

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 24, 2024

GRIMES ROCK, INC.,
Contestant

v.

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

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

v.

GRIMES ROCK, INC.,
Respondent

CONTEST PROCEEDING

Docket No. WEST 2022-0334-RM
§104(b) Order No. 9619115; 08/21/2022

Mine: Grimes Rock, Inc.
Mine ID: 04-05432

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2023-0015-M
A.C. No. 04-05432-563106-01

Docket No. WEST 2023-0016-M
A.C. No. 04-05432-563106-02

Mine: Grimes Rock, Inc.

**ORDER GRANTING THE SECRETARY’S MOTION FOR SUMMARY DECISION &
ORDER DENYING GRIMES ROCK’S MOTION FOR SUMMARY DECISION**

These cases are before me upon a notice of contest filed by Grimes Rock, Inc. (“Grimes Rock”) and petitions for assessment of civil penalty filed by the Secretary of Labor (the “Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Grimes Rock pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act” or the “Act”).

The Secretary and Grimes Rock filed cross motions for summary decision and oppositions to the respective motions. For reasons set forth below, the Secretary’s motion for summary decision is **GRANTED** and Grimes Rock’s motion for summary decision is **DENIED**.

I. BACKGROUND

The contest docket and two penalty dockets at issue involve two 104(a) citations and one 104(b) order that arise from Grimes Rock’s alleged failure to comply with orders issued by former Commission Judge Miller (“Judge Miller”) in a temporary reinstatement proceeding brought by the Secretary of Labor on behalf of Alvaro Saldivar (“Saldivar”) against Grimes Rock, WEST 2021-0178-DM (the “Saldivar TR Case”). A brief history of that case and how it relates to the enforcement actions at issue is helpful to understand the posture of these cases.

On May 18, 2021, Judge Miller issued a Decision and Order of Temporary Reinstatement in the Saldivar TR Case. Subsequently, the parties filed a Settlement Agreement and Joint Motion for Temporary Economic Reinstatement in that matter. On May 28, 2021, Judge Miller approved the settlement agreement and ordered Grimes Rock to pay Saldivar \$2,134.78 per pay period, subject to normal deductions, and to otherwise comply with the terms of the settlement.¹ This amount was the difference between Saldivar's earnings at the job he held at the time and his earnings at Grimes Rock. The agreement was silent on what would happen if Saldivar no longer had other employment to offset Grimes Rock's payments. As set forth in more detail in the Saldivar TR Case, the parties disputed how much Grimes Rock should pay Saldivar after he was incarcerated and lost his other job. 45 FMSHRC 947, 948-949 (Nov. 2023).

On May 27, 2022, the Secretary filed a Motion to Enforce the Order Approving Settlement (the "Motion to Enforce") and requested that Judge Miller require Grimes Rock to make certain payments due under the Order Approving Settlement. On June 17, 2022, Judge Miller issued an order (the "Enforcement Order") granting the Secretary's Motion to Enforce and ordering Grimes Rock to pay a sum of \$12,533.94 to Saldivar.² This amount is what the Secretary contended were overdue and missing temporary economic reinstatement payments due Saldivar. Grimes Rock appealed Judge Miller's Enforcement Order, as well as other issues, to the Commission. On July 22, 2022, the Commission granted Grimes Rock's petition for discretionary review.

The two citations and orders at issue in this proceeding stem from Grimes Rock's alleged failure to comply with Judge Miller's orders in the Saldivar TR Case. Citation No. 9619114, issued under section 104(a) on August 15, 2022³, alleges a violation of section 105(c) of the Mine Act and asserts that Grimes Rock failed to comply with Judge Miller's Enforcement Order which required Grimes Rock to pay Saldivar \$12,533.94.⁴ Order No. 9619115, issued under

¹ For purposes of this order, I refer to Judge Miller's May 28, 2021 order as the "Order Approving Settlement."

² The same day, Judge Miller issued a decision in the companion discrimination case in which she found that Grimes Rock had not discriminated against Saldivar in violation of the Act. *Secretary of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 473 (June 2022) (ALJ).

³ The issuance dates for the enforcement actions discussed in this paragraph are taken from MSHA Form 7000-3 for Citation Nos. 9619114 and 9619116, and Order No. 9619115.

⁴ On August 17, 2022, two days after Citation No. 9619114 was issued, Grimes Rock filed a motion with the Commission asking that it stay Judge Miller's Enforcement Order directing Grimes Rock to pay Saldivar \$12,533.94. On August 30, 2022, the Commission denied Grimes Rock's motion to stay. *Secretary of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 725 (Aug. 2022). In its order, the Commission stated that "[f]or purposes of this Motion to Stay, we conclude that it was not unreasonable for all involved to assume that in the event Saldivar were no longer employed elsewhere, Grimes Rock's payments would automatically revert to the

section 104(b) on August 21, 2022, alleges that Grimes Rock failed to correct the condition described in Citation No. 9619114 by not making payments required by Judge Miller’s Order Approving Settlement and Enforcement Order. Finally, Citation No. 9619116, issued under section 104(a) on August 22, 2022, alleges that Grimes Rock violated section 104(b) when it continued to conduct work activities at the mine site after Order No. 9619115 was issued.

On November 28, 2023, the Commission issued a decision in the Saldivar TR Case affirming Judge Miller’s Enforcement Order and remanding certain issues for further determination. For purposes of the instant proceeding, the Commission’s affirmation of Judge Miller’s Enforcement Order requiring Grimes Rock to pay Saldivar the sum of \$12,533.94 is critical. The remanded case was assigned to this court.⁵ However, Grimes Rock appealed the Commission’s decision to the Ninth Circuit Court of Appeals and I stayed the case pending the Ninth Circuit’s ruling on the appeal. On May 23, 2024, the Ninth Circuit dismissed Grimes Rock’s appeal for lack of jurisdiction.⁶

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

This statement of undisputed materials facts is based on the submissions of the parties in their respective motions for summary decision, oppositions to such, and this court’s taking notice of orders and decisions issued by Judge Miller, the Commission, and the Ninth Circuit Court of Appeals in the Saldivar TR Case. Facts submitted by the parties that are not discussed in this section are either in dispute or are unnecessary for resolution of this matter.

On May 18, 2021, Judge Miller issued a Decision and Order of Reinstatement in the Saldivar TR Case in which she granted the Secretary’s application for temporary reinstatement and ordered as Grimes Rock to “immediately upon receipt of receipt of this decision, reinstate Mr. Saldivar to his former position at the mine effective as of the date of this decision.” *Sec’y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 43 FMSHRC 287, 292 (May 2021) (ALJ). The Decision and Order of Reinstatement further required that “[t]he employment of Mr. Saldivar shall be at the same rate of pay and with all benefits, including any raises, that he received prior to discharge, pending a final Commission order on the complaint of discrimination.” *Id.*

On May 28, 2021, Judge Miller issued an Order Approving Settlement in the Saldivar TR Case in which she ordered Grimes Rock to pay an agreed upon amount every two weeks, subject

full amount under the Judge’s Order, consistent with the purpose of temporary reinstatement.” *Id.* at 727-728.

⁵ Judge Miller retired prior to issuance of the Commission’s November 28, 2023, decision in the Saldivar TR Case.

⁶ On July 15, 2024, the Ninth Circuit issued its mandate returning jurisdiction to the Commission. On July 23, 2024, the Commission issued a notice in which it confirmed that I “may proceed on remand as originally instructed and consistent with the Commission’s November 28, 2023 decision.” *Sec’y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 46 FMSHRC ___, No. WEST 2021-0178 (July 23, 2024).

to normal deductions, and to comply with the terms of the settlement agreement. Unpublished Order (May 28, 2021).

On June 17, 2022, Judge Miller issued the Enforcement Order in the Saldivar TR Case in which she ordered Grimes Rock to pay a sum total \$12,533.94 to Saldivar for past due wages owed.⁷ *Sec’y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 497 (June 2022) (ALJ). The Enforcement Order required Grimes Rock to pay Saldivar “the full wages as ordered” in the May 18 Decision and Order of Reinstatement. *Id.* at 499. The Enforcement Order did not explicitly include a due date for payment.

