

**April 2017**

**TABLE OF CONTENTS**

**COMMISSION ORDERS**

04-12-17	BENNETT MINERAL COMPANY	VA 2016-43-M	Page 813
04-12-17	UNITED RENTALS (NORTH AMERICAN), INC.	WEST 2016-122-M	Page 816
04-12-17	ENVIRO CARE INC.	WEST 2016-488-M	Page 819
04-12-17	WM. J. CLARK TRUCKING SERVICE INC.	WEST 2016-591-M	Page 825
04-28-17	OHIO VALLEY COAL COMPANY	LAKE 2016-399	Page 829
04-28-17	HNS, INC.	WEST 2016-108-M	Page 832
04-28-17	UNITED RENTALS NORTHWEST	WEST 2016-668-M	Page 835

**ADMINISTRATIVE LAW JUDGE DECISIONS**

04-07-17	M-CLASS MINING, LLC	LAKE 2012-519	Page 839
04-07-17	NEWMONT SLATE COMPANY, INC.	YORK 2016-20-M	Page 850
04-10-17	CACTUS CANYON QUARRIES, INC.	CENT 2016-410	Page 879
04-11-17	ARNOLD STONE INC	CENT 2016-0540	Page 884

04-27-17	MATTHEW BANE v. DENISON MINES (USA) CORP., now known as ENERGY FUELS RESOURCES (USA) INC.	WEST 2012-1224- DM	Page 897
----------	--	-----------------------	----------

#### **ADMINISTRATIVE LAW JUDGE ORDERS**

04-05-17	SHELLEY KELHI v. ALPHA COAL WEST, INC. and CONTURA COAL WEST, LLC	WEST 2017-38-D	Page 939
04-17-17	ROBERT C. HALL v. GMS MINE REPAIR & MAINTENANCE, INC.	PENN 2016-228-D	Page 947
04-28-17	KLONDEX MIDAS OPERATIONS, INC.	WEST 2015-416-M	Page 949

**Review was granted in the following case during the month of April 2017:**

Signal Peak Energy LLC v. Secretary of Labor, Docket No. WEST 2016-624-R (Judge Miller, March 7, 2017)

**Review was denied in the following case during the month of April 2017:**

Secretary of Labor v. Jones Brothers, Inc., Docket Nos. SE 2016-218, et al. (Judge Miller, March 6, 2017)



# **COMMISSION ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 12, 2017

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

v.

BENNETT MINERAL COMPANY

Docket No. VA 2016-43-M  
A.C. No. 44-06600-378977

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ William I. Althen  
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen Jr., Commissioner

Distribution:

Donna Rutkowski  
Bennett Mineral Company  
P.O. Box 28  
Walkerton, VA 32177

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 12, 2017

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

v.

UNITED RENTALS (NORTH  
AMERICAN), INC.

Docket No. WEST 2016-122-M  
A.C. No. 02-00144-370248 D113

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ William I. Althen  
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen Jr., Commissioner

Distribution:

Karie N. Wilson, Esq.  
Alverson, Taylor, Mortensen & Sanders  
7401 West Charleston Blvd.  
Las Vegas, NV 89117-1401

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 12, 2017

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

v.

ENVIRO CARE INC.

Docket No. WEST 2016-488-M  
A.C. No. 26-01621-377475 A9039

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 15, 2016, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) received from Enviro Care Inc. (“Enviro”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“JWR”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

MSHA issued two citations to Enviro on February 3, 2015, Citation Nos. 8869483 and 8869484. On Feb 11, 2015, the Division Manager for Enviro's office in Elko, Nevada, requested a meeting with MSHA to clarify the regulations related to these alleged violations. At the time, Enviro tentatively planned to request that these citations be vacated. While Enviro claims that this meeting never occurred, the Secretary provided records showing that the conference occurred on February 19, 2015, via telephone. The Secretary states that this meeting resulted in Citation No. 8869483 being upheld and Citation No. 8869484 being vacated; therefore, only one citation remains at issue.

The proposed assessment for Citation No. 8869483 was issued on March 26, 2015, and proposed a penalty of \$100. MSHA did not issue a proposed assessment for Citation No. 8869484. The Secretary asserts that the proposed assessment was delivered on April 2, 2015, and became a final order of the Commission on May 4, 2015.

Enviro concedes that the proposed assessment was correctly sent to its Safety Manager at its North Salt Lake office in Utah. However, Enviro asserts that when its North Salt Lake office received the assessment, the position of safety manager was in transition because a new safety manager was in the process of being appointed. In addition, the Division Manager, who had requested the meeting with MSHA, did not view the assessment because he was part of the Elko office, not the North Salt Lake office. Consequently, office personnel who did not normally handle MSHA assessments reviewed the assessment in this matter, assumed that it was a bill, and accidentally paid the civil penalty at issue.

The Secretary asserts that he mailed a delinquency notice to Enviro on June 18, 2015. MSHA received a payment check from Enviro for \$100 dated June 23, 2015.

The Secretary opposes the request to reopen. The Secretary argues that Enviro's failure to contest the proposed assessment was caused by inadequate or unreliable internal procedures, which does not justify reopening under Rule 60(b)(1). The Secretary further states that the motion to reopen was filed with MSHA approximately 11 months after the assessment became a final order and approximately 10 months after the operator received the delinquency notice. The Secretary argues that this delay in filing the motion to reopen after the order became final and after the operator received the delinquency notice warrants denial of the motion to reopen.

Reopening a penalty that has become final is extraordinary relief. Thus, the operator has the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening:

At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure.

*Higgins Stone Co.,* 32 FMSHRC 33, 34 (Jan. 2010).

In reviewing an operator's explanation, we consider the entire range of factors relevant to determining mistake, inadvertence, surprise, excusable neglect, or other good faith reason for reopening. No precise formula exists for weighing the factors, and the analysis is conducted on a case-by-case basis. However, key factors are readily identifiable. The Commission has long provided guidance to operators on its website explaining the factors that will generally be considered in determining whether to grant relief:

The Commission has considered a number of factors in determining whether good cause exists: (1) the error does not reflect indifference, inattention, inadequate or unreliable office procedures or general carelessness; (2) the error resulted from mistakes that the operator typically does not make; (3) procedures to prevent, identify and correct such mistakes have been adopted or changed, as appropriate; (4) . . . A proper motion must also provide all relevant documentation and identify the persons who have knowledge of the circumstances. . . . Motions for relief must identify and explain: (1) why a timely contest was not filed; (2) how and when you first discovered the failure to timely contest the penalty and how you responded once this was discovered (3) If the motion to reopen was filed more than 30 days after you first learned that the penalty was not timely contested, you must provide a reasonable explanation for the delay or your motion may be DENIED.

FMSHRC, *Requests to Reopen*,  
<https://www.fmshrc.gov/content/requests-reopen> (last visited April 4, 2017).

In addition, we consider the good faith of the operator's actions and whether MSHA opposed the motion to reopen. *Pioneer Inv. Servs. Co. v. Brunswick Associated Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FC Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006); *Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011). To justify reopening, an operator's detailed recounting of the circumstances should demonstrate that the operator acted at all times in good faith and without any purpose of evasion or delay, taking into account the nature of the violation, the amount of the penalty, and the circumstances of receipt and processing of the proposed assessment. The operator's motion should also address whether errors were within the operator's control, and the reasons for any delay in filing the motion itself, especially after notice of the delinquency.

Under Rule 60(c) of the Federal Rules of Civil Procedure, a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c). MSHA's June 18, 2015 delinquency notice gave Enviro notice that it had failed to contest the proposed assessment, but Enviro did not file this motion to reopen until April 2016. Although Enviro's motion to reopen is not expressly barred by the one year limit set forth in Rule 60(c), the rule still illustrates the importance of filing expeditiously. The operator knew of its default for nearly ten months and failed to file this motion to reopen until approximately 11

months after the assessment became a final order. Further, it did not explain the lengthy delay in filing, including the 10 month delay after receiving a delinquency notice from the Secretary.

