

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of the Chief Administrative Law Judge  
1331 Pennsylvania Avenue, N.W., Suite 520N  
Washington, D.C. 20004

May 29, 2026

ROBERT THOMAS,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEST 2018-0402-DM
	:	MSHA Case No. WE-MD-2018-06
v.	:	
	:	
CALPORTLAND COMPANY,	:	Mine: Sanderling Dredge
Respondent.	:	Mine ID: 45-03687
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2019-0205
Petitioner,	:	
	:	
v.	:	
	:	
CALPORTLAND COMPANY,	:	Mine: Sanderling Dredge
Respondent.	:	Mine ID: 45-03687

**ORDER TO REINSTATE**  
**ORDER TO PAY**  
**ORDER FOR SUPPLEMENTAL BRIEFING**

Before: Judge Paez

This consolidated proceeding is before me upon an Order of Remand—issued by the Commission on December 4, 2025—to calculate any damages and interest owed to Complainant Robert Thomas (“Thomas”). The matter arises out of a complaint of discrimination brought by Thomas against CalPortland Company (“CalPortland”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, (“Mine Act”), 30 U.S.C. § 815(c)(3). Nearly seven-and-a-half years have passed since ALJ Miller’s finding of discrimination. On April 20, 2026, CalPortland exhausted all of its appeals. *Thomas v. FMSHRC and CalPortland Co.*, No. 24-1442, 2025 WL 2651299, at \*1 (9th Cir. Sep. 16, 2025), *cert. denied*, No. 25-975, 2026 WL 1052123 (U.S. Apr. 20, 2026).

**I. HISTORY OF JUDGMENT**

On December 10, 2018, ALJ Miller issued a decision and order finding that CalPortland had discriminated against Thomas in violation of section 105(c)(1) of the Mine Act.

*CalPortland Co.*, 40 FMSHRC 1503 (Dec. 2018) (ALJ). ALJ Miller also referred her finding of discrimination to the Secretary of Labor (“Secretary”) for the assessment of a civil penalty against CalPortland, alongside awarding Thomas \$76,185.67 in back pay, lost benefits, plus additional interest. Following that decision, ALJ Miller issued a Supplemental Order for Attorneys Fees and Costs on January 8, 2019, awarding \$74,852.05 in attorneys’ fees and costs to Thomas. On January 24, 2019, the Secretary assessed a civil penalty of \$17,500.00 to CalPortland under Docket No. WEST 2019-0205.

After appeal before the Commission, the U.S. Court of Appeals for the Ninth Circuit rejected the Commission’s application of the *Pasula-Robinette* causation standard to section 105(c) cases. *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021), *rev’g CalPortland*, 42 FMSHRC 43 (Jan. 2020). The Ninth Circuit then remanded the case to the Commission to apply a “but-for” causation standard. The Commission subsequently remanded the case to ALJ Miller. *CalPortland Co.*, 43 FMSHRC 314 (June 2021).

On remand, ALJ Miller reexamined the facts of this case consistent with the Ninth Circuit’s instructions and issued a decision on December 2, 2021, concluding that CalPortland had discriminated against Thomas in violation of the Mine Act. *CalPortland Co.*, 43 FMSHRC 531, 550 (Dec. 2021) (ALJ). Accordingly, ALJ Miller ordered CalPortland to reinstate Thomas to his former position. ALJ Miller further ordered payment of the back pay, lost benefits, interest, and attorneys’ fees and costs previously ordered under her December 10, 2018 and January 8, 2019 orders. ALJ Miller also ordered payment of the civil penalty assessed in WEST 2019-0025 to the Secretary, pending exhaustion of CalPortland’s appeals. *Id.* Following that decision, ALJ Miller issued an Order for Back Pay and Amended Supplemental Order for Attorney’s Fees and Costs on February 9, 2022, awarding Thomas \$224,220.15 in additional back pay, lost benefits, and interest as well as an additional \$110,558.26 in attorneys’ fees and costs incurred during the appeals process. As of the February 9, 2022 order, the total amount of back pay, benefits, interest, attorneys’ fees and costs incurred was the sum of \$493,652.66.