On August 16, 2022, MSHA Investigator Troy Van Wey traveled to the mine and confirmed Grimes Rock had not paid Saldivar \$12,533.94 as instructed in the Enforcement Order. Sec’y Mot. 4 (citing Sec’y Mot. Ex. 3 ¶9).⁸ Investigator Van Wey served Citation No. 9619114 on Grimes Rock the same day and set the abatement time for 4:00 p.m. the following day, April 17, 2022. Sec’y Mot. 4 (citing Sec’y Mot. Ex. 3 ¶9).⁹

On August 22, 2022, Van Wey returned to the mine and determined that Grimes Rock had not yet abated Citation No. 9619114. Sec’y Mot. 4 (citing Sec’y Mot. Ex. 3 ¶¶10 and 10(a), Ex. 4 p. 12). Grimes Rock did not ask for an extension of the abatement time. Sec’y Mot. 4 (citing Sec’y Mot. Ex. 3 ¶10(a)). Van Wey did not extend the abatement time. Sec’y Mot. 4 (citing Sec’y Mot. Ex. 3 ¶10(a)).¹⁰ At 7:00 a.m. on August 22, Van Wey served 104(b) Order No.

⁷ Grimes Rock, in its opposition, disputes the validity of Judge Miller’s Enforcement Order. As discussed below, the Commission affirmed Judge Miller’s Enforcement Order and the Ninth Circuit dismissed Grimes Rock’s appeal in the Saldivar TR Case for lack of jurisdiction. Accordingly, the validity of the Enforcement Order is not at issue in this matter.

⁸ Grimes Rock, in its opposition, disputes that its safety coordinator confirmed to the investigator that it had not paid Saldivar the \$12,533.94. Grimes Opp’n 2-3; Grimes Rock Objections to Petitioner’s Purported Evidence ¶2(C). However, the Secretary’s motion and the investigator’s declaration it relies upon do not state that the employee confirmed that payment had not been made. Rather, the Secretary’s motion makes no mention of the employee in the statement of undisputed facts, and the investigator’s declaration states only that the investigator met with the employee and served Citation No. 9619114 upon the same employee after the *investigator* confirmed payment had not been made.

⁹ Grimes Rock, in its opposition, argues that the abatement time was unreasonable and arbitrarily set because the Enforcement Order did not set a due date. Grimes Opp’n 3. However, Grimes Rock’s argument is legal in nature, and does not dispute that Van Wey set an abatement time. The lack of a due date on the Enforcement Order is addressed below.

¹⁰ While the Secretary framed this fact as “Van Wey determined that the abatement time should not be extended[,]” Sec’y Mot. 4, which Grimes Rock disputed, Grimes Opp’n 3, I need only take from it the fact that Van Wey did not extend the abatement time, which is not an opinion as Grimes Rock suggests in its opposition.

9619115 on Grimes Rock, which covered the entire mine site. Sec’y Mot. 4 (citing Sec’y Mot. Ex. 3 ¶10(b)).

The mine continued to operate after Order No. 9619115 was issued. Sec’y Mot. 4 (citing Sec’y Mot. Ex. 3 ¶10(b), Ex. 4 p. 14). After Order No. 9619115 was issued, Vic Lester, the safety coordinator at the mine, stated to Van Wey that “we are not shutting down” and “I just called the boss and we’re not shutting down.” Sec’y Mot. 5 (citing Sec’y Mot. Ex. 3 ¶ 10(c)).

At 8:07 a.m. on August 22, 2022, Van Wey issued Citation No. 9619116 for working in the face of Order No. 9619115. Sec’y Mot. 4 (citing Sec’y Mot. Ex. 3 ¶10(d)). After Citation No. 9619116 was issued, Grimes Rock paid Saldivar \$12,533.94, less taxes and standard deductions. Sec’y Mot. 5 (citing Sec’y Mot. Ex. 4 pp. 17-18).

On August 30, 2022, the Commission issued an order denying Grimes Rock’s August 17, 2022, motion to stay Judge Miller’s Enforcement Order. *Sec’y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 725 (Aug. 2022).

The Secretary proposed specially assessed penalties of \$1,264.00 for Citation No. 9619114 and \$1,485.00 for Citation No. 9619116. Sec’y Mot. 5 (citing Exhibit A in the Petitions for the Assessment of Civil Penalty in docket numbers WEST 2022-0015 and WEST 2022-0016).

In 2022, Grimes Rock reported 93,597 working hours and an average of 32 employees.¹¹ Sec’y Mot. 5 (citing MSHA’s Mine Data Retrieval System). The Secretary provided a copy of the Assessed Violation History. Sec’y Mot. 5 (citing Sec’y Mot. Ex. 5).¹²

¹¹ Grimes argues that the information on hours worked and average number of employees is irrelevant, that any probative value of that information will be substantially outweighed by unfair prejudice and the confusing of issues, and that the information is based on inadmissible hearsay. Grimes Opp’n 3. I disagree. First, the information is clearly relevant given that it goes directly to the size of the operator, i.e., one of the factors I must consider when assessing a penalty. Second, the court routinely takes notice of information found on MSHA’s Mine Data Retrieval System and the information presented by the Secretary matches that which court found in this case. There is no risk of confusion and Grimes Rock will not be prejudiced. Third, and finally, although the Commission is guided by the Federal Rules of Evidence, it is not bound by them. Like the Assessed Violation History Report discussed below, the information regarding the size of the operator is routinely offered by the Secretary and accepted by the court.

¹² Grimes Rock makes essentially the same arguments about the Assessed Violation History Report as it did regarding the information about the size of the operator. Information regarding the history of violations, like the information regarding the size of the operator, must be considered by the court when assessing a penalty, will not prejudice Grimes Rock, and is routinely offered by the Secretary and accepted by the court.

On November 28, 2023, the Commission issued a decision in the Saldivar TR Case in which a majority, among other things, affirmed Judge Miller's Enforcement Order. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 45 FMSHRC 947 (Nov. 2023). On December 8, 2023, Grimes Rock filed a motion for reconsideration of the Commission's decision or, in the alternative, a motion to stay all proceedings, including the instant proceeding. On December 18, 2023, the Commission denied Grimes Rock's motions. Unpublished Order (December 18, 2023).

On December 26, 2023, Grimes Rock appealed the Commission's decision in the Saldivar TR Case to the Ninth Circuit Court of Appeals. On May 23, 2024, the Ninth Circuit dismissed the appeal for lack of jurisdiction. *Grimes Rock, Inc. v. FMSHRC and Sec'y of Labor*, No. 23-4418 (9th Cir. May 23, 2024).¹³

III. SUMMARY OF THE PARTIES' ARGUMENTS

The parties' submissions and arguments are quite extensive. As a consequence, I felt it necessary to summarize their arguments in detail before analyzing the issues, which makes this order somewhat repetitive and long.

A. The Secretary's Motion for Summary Decision

The Secretary asserts that this case presents no genuine issues of material fact and that she is entitled to summary decision as a matter of law on the two citations and order at issue. Sec'y Mot. 2.

Regarding Citation No. 9619114, the Secretary asserts that Grimes Rock violated an order promulgated under the Act when it failed to comply with Judge Miller's Order Approving Settlement and subsequent Enforcement Order. Sec'y Mot. 2. Section 104(a) of the Act requires the Secretary to issue a citation if an operator violates any order promulgated pursuant to the Act. Sec'y Mot. 6. The Secretary cites *C.R. Meyer & Sons Co., Inc.*, 38 FMSHRC 2950 (Dec. 2016) (ALJ) and *WV Rebel Coal Co.*, 7 FMSHRC 2234 (Dec. 1985) (ALJ) and argues that the Order Approving Settlement and subsequent Enforcement Order in the Saldivar TR Case were promulgated pursuant to the Act and issued under section 105(c)(2), and therefore may be enforced by issuing a 104(a) citation. Sec'y Mot. 6. Judge Miller's Enforcement Order required Grimes Rock to pay \$12,533.94 in overdue and missing temporary reinstatement payments to the miner. Sec'y Mot. 4. On August 16, 2022, a MSHA investigator traveled to the mine and confirmed Grimes Rock had not made the payments due under the Enforcement Order. Sec'y Mot. 4, 9. In response, the investigator issued Citation No. 9619114 for failing to comply with the order. Sec'y Mot. 9. The Secretary argues that because Grimes Rock did not comply with Judge Miller's order, the fact of violation is proven. Sec'y Mot. 9.

Further, the Secretary asserts that Grimes Rock acted with reckless disregard when it deliberately chose to ignore Judge Miller's order and "failed to exhibit the slightest degree of care." Sec'y Mot. 10, 16. A full two months elapsed after Judge Miller issued the Enforcement

¹³ The Ninth Circuit's order was issued after the parties had filed their motions.

Order before the MSHA investigator traveled to the mine to verify compliance, which suggests “Grimes would never have paid the miner were it not for the Secretary’s intervention.” Sec’y Mot. 10. Grimes Rock did not seek a stay of Judge Miller’s order until after Citation No. 9619114 was issued and, instead, simply chose to not comply with the order. Sec’y Mot. 10.