The operator has offered no excuse for failing to act until the motion was nearly deemed inexcusable by the express terms of Rule 60. Under the circumstances, we cannot consider Enviro's motion to have been made "within a reasonable time." *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

Moreover, Enviro has not adequately explained how the proposed assessment was handled after it was received by its North Salt Lake office. The operator's explanation is that "the position of Safety Manager was in transition with a new Dept. Manager being appointed," and that office personnel not familiar with MSHA procedures assumed that notices from MSHA were "bills" and paid the proposed penalty "accidentally." Mot. to Reopen. We note that the proposed assessment was received by Enviro on April 2, 2015, that the delinquency notice was dated June 18, 2015, and that the payment check was dated June 23, 2015. Obviously, the "bill" was the delinquency notice. Enviro's explanation that the position of Safety Manager was in transition does not account for the nearly three months during which the proposed assessment was mishandled.<sup>1</sup>

Accordingly, we deny Enviro's motion to reopen, on the basis of the lengthy unexplained delay in filing the motion, as well as the failure to provide a coherent explanation of why the proposed assessment was not timely contested.

/s/ William I. Althen  
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen Jr., Commissioner

---

<sup>1</sup> It is not clear that Enviro understood what had happened even as of the time its motion to reopen was filed. The motion claims that the meeting with MSHA which it had requested was "never scheduled," although MSHA records show that a meeting by telephone took place on February 19, 2015, shortly after the two citations were issued. Moreover, the motion to reopen requests that both Citation Nos. 8869484 and 8869483 be reopened, although Citation No. 8869484 was vacated by MSHA as a result of the telephonic meeting, and was not included in the subsequent proposed assessment.

Distribution:

Chet Littledyke  
Elko Division Manager  
Enviro Care, Inc.  
620 Union Pacific Way  
Elko, NV 89801

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 12, 2017

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

v.

WM. J. CLARK TRUCKING SERVICE  
INC.

Docket No. WEST 2016-591-M  
A.C. No. 04-04119-386633

Docket No. WEST 2016-592-M  
A.C. No. 04-04119-389032

Docket No. WEST 2015-839-M  
A.C. No. 04-04119-386633

Docket No. WEST 2015-840-M  
A.C. No. 04-04119-386633

Docket No. WEST 2015-893-M  
A.C. No. 04-04119-389032

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 18, 2016, the Commission received from Wm. J. Clark Trucking Service Inc. (“Clark”) a motion seeking to reopen a penalty assessment that the operator believed had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup> Yet, in its letter requesting reopening, Clark references two proposed penalty assessments. Accordingly, the Commission’s Docket Office assigned Clark’s request two docket numbers—WEST 2016-591-M (A.C. No. 000386633) and WEST 2016-592-M (A.C. No. 000389032)—to consider each assessment separately.

---

<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEST 2016-591-M, WEST 2016-592-M, WEST 2015-840-M, WEST 2015-893-M, and WEST 2015-839-M involving similar procedural issues. 29 C.F.R. § 2700.12.

The Secretary opposes Clark's request, explaining that the assessments in question were properly contested and had already been docketed prior to Clark's filing of the motion to reopen. The Secretary states that Assessment No. 000386633 was split between Docket Nos. WEST 2015-839-M and WEST 2015-840-M, while Assessment No. 000389032 was docketed as Docket No. WEST 2015-893-M. WEST 2015-840-M and WEST 2015-893-M were assigned to a Commission Administrative Law Judge and, according to Commission records, have since been settled and disposed. Accordingly, the Secretary asserts that the operator's motion regarding these assessments is moot.

In WEST 2015-839-M, however, the operator failed to file an Answer, so Chief Administrative Law Judge Robert J. Lesnick issued an "Order to Show Cause" and an "Order of Default" on December 4, 2015. The Secretary asserts that the Chief Judge's order became a final order on January 3, 2016, because Clark failed to respond.

According to Commission records, the operator filed two separate letters with the Commission. The first letter, dated October 30, 2015, served as the operator's Answers for WEST 2015-840-M and WEST 2015-893-M. The second letter, dated December 21, 2015, also lists WEST 2015-893-M in its subject line. Accordingly, the Commission's docket office filed the December 21 letter in that file. Upon closer review, however, we note that the operator in his December 21 letter refers to Assessment No. 000386633, which was docketed in part as WEST 2015-839-M. Furthermore, the operator also notes in that letter that it received a filing on December 4, 2015, the date of the Order to Show Cause in WEST 2015-839-M.

Given this evidence, we understand that the operator intended his December 21 letter to serve as a response to the Order to Show Cause for WEST 2015-839-M, but mistakenly transposed the last two digits of the docket number. The Commission received Clark's letter on December 21, 2015, prior to the January 3, 2016 deadline for responding to the Order to Show Cause. Therefore, we conclude that the operator was not in default under the terms of the Order to Show Cause because it timely complied with the Order. *See Vulcan Constr. Materials*, 33 FMSHRC 2164 (Sept. 2011). This renders the Default Order a nullity. Accordingly, WEST 2015-839 is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Docket Nos. WEST 2015-840-M and WEST 2015-893-M were assigned to a Commission Judge and settled in two separate orders on January 5, 2017. We therefore agree with the Secretary's contention that the request to reopen these dockets is moot.<sup>2</sup>

/s/ William I. Althen  
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

---

<sup>2</sup> Docket No. WEST 2016-591-M is duplicative of WEST 2015-839-M and WEST 2015-840-M, while Docket No. WEST 2016-592-M is duplicative of WEST 2015-893-M. Because they are duplicative, Docket Nos. WEST 2016-591-M and WEST 2016-592-M are hereby dismissed.

Distribution:

William J. Clark  
William J. Clark Trucking Service Inc.  
P.O. Box 682  
King City, CA 93930

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 28, 2017

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

v.

OHIO VALLEY COAL COMPANY

Docket No. LAKE 2016-399  
A.C. No. 33-01159-400683

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 3, 2016, the Commission received from Ohio Valley Coal Company (“Ohio Valley”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“JWR”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or another reason justifying relief. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on January 10, 2016, and became a final order of the Commission on February 9, 2016. Ohio Valley asserts that the Notice of Contest in this matter was mistakenly mailed to the wrong address because at the time the

instant assessment was issued, the company was in the process of changing safety directors. In filing the Notice of Contest, the new safety director inadvertently relied upon mailing labels that listed MSHA's previous address. Ohio Valley did not learn about the error until the Notice of Contest was returned undelivered on February 19, 2016. The safety director corrected the address and resent it the same day. He further avers that he did not learn that MSHA did not accept the notice of contest as filed until late July 2016. Thereafter, Ohio Valley promptly filed its motion to reopen. Following this event, Ohio Valley implemented remedial measures to ensure that all relevant parties were aware of MSHA's change of address. The Secretary does not oppose the request to reopen.

Having reviewed Ohio Valley's request and the Secretary's response, we find that the operator's failure to properly file its contest was the result of an inadvertent mistake. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ William I. Althen  
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

Distribution:

Christopher D. Pence, Esq.  
Hardy Pence PLLC  
500 Lee Street, East, Suite 701 (25301)  
Post Office Box 2548  
Charleston, WV 25329-2548

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 28, 2017

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

v.

HNS, INC.