Thereafter, CalPortland filed a petition for discretionary review with the Commission challenging the Judge’s decision, which the Commission granted on January 10, 2022. Additionally, on March 21, 2022, the Commission formally consolidated the above-captioned proceedings and ordered a stay of briefing on the matter of ALJ Miller’s February 9, 2022 supplemental order. On review, the Commission reversed ALJ Miller’s decision on remand and concluded that Thomas had failed to show that, but for his protected activity, he would not have been suspended or terminated. *CalPortland Co.*, 46 FMSHRC 119, 133 (Mar. 2024). Thomas again appealed the Commission’s decision to the Ninth Circuit on March 11, 2024.

In an unpublished decision, the Ninth Circuit concluded that the Commission misapplied the substantial evidence standard and that, based on the Judge’s findings, the miner had succeeded in his claim. *Thomas v. FMSHRC and CalPortland Co.*, No. 24-1442, 2025 WL 2651299, at 1 (9th Cir. Sep. 16, 2025). The Ninth Circuit vacated the Commission’s decision and remanded it stating that “[t]he matter of the ALJ’s supplemental order regarding the amount of damages remains to be conclusively resolved.” *Id.* at 3. On October 3, 2025, the Ninth Circuit issued its mandate returning the case to the Commission’s jurisdiction. CalPortland then exercised its last avenue for appeal by filing a Petition for Writ of Certiorari to the Supreme

Court on February 13, 2026. *CalPortland Co. v. Thomas*, No. 25-975 (U.S. Feb. 13, 2026). However, CalPortland’s petition was denied on April 20, 2026. *CalPortland Co. v. Thomas*, No. 25-975, 2026 WL 1052123 (U.S. Apr. 20, 2026). This matter was assigned to me on May 15, 2026, to conclusively resolve and calculate any damages and interest owed to Thomas.

## II. SECRETARY’S ASSESSMENT OF CIVIL PENALTY

Thomas originally brought this matter individually under Docket No. 2018-0402-DM. Following ALJ Miller’s initial December 10, 2018 decision, the Secretary instituted an action for the assessment of a civil penalty of \$17,500.00 on January 24, 2019. (Sec’y Penalty Pet.) That civil penalty action remains pending in Docket No. WEST 2019-0205.

Pursuant to the Decision Approving Settlement issued on March 21, 2019, CalPortland has exhausted its appeal and is therefore obligated to pay a civil penalty of \$17,500.00 plus any applicable interest through the date of payment, to be calculated by the parties within 30 days of this Order. *Thomas v. FMSHRC and CalPortland Co.*, No. 24-1442, 2025 WL 2651299, at \*1 (9th Cir. Sep. 16, 2025), *cert. denied*, No. 25-975, 2026 WL 1052123 (U.S. Apr. 20, 2026).

## III. DAMAGES AND RELIEF

### A. Robert Thomas’ Back Pay and Lost Benefits

The Mine Act gives the Commission the authority in proceedings under section 105(c)(3) to assess against an operator “a sum equal to the aggregate amount of all costs and expenses (including attorney’s fees) as determined by the Commission to have been reasonably incurred by the miner.” 30 U.S.C. § 815(c)(3). The Commission determined back pay “is the sum a miner would have earned but for the discrimination, less his net interim earnings. Gross back pay encompasses not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer’s overall wage-benefit package.” *Shamrock Coal Co.*, 15 FMSHRC 972, 976 (June 1993). An award of attorneys’ fees is “a matter that lies within the sound discretion of the trial judge.” *E. Assoc. Coal Corp.*, 7 FMSHRC 2015, 2027 (Dec. 1985).

As part of ALJ Miller’s initial December 10, 2018 decision in this matter, CalPortland was ordered to pay \$76,185.67, plus quarterly interest at the Federal underpayment rate through the date of payment, in backpay and lost benefits to Thomas. *CalPortland Co.*, 40 FMSHRC 1503, 1517–18 (Dec. 2018) (ALJ). Thereafter, as part of ALJ Miller’s February 9, 2022 supplemental order, CalPortland was ordered to pay an additional \$224,220.15, plus quarterly interest at the Federal underpayment rate through the date of payment, in backpay and lost benefits to Thomas. Both **ORDERS** are hereby **REINSTATED**.