Regarding Order No. 9619115, the Secretary asserts that the order was validly issued and should be affirmed because Grimes Rock failed to abate the condition at issue in Citation No. 9619114. Under section 104(b) of the Act, if the Secretary finds that a violation described in a section 104(a) citation has not been abated within the time set for abatement, and the Secretary determines that the abatement time should not be extended, the Secretary shall issue an order immediately withdrawing miners and prohibiting all non-exempt persons from entering the area affected until the Secretary determines the citation has been abated. Sec’y Mot. 6. The Secretary cites *WV Rebel Coal Co.*, 7 FMSHRC 2234 (Dec. 1985) (ALJ) and argues a 104(b) order is proper where the violation described in the underlying section 104(a) citation is the failure to comply with an order enforcing temporary reinstatement. Sec’y Mot. 7, 11. For a 104(b) order to be validly issued, the Secretary must prove by a preponderance of the evidence that the violation described in the underlying 104(a) citation existed at the time the 104(b) withdrawal order was issued. Sec’y Mot. 10-11. Here, when the investigator served Citation No. 9619114 on August 16, 2022, he set the abatement time for 4:00 p.m. the following day, August 17. When the investigator traveled to the mine on August 22, he determined that Grimes Rock still had not abated the condition cited in Citation No. 9619114 and, accordingly, issued 104(b) Order No. 9619115 to Grimes Rock. Sec’y Mot. 11. The Secretary asserts that she properly issued the order and is entitled to judgment as a matter of law. Sec’y Mot. 11.

With regard to Citation No. 9619116, the Secretary argues that Grimes Rock worked in the face of Order No. 9619115, which required that Grimes Rock withdraw all miners from the entire mine site. Sec’y Mot. 11-12. A 104(a) citation may be issued for failure to comply with a valid 104(b) order. Sec’y Mot. 6 (citing *BC Quarries, LLC*, 44 FMSHRC 267 (Apr. 2022) (ALJ)). Here, the MSHA investigator who issued the 104(b) order observed that Grimes Rock continued operations at the mine, and therefore worked in the face of the validly issued 104(b) order. Sec’y Mot. 11-12. As a result, the investigator issued Citation No. 9619116 under section 104(a) for violating an order promulgated under the Act. Sec’y Mot. 6, 12.

The Secretary asserts that Grimes Rock exhibited reckless disregard when it intentionally worked in the face of Order No. 9619115. Sec’y Mot. 12. An operator acts with reckless disregard when it intentionally causes the violative conduct. Sec’y Mot. 12 (citing *Hidden Splendor Res., Inc.*, 34 FMSHRC 3310 (Dec. 2012) (ALJ)). Here, Grimes Rock made no attempt to comply with the 104(b) order and had already disregarded Judge Miller’s Enforcement Order and Citation No. 9619114, which was issued for failing to comply with the Enforcement Order. Grimes Rock’s negligence with respect to Citation No. 9619116 was “severe.” Sec’y Mot. 12.

The Secretary maintains that the purpose of the Act’s temporary reinstatement provision is twofold: to provide a miner with income until the discrimination case on the merits is resolved and to prevent a chilling effect on other miners’ willingness to exercise their rights under the Act. Sec’y Mot. 13. Grimes Rock cannot elect to follow or not follow judicial orders based on its

own determination whether an order is valid. Sec’y Mot. 13-14. Grimes Rock’s failure to comply with Judge Miller’s Enforcement Order, as well as the citations and orders at issue, undermines both the power of the Commission to require operators to comply with the Act and the Secretary’s power to protect miners and enforce the Act. Sec’y Mot. 13-14.

The Secretary argues that the recommended penalties for Citation Nos. 9619114 and 9619116, both of which involve a proposed special assessment, are appropriate. Sec’y Mot. 14. She states that in the fifteen months preceding the first citation Grimes Rock had 19 violations, 7 of which were S&S. Sec’y Mot. 15. She asserts that, although Grimes Rock is a moderately sized operator, its actions have the potential to influence each of its 32 employees who may be aware of Grimes Rock’s failure to pay Saldivar as ordered. Sec’y Mot. 15-16. Further, the Secretary asserts that the reckless disregard designations for both citations should weigh heavily in assessing penalties, and that the penalties should convey that ignoring orders issued pursuant to the Act is “unacceptable, possibly dangerous, and not to be repeated.” Sec’y Mot. 16-17. Furthermore, while the Secretary acknowledges that the citations were not S&S, she asserts that they are nevertheless serious given the potential impact to the rule of law. Sec’y Mot. 17. Grimes Rock has not asserted or otherwise established that the proposed penalties will impact its ability to continue in business. Sec’y Mot. 17. Finally, the Secretary avers that Grimes Rock did not abate the citations in good faith. Sec’y Mot. 17-18. Based on these factors, the Secretary asserts that the proposed special assessments “reflect the dangerous and cavalier attitude Grimes Rock took toward a judicial order . . . and the Secretary’s withdrawal order[.]” Sec’y Mot. 18. The larger than regular penalties will impress upon Grimes Rock that compliance with Mine Act orders is not optional. Sec’y Mot. 18.

B. Grimes Rock’s Opposition to the Secretary’s Motion for Summary Decision

Much of Grimes Rock’s opposition to the Secretary’s motion involves arguments regarding the alleged invalidity of Judge Miller’s Enforcement Order and other issues already litigated in the Saldivar TR Case.¹⁴ For reasons set forth later in this order, I do not describe those arguments in detail.¹⁵ However, other arguments made by Grimes Rock in its opposition

¹⁴ Among other things, Grimes Rock argues that (1) Judge Miller lacked authority to retroactively rewrite the settlement agreement reached by the parties in the Saldivar TR Case and require more money be paid, (2) Saldivar’s incarcerations during the temporary economic reinstatement constituted changed circumstances that were not properly considered by either Judge Miller or the Commission, (3) after-acquired evidence that Saldivar hid convictions on his job application were not properly considered by either Judge Miller or the Commission, (4) and Judge Miller failed to consider certain evidence in the Saldivar TR Case and denied Grimes Rock evidentiary hearings, thereby depriving it of due process.

¹⁵ Grimes Rock also argues in its opposition that the proposed penalties are inappropriate because the Secretary was estopped from taking a position inconsistent with a position taken in the appeal of the Saldivar TR Case to the Ninth Circuit. Grimes Opp’n 24-25. Further, it argued that, if it prevailed in its appeal to the Ninth Circuit, it could not be found to have committed the actions at issue in this case with the requisite negligence. Grimes Opp’n 25-26. However, as

are relevant to the instant proceeding. A summary of those arguments follows.

Grimes Rock makes three primary arguments in support of its contention that the Secretary had no right to threaten to shut down the mine if Grimes Rock did not pay more than was agreed to in the temporary economic settlement agreement. Grimes Opp'n 12. First, Grimes Rock asserts that the Secretary did not issue Citation No. 9619114 in connection with an "inspection or investigation" as is required by the language of section 104(a). Grimes Opp'n 12. Second, it argues that the Secretary admitted that the citations and order at issue do not allege a health or safety violation. Grimes Opp'n 12. Third, Grimes Rock asserts that "the citations were vague as to what amount is owed and did not provide a reasonable time to abate." Grimes Opp'n 12.

With regard to Citation No. 9619114, Grimes Rock argues that the Secretary only provided Grimes Rock with one day to abate the cited condition and that the case relied upon by the Secretary to support the validity of issuing a 104(a) citation for an alleged violation of a judicial order in temporary reinstatement case, i.e., *C.R. Meyer & Sons Co. Inc.*, 38 FMSHRC 2950 (Dec. 2016) (ALJ), is not binding on this court. Grimes Opp'n 26. Moreover, Grimes Rock cites the Commission's decision in *Hopkins County Coal, LLC*, 38 FMSHRC 1317 (June 2016), which is binding, and argues that, unlike the situation in that case where an operator was cited for refusing to provide employee records to an inspector, "there is no hazardous safety risk – immediate or non-immediate" in the case at hand. Grimes Opp'n 26-27.

Grimes Rock also argues that the Secretary must prove that it was negligent in the context of Citation No. 9619114 and asserts that the Secretary cannot prove that Grimes Rock acted with even ordinary negligence. Grimes Opp'n 27. It cites Commissioner Althen's dissent in the Commission's decision in the Saldivar TR Case as evidence that it did not act negligent and asserts that the reasonable thing would have been for the Secretary to stay any payment until the Commission decided the legal issues involved.¹⁶ Grimes Opp'n 27. Further, Grimes Rock asserts that, contrary to the Secretary's statement that it "failed to exhibit the slightest degree or care," the record shows that it has gone to "extraordinary lengths to ensure the novel legal issues Commissioner Althen found 'important' are properly preserved for appellate review" and that it "respected and complied with the ALJ's Orders."¹⁷ Grimes Opp'n 28.

stated above, the Ninth Circuit dismissed the appeal for lack of jurisdiction. Accordingly, I do not address those arguments.