Docket No. WEST 2016-108-M  
A.C. No. 10-02214-388660

Docket No. WEST 2016-135-M  
A.C. No. 10-02214-388660

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

**ORDER**

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 5, 2015, the Commission received from HNS, Inc. (“HNS”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“JWR”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or another reason justifying relief. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

---

<sup>1</sup> Upon review, it was determined that that citation had been mistakenly docketed twice, once in WEST 2016-108-M and again in WEST 2016-135-M. Accordingly, we hereby dismiss Docket No. WEST 2016-135-M as duplicative of Docket No. WEST 2016-108-M.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments in both proceedings were delivered on August 10, 2015, and became final orders of the Commission on September 9, 2015. HNS asserts that it inadvertently failed to contest the assessments because its secretary/treasurer was out of town during the summer in which the instant citations were issued. The employees at the mine were unaware that they were required to follow up with MSHA and contest the citations. As a result, the Notice of Contest was not filed until the secretary/treasurer returned to the mine. The Secretary does not oppose the request to reopen.

Having reviewed HNS' request and the Secretary's response, we find that the operator's failure to timely contest the citation herein was the result of inadvertent mistake. In the interest of justice, we hereby reopen Docket No. WEST 2016-108-M and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ William I. Althen  
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

Distribution:

Robert Hines  
Secretary/Treasurer  
HNS, Inc.  
63830 Industrial Lane  
La Grande, OR 97850

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 28, 2017

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

v.

UNITED RENTALS NORTHWEST

Docket No. WEST 2016-668-M  
A.C. No. 02-00144-370248 D113

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 20, 2015, the Commission received from United Rentals Northwest (“United Rentals”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“JWR”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or another reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on January 2, 2015, and became

a final order of the Commission on February 1, 2015.<sup>1</sup> United Rentals asserts that it never received the penalty assessment in this matter. The operator avers that it had contested the citation at issue, which was contained in Docket No. WEST 2016-225-RM, and was monitoring the mail for the assessment with intent to contest it as well. United Rentals claims that it had two employees tasked with responding to MSHA assessments and arranging for payments and that neither received the assessment here. The operator received no deficiency notice because MSHA applied an overpayment on an unrelated issue to satisfy the assessment in this matter. United Rentals asserts that it only learned of the assessment on September 14, 2015, when it received an Order to Show Cause in the contest docket stating that the assessment had been paid. United Rentals responded by filing the instant motion less than thirty days after receiving the Show Cause Order. The Secretary does not oppose the request to reopen.

Having reviewed United Rentals request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ William I. Althen  
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

---

<sup>1</sup> MSHA asserts the assessment became a final order "30 days after receipt on February 13, 2015." It further claims that delivery was made via USPS Certified Mail. However, there is no proof of "receipt" on January 2 or January 14, or other explanation for the calculation of the 30-day period.

Distribution:

Nathan R. Reinmiller, Esq.  
Alverson, Taylor, Mortensen & Sanders  
7401 W. Charleston Boulevard  
Las Vegas, NV 89117

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450



# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9956 / FAX: 202-434-9949

April 7, 2017

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

v.

M-CLASS MINING, LLC,  
Respondent.

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

v.

MARK McCURDY, employed by  
M-CLASS MINING, LLC,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2012-519  
A.C. No. 11-03189-283857

Mine: MC #1 Mine

Docket No. LAKE 2015-339  
A.C. No. 11-03189-374209 A

Mine: MC #1 Mine

**DECISION GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION AND  
DENYING THE SECRETARY'S CROSS-MOTION FOR SUMMARY DECISION**

Before: Judge Rae

**I. STATEMENT OF THE CASE**

The above-captioned proceedings arise out of two petitions for assessment of civil penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). At issue are two orders issued by the Secretary of Labor under section 104(d)(2)<sup>1</sup> of the Mine Act: Order Number 8432252 and Order Number 8432253. The Secretary seeks penalties against mine operator M-Class Mining, LLC ("M-Class") for both

---

<sup>1</sup> The issuance of an order under section 104(d)(2) denotes that the alleged violation was caused by the mine operator's "unwarrantable failure" to comply with a mandatory health or safety standard and that the mine had previously received a section 104(d)(1) order without an intervening clean inspection. See 30 U.S.C. § 814(d)(2); *Lodestar Energy, Inc.*, 25 FMSHRC 343 (July 2003).

alleged violations. The Secretary also seeks a penalty under section 110(c)<sup>2</sup> of the Mine Act against M-Class employee Mark McCurdy solely for the violation alleged in Order Number 8432252. These matters were initially consolidated before a different judge and later reassigned to me for hearing.

After the completion of discovery but before a hearing was held, Respondents M-Class and McCurdy jointly filed a motion for partial summary decision asking me to vacate Order Number 8432252. (Resp. Mot., Feb. 8, 2017.) The Secretary filed a response in opposition and cross motion for summary decision asking me to uphold both violations and assess the penalties proposed by MSHA. (Sec'y Cross Mot., Feb. 27, 2017.) Respondents filed a response in opposition and further moved to vacate Order Number 8432253; in the alternative, they argued that even if either of the violations are upheld, summary decision is not appropriate on the issues of gravity, negligence, or the appropriate penalty amounts.<sup>3</sup> (Resp. Cross Mot., Mar. 7, 2017.) The Secretary then filed a response in opposition reiterating his position that he is entitled to summary decision on all issues. (Sec'y Response, Mar. 22, 2017.)

I have reviewed the parties' submissions at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the evidence. Based on the entire record, for the reasons discussed below and because no material facts remain in dispute, I vacate both orders.

## II. FACTUAL BACKGROUND

The following facts are not in dispute.

These proceedings arise out of an incident in which McCurdy sustained an electrical shock injury while working as a maintenance foreman at the MC #1 Mine, a large underground coal mine in Illinois operated by M-Class. The accident occurred during the mine's third shift on May 23, 2011. On that night, McCurdy had been tasked with determining what was causing one of the continuous mining machines to "drop out" (intermittently lose power and stop working)

---

<sup>2</sup> Section 110(c) provides that a corporate mine operator's agent, officer, or director who knowingly authorizes, orders, or carries out a Mine Act violation may be subject to civil penalties in his individual capacity. 30 U.S.C. § 820(c).

<sup>3</sup> Respondents also objected to several exhibits the Secretary had filed in anticipation of hearing. Specifically, Respondents objected to admission of the mine's violation history report to the extent it was outside the relevant scope of section 110(i) and objected to use of the MSHA inspectors' field notes or interview notes for any purpose other than to refresh recollection. My decision here rests on the evidence and testimony the parties have submitted with their cross motions for summary decision, but I note that I have reviewed the entire file, including both parties' prehearing submissions, and I overrule Respondents' objections as meritless. The mine's violation history forms were never submitted. Moreover, the violation history data is a matter of public record, as it is available on MSHA's Mine Data Retrieval website, and I am capable of determining its relevance or lack thereof and weighing it appropriately. As for the inspectors' notes, I am permitted to consider relevant hearsay evidence under Commission Procedural Rule 63(a). 29 C.F.R. § 2700.63(a).

for no apparent reason. (McCurdy Depo. 10-11.)<sup>4</sup> Although two other maintenance workers were changing a tire on a shuttle car nearby, they did not see what caused the accident. McCurdy was working alone and was the only witness to the accident and the events leading up to it. (*Id.* at 18.)

McCurdy provided the following account of the night's events. First he tested the radio controller to the continuous miner and found no defects. Next he locked and tagged out the continuous miner so he could examine the radio circuitry outside the machine and then checked the internal components which included opening the control panel on the body of the machine to check all the wires and connections, then he restored power so he could check the fault log on the machine's computer system and "bump" the cutter head to see if there were any loose wires and if shaking the machine would make it drop out. (McCurdy Depo. 11-16.) He could not get it to drop out, so he locked and tagged it out again, rechecked the wires for a loose connection, restored power again, rebooted several times and tried bumping the head a second time, then tried walking the remote controller away from the machine to see if radio contact would be lost; he still could not find the source of the problem. (*Id.* at 15-19.) He then left and checked on the two men working on the shuttle car in a crosscut. (*Id.* at 18.) When he returned, he knelt in front of the continuous miner and looked at the electrical panel, trying to decide what to do next. (*Id.* at 19, 36.) "And then next thing I know I was beside the miner getting shocked," he stated. (*Id.* at 18.) He was not wearing gloves and he was touching an energized wire. (*Id.* at 21-22.) He could not pull his hand away, so he screamed, and the two miners working on the shuttle car came running over and tackled him and pulled him out of the current. (*Id.* at 22-23.) McCurdy was hospitalized overnight and returned to work on May 25. (*Id.* at 23-27.)

