSHA views the Fairland Plant and Quarries as being an integrated operation ("the Clendennen Ranch was already tied to the 41009 mine ID through violations that Mr. Davis cited" Tr. 110), and requested that Carson narrow his questioning to the citations actually at issue in these matters and not to a hypothetical future violation that might be issued to Cactus Canyon. Tr. 135.

Example 2(F)

"*Repeated speaking for Secretary* at [Tr] 140, l.19-21." Again, contrary to Carson's allegation, the undersigned did not "speak for the Secretary," but rather directed Carson to refrain from reiterating testimony provided by Fisher mere seconds earlier. Indeed, Fisher's testimony on the same page of the transcript cited by Carson states that "the Clendennen Ranch, we believe, is part of the plant, the quarries. It's not adjacent as if you could throw a rock and hit it, but we consider it part of it." Tr. 140.

Example 2(G)

> "Interruptions *and coaching of witness* on the only jurisdictional regulation, §56.1000."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 14. Rather than coaching Fisher, the undersigned assisted Carson by requesting that Fisher clarify potential inconsistencies in his testimony concerning the proximity of Clendennen Ranch to the Fairland Plant. Tr. 136-37.

Example 2(H)

> "There is no excuse for *active sabotage of Cactus' case and actively creating the Secretary's claims of jurisdiction* based on Judge McCarthy's best presentation of the previously undisclosed jurisdictional testimony of Mr. Fischer (sic) and on/off reliance on §56.1000."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 13. Neither Fisher nor any other representative for the Secretary has claimed that 30 CFR § 561000 creates a regulatory vehicle for MSHA to exercise jurisdiction over Cactus Canyon, and all references to that regulation came from Carson during his cross-examination of Fisher. Tr. 131-35. Carson's claim that the undersigned attempted to rely on this regulation to 'engineer' MSHA's jurisdiction is, at best, confusing.

Example 2(I)

Worse still, Carson explicitly accuses the undersigned of actively pre-determining the result of the hearing in favor of the Secretary.

> "Similarly, Judge McCarthy *pre-decided merits of the case*, and changed his Orders on Summary Disposition from Denied based on genuine issues of material facts

> into a substantive Denial of the merits of Cactus' Motion involving Mine Act Jurisdiction and the Clendennen ranch Mine (. . .) At the hearing, Judge McCarthy converted the Denial into a substantive one on the merits of Cactus' case. P. 117, l. 2 – 11, and p. 133, l 25 – p.134, l.1. Based on that substantive reversal *he is pre-judged mining without reference to the statute, regulations, and case law* (. . .) "When Fisher re-confirms no extraction at Fairland, Judge McCarthy contradicts Fisher *and seeks to revise testimony to support McCarthy's prejudgment*."

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 11. The undersigned made no such reversal, and instead restated the holding in the Order Denying Summary Decision, wherein the undersigned found that a Commission ALJ "lacks jurisdiction to review Contestant's arguments involving MSHA's failure to issue mine identification numbers separate from Mine ID 41-00009." Order Denying Mot. for Sum. Dec. at 3; Tr. 117-18, 133-34.

Example 2(J)

Carson again accuses the undersigned of prejudging these matters in stating the following:

> "Judge McCarthy dismisses the FOIA response by Fisher's boss, the District Manager. 'I know all this,' p. 157, 121-122 (sic). Fisher's testimony supersedes and *the ALJ has made up his mind before cross exam of the first witness is concluded.*"

Cactus Canyon 29 C.F.R. §2700.81(b) Req. Withdraw, 15. The undersigned did not "make up his mind" prematurely, nor did he express that he had resolved the competing arguments presented by the parties concerning whether MSHA's exercise of its jurisdiction over the Fairland Plant was proper. Rather, the undersigned directed Carson to "go ahead" and move on from a duplicative line of questioning relating to the jurisdictional review requested by Cactus Canyon. Tr. 157; *see Medusa Cement*, 20 FMSHRC at 150 (holding that it is not an abuse of discretion to request that counsel stop repetitive, irrelevant, or hypothetical questioning of witnesses at trial). By that point, Carson's line of questioning on that issue had eclipsed nearly 50 pages within the transcript of these proceedings. *See* Tr. 109-157.