¹⁶ Grimes Rock cited Commissioner Althen's dissent in the Saldivar TR Case throughout both its motion for summary decision and opposition to the Secretary's motion in this matter. However, dissenting opinions are not binding. That is especially true when the dissenting opinion reaches conclusions that contradict the conclusions of the majority in a case that forms the basis of another directly related matter, such as is the case here.

¹⁷ In addition, Grimes Rock asserted that if the Ninth Circuit reversed the Commission's decision in the Saldivar TR Case, then no negligence could be found for violating an invalid order.

With regard to Order No. 9619115, Grimes Rock argues that the order was invalidly issued. Grimes Opp'n 28. Citing the Fifth Circuit's decision in *Allied Products Co. v. FMSHRC*, 666 F. 2d 890 (5th Cir. 1982), it asserts that 104(b) withdrawal orders can only be issued for health and safety violations and argues that Judge Miller's "temporary reinstatement backpay order was not a 'health and safety' violation." Grimes Opp'n 28. It further argues her order was effectively a contempt order which needed to be filed in the district court. Grimes Opp'n 29.

In addition, Grimes Rock argues that the Secretary did not provide a reasonable time to abate. Grimes Opp'n 29. A determination of reasonableness depends on the circumstances. Grimes Opp'n 29 (citing *Nelson Brothers Quarries*, 24 FMSRHC 980 (Nov. 2002) (ALJ)). Here, it was "unreasonable to subject Grimes Rock to a withdrawal order when the Secretary knew the Commission had granted Grimes' petition to review the underlying issue." Grimes Opp'n 29. Instead, the Secretary threatened to close the mine even though she did not have that power because a "safety finding is required for a citation where a withdrawal is involved." Grimes Opp'n 29 (again citing *Allied Products Co.*).

Further, Grimes Rock argues that the Secretary's reliance on *WV Rebel Coal*, 7 FMSHRC 2234 (Dec. 1985) (ALJ) for the proposition that a 104(b) order can be issued where an operator failed to abate a violation of an order reaffirming temporary reinstatement, is misplaced. Grimes Opp'n 29-30. In *WV Rebel Coal* the operator had filed a motion for interlocutory review, which was denied, whereas here the Commission had granted the petition for discretionary review on the precise underlying legal questions. Grimes Opp'n 29-30.

Regarding Citation No. 9619116, Grimes Rock argues that the underlying 104(b) order was invalid and "citations involving withdrawal cannot be issued if non-*safety* related." Grimes Opp'n 30 (emphasis in original). Here, the citation did not allege a health or safety violation. Grimes Opp'n 30. Moreover, the Secretary's statement of the law regarding *BC Quarries LLC*, 44 FMSHRC 267 (Apr. 2022) (ALJ) is overbroad and incorrect as applied to this case, given that in that case the operator worked in the face of "*safety hazards* violations." Grimes Opp'n 30 (emphasis in original). Further, Grimes Rock argues that it did not act with reckless disregard in the context of this citation and, rather, it was the Secretary who acted in such a manner when she threatened to shut down the mine. Grimes Opp'n 30.

With regard to the penalty factors, Grimes Rock argues it was the Secretary who acted with negligence both in compelling Grimes Rock to pay Saldivar and in issuing the 104(b) order under these circumstances. Grimes Opp'n 31. Further, it asserts that the gravity of the citations was de minimus and there will be "zero gravity of harm" to Saldivar if Grimes Rock prevails before the Ninth Circuit. Grimes Opp'n 31. Grimes Rock argues that the good faith abatement factor favors it because, on August 16, 2022, it requested that the Secretary stay payment of funds to Saldivar while the Commission reviewed the Saldivar TR Case. Grimes Opp'n 32. Regarding the penalty factor addressing the size of its business, Grimes Rock argues that any penalty imposed under the circumstances has the potential to influence its current employees in a

Grimes Opp'n 27. However, as previously mentioned, the Ninth Circuit dismissed Grimes Rock's appeal for lack of jurisdiction.

way not intended by Congress, i.e., to “transform temporary reinstatement into a haven for otherwise terminable employees[.]” Grimes Opp’n 32. With regard to its ability to continue in business, Grimes Rock asserts that despite the Secretary’s best efforts to shut down the mine, Grimes Rock will continue its business. Grimes Opp’n 32. Finally, regarding its history of previous violations, Grimes Rock cites *WV Rebel Coal* for the proposition that, given the nature of the violation, that factor is not helpful in determining an appropriate penalty. Grimes Opp’n 32-33.

With regard to the proposed special assessments, Grimes Rock argues that it engaged in no dangerous actions and that it terminated Saldivar because he was a danger to the mine. Grimes Opp’n 33. There is no justification for larger than regularly assessed penalties, and Grimes Rock asserts it is due its overpayment for time that Saldivar was unjustly enriched, and this court should stay issuing a penalty until the Ninth Circuit issues its decision in the Saldivar TR Case. Grimes Opp’n 33. Alternatively, the court should impose a nominal penalty of \$1.00 and that penalty should be subtracted from Grimes Rock’s overpayment to Saldivar. Grimes Opp’n 33. Finally, Grimes Rock argues that the Secretary is attempting to make an example out of it and seeks to penalize Grimes Rock with an amount roughly nine times greater than that imposed by the court in the *C.R. Meyer* case cited by the Secretary. Grimes Opp’n 33-34.

C. Grimes Rock’s Motion for Summary Decision¹⁸

Much of Grimes Rock’s motion for summary decision raises arguments identical those raised in its opposition to the Secretary’s motion for summary decision. Many of those arguments are not relevant to this proceeding, e.g., the alleged invalidity of Judge Miller’s Enforcement Order in the Saldivar TR Case and the Commission’s decision upholding that order. The remaining arguments relevant to this proceeding are summarized below.¹⁹

Grimes Rock makes the same three primary arguments in support of its contention that the Secretary had no right to threaten to shut down the mine if Grimes Rock did not pay more than was agreed to in the temporary economic settlement agreement. Grimes Mot. 13. First, Grimes Rock asserts that the Secretary did not issue Citation No. 9619114 in connection with an

¹⁸ Of the arguments and issues raised in Grimes Rock’s motion for summary decision, largely only section III and H on pages 7 and 8, and section V on pages 13 and 14 address issues that are presently before me.

¹⁹ Following the submission of Grimes Rock’s motion for summary decision the Secretary filed a motion to strike certain exhibits included in Grimes Rock’s motion. Specifically, the Secretary sought to strike exhibits 8, 16, and 20 because those documents allegedly did not comply with Commission Procedural Rule 5(e), which requires parties, when submitting information to the Commission, to take certain steps to “protect information that tends to identify certain individuals or constitute an unwarranted intrusion of personal privacy.” In response, Grimes Rock withdrew the originally filed unredacted exhibits 8, 16 and 20 and filed redacted versions of those exhibits. The court has removed the unredacted versions of the exhibits from the official record.

“inspection or investigation,” as is required by the language of section 104(a). Grimes Mot. 13. Second, it argues that the Secretary admitted that the citations and order at issue do not allege a health or safety violation. Grimes Mot. 13. Third, Grimes Rock states that “the citations were vague as to what amount is owed and did not provide a reasonable time to abate.” Grimes Mot. 14.

D. The Secretary’s Opposition to Grimes Rock’s Motion for Summary Decision

The Secretary, in her opposition to Grimes Rock’s motion for summary decision, argues that the only issue in this case is whether she can establish the violations alleged in the citations and order by a preponderance of the evidence. Sec’y Opp’n 1. Grimes Rock’s arguments regarding the Saldivar TR Case have already been decided by the Commission and are irrelevant to this case. Sec’y Opp’n 1. Further, Grimes Rock does not identify any disputed material fact and asserts meritless legal arguments. Sec’y Opp’n 1. Furthermore, Grimes Rock’s motion does not establish that the Secretary’s citations and order are invalid as a matter of law and, accordingly, summary decision should be granted in favor of the Secretary. Sec’y Opp’n 1-2.