M-Class notified MSHA of the accident the morning after it happened. (Sec'y Cross Mot., Ex. 5 – Bretzman Decl.) MSHA inspectors Robert Bretzman and Keith Jeralds visited the scene of the accident, interviewed McCurdy at the hospital, and interviewed the two miners who had come to his aid. (*Id.*) As a result of their investigation, on May 24, Inspector Bretzman issued the two orders that are the subject of these proceedings. Order Number 8432252 alleges that McCurdy was performing work on the energized continuous miner at the time he was shocked, in violation of 30 C.F.R. § 75.509, which requires electric equipment to be deenergized before work is performed on it except when necessary for troubleshooting or testing. Order Number 8432253 alleges that McCurdy's failure to wear gloves while testing and troubleshooting the continuous miner violated 30 C.F.R. § 75.1720(c), which requires gloves to be worn whenever work is performed or materials are handled that could injure the hands.

---

<sup>4</sup> A complete copy of McCurdy's deposition is appended to Respondents' March 7, 2017 filing. (Resp. Cross Mot.) The parties also submitted portions of the depositions of three MSHA employees, which can be found in the following filings:

Resp. Mot, Ex. B – Bretzman Depo. 1-4, 57-68, 81-83

Resp. Mot, Ex. C – Jeralds Depo. 1-4, 17-24, 29-32

Sec'y Cross Mot., Ex. 4 – Bretzman Depo. 1, 58, 63, 67-68, 71-72, 74-76, 79-80

Sec'y Cross Mot., Ex. 6 – Wilcox Depo. 1, 8-9, 20, 26

Sec'y Cross Mot., Ex. 7 – Jeralds Depo. 1, 13-14, 18-19, 21-22, 24-25

### III. LEGAL PRINCIPLES

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

Commission Procedural Rule 67, which is analogous to Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to grant summary decision when the entire record shows that “there is no genuine issue as to any material fact” and that “the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b); *see Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The record must be viewed in the light most favorable to the nonmoving party and the judge may not weigh the factual evidence or engage in fact-finding beyond those facts that are established in the record. *W. Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015); *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4 (Jan. 2007). Summary judgment should not be granted “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

### IV. DISCUSSION AND CONCLUSIONS OF LAW

#### A. Order Number 8432252 (Violation of 30 C.F.R. § 75.509)

Order Number 8432252 states:

On May 23, 2011 a non-fatal electrical accident occurred. Maintenance Foreman Mark McCurdy was performing work on an energized Joy Continuous Miner, company number 003, located on the tailgate unit. McCurdy was working in the energized traction controller when he contacted an energized part with his right hand. All power circuits and electric equipment shall be deenergize [sic] before work is done on such circuits and equipment. Maintenance Foreman Mark McCurdy engaged in aggravated conduct constituting more than ordinary negligence in that he did not lock out and tag the continuous miner. This violation is an unwarrantable failure to comply with a mandatory standard.

Inspector Bretzman assessed the alleged violation as reasonably likely to cause a fatal injury to one person, S&S, and involving reckless disregard. The Secretary seeks penalties of \$52,500.00 against M-Class and \$8,000.00 against McCurdy for the alleged violation.

The mandatory safety standard alleged to have been violated is § 75.509, which provides: “All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing.” 30 C.F.R. §

75.509. As noted above, McCurdy was the only witness to the May 23, 2011 electrical accident. The Secretary does not challenge his credibility or dispute his account of the night's events. The parties' sole dispute is whether McCurdy's activities amounted to work on electrical equipment that required the continuous miner to be deenergized pursuant to § 75.509 at the time he was shocked.

Respondents argue that McCurdy was troubleshooting. (Resp. Mot. 6.) The Secretary's Program Policy Manual (PPM), which is his main source of policy guidance to MSHA inspectors and the mining industry, states that "troubleshooting or testing includes the work of locating electrical, hydraulic or mechanical problems on a machine." (Resp. Mot., Ex. D; Sec'y Cross Mot., Ex. 8.) It is undisputed that McCurdy's assigned task the night of the accident was to locate the problem on the continuous mining machine that was making it intermittently lose power. (McCurdy Depo. 10-11; Bretzman Depo. 65.) This task is consistent with the PPM's guidance on what sort of activities constitute troubleshooting, and indeed, all three of the Secretary's witnesses agreed that McCurdy was engaged in troubleshooting during at least part of the shift. (Wilcox Depo. 8; Bretzman Depo. 75-76; Jeralds Depo. 18-19.)

Nonetheless, the Secretary maintains that at the time of the accident, McCurdy's activities had deviated from troubleshooting to electrical work that required the continuous miner to be deenergized. (Sec'y Cross Mot. 2; Wilcox Depo. 8.) I reject this argument and conclude that McCurdy was still troubleshooting, for the following reasons.

First, it is undisputed that McCurdy was still trying to locate the problem on the miner at the time he was shocked. (Bretzman Depo. 66-67; Jeralds Depo. 19.) McCurdy asserted, "I feel the whole time I was troubleshooting because I never did figure out what was wrong with the machine." (McCurdy Depo. 37.) Inspector Jeralds agreed, stating, "As far as I know, yeah ... he didn't know what was wrong with the miner yet, he was still troubleshooting." (Jeralds Depo. 19.) The Secretary contends that Jeralds simply misspoke. (Sec'y Cross Mot. 15.) But regardless of whether the witness meant to use the term "troubleshooting," he conceded McCurdy was still trying to locate the problem on the continuous miner, which is consistent with the PPM's definition and the plain meaning of the word.

The Secretary advances a different interpretation, arguing that in order for a miner's activities to constitute troubleshooting, the miner must be wearing gloves or using a meter to take readings. (*See* Sec'y Cross Mot. 7-8, 10-11.) This interpretation is based on testimony from Inspectors Bretzman and Jeralds. According to Bretzman, "to be testing or troubleshooting, [McCurdy] would have had to been taking voltage readings with a meter," and "once his hands crossed that imaginary line of the controller and he wasn't taking voltage or current measurements ... he's not testing and troubleshooting, he's working." (Bretzman Depo. 65, 68.) According to Jeralds, "when he took his gloves off it became electrical work." (Jeralds Depo. 19.) Jeralds asserted that Title 30 of the Code of Federal Regulations defines troubleshooting as requiring both gloves and a meter, but he could not point to any specific code provision saying so. (*Id.* at 22-25.) Review of the CFR shows that no such provision exists. The Secretary has

identified no other support for Bretzman and Jeralds' opinions except the PPM, which provides the following guidance on § 75.509:

For the purpose of this Section, troubleshooting or testing includes the work of locating electrical, hydraulic or mechanical problems on a machine and the work of verifying that proper repairs have been performed. Troubleshooting or testing does not include the repair of the electrical, hydraulic, or mechanical problems. When troubleshooting and/or testing an energized machine, extreme caution must be taken to prevent inadvertent contact with energized parts in close proximity and assurance that equipment will not be accidentally started. Examples of tests which may be performed with equipment energized are:

1. Voltage and current measurements;
2. Pressure and volume measurements on hydraulic systems; and
3. Mechanical clutch setting.

Sections 75.1720(c) and 77.1710(c) require that protective gloves be worn by miners when they are performing work "which might cause injury to the hands," unless the gloves would create a greater hazard by becoming entangled in the moving parts of equipment. As the accident and injury data associated with working on energized circuits and equipment clearly indicate, this type of work presents a significant risk of hand injury.