Example 2(K)

Perhaps most disrespectfully and outrageously of all, Carson accuses the undersigned of participating in criminal activity in concert with the representatives for the Secretary of Labor.

> "Judge McCarthy *interrupts to aid and abet false testimony,* this time by the AR Davis. P. 361, l.17 – p. 368, l.25."

> "Extended critical interruptions *in order to aid and abet false testimony* by the AR Davis. P. 361, l. 17 – p.368, l. 25."

Cactus Canyon Req. Withdraw, 15-16. "Aiding and abetting" is defined as assist[ing] or facilitate[ing] the commission of a crime or tort, or to promote its accomplishment. AID AND

ABET, Black's Law Dictionary (12th ed. 2024). In the federal context, the elements necessary to uphold a conviction for "aiding and abetting" a crime are

> 1. That the accused had specific intent to facilitate the commission of a crime by another;
> 2. That the accused had the requisite intent of the underlying substantive offense;
> 3. That the accused assisted or participated in the commission of the underlying substantive offense; and
> 4. That someone committed the underlying offense.

See United States v. DePace, 120 F.3d 233 (11th Cir. 1997); *United States v. Chavez*, 119 F.3d 342 (5th Cir. 1997); *United States v. Powell*, 113 F.3d 464 (3d Cir. 1997); *United States v. Sayetsitty*, 107 F.3d 1405 (9th Cir. 1997); *United States v. Leos-Quijada*, 107 F.3d 786 (10th Cir. 1997); *United States v. Stands*, 105 F.3d 1565 (8th Cir.), *cert. denied* (October 6, 1997) (No. 96-9541); *United States v. Pipola*, 83 F.3d 556 (2d Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 183, 136 L.Ed.2d 122 (1996); *United States v. Chin*, 83 F.3d 83 (4th Cir. 1996); *United States v. Lucas*, 67 F.3d 956, 959 (D.C. Cir. 1995); *United States v. Spinney*, 65 F.3d 231 (1st Cir. 1995); *United States v. Spears*, 49 F.3d 1136 (6th Cir. 1995). To convict as a principal of aiding and abetting the commission of a crime in the 5th Circuit – the circuit in which Carson is licensed to practice – a jury must find beyond a reasonable doubt that the defendant "associated with the criminal venture, purposefully participated in the criminal activity, and sought by his actions to make the venture successful." *United States v. Landerman*, 109 F.3d 1053, 1068 n.22 (5th Cir. 1997); A defendant associates with a criminal venture if he "shares in the criminal intent of the principal, and the defendant participates in criminal activity if he has acted in some affirmative manner designed to aid the venture." *Landerman*, 109 F.3d at 1068 n.22.

As an attorney who "has practiced law for over 40 years," Carson should know that certain words can be especially impactful or damaging depending on the context in which they are used. CC. Ex 13 at 2. Accusing a U.S. Administrative Law Judge of committing criminal or tortious conduct without concomitantly presenting substantial (or any) evidence to that effect is beyond the pale and is well-nigh unprecedented in the undersigned's executive branch judicial experience. As an initial matter, Carson has not alleged that any MSHA inspector or other representative of the Secretary has participated in any illegal activity and, without a predicate showing of criminal activity, this tribunal could not have aided or abetted any purported criminal venture. *Landerman*, 109 F.3d at 1068. Further, other than a conclusory statement that Davis' testimony was false, Carson has not pointed to any inaccuracies or misrepresentations on the behalf of MSHA that the undersigned supposedly "aid[ed] and abet[ted]." Cactus Canyon Req. Withdraw, 15-16, Tr. 361-68. In his allegedly "false testimony," Davis describes, with limited interruptions by the undersigned in the interest of clarification, his review of MSHA's four prior inspections of the Fairland Plant and Quarries and his knowledge of MSHA's jurisdictional review concluding that the Fairland Plant and Quarries fall within the auspices of MSHA's jurisdiction under Mine Identification Number 41-00009. Tr. 361-68. Carson and Cactus Canyon's vehement objection to MSHA's proper exercise of its jurisdiction is well documented within this record, but Cactus Canyon's opposition to MSHA's exercise of its jurisdiction does not in itself provide support to Carson's implicit suggestion that Davis provided false testimony at hearing, nor does it support in