The Secretary takes issue with several of the facts Grimes Rock asserts as uncontroverted.²⁰ Specifically, she maintains that Grimes Rock’s assertion that the citations and order were not issued as part of an inspection or investigation and did not allege any health or safety violations are legal conclusions not facts. Sec’y Opp’n 2. Second, the Secretary asserts that several of the allegedly uncontroverted facts are immaterial to this case. Sec’y Resp. 2-3.²¹

The Secretary argues that Grimes Rock’s assertion that Judge Miller lacked authority to order payment of past due wages is wrong both because the Commission already determined that Judge Miller’s order was valid and, even if the order had not been valid, the Secretary has authority to enforce unstayed, appealed orders regardless of whether those same orders are ultimately found to be valid. Sec’y Opp’n 3-4 (citing *Coleman v. Tollefson*, 575 U.S. 532 (2015) and other cases).

Further, the Secretary asserts that, contrary to Grimes Rock’s opinion, the Act’s language does not limit the issuance of 104(a) citations to only alleged health and safety violations. Sec’y Opp’n 4. Rather, the Secretary can issue 104(a) citations for violations of any mandatory health or safety standard, rule, order or regulation promulgated pursuant to the Act, including violations of 105(c) temporary reinstatement orders, which encourage miner participation in health and safety enforcement. Sec’y Opp’n 4 (citing *C.R. Meyer & Sons Company*, 38 FMSHRC 2950 (Dec. 2016) (ALJ)).

The Secretary asserts that, despite Grimes Rock’s arguments to contrary, Citation No. 9619114 was validly issued following an investigation/inspection and, accordingly, the

²⁰ In addition to its motion for summary decision, Grimes Rock filed a document entitled Separate Statement of Uncontroverted Facts in Support of Motion for Summary Decision.

²¹ My statement of undisputed materials facts can be found above.

subsequently issued order was also validly issued. Sec’y Opp’n 5. The activity code listed on the citation indicates that it was issued as part of a “special investigation.” Sec’y Opp’n 5. MHTA conducts several types of inspections and investigations, including special investigations involving section 105(c) discrimination complaints. Sec’y Opp’n 5. Here, Citation No. 9619114 was issued as a result of an inspection and the subsequent order and citation were issued as a result of the investigator’s obligation to verify abatement of the original citation. Sec’y Opp’n 5.

The Secretary asserts that the citations and order at issue are not impermissibly vague, as alleged by Grimes Rock. Sec’y Opp’n 5. Rather, the citations and order are clear: “Grimes must comply with Judge Miller’s order.” Sec’y Opp’n 6. Moreover, Citation No. 9619114 clearly states an amount owed, which is the same total amount Judge Miller ordered Grimes Rock to pay in her Enforcement Order, i.e., \$12,533.94. Sec’y Opp’n 5-6. Further, Order No. 9619115 also references Grimes Rock’s duty to pay. Sec’y Opp’n 6. Grimes Rock ultimately paid the amount due, which suggests it understood what was due. Sec’y Opp’n 6. Even if Grimes Rock misunderstood, that does not excuse its failure to comply with Judge Miller’s order. Sec’y Opp’n 6.

Although Grimes Rock asserts that the citations and order did not set a reasonable time to abate the violations, the Secretary disagrees. Sec’y Opp’n 6. A cited condition must be capable of being abated within the time set, and the time set does not consider the convenience of the operator. Sec’y Opp’n 6. Almost two months elapsed after Judge Miller issued her Enforcement Order before Citation 9619114 was served on Grimes Rock at 12:50 p.m. on August 16. Sec’y Opp’n 7. The citation set an abatement time the following day at 4:00 p.m. Sec’y Opp’n 7. Grimes Rock still had not abated the condition as of August 22, and failed to explain why the abatement time was unreasonable. Sec’y Opp’n 7. Moreover, although Grimes Rock can contest the reasonableness of the abatement time set for Citation No. 9619114, it was required to “immediately” comply with Order No. 9619115, i.e., the subsequently issued 104(b) order. Sec’y Opp’n 7. Further, the abatement time set for Citation No. 9619116, i.e., 45 minutes, must have been reasonable because Grimes Rock was able to issue a check to Saldivar within that time. Sec’y Opp’n 7.

E. Reply Briefs

Following the submission of the parties’ oppositions to the respective cross motions for summary decision, Grimes Rock filed a reply brief in which it made an estoppel argument regarding a position taken by the Secretary in the Saldivar TR Case that was, at the time of filing of the reply brief, pending before the Ninth Circuit Court of Appeals. In addition to the estoppel argument, Grimes Rock’s reply brief also sought to address statements in the Secretary’s opposition regarding Grimes Rock’s purported statement of undisputed material facts. The Secretary, in turn, filed a motion to strike Grimes Rock’s reply brief, in which she argued that the Commission’s procedural rules do not contemplate reply briefs and that a party should seek permission to file such. Grimes Rock filed an opposition to the Secretary’s motion to strike in which it requested that its reply brief be accepted by the court.

Subsequently, the Secretary filed a motion for leave to file a reply brief in response to Grimes Rock's opposition of the Secretary's motion for summary decision, as well as the reply brief itself. In her reply brief the Secretary addressed an argument made by Grimes Rock in its opposition that alluded to a potential claim for attorney fees under the Equal Access to Justice Act.

Although Grimes Rock would have been better served to request leave of the court to file its reply brief, I have accepted the brief and included it in the record. However, because the Ninth Circuit recently dismissed the Saldivar TR Case for lack of jurisdiction, Grimes Rock's estoppel argument is moot. Moreover, the other points raised in Grimes Rock's reply brief are addressed above in section II and below in section IV(A) of this order. Further, I decline to address any arguments regarding a potential EAJA action or defenses to such in this proceeding. Those arguments and defenses must be made in a separate a formal proceeding initiated via an application filed pursuant to 29 C.F.R. Part 2704. Nevertheless, the Secretary's Motion for Leave to File Reply to Grimes' Opposition to the Secretary's Motion for Summary Decision is **GRANTED** and I have accepted the reply brief and included it in the record.

IV. DISCUSSION

A. Preliminary Matter

As mentioned previously, much of Grimes Rock's motion for summary decision, its opposition to the Secretary's motion for summary decision, and other filings in this matter include arguments regarding the alleged invalidity of Judge Miller's June 17, 2022 Enforcement Order and the Commission's decision upholding that order. In my February 21, 2023, Order Denying Grimes Rock's Request for Stay I made clear that when the Commission issued its decision in the Saldivar TR Case, its findings became the law of the Commission on the issues decided. Although Grimes may not agree with the Commission's decision to uphold Judge Miller's Enforcement Order, the decision is nevertheless binding on the parties, as well as this court, "unless and until stayed or overturned by a reviewing court of appeals." *Maben Energy Corporation*, 3 FMSHRC 2776, 2777 (Dec. 1981) (citing 30 U.S.C. § 816(c)). Nothing has changed since I issued my order denying the request for stay, aside from the fact that the Commission's decision in the Saldivar TR Case is no longer before the Ninth Circuit. Accordingly, the Commission's decision in the Saldivar TR Case continues to be the law of the Commission. Unlike the Commissioners and Courts of Appeal, I do not sit in a position of review regarding already decided questions of law and fact. Consequently, I have not considered Grimes Rock's proposed undisputed facts that are related to, or arguments premised upon, the alleged invalidity of Judge Miller's Enforcement Order and/or the Commission's decision affirming that order and making other findings. I address the remaining arguments below.

B. Alleged Violations

i. Citation No. 9619114

On August 15, 2022, MSHA Investigator Troy Van Wey issued Citation No. 9619114 under section 104(a) of the Mine Act for an alleged violation of section 105(c) of the Mine Act.

The citation alleges as follows:

The mine operator has refused to comply with an order promulgated pursuant to the Mine Act. FMSHRC ALJ Miller ordered Grimes to temporarily reinstate miner Alvaro Saldivar at his previous rate of pay. The Commission affirmed this order. ALJ Miller approved a temporary economic reinstatement agreement. Grimes did not seek or obtain a stay of the temporary reinstatement order. On June 17, 2022, ALJ Miller issued an order granting the Secretary's motion to enforce the court-ordered settlement agreement. The ALJ ordered Grimes to pay Saldivar the economic reinstatement for the period from May 17, 2022 through June 17, 2022, which Grimes had not paid at all. The ALJ also ordered Grimes to pay the full amount owed for November 8, 2021 through March 28, 2022, which Grimes had only paid a portion of. In total, the ALJ ordered Grimes to pay Saldivar \$12,533.94. Grimes did not seek or obtain a stay of this order. Grimes has not made the reinstatement payments as ordered. This failure to comply with an order promulgated pursuant to the Mine Act is a violation of section 104(a) of the Act.