Therefore, gloves, in accordance with Sections 75.1720(c) and 77.1710(c), are required whenever miners troubleshoot or test energized electric power circuits or electric equipment.

(Resp. Mot., Ex. D; Sec'y Cross Mot., Ex. 8.)

The Secretary's position fails for several reasons. The PPM discusses the meaning of troubleshooting and distinguishes it from making repairs. McCurdy was troubleshooting the machine as both inspectors acknowledged that he had not yet found the cause of the power failure and he was not engaged in making repairs. The PPM sets forth a non-exhaustive list of activities which might constitute testing; voltage and current measurements taken with a meter are mentioned as just one item in this list, not as a defining element of troubleshooting. The PPM does not, however, limit an experienced electrician from employing the means he determines necessary to identify the cause of an electrical power failure. Here, McCurdy employed the use of a Triplett meter as well as checked the fault log of the computer system in order to identify the problem, neither of which was successful. (McCurdy Depo. 14, 31.) He then followed a systematic, graduated approach to troubleshoot the problem which included means beyond the use of a meter. The Secretary's witnesses, neither of whom is a certified electrician as is McCurdy, did not identify his approach as unusual or unnecessary or outside the bounds of troubleshooting a problem. In fact, Jeralds testified that McCurdy was troubleshooting until he was corrected by counsel and Bretzman confirmed that McCurdy was tracing wires to find where the drop was and the way to do that would be by using a volt meter or by "using your hand to physically move the wires and trace them." (Bretzman Depo. 62; Jeralds Depo. 19, 21.)

Secondly, the second paragraph of the PPM addressing the use of gloves is not intended to be used to define the term “troubleshooting.” Additionally, it recognizes the exception to wearing gloves contained in the mandatory standard when doing so would pose a greater risk of injury. This paragraph is best read simply as advising operators to be mindful of the separate requirements of § 75.1720(c) and § 77.1710(c), which mandate gloves be worn when working on energized electric equipment. In short, the PPM does not support the Secretary’s back door approach to defining troubleshooting, as used in § 75.509, by the use of gloves or a meter. Also, it would be illogical to hold that the nature of a miner’s activities changes when he doffs or dons his gloves or to limit troubleshooting to taking readings with a meter when the Secretary’s own witnesses agree that McCurdy was engaged in troubleshooting while undertaking other activities such as tracing wires and bumping the cutter head. (E.g., Jeralds Depo. 18.)

I find the Secretary’s reliance on the PPM to prove the violation is unsupportable and it is a position taken solely for the purposes of litigation. It is inconsistent with the PPM’s plain and simple description of troubleshooting as the work of locating problems. I decline to defer to the Secretary’s interpretation.<sup>5</sup>

The Secretary next posits that McCurdy reached his hand across an “imaginary line” into the energized control panel and therefore “was no longer performing any troubleshooting, but rather, was working.” (Sec’y Cross Mot. 7, 13.) The Secretary relies solely on the fact that an accident occurred that led to McCurdy’s pinky finger contacting a 110 volt wire. It contemplates that he intentionally did so. However, there is no evidence to support this conclusion. When McCurdy contacted the 110 volt wire, he was not purposefully or intentionally passing the imaginary line the inspectors identified. He had just traveled to a crosscut to check on miners who were working on a shuttle car, came back and stood before the miner machine to think. The next moment he was shocked by 110 volts. The point of contact was his pinky finger, not his thumb and first two fingers as one would expect if he were intentionally reaching in the control box to trace wires. (Bretzman Depo. 63; Jeralds Depo. 18.) McCurdy could not explain how the contact came about, but he is an experienced electrician familiar with the “imaginary line” principle and its underlying safety rationale, and he testified he did not intend to stick his hands into the machine. (McCurdy Depo. 34, 36.) The last thing he remembered was kneeling in front of it trying to collect his thoughts. (*Id.* at 22, 36.) Whether he lost his balance and fell against the machine or reached his hand out to regain his balance and accidentally made contact is immaterial. McCurdy testified that he is a certified electrician with significant experience. He is therefore trained in the National Electrical Code requirements as well as MSHA’s standards and policies and clearly exhibited conscientious work habits. There is no evidence to contradict

---

<sup>5</sup> The Secretary contends that his interpretation of “troubleshooting” as requiring gloves and a meter is entitled to deference as an exercise of his delegated lawmaking powers. (Sec’y Cross Mot. 9.) As a general rule, the Secretary’s interpretation of his own ambiguous regulations is entitled to deference unless the interpretation is unreasonable, plainly erroneous, inconsistent with the regulation, or does not reflect the agency’s fair and considered judgment. Christopher v. SmithKline Beecham Corp., 567 U.S. \_\_, 132 S. Ct. 2156, 2166 (2012); Auer v. Robbins, 519 U.S. 452, 461-63 (1997); Hecla Ltd., 38 FMSHRC 2117, 2122 (Aug. 2016). In this case, however, I find that the Secretary’s proffered interpretation of “troubleshooting” is unreasonable because it is illogical and legally unsupported, as discussed above. I also cannot conclude that it reflects the agency’s fair and considered judgment.

McCurdy's recount of the events and I find him to be credible. I find that the Secretary has failed to prove by a preponderance that McCurdy was engaging in work at the moment the accident occurred. It was a completely inadvertent and unforeseeable occurrence. I find, therefore, that the evidence is insufficient for the Secretary to prevail on this argument.

The Secretary also raises the allegation that Respondents have not established it was necessary for the continuous miner to be energized at the time McCurdy was shocked. (Sec'y Cross Mot. 6-7, 11-14.) But the Secretary bears the burden of proof, and the case law suggests that a qualified electrician has latitude to determine how to troubleshoot equipment and whether it is necessary for it to be energized or not. *See, e.g., Badger Coal Co.*, 6 FMSHRC 874, 895-900 (Apr. 1984) (ALJ) (finding no violation when qualified electrician was electrocuted while troubleshooting energized equipment); *Consolidation Coal Co.*, 2 FMSHRC 866, 867 (Apr. 1980) (ALJ) (noting that standard "prohibits troubleshooting with the power on only where it can be shown that the trouble encountered is reasonably susceptible of a fix or repair without the power on"). A determination that § 75.509 has been violated normally entails, at the very least, identification of what work was being performed on energized circuits or equipment. *See, e.g., Am. Coal Co.*, 36 FMSHRC 1311, 1314-15 (May 2014) (ALJ) (moving electric wires with hand and shutting panel door), *aff'd on other grounds*, 39 FMSHRC 8 (Jan. 2017); *FMC Wyo. Corp.*, 16 FMSHRC 124, 129 (Jan. 1994) (ALJ) (tightening loose screw inside electric panel); *Peabody Coal Co.*, 13 FMSHRC 1308, 1312 (Aug. 1991) (ALJ) (taping electric leads). In past cases where the operator has argued it was troubleshooting, the Secretary has prevailed only on a specific showing that the operator's activities were directed toward making repairs rather than identifying a problem, that the operator had already identified the problem, or that it was not necessary for the equipment to be energized during that particular troubleshooting activity. *See Peabody W. Coal Co.*, 25 FMSHRC 293, 299 (June 2003) (ALJ); *Amax Coal Co.*, 3 FMSHRC 1975, 1982 (Aug. 1981) (ALJ); *Leeco Inc.*, 16 FMSHRC 1496, 1502-03 (July 1994) (ALJ); *cf. Badger Coal, supra; U.S. Steel Corp.*, 2 FMSHRC 3220 (Nov. 1980) (ALJ). There is no such evidence here.