any manner Carson's direct allegation that MSHA and this tribunal possessed a shared "criminal intent or acted in concert to effectuate a "criminal venture." *Landerman*, 109 F.3d at 1068.

Most of the foregoing allegations are meant to impugn the character and integrity of the undersigned in service of securing my withdrawal from these proceedings and further delaying MSHA's appropriate exercise of its jurisdiction over Respondent.[22] They clearly cross the line for acceptable advocacy in Commission proceedings. Carson offers insufficient record support to substantiate his spurious ad hominem attacks and he attempts to paint a false picture of judicial dishonesty and conspiracy against Respondent. Even if Carson believes in good faith that bias exists, given the paucity of evidence cited in support when properly read in context, the undersigned concludes that the allegations reek of frivolity and bad-faith and merit a Commission recommendation for unprofessional conduct sanctions under Commission Procedural Rule 80 and Texas Disciplinary Rule of Professional Conduct 8.02.

It is the role of the Commission to determine appropriate sanctions. 29 CFR § 2700.80. After extensive research, it is my recommendation that Attorney Carson be restricted be suspended from practicing before the Commission for one year, and this matter be referred to the Texas bar for any additional or reciprocal discipline under Texas Disciplinary Rule of Professional Conduct 8.02.[23]

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[22] The undersigned takes judicial notice of the fact that since the hearing, Carson's brazen efforts to restrict MSHA's appropriate exercise of its jurisdiction has escalated. On September 7, 2023, following the hearing in these matters and following the issuance of ALJ Manning's decision finding MSHA jurisdiction over the Fairland Plant, Carson allegedly sent a letter to MSHA threatening to deny entry of any MSHA inspectors to the Fairland Plant. The letter states "MSHA Treated as Trespasser" and closes with the line, "Please do not harass and threaten employees of the [Fairland] Plant by sending an inspector to test our resolve in treating the inspector as a trespasser." *Su v. Cactus Canyon Quarries, Inc*., No. 1:23-CV-1147-RP, 2023 WL 8041009, at *1 (W.D. Tex. Nov. 20, 2023). In a proceeding granting the Secretary's application for a preliminary injunction, the U.S. District Court for the Western District of Texas ordered that MSHA inspectors be accompanied by representatives from the U.S. Marshall service, at Cactus Canyon's expense, during future inspections of the Fairland Plant and Quarries. *Id*. at 12.

[23] The ability of administrative tribunals to sanction or otherwise discipline attorneys practicing within their respective jurisdiction is well documented. For example, by statute, the Secretary of the Treasury is authorized by federal statute to regulate and potentially sanction tax attorneys. 31 U.S.C. §330 (2006). The Security and Exchange Commission is authorized to censure, temporarily suspend, or permanently disbar professionals from practicing before the SEC. Pursuant to SEC Rule 102(e) an attorney may be disciplined for (1) failing "to possess the requisite qualifications to represent others," (2) "lacking ... character or integrity or [engaging] in unethical or improper professional conduct," or (3) "willfully violat[ing] ... any provision of the Federal securities laws." 17 C.F.R. § 201.102(e)(1). The governing regulations of the Department of Justice's Executive Office for Immigration Review allow "adjudicating officials" or the Board of Immigration Appeals to sanction any practitioner, if it finds it to be in the public interest to do so. 8 C.F.R. §1003.101(a) (2010). The Patent and Trademark Office has a well-developed system to both investigate and bring action against patent practitioners who violate the USPTO Code of Professional Conduct. *See* Patent and Trademark Office Code of Professional Responsibility, 37