Investigator Van Wey determined that the alleged violation presented no likelihood of an injury or illness, was not S&S, and one person was affected. He further determined that the alleged violation was a result of Grimes Rock's reckless disregard. The Secretary proposed a specially assessed civil penalty in the amount of \$1,264.00 for the alleged violation.

Grimes Rock raises three issues I address before moving to an evaluation of whether a violation existed.

First, Grimes Rock argues that the citation is invalid because it was not issued during an "inspection" or "investigation," as required by section 104(a) of the Act.²² I disagree. MSHA conducts several types of inspections and investigations. The type of inspection or investigation is denoted by a code in Section 19 of the "Mine Citation/Order" form, i.e., MSHA Form 7000-3. Section 19 of the completed form for Citation No. 9619114 indicates the type of action was an "E05" event. The Secretary, in her response to Grimes Rock's motion for summary decision,

²² Section 104(a) of the Act reads, in pertinent part, as follows:

If, upon *inspection or investigation*, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator.

30 U.S.C. § 814(a) (emphasis added).

explained that “E05” is the “‘special investigation’ activity code associated with section 105(c) enforcement activity.” Sec’y Opp’n 5. Here, the citation was issued by an authorized representative of the Secretary, i.e., special Investigator Van Wey, as a result of his investigation to confirm compliance with Judge Miller’s Enforcement Order requiring Grimes Rock to pay an amount due in the Saldivar TR Case. Accordingly, I reject Grimes Rock’s argument and find that the citation was issued in connection with an inspection or investigation.

Second, Grimes Rock argues that the citation is invalid because it does not allege a “health” or “safety” violation, as is required by section 104(a). I disagree and find that, in making its argument, Grimes Rock misinterprets the language of section 104(a). Section 104(a) grants the Secretary authority to issue a citation for a violation of the “Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act.” 30 U.S.C. § 814(a). In *C.R. Meyer & Sons Co.*, 38 FMSHRC 2950 (Dec. 2016) (ALJ) Judge Miller found that because a temporary reinstatement order is an *order* promulgated pursuant to the Act, section 104(a) “clearly authorizes the Secretary to issue a citation” for a violation of such.²³ Although I am not bound by her decision in that matter, I agree with her interpretation and find that section 104(a) authorizes the Secretary to issue a citation for a violation of a temporary reinstatement order, which is an order promulgated pursuant to the Act, and that such citation need not involve an alleged “health” or “safety” violation.

Third, Grimes Rock argues that the citation is vague on its face as to what amount was owed. I disagree. Judge Miller’s Enforcement Order required Grimes Rock to pay two separate amounts, i.e., \$9,723.08 and \$2,810.86, and explained how those amounts were calculated. The sum total of those amounts is \$12,533.94. The citation body clearly indicates that Judge Miller ordered Grimes Rock to pay the same amount and asserts that Grimes Rock did not make the payment as ordered. Accordingly, I find that the citation is not vague as to the amount owed.

a. Fact of Violation

In order for the Secretary to prove a 104(a) violation of section 105(c) in this matter, the undisputed material facts must establish that Grimes Rock failed to comply with an order promulgated pursuant to the Mine Act. The body of the citation alleges that Grimes Rock failed to comply with Judge Miller’s orders when it did not pay Saldivar \$12,533.94 in past due economic reinstatement payments. The undisputed material facts establish that Grimes Rock had not paid that amount when Citation No. 9619114 was issued on August 15 and served on August 16. However, that is not the end of the analysis.

²³ Judge Miller’s decision in *C.R. Meyer & Sons Co.* explains why the “mandatory health or safety” language in section 104(a) applies to the term “standard” and is not a “series qualifier” for the terms listed after, i.e., “rule, order, or regulation[.]” 38 FMSHRC 2950, 2953-2954 (“The series-qualifier canon should not be applied where contextual cues point to another meaning.” Because “‘mandatory health or safety standard’ is a defined term referring to a specific set of regulations[,] . . . it is most likely that Congress intended to invoke a term of art in Section 104(a) and did not intend ‘mandatory health or safety’ to apply to all of the terms in that provision.”)

Grimes Rock argues that it did not violate the Enforcement Order because the order did not set a due date for payment. Although it is true the Enforcement Order did not include an explicit due date for compliance, I find that Grimes Rock nevertheless failed to comply with the order. Judge Miller, in her May 18, 2021, Decision and Order of Reinstatement, ordered Grimes Rock to “immediately upon receipt of receipt of this decision, reinstate Mr. Saldivar to his former position at the mine effective as of the date of this decision[.]” and stated that “[t]he employment of Mr. Saldivar shall be at the same rate of pay and with all benefits, including any raises, that he received prior to discharge, pending a final Commission order on the complaint of discrimination.” Judge Miller’s requirement that Saldivar be “immediately” reinstated was not a choice on her part. Rather, the Mine Act requires that where a discrimination complaint is not frivolously brought the Commission “shall order the *immediate* reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2). When the parties submitted their Settlement Agreement and Joint Motion for Temporary Economic Reinstatement in the Saldivar TR Case and Judge Miller issued her Order Approving Settlement, nothing changed regarding the need for Saldivar’s immediate temporary reinstatement aside from the fact that the reinstatement became economic in nature, i.e., Saldivar was to be paid as if he was working but was not required to report to his job. Similarly, nothing changed regarding the immediate need for compliance when Judge Miller issued her Enforcement Order, in which she ordered Grimes Rock “to pay Saldivar the full wages as ordered in the [original May 18, Decision and Order of Reinstatement.]” The need for immediate compliance, whether in the form of temporary *actual* reinstatement or temporary *economic* reinstatement, always existed.²⁴ Grimes Rock ignored that instruction and, in doing so, violated an order promulgated pursuant to the Act.²⁵

b. Gravity

The issuing investigator determined that there was no likelihood of an injury or illness and that, if an injury or illness were to occur, it could reasonably be expected to result in no lost workdays. Moreover, he found that only one individual was affected. However, the Secretary

²⁴ The Commission, in its November 28, 2023, decision in in the Saldivar TR Case, noted that in lieu of a temporary reinstatement order the parties may reach a temporary economic reinstatement agreement ““that is consistent with the purposes of section 105(c).” 45 FMSHRC at 957 (quoting *Lehigh Cement*, 42 FMSHRC 467, 469 (July 2020) (emphasis added by Commission in *Saldivar*)). The Commission acknowledged that a purpose of section 105(c)’s temporary reinstatement provision is to, during the temporary reinstatement period, put the miner in no worse a position than they were in when working for the operator, and that “economic reinstatement agreement[s] must work in tandem with any existing order of temporary reinstatement and cannot deprive a miner of the full wages owed under and intended by the Mine Act’s temporary reinstatement provision.” *Id.* at 957-58.

²⁵ As a practical matter, common sense dictates that any payment ordered for *past due* wages is, by nature, overdue and should be paid immediately. However, I am mindful of the fact that there may be situations where immediate compliance in the form of payment is difficult. That is not the case here. Here, Grimes Rock did not pay Saldivar until August 22, 2022, i.e., more than two months after Judge Miller issued the Enforcement Order.

argues that “[a]lthough the citations here are not S&S, that does not mean the violation was not serious. Indeed, the potential harm to the rule of law is quite significant.” Sec’y Mot. 17. I reject the Secretary’s attempt to analogize the potential for physical harm to miners that generally forms the basis for an evaluation of gravity,²⁶ with the potential for harm to the rule of law. Failure to follow Judge Miller’s order did not put any miners at risk of physical harm in the form of injury or illness. The one miner directly affected, Saldivar, had been temporarily economically reinstated up until the date Judge Miller issued the Enforcement Order and, therefore, was not at the mine site and was not at risk of sustaining any injury or illness as a result of the violation at the time the citation was issued roughly two months later. The gravity of the violation was exceptionally low, as accurately reflected by the issuing investigator’s determination that there was no likelihood of an injury or illness, and that any potential injury would not result in lost workdays.

c. Negligence

The Secretary’s regulations define “reckless disregard” as “conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3. However, Commission judges are not bound by the Secretary’s definitions of negligence and, rather, may evaluate negligence “from the starting point of a traditional negligence analysis[.]” *Brody Mining LLC*, 37 FMSHRC 1687, 1701-1702 (Aug. 2015). In determining whether an operator has met the high duty of care required by the Act, the judge “consider[s] what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Id.* at 1702.