McCurdy is a qualified electrician who was engaged in troubleshooting a problem on the continuous miner at the time of the alleged violation. Section 75.509 permitted him to energize the machine as necessary in furtherance of this purpose so he could take actions such as checking the machine's computer fault log and bumping the cutter head. Although he was shocked, the injury does not prove the violation. No one saw how the accident happened and the Secretary cannot prove he put his hand in the panel or was performing work on it. I conclude that the Secretary cannot establish a violation of § 75.509 on this evidence and that the Respondent is entitled to summary decision on this issue.

B. Order Number 8432253 (Violation of 30 C.F.R. § 75.1720(c))

Order Number 8432253 states:

Maintenance Foreman Mark McCurdy was testing and troubleshooting the traction controller, of the Joy Continuous Miner company number 003, located on the tailgate unit. McCurdy was not wearing gloves while performing testing and troubleshooting. Gloves are required when testing

and troubleshooting energized electrical power circuits or electric equipment. This is an unwarrantable failure to comply with a mandatory standard.

The inspector assessed the alleged violation as reasonably likely to cause a fatal injury to one person, S&S, and involving high negligence. The Secretary seeks a penalty of \$41,500.00 against M-Class for this alleged violation.

The cited safety standard is § 75.1720(c), which requires underground coal miners to wear “[p]rotective gloves when handling materials or performing work which might cause injury to the hands,” unless gloves “would create a greater hazard by becoming entangled in the moving parts of equipment.” 30 C.F.R. § 75.1720(c).

It is undisputed that Foreman McCurdy was not wearing gloves when he was shocked. However, M-Class argues that he was merely kneeling in front of the continuous miner at the time and that the Secretary cannot prove he was “handling materials or performing work which might cause injury to the hands.” (Resp. Cross Mot. 10.) I agree. As discussed above, the Secretary’s evidence is insufficient to establish exactly what McCurdy was doing at the time he was shocked or to rule out the possibility that his contact with the unidentified electrical component resulted from a loss of balance, a fall, or some other inadvertent motion that led him to accidentally contact the electrical panel. The regulation cannot have intended to punish him for accidentally contacting a live wire when the Secretary cannot prove he was taking the sort of foreseeable risk that would have obligated him to wear gloves.

The Secretary contends that the PPM requires a miner to wear gloves in accordance with § 75.1720(c) whenever he is troubleshooting or testing energized equipment. (Sec’y Cross Mot. 8; Sec’y Response 8.) But the regulation itself requires gloves to be worn only when handling materials or performing work which could injure the hands. Not all activities that constitute troubleshooting will necessarily pose a risk of injury to the hands, and in some circumstances it is safer *not* to wear gloves when troubleshooting. For example, McCurdy testified that when he was “bumping” the cutter head on the continuous miner, he took his gloves off to operate the miner’s control because “I’m not a continuous miner operator, I’d just as soon have my hands on the remote, not hit the wrong button.” (McCurdy Depo. 33.) This situation seems to fit the exception to § 75.1720(c) that allows a miner not to wear gloves when they would pose a hazard. Hitting the wrong button on the remote control is a legitimate concern, particularly for an electrician who is not a miner operator, because it creates a risk that the miner will be run over, pinned against the rib, or otherwise injured due to unintended movement of the machine, which has happened many times in underground coal mines. *See, e.g., Pontiki Coal Corp.*, 15 FMSHRC 48 (Jan. 1993) (ALJ) (discussing incident where a troubleshooter who was trying to rotate the cutter head hit the wrong button and activated the conveyor chain instead, which pulled him under the machine and killed him). Thus, I reject the Secretary’s suggestion that gloves must be worn at all times whenever a miner is troubleshooting because this would run counter to the Mine Act’s safety-promoting purposes in some situations.

The Secretary’s witnesses said that McCurdy was tracing wires before he was shocked, which is a type of troubleshooting that would pose a risk of injury to his hands. (Bretzman Depo.

61; Jeralds Depo. 17.) But McCurdy specifically denied tracing wires at the time he was shocked, stating, “I don’t recall at that time tracing wires when I contacted. I traced the wires earlier when I had the miner locked out.” (McCurdy Depo. 31.) Supporting this statement, he provided a detailed account of all the actions he took that day to troubleshoot the continuous miner:

He started by locking the miner out at the power center then checking the radio circuitry, including the radio circuit connections for the antenna and receiver. (*Id.* at 11-12.) With the machine still deenergized, he opened the control panel and checked the various electrical components connected to the CCU and battery backup using a screwdriver and gloves. (*Id.* at 11, 13-15, 20-21.) When he still could not find the problem, he turned the power back on, “bumped” the cutter head with his gloves off, and checked the fault log on the machine’s Jana computer system, which is controlled by a mouse on the outside of the machine just like a regular computer. (*Id.* at 13-15.) Next, he tried rebooting the Jana system using the control breaker, to no avail. (*Id.* at 15-16, 29.) He then went back to the power center, locked the machine out a second time, and went over the control wires again. (*Id.* at 16-17.) Then he reenergized the machine, bounced the head again, and tried starting the machine with the remote and backing away from it to see if it would drop out. (*Id.* at 17-18.) He also traced the wires to make sure they were hooked up during one of the two times he had the machine locked out, then he took voltage measurements with a Triplett meter after restoring the power. (*Id.* at 31, 33-34.) After all of his efforts failed to locate the problem, he left and checked on the men working on the shuttle car. (*Id.* at 18.) When he came back, he knelt beside the control panel, looking in it and “[t]rying to go through my head to figure out what else I could do to make this machine drop out” with his gloves sitting on top of the machine and his tools sitting on the machine and in his bibs; at that point he was shocked. (*Id.* at 18-22, 35-36.)

The Secretary does not challenge McCurdy’s account and can produce no other evidence to show what he was doing when he was shocked. McCurdy’s testimony indicates he was knowledgeable and trained in proper procedures, such as the convention against crossing the “imaginary line” into an energized electrical panel, and exhibited proper respect for them; he was an experienced electrician who would not be expected to intentionally or needlessly expose himself to potentially fatal injuries by reaching into an energized panel barehanded. (*Id.* at 8-10, 34, 36.) I find the evidence insufficient for the Secretary to prevail on an argument that McCurdy was tracing wires or performing other work that posed a risk of injury to his hands at any one time when he was not wearing gloves.

The Secretary bears the burden of proof, but has failed to produce evidence sufficient to establish a violation of § 75.1720(c). The Secretary has not identified any material facts remaining in dispute. M-Class is entitled to summary decision on this violation.

**ORDER**

Respondents' motions for summary decision are **GRANTED**, the Secretary's cross motion for summary decision is **DENIED**, and Order No. 8432252 and Order No. 8432253 are **VACATED**.

Because no issues remain for adjudication, these proceedings are hereby **DISMISSED**.

/s/ Priscilla M. Rae  
Priscilla M. Rae  
Administrative Law Judge

Distribution:

Emelda Medrano, Esq., U.S. Department of Labor, Office of the Solicitor, Eighth Floor, 230 South Dearborn Street, Chicago, IL 60604

Christopher D. Pence, Esq., Hardy Pence PLLC, P.O. Box 2548, Charleston, WV 25329

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 2017

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

v.

NEWMONT SLATE COMPANY, INC.,  
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. YORK 2016-20-M  
A.C. No. 43-00011-393999

Mine: Newmont Slate Co.

## AMENDED DECISION<sup>1</sup>

Appearances: Emily B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado for Petitioner

John Williams, President, Newmont Slate Company, Inc., West Pawlet, Vermont for Respondent

Before: Judge Barbour

In this civil penalty proceeding arising under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 815, 820 (2012) (the “Mine Act”), the Secretary of Labor on behalf of his Mine Safety and Health Administration (“MSHA”) petitions for the assessment of civil penalties for 16 violations of mandatory safety, health, and training standards found in Parts 56, 46 and 62 of Title 30 Code of Federal Regulations. The violations are alleged to have occurred at a slate quarry and mill owned and operated by Newmont Slate Company, Inc. (“Newmont”). At the facility slate is quarried and then cut and shaped into shingles used primarily for roofing and cladding. Newmont is one of the few companies in the United States that does such work.