Additionally, I adopt ALJ Miller’s reasoning in her February 9, 2022 Supplemental Order regarding whether CalPortland was denied an opportunity to explore Thomas’ mitigation efforts and conclude that back pay is appropriate. Order for Back Pay and Amended Supplemental Order for Attorney’s Fees and Costs at 3 (Feb. 9, 2025) (holding that “Respondent did not object

to the Court's order to file information when it was issued, and it did not request a hearing to investigate these matters").

Furthermore, CalPortland remains liable for Thomas' backpay that accrues up until the time at which he is reinstated. *See Ark.-Carbona Co.*, 5 FMSHRC 2042, 2052 n.14 (Dec. 1983) (holding that "[i]n a discrimination case where, as here, there has been an illegal discharge, the back pay period normally extends from the date of the discrimination to the date a bona fide offer of reinstatement is made."); *cf. Inda v. United Air Lines, Inc.*, 405 F.Supp. 426, 435 (N.D. Cal. 1975) (holding that, under Title VII, "United is further liable to plaintiffs for back pay in 1975 until such time as they are reinstated pursuant to this Court's order."). If the prevailing employee is not reinstated during the appellate process, the backpay period remains open and encompasses the time that the appeal was pending. *Cf. Taylor v. Philips Industries, Inc.*, 593 F.2d 783, 788 (7th Cir. 1979) (holding that, under Title VII, "[b]ecause we hold that Taylor was the victim of unlawful discrimination, the relief should cover the period up until the date of her reinstatement, including the time occupied by this appeal.").

Accordingly, the parties are **ORDERED** to submit additional documentation regarding Thomas' backpay that has accrued since ALJ Miller's February 9, 2022 supplemental order. Thomas shall submit his accounting of the backpay and quarterly interest at the Federal underpayment rate within twenty days of the date of this Order, and CalPortland shall submit a response within twenty days of Thomas' filing.

## **B. Attorneys' Fees and Costs**

Thomas is also entitled to reasonable attorneys' fees and costs. 30 U.S.C. § 815(c)(3). To evaluate reasonableness, courts typically consider an attorney's reasonable hourly rate and whether the number of hours expended on the case was reasonable. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550–53 (2010).

Following ALJ Miller's initial decision, CalPortland was ordered on January 8, 2019 to pay Thomas \$74,852.05 in attorneys' fees and costs. Additionally, as part of ALJ Miller's February 9, 2022 supplemental order, CalPortland was ordered to pay an additional \$110,558.26 in attorneys' fees and costs. ALJ Miller also ordered payment of quarterly interest at the Federal underpayment rate through the date of payment, but solely on Thomas' initial award of \$74,852.05. Both **ORDERS** are hereby **REINSTATED**.

Additionally, I adopt ALJ Miller's reasoning in her February 9, 2022 Supplemental Order regarding whether the Commission lacks the authority to award attorney's fees based on legal work performed while this case was before the Ninth Circuit and conclude that an award of attorney's fees is appropriate. Order for Back Pay and Amended Supplemental Order for Attorney's Fees and Costs at 4–5 (Feb. 9, 2025) (holding that "[s]uch authority is inapposite in the context of the Mine Act [as it] . . . has no such provision. In fact, the text of the Mine Act supports a much broader interpretation of the sort of fees available to the prevailing miner in a case under section 105(c)(3)").

Additionally, Thomas shall submit itemized invoices for additional attorneys' fees and costs incurred during the appeals process since February 9, 2022. It is hereby **ORDERED** that Thomas shall submit his accounting of attorneys' fees within twenty days of the date of this Order, and CalPortland shall submit a response within twenty days of Thomas' filing.

#### **IV. ORDER**

**WHEREFORE**, Respondent is hereby **ORDERED** to **REINSTATE** Robert Thomas to his former position with CalPortland with the same pay and benefits as he would have accrued had he remained employed. The mine shall remove from Thomas' personnel file any mention of any employment action stemming from this incident and shall post a notice at the nearest CalPortland land-based office, in a conspicuous location, and on paper at least 8" x 10" size, setting forth the rights of miners protected by 105(c) of the Mine Act.