With regard to Citation No. 9619114, I find that Grimes Rock’s negligence was quite high. As discussed above in regard to Grimes Rock’s argument that there was no due date on the Enforcement Order, the need for immediacy in complying with the order to reinstate Saldivar pending a final Commission order on the complaint of discrimination was clear. When the parties bargained for Saldivar’s reinstatement to take the form of “economic reinstatement,” nothing changed with regard to the need for immediacy. Nevertheless, Grimes Rock failed to make payment prior to service of Citation No. 9619114 on August 16, 2022, i.e., almost two months after Judge Miller issued the Enforcement Order. A reasonably prudent person familiar with the mining industry and need for immediacy in complying with an order of temporary actual reinstatement or temporary economic reinstatement certainly would not have waited two months to pay past due wages. Accordingly, I find that Grimes Rock exhibited very high negligence in connection with Citation No. 9619114.

²⁶ The Commission has held that it has “consistently considered gravity holistically, considering ‘factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected.’” *The American Coal Co.*, 39 FMSHRC 8, 20 (Jan. 2017) (citing *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016)).

ii. Order No. 9619115

On August 21, 2022, MSHA Investigator Van Wey issued Order No. 9619115 under section 104(b) of the Mine Act for an alleged violation of section 105(c) of the Mine Act. The citation alleges as follows:

The condition described in citation 9619114 was not corrected. Grimes Rock Inc. has not complied with the order promulgated pursuant to the Mine Act. Grimes Rock has not paid the amount owed in temporary economic reinstatement as required by the ALJ's temporary reinstatement order and order to enforce temporary reinstatement.

Section 104(b)²⁷ of the Act authorizes the Secretary to issue a withdrawal order when an operator fails to totally abate the violative condition described in a 104(a) citation and the inspector determines that the time set for abatement in the underlying 104(a) citation should not be extended.²⁸ 30 U.S.C. § 814(b). The Act requires the inspector to determine the extent of the area affected by the underlying violation and then issue an order compelling the operator to immediately withdraw all persons, except those authorized under the statute, from the affected area until the underlying violation is abated. *Id.* The Secretary “bears the burden of proving that the violation has not been abated within the time period originally fixed or as subsequently extended[,]” and “establishes a prima facie case . . . by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued.” *Hibbing Taconite Co.*, 38 FMHSRC 393, 397 (citing *Mid-Continent Res., Inc.*, 11 FMSHRC 505, 509 (Apr. 1989)). An “operator may challenge the reasonableness of the time set for abatement or the Secretary’s failure to extend

²⁷ Section 104(b) reads, in pertinent part, as follows:

If . . . an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

²⁸ Under section 104(a) the inspector, in the citation, must “describe with particularity the nature of the violation” and “fix a reasonable time for abatement of the violation.” 30 U.S.C. § 814(a).

that time.” *Id.* (citing *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (Nov. 1989)). In reviewing a challenge to the reasonableness of the time set for abatement or the failure to extend that time, the Commission reviews the inspector’s decision under an “abuse of discretion” standard. *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996).

Here, the undisputed material facts establish that when Investigator Van Wey served Citation No. 9619114 on Grimes Rock on April 16, 2022, he set an abatement time of 4:00 p.m. the following day, April 17, 2022. The undisputed material facts further establish that Grimes Rock had not abated the condition described in Citation No. 9619114, i.e., failure to follow Judge Miller’s order and make payment of \$12,533.94 to Saldivar, at the time Van Wey issued 104(b) Order No. 9619115 at 7:00 a.m. on August 22, 2022, i.e., several days after the time for abatement had passed. Accordingly, I find that the Secretary has proven a prima facie case regarding this violation.

Although Grimes Rock argues the Secretary did not provide a reasonable time to abate the underlying 104(a) citation, I disagree.²⁹ I find that time set for abatement was reasonable and Van Wey did not abuse his discretion. The process for abating the citation was not complex. Grimes Rock needed only to pay the amount due Saldivar via direct deposit or check – something which should take only a matter of minutes, or at most hours. However, Van Wey, in an exercise of his discretion, set the abatement time for 4:00 p.m. the following day. In doing so, he afforded Grimes Rock approximately an entire workday to make the payment. Grimes Rock provided no reason for why it could not comply and at no point requested an extension to the abatement time.³⁰ It is important to recognize that even before Citation No. 9619114 was issued, Grimes Rock had *almost two months* to comply with Judge Miller’s Enforcement Order following its issuance. However, Grimes Rock chose not to comply within that window and then again chose not to comply within the abatement window set by Investigator Van Wey. Even after the time for abatement had passed, Grimes Rock still failed to comply and only eventually did so after Van Wey issued the subject 104(b) order and a subsequent 104(a) citation for working in the face of that order.

Grimes Rock argues that, as a general matter, 104(b) withdrawal orders “can only be issued for violation of health and safety violations” and cites the Fifth Circuit’s decision in *Allied*

²⁹ Grimes Rock framed its argument as a challenge to the abatement time for the 104(b) order. However, as noted in the Secretary’s opposition, compliance with a 104(b) order must be “immediate.” 30 U.S.C. § 814(b). To the extent Grimes Rock intended to challenge the abatement time set in the underlying 104(a) citation, I have addressed that argument.

³⁰ Although Grimes Rock argues it was unreasonable for the Secretary to pursue enforcement actions in light of the fact that the Commission had granted discretionary review on multiple issues, I find that argument to be without merit. At no time did a court, the Commission, or the Secretary ever agree to stay enforcement of Judge Miller’s order. Rather, the order remained in effect and Grimes Rock was required to comply. However, Grimes Rock failed to comply both prior to the issuance of Citation No. 9619114 and after the reasonable abatement time had passed.

Products Co. v. FMSHRC, 666 F.2d 890 (5th Cir. 1982). However, I find that Grimes Rock’s reliance on *Allied Products Co.* is misplaced. In *Allied Products Co.* the court was not concerned with a 104(b) withdrawal order. Rather, in a footnote, the court drew a distinction between citations issued under section 104(a), which are not withdrawal orders and do not require a “safety” finding, and withdrawal orders issued under section 104(d)(1), which do require a “safety finding.”³¹ Here, the withdrawal order was issued under section 104(b), the language of which does not include any required “safety finding.” Moreover, the language of section 104(b) is quite clear in that 104(b) orders may be issued where a “violation described in a citation issued pursuant to subsection [104](a) has not been totally abated.” 30 U.S.C. § 814(b). As discussed above, Citation No. 9619114 was validly issued under section 104(a) and, accordingly, issuance of a 104(b) order was proper when Van Wey discovered that the condition had not been abated. See *WV Rebel Coal Co.*, 7 FMSHRC 2234 (Dec. 1985) (ALJ).

Finally, in its argument regarding Order No. 9619115, Grimes Rock makes passing mention that Judge Miller’s “temporary reinstatement backpay order was . . . a contempt order, which needed to be filed in the district court.” Grimes Opp’n 28-29. I disagree. It is true that the Commission does not possess contempt power. However, Judge Miller’s Enforcement Order only ordered Grimes Rock to make payments that were past due. That is, the order did not instruct Grimes Rock to make any payments beyond that which Judge Miller determined were required under the Decision and Order of Temporary Reinstatement and subsequent Order Approving Settlement. Nothing about the Enforcement Order was punitive in nature, nor did it set forth any sanction or consequence for Grimes Rock’s failure to make the ordered payments. Accordingly, I find that Judge Miller’s order was not in the nature of a contempt order and, as are result, it was not necessary for the Secretary to file the Motion to Enforce with the district court.³²

For the above reasons, Order No. 9619115 is **AFFIRMED** as issued.

³¹ A representative of the Secretary is authorized to issue a withdrawal order under section 104(d)(1) after first issuing a citation under the same section. Citations can be issued under 104(d)(1) for violations that “significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard” and are “caused by an unwarrantable failure . . . to comply with such mandatory health or safety standards.” 30 U.S.C. § 814(d)(1).

³² In the event Grimes Rock’s argument was intended to assert that Order No. 9619115 was a contempt order, I again disagree. Judge Miller’s analysis of an almost identical issue in *C.R. Meyer & Sons Co., Inc.*, 38 FMSHRC 2950 (Dec. 2016) (ALJ), is persuasive on this point. In *C.R. Meyer* Judge Miller, in finding that a 104(a) citation issued for failing to comply with an order of temporary reinstatement was valid, drew a distinction between situations in which an agency attempts to enforce its own order and cases like the present where the Secretary asks the Commission, a separate agency, to enforce an order. *Id.* at 2954-2955. Judge Miller went on to state that “[t]here is no precedent in the Commission body of cases or the court of appeals that prohibit the Secretary from issuing both a 104(a) citation for a violation of a temporary reinstatement order and simultaneously proceeding in the federal district court to enforce the order.” *Id.* at 2955. The same is true for 104(b) orders.

iii. Citation No. 9619116

On August 22, 2022, MSHA Investigator Van Wey issued Citation No. 9619116 under section 104(a) of the Mine Act for an alleged violation of section 104(b) of the Mine Act. The citation alleges as follows:

The mine operator has continued to conduct work activities at the mine site. MSHA issued a 104(b) order no. 9619115 on 8/22/2022 at 07:00 hrs and work activities have continued in the affected area (the entire mine site) despite the order. Grimes Rock Inc has continued to operate the crushing plant and load-out customer trucks since the issuance of the order.