The citations were issued by MSHA Inspector John Burton who made findings regarding the existence of the alleged violations, the gravity of the violations and the negligence of the

---

<sup>1</sup> The court’s original decision issued on March 30, 2017, contained several clerical errors regarding the Secretary’s proposed penalties in Citation Nos. 8917956, 8917960, and 8917966. The decision has been amended to reflect the correct proposed and assessed penalties. As a result of these changes, Newmont shall be required to pay civil penalties in the amount of \$4,462, instead of the amount of \$3,592 originally specified in the March 30 decision. Further, the final order has been amended to reflect the modifications made to Citation Nos. 8917954 and 8917963 in the body of this decision.

company.<sup>2</sup> Burton also found that three of the alleged violations were significant and substantial contributions to mine safety hazards (“S&S violations”). The Secretary proposed civil penalties that in the aggregate total \$6,002.00. Newmont contested the violations and the proposed penalties asserting that some of the violations did not occur or if they did that Burton’s findings and many of the proposed penalties were not justified by the facts.

After the chief judge assigned the case the court issued an order requiring the parties to confer to determine if they could resolve their differences. When they could not the court asked a special counsel to intervene in the hope that an independent and impartial official could facilitate a settlement. When counsel’s efforts failed the court scheduled a hearing in Rutland, Vermont. The Secretary was represented by counsel. The company was represented by its president, John Williams.<sup>3</sup>

Prior to going on the record the court asked the parties to make a final attempt to reach an agreement on the case or at least to resolve their differences with regard to some of the alleged violations. The parties conferred, but again were unable to come to an understanding, and the case then went forward. Tr. 9-10.

---

<sup>2</sup> John Burton is a duly authorized mine inspector working out of the MSHA field office in Albany, New York. Burton graduated from high school in 1988 and then went into the United States Army where he served as a combat engineer and a heavy equipment operator. Following his honorable discharge Burton worked for a construction company as a foreman and a heavy equipment operator. After leaving the construction company Burton worked for a company producing and selling concrete redi-mix and the aggregates from which redi-mix is produced. While working in the redi-mix business Burton operated and maintained a wash plant, a screening plant, and he operated various types of mobile equipment. Tr. 33. He also was responsible for conducting workplace examinations and mobile equipment examinations. Tr. 33-24. Burton next worked as a haul truck driver for a construction company where he once again operated various types of heavy equipment.

<sup>3</sup> Williams has been mining slate for 53 years. He knows the business inside and out. However, he is not conversant with the mechanics of the Mine Act. Williams explained to the court that while in the past he accepted citations as written and paid fines as assessed, he found the process “downright annoying.” Tr. 19. Adding to his pique was his claim that the inspection during which the subject citations were issued resulted in the most citations the company ever received in a single inspection. Tr. 77. Williams stated he decided to use the present case to “see how the system works.” Tr. 19. He credited the Secretary’s counsel with perseverance and patience in explaining to him how violations are assessed and how they are contested. The court also recognizes and commends counsel’s willingness to add a teaching function to her many other duties. In going out of her way to assist Williams counsel acted in the best interests of her client and the public. The court also commends Williams for his efforts to better understand the Mine Act. The court recognizes the company was engaged in a learning experience that required a more than ordinary investment of counsel for the Secretary’s and the court’s time, but the court believes that the experience was worthwhile and that it will lead to a safer mine and a more harmonious relationship between the company and the agency.

## **AGREED UPON FACTS AND CONCEDED VIOLATIONS**

Prior to hearing the witnesses, counsel for the Secretary reported that she and the company agreed upon several relevant facts, namely:

1. When the subject citations were issued, the company was subject to the jurisdiction of the Mine Act.
2. The company engaged in slate mining operations at the subject mine.
3. The company's mining operations affected interstate commerce.
4. At all times relevant the company [was] an "operator" as defined in section 3(d) of the Mine Act.
5. Inspector Burton was acting in his official capacity as a duly authorized representative of the Secretary when he issued the subject citations.
6. The proposed penalties will not affect the company's ability to remain in business.

Tr. 17-18, 21.

After stating his agreement with the facts, Williams advised the court that through his better understanding of the assessment and contest processes there were several citations he could accept as written, or, as Williams put it, he could "skip right over." Tr. 20. As further explained below, ultimately Williams withdrew Newmont's contests of seven citations. See "The Uncontested Citations," *infra*.

## **THE CONTESTED CITATIONS**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
8917961	8/25/15	56.4101	\$263

The citation states:

There were no signs readily visible prohibiting open flame or smoking or open flames at the 4 propane tanks [at] the west side yard area of the mill. The propane tanks supply propane to the mill building and miners transport and cleave slate in the west side yard area of the mill. This condition exposes a miner to a

fire/explosion hazard. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh.9 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to a fatal injury and was due to the company's low negligence.

In August 2015 Burton was assigned to inspect Newmont's quarry. Although he had inspected other slate quarries, the August inspection was his first visit to Newmont's facility.<sup>4</sup> Tr. 40. Burton began the inspection on August 25. Burton had been conducting inspections on his own for about 18 months. Tr. 70. When Burton arrived the mine was operating and production was ongoing. Tr. 62. During the inspection Burton was accompanied by Albert Gallupe, Newmont's maintenance foreman. *Id.*

Among the first things Burton observed were four propane tanks on the west side of the mill building. Burton looked but saw no signs prohibiting open flames or smoking in the vicinity of the tanks. Tr. 50. Burton described mandatory safety standard section 56.4101 (30 C.F.R. § 56.4101) as requiring "a mine operator [to] post readily visible signs where a . . . fire [and/or] explosion hazard exists." Tr. 50-51.

Burton explained that the tanks supply propane to the mill where miners cleaved slate into shingles.<sup>5</sup> No signs were posted on the tanks or in the area of the tanks warning miners of a fire or explosion hazard. Tr. 51. Burton found that the lack of signs constituted a violation of section 56.4101. *See* Gov't Exh. 9 at 3. However, he also found that it was unlikely the company's failure to post the signs would result in an accident. Still, if the gases in one of the tanks "were to vent" (meaning were to escape the tank) and to do so in the vicinity of an open flame, a fatal accident could occur.<sup>6</sup> Tr. 54. Burton stated that even though, "There were no open flames or sparking materials observed in or around the . . . tanks[,]” (Tr. 52) if an accident occurred, "the fireball and flying projectiles that would come from the steel tank would be expected to kill a miner." *Id.*; *see also* Tr. 130. Burton testified that only one person was subject to the hazards of a tank explosion, the person who regularly cleaved the slate. Tr. 55. He noted however that the area was traveled, albeit not regularly, by other miners in mobile equipment. Tr. 56 (*referencing* Gov't Exh. 9 at 4.), 58.

Burton found that Newmont's negligence was low. He acknowledged that Newmont management officials did not travel the area on a regular basis. He was of the view that the

---

<sup>4</sup> At the time the mine consisted of the quarry where slate was extracted, the mill buildings in and around which slate was processed and other structures related to the business. Tr. 41. The mine employed approximately 45 to 48 people. Tr. 43. Burton described the facility as "one of the larger slate mines in the region." Tr. 42. Burton stated if he were to rate the mine for cleanliness and organization he would consider it "about average." Tr. 69.

<sup>5</sup> According to Burton, the process of cleaving the slate requires the use of pneumatic hammers to "size the slate for thickness." Tr. 51.