Respondent is further **ORDERED** to **PAY** back pay and lost benefits to Thomas in the amount of **\$300,405.82** within 30 days of the date of this Order.

Respondent is further **ORDERED** to **PAY** attorneys' fees and costs to Thomas in the amount of **\$185,410.31** within 30 days of the date of this Order.

Complainant is **ORDERED** to submit, within twenty days, his updated estimates of:

- (1) the backpay, lost benefits, and quarterly interest at the Federal underpayment rate to which he is entitled for the period between February 9, 2022, and the date of this Order;
- (2) the reasonable attorneys' fees and costs incurred between February 9, 2022, and the date of this Order;
- (3) the quarterly interest owed on Thomas' initial back pay and lost benefits award of \$300,405.82 at the Federal underpayment rate through the date of payment; and
- (4) the quarterly interest owed on Thomas' initial attorneys' fees and costs award of \$185,410.31 at the Federal underpayment rate through the date of payment. *See* Internal Revenue Service, *Quarterly interest rate*, IRS (May 29, 2026), <https://www.irs.gov/payments/quarterly-interest-rates>.

Respondent is **ORDERED** to submit its response to the Complainant's estimate within twenty days of service of the Complainant's submission.

Respondent is **FURTHER ORDERED** to **PAY** a civil penalty in Docket No. WEST 2019-0205 of **\$17,500.00** plus any applicable interest through the date of payment within 30 days of this Order.<sup>1</sup> Respondent is directed to contact MSHA's Office of Assessments to determine any applicable interest.



Alan G. Paez  
Administrative Law Judge

Distribution (Via Electronic Mail Only):

Brian P. Lundgren, Esq., Jackson Lewis P.C.  
520 Pike Street, Suite 2300, Seattle, WA 98101  
(Brian.Lundgren@jacksonlewis.com)

Jessica M. Cox, Esq., Jackson Lewis P.C.  
520 Pike Street, Suite 2300, Seattle, WA 98101  
(Jessica.Cox@jacksonlewis.com)

M. Christopher Moon, Esq., Jackson Lewis P.C.  
215 South State Street, Suite 760, Salt Lake City, UT 84111  
(Christopher.Moon@jacksonlewis.com)

Dylan B. Carp, Esq., Jackson Lewis P.C.  
50 California Street, 9th Floor, San Francisco, CA 94111-4615  
(Dylan.Carp@jacksonlewis.com)

Colin F. McHugh, Esq., McHugh Law, PLLC  
1207 Washington Street, Suite 225, Vancouver, WA 98660  
(colin@colinmchughlaw.com)

Trevor J. Cartales, Esq., Navigate Law Group  
1310 Main Street, Vancouver, WA 98660  
(tcartales@navigatelawgroup.com)

Alexander Higgins, Esq., Law Offices of Alex J. Higgins  
2200 Sixth Avenue, Suite 500, Seattle, WA 98121  
(alex@alexjhiggins.com)

---

<sup>1</sup> Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>.

Thomas A. Paige, Esq., Deputy Associate Solicitor  
US Department of Labor, Office of the Solicitor, Division of Mine Safety and Health  
200 Constitution Avenue NW, Suite N4428, Washington, DC 20210  
(Paige.Thomas@dol.gov)

Jennifer A. Ledig  
US Department of Labor, Office of the Solicitor, Division of Mine Safety and Health  
200 Constitution Avenue NW, Suite N4428, Washington, DC 20210  
(Ledig.jennifer.a@dol.gov)

Susannah M. Maltz, Esq.  
Office of the Solicitor, U.S. Department of Labor, Division of Mine Safety and Health  
200 Constitution Avenue NW, Suite N4428, Washington, DC 20210  
(Maltz.Susannah.M@dol.gov)

Melanie Garris  
U.S. Department of Labor, MSHA, Office of Assessments  
200 Constitution Ave NW, Washington, DC 20210  
(garris.melanie@dol.gov)

/JPN