Investigator Van Wey determined that the alleged violation presented no likelihood of an injury or illness, was not S&S, and affected zero persons. He further determined that the alleged violation was a result of Grimes Rock's reckless disregard. The Secretary proposed a specially assessed civil penalty of in the amount of \$1,485.00 for the alleged violation.

a. Fact of Violation

In order for the Secretary to prove a 104(a) violation of section 104(b), the undisputed material facts must establish that Grimes Rock worked in the face of a validly issued 104(b) withdrawal order. See e.g., *BC Quarries, LLC*, 44 FMSHRC 267 (Apr. 2022) (ALJ). I have already found that the underlying 104(b) withdrawal order was validly issued. Moreover, the undisputed material facts establish that the mine continued to operate after the order was issued and that Grimes Rock's safety coordinator communicated to Investigator Van Wey that the mine would not be shutting down. In doing so, Grimes Rock worked in the face of the validly issued withdrawal order. Accordingly, I find that the undisputed materials facts establish that a violation is proven.³³

b. Gravity

The issuing investigator determined that there was no likelihood of an injury or illness and that, if an injury or illness were to occur, it could reasonably be expected to result in no lost workdays. Moreover, he found that zero persons were affected. The Secretary raised the same argument regarding gravity for both Citation Nos. 9619114 and 9619116. For the same reasons

³³ Grimes Rock, in contesting the validity of Citation No. 9619116, again argues that the underlying 104(b) order that gave rise to this citation was invalid. For reasons discussed above, I reject that argument. Similarly, and also for reasons discussed above, I reject Grimes Rock's apparent argument that a 104(a) citation can only be issued for "working in the face of *safety hazards* violations." Grimes Opp'n 30. Nothing in section 104(a) limits issuance of citations under that section to violations involving safety hazards. As discussed above, 104(a) citations may be issued for violations of orders promulgated under the Act. Here, Citation No. 9619116 was issued for a violation of Order No. 9619115, i.e., an order promulgated under the Act.

discussed above in relation to the gravity of Citation No. 9619114, I find that the gravity of this citation was exceptionally low.

c. Negligence

My negligence findings for Citation No. 9619114 are equally applicable to Citation No. 9619116. Grimes Rock failed to comply with Judge Miller’s order, failed to abate Citation No. 9619114 issued for failing to comply with Judge Miller’s order, and ultimately worked in the face of the withdrawal order issued for failing to abate the underlying 104(a) citation. In addition, although Grimes Rock ultimately paid Saldivar the past due wages shortly after Citation No. 9619116 was issued, it did so defiantly, as evidenced by its safety coordinator’s statement to the MSHA investigator after the withdrawal order was issued that Grimes Rock was “not shutting down.” Even though only a short period elapsed after the withdrawal order went into effect before Citation No. 9619116 was issued for working the face of that order, the safety coordinator’s statement indicates Grimes Rock had no intention of complying with the withdrawal order. Accordingly, I find the Grimes Rock exhibited extreme indifference and was highly negligent when it worked in the face of the validly issued 104(b) withdrawal order.

C. Penalties

The Secretary proposed specially assessed penalties of \$1,264.00 for Citation No. 9619114 and \$1,485.00 for Citation No. 9619116.

Section 110(i) of the Mine Act states that “[i]n assessing civil monetary penalties, the Commission shall consider the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.” 30 U.S.C. § 820(i). Commission judges assess penalties *de novo* pursuant to section 110(i) and are not bound by the Secretary’s proposed assessments or Part 100 regulations governing those proposed assessments. *Solar Sources Mining, LLC*, 43 FMSHRC 367 (Aug. 2021).

I have already discussed the negligence and gravity associated with the two citations for which penalties have been proposed. Grimes Rock’s negligence with regard to both citations weighs heavily in my penalty determinations and, for both citations, justifies significant penalties. I have also considered the very low gravity of both citations. The remaining factors are discussed below.

i. History of Violations

Grimes Rock was issued 19 104(a) citations during the 15 months preceding issuance of the enforcement actions that they are the subject of this order. Sec’y Mot. Ex. 5. Five of those citations were ultimately vacated as part of a court approved settlement. Unpublished Decision Approving Settlement (March 30, 2022). Of the remaining citations, a number were modified to reduce the negligence and modify the gravity to non-S&S as part of the same court approved

settlement. *Id.* Grimes Rock’s violation history is minimal given the size of the operator. Given the nature of the violations at issue here, I find that this factor is not particularly significant.

ii. Size of the Operator

In 2022, Grimes Rock reported 93,597 working hours and an average of 32 employees, Sec’y Mot. 5 (citing MSHA’s Mine Data Retrieval System), meaning that Grimes Rock is a small to moderately sized operator.

iii. Effect on the Operator’s Ability to Continue in Business

As a general matter, in the absence of proof that a penalty will adversely affect an operator’s ability to continue in business, it is presumed that no such adverse effect will occur. *Sellersburg Co.*, 5 FMSHRC 287, 294 (Mar. 1983). Here, Grimes Rock does not assert that the proposed penalties will impact its ability to continue in business and even concedes that, despite the Secretary’s “best efforts to shut down” the mine, it “will continue its business[.]” Grimes Opp’n 32. Accordingly, my penalty assessment is made with the presumption that the originally proposed specially assessed penalty amounts will not affect Grimes Rock’s ability to continue in business.

iv. Good Faith Abatement

As discussed above in the context of my negligence analysis, the record is quite clear that Grimes Rock did not abate either citation in good faith. First, with regard to Citation No. 9619114, Grimes Rock did not abate the cited condition until after both the 104(b) order and subsequent 104(a) citation for working in the face of the order were issued. Second, with regard to Citation No. 9619116, Grimes Rock did not abate the citation by immediately withdrawing its miners so as to comply with the 104(b) order, and instead indicated to the MSHA investigator that it would not be shutting down. Although Grimes Rock ultimately paid Saldivar the amount due, its actions were certainly not taken in good faith. Accordingly, I find that this factor weighs heavily in my penalty calculations for Citation Nos. 9619114 and 9619116.

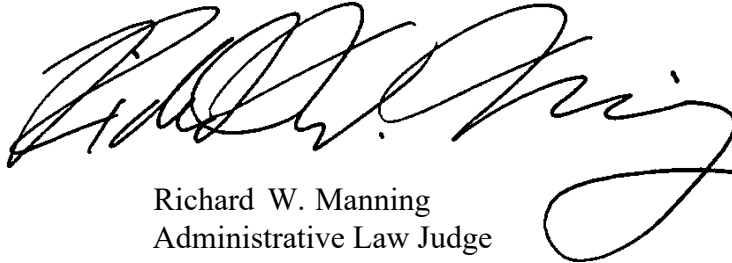
Considering the above findings and analysis, I find that penalties of \$1,264 for Citation No. 9619114 and a \$1,485 for Citation No. 9619116 are appropriate.

V. ORDER

For the above reasons, the Secretary’s motion for summary decision is **GRANTED** and Grimes Rock’s motion for summary decision is **DENIED**.³⁴ Citation Nos. 9619114 and 9619116

³⁴ Grimes Rock filed a Motion for Evidentiary Hearing in which it requested a hearing in the event there are genuine issues of material fact that preclude summary decision in favor of Grimes Rock. However, because the Secretary’s motion for summary decision is being granted and I am affirming the citations and order, there is no need for an evidentiary hearing. Accordingly, Grimes Rock’s Motion for Evidentiary Hearing is **DENIED**.

and Order No. 9619115 are **AFFIRMED** as discussed above. Grimes Rock is **ORDERED TO PAY** a sum of \$2,749.00 within 40 days of the date of this order.³⁵



Richard W. Manning
Administrative Law Judge

Distribution (Via Certified Mail and email)

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³⁵ Payment (check or money orders) should be sent to U.S. Department of Labor, Mine Safety and Health Administration, Payment Office, P.O. Box 790390, St. Louis, MO. 63179-0390; Electronic payments can be applied via <https://www.pay.gov/public/form/start/67564508> Please include Docket Number & A.C. Numbers with payment.