IX. ORDER

For the reasons set forth above, the undersigned finds that milling occurs at the Fairland Plant and, thus, both the Fairland Plant and Clendennen Ranch mine operated by Cactus Canyon are subject to Mine Act jurisdiction;

IT IS ORDERED THAT, consistent with my reasoning above, Citation Nos. 9678438, 9678439, 9678441, and 9678444 be **VACATED**;

IT IS FURTHER ORDERED THAT Citation Nos. 9678437, 9678440, 9678442, and 9678446 be **AFFIRMED**, as issued;

IT IS FURTHER ORDERED THAT Citation No. 9678443 be modified to lower the assessed gravity level from 'permanently disabling' to 'lost workdays or restricted duty', but otherwise **AFFIRMED**, as issued;

IT IS FURTHER ORDERED THAT Citation Nos. 9678445 and 9678446 be **MODIFIED** to raise the negligence level from 'low' to 'high', raise the respective penalty amounts from $183.00 to $335.00 and from $133.00 to $325.00, and lower the assessed gravity level for Citation No. 9678446 from 'permanently disabling' to 'lost workdays or restricted duty', but otherwise be **AFFIRMED,** as issued;

C.F.R. §§ 10.20-10.112 (2009). The National Labor Relations Board ("NLRB") regulations state that "[a]ny attorney or other representative appearing or practicing before the Agency shall conform to the standards of ethical and professional conduct required of practitioners before the courts." 29 C.F.R. § 102.177(a) (2010). In disciplinary proceedings before the NLRB, the Board has suspended an attorney for a period of one year for (1) ad hominem comments and scurrilous characterizations of counsel for the General Counsel, and (2) Misrepresentations to the judge and obstruction and delay of the hearing. *Joel I. Keiler*, 316 NLRB 763, 770 (1995). The NLRB imposed a six-month suspension of an attorney found to have engaged in conduct (1) involving dishonesty, fraud, deceit or misrepresentation during his testimony, and (2) that was disrespectful towards witnesses, the interpreter and the Board's counsel. *David M. Kelsey*, 349 NLRB 327 (2007). An attorney who (1) failed to apprise the NLRB of a material change of fact, and (2) used profanity directed towards opposing counsel and witnesses was suspended for a period of one year, with six months of the suspension being stayed. *In the Matter of an Attorney,* 307 NLRB 913 (1992).

The Commission has imposed, in the context of formal disciplinary proceedings, a 60-day suspension of a practitioner for unprofessional conduct in deliberately failing to appear at a hearing before a Commission ALJ. *Disciplinary Proceeding*, 8 FMSHRC 410, 415 (1986). Carson's conduct here is, in the undersigned's view, far more egregious than an isolated failure to appear at a hearing and thus warrants a longer period of suspension.

The total proposed penalties have been reduced from $1,754.00 to $1,242.00. Cactus Canyon is **ORDERED TO PAY** the Secretary of Labor the sum of $1,242.00 within thirty (30) days of the date of this decision;[24]

Finally, **IT IS FURTHER ORDERED THAT** Attorney Carson be referred for disciplinary action within the Commission under Commission Procedural Rule 80, and with the Office of the General Counsel of the State Bar of Texas for conduct violative of Texas Disciplinary Rule of Professional Conduct 8.02.

SO ORDERED.

Thomas P. McCarthy
Administrative Law Judge

Distribution: (Certified Mail & Email)

Felix R. Marquez, Esq.
Senior Trial Attorney
U.S. Department of Labor, Office of the Solicitor
525 S. Griffin Street, Suite 501
Dallas, Texas 75202
marquez.felix.r@dol.gov

Andy Carson, Esq.
President, Cactus Canyon Quarries, INC.
7232 CR 120
Marble Falls, TX 78654
acarsonmarblefalls@aol.com

[24] Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508 or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.