<sup>6</sup> Indeed, as Burton noted, such a fatal accident occurred in 2001 at a different metal/nonmetal facility. Tr. 53-54; *see* Gov't Exh. 9(b).

officials might not have been aware of the absence of the required signs. This was especially true since the area was not required to be pre-shift or on-shift examined on a regular basis. Tr. 58. To abate the alleged violation the company placed a sign stating “No Smoking –Danger” at the edge of the road adjacent to the tanks. Tr. 64; Gov’t Exh. 9 at 4.

For his part Williams maintained that miners would recognize the propane tanks for what they were and would know not to have open flames or lighted cigarettes around them. Therefore, in William’s opinion a fatal accident was very unlikely. *See, e.g.*, Tr. 76.

### **THE VIOLATION, ITS GRAVITY AND NEWMONT’S NEGLIGENCE**

Section 56.4101 states, “Readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.” Burton’s unrefuted testimony established the violation. A precondition for posting the required signs is a “fire or explosion hazard.” It is common knowledge that propane is highly flammable and explosive and as Burton stated, if the gases in any one of the tanks “were to vent” an open flame could spark an explosion. Tr. 54. The record supports finding the propane was regularly used in the process of cleaving slate in the mill and mill yard. Tr. 55. While it is true that Burton saw no open flame or flames in the vicinity of the tanks (*Id.*), without a warning sign or signs there was the potential hazard of a miner using flame producing equipment (*e.g.*, welding) or of lighting a cigarette dangerously near the tanks. If one or more of the tanks vented the gas could ignite and a catastrophic explosion could result. The court credits Burton’s testimony that such an event would likely result in a fatality. Tr. 130. Because of the grave consequences, the court concludes that violation was moderately serious, even though a resulting fire or explosion was unlikely given the small chance of a tank venting and of an ignition source being in the area.<sup>7</sup>

Burton found that Newmont’s negligence was low and the record supports the finding. Burton’s testimony that the area containing the propane tanks was not subject to regular pre-shift or on-shift examination and management officials did not travel past the tanks frequently was not contradicted. Tr. 58. Given this, it would have been easy for the company frequently to fail to note and correct the lack of warning signs.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
8917962	8/25/15	56.13011	\$585

The citation states:

There were two air receiver tanks . . . that did not have automatic relief valves or pressure gauges installed. First a blue Emglo 50 gallon air tank was connected to the air compressor in the yard splitting area. Second a 30 gallon air tank was mounted to air compressor c9804 in the

---

<sup>7</sup> The court fully agrees with Williams that most miners would recognize the propane tanks and would know not to produce an ignition source in their presence. Tr. 76.

quarry. Both air tanks did not have automatic pressure relief valves or an air pressure gauge installed on the air tanks. This condition does not allow a miner to know how much air is inside the portable air tanks nor does it allow the tank to vent if the maximum allowable working pressure is exceeded creating and exploding of a pressure vessel hazard [(sic.)]. In the event an accident were to occur it would be likely that a fatal injury would be expected.

Gov't Exh.10 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to a fatal injury and was due to the company's moderate negligence.

Burton issued the citation because, "There were two receiver tanks at the mine that were not equipped with safety valves or pressure gauges." Tr. 84. Burton found the condition violated section 56.13011, which states that such tanks "shall be equipped with one or more automatic pressure relief valves" and that "[a]ir receiver tanks also shall be equipped with . . . pressure gauges." 30 C.F.R. § 56.13011; Tr. 84. Burton testified the words "shall" as used in the standard mean that the presence of pressure relief valves and gauges on the tanks are mandatory. *Id.* Burton maintained that one of the air tanks (the Emglo 50 gallon tank) was connected to an air compressor in the slate splitting area of the mill yard (also known as the slate cleaving area). The tank was not equipped with a pressure relief valve or a pressure gauge. Tr. 85. He further testified that he saw another air tank that was mounted on an air compressor. That tank, like the Emglo 50 gallon tank, did not have a pressure relief valve or a pressure gauge. *Id.* The two tanks were approximately 700 to 1000 feet apart. *Id.*

Burton identified a photograph of the Emglo 50 gallon tank and circled two ports on the tank where a pressure relief valve should have been located. Tr. 86; Gov't Exh. 10 at 3. Burton also identified a photograph of the air receiver tank that was mounted on an air compressor. Gov't Exh. 10 at 4. Neither a pressure relief valve nor a pressure gauge was present. Tr. 92. On the photograph Burton circled the ports where the relief valve and the pressure gauge should have been. Tr. 91-92; Gov't Exh. 10 at 4. Burton explained that the valves protected against the tanks exploding if they were "over pressured" (Tr. 86), and the gauges insured miners knew the tanks contained the right amounts of air. (Tr. 87).

In Burton's opinion both tanks presented with two conditions that violated section 56.13011. The tanks had no pressure relief valves and no pressure gauges. Tr. 88-89. Burton explained that the relief valves and pressure gauges are sometimes combined as a single piece of equipment and sometimes they are two separate pieces of equipment. Tr. 90-91. However, neither tank had either configuration.

Burton found that an injury was unlikely to occur as a result of the missing valves and gauges. Tr. 93. He noted the Emglo 50 gallon tank had a cracked air valve. Because of this it was operated at a lower air pressure than otherwise would have been the case. Tr. 93. Nonetheless, if either of the tanks became over pressurized and exploded, flying shrapnel could easily kill a miner. Tr. 95; Gov't Exh. 10 at 1. Burton believed the persons most likely to be affected were miners who used the tanks to cut slate. Tr. 96. He concluded that the hazard was enhanced by the

fact that both tanks were portable. They “could be moved anywhere on the mine site” and could be used by a miner who was not familiar with the equipment. Tr. 121, *see also* Tr. 125, 128.

Burton found that the company was moderately negligent. Gov’t Exh. 10 at 1. He based his finding on the fact that a miner told him it was permissible to operate the tanks without the valves and gauges because the tanks were usually connected to a “regulated compressor” and the regulated compressor system contained the required valves and gauges. Tr. 96. Based on the miner’s statement Burton concluded that mine management knew the condition existed. *Id.*

Williams was able to provide more information regarding the operation of the tanks. He explained that they were used to power a “rivet buster,” a pneumatic hammer used to break slate. He agreed pressure relief valves and pressure gauges were required but in his opinion their presence on the tanks was not mandatory. Rather, he thought they could be located as part of the regulated compressor system.<sup>8</sup> Tr. 103-04. Williams testified that the system’s compressor was located inside the mill. The compressor was connected to the cited tanks with a three quarter inch airline. Tr. 105. Although at the time of the inspection the Englo 50 gallon air tank was disconnected from the system and the air compressor was 400 feet away from the tank, Williams agreed that the tank could be moved and was available for use. Tr. 115-16. The same thing was true of the other cited tank. Tr. 116.

Williams maintained there was no chance the cited tanks would explode because the air pressure in the tanks was below the level necessary to cause their failure. Tr. 116. While an “oddball tank” could be dangerous, he noted the cited tanks had been checked and tested prior to use to confirm their integrity. Tr. 106. Williams argued that although the standard refers to “tanks,” technology had advanced to the point where the standard should be revised to apply to “[a]ir receiver systems.” *Id; See also* Tr. 114. If the standard were reworded this way the company would be in compliance. *Id.* Nonetheless, Williams agreed that both of the cited tanks were air receiver tanks and that neither had a pressure relief valve and a pressure gauge on the tank. Tr. 109-10.

### **THE VIOLATION, ITS GRAVITY AND NEWMONT’S NEGLIGENCE**

The court finds the violation existed as charged. The standard is clear. It states that air receiver tanks “shall be equipped” with one or more automatic pressure relief valves and with pressure gauges. 30 U.S.C. § 56.13011. As Burton correctly noted, “shall be equipped” means that the specified items must be present on the tanks. Tr. 84-85. Burton testified that the items were not present on either tank (Tr. 85-86, 88-89, 91-92), and Williams agreed. Tr. 108-10.

While there was a violation, the testimony leads the court to conclude the violation was technical and that it presented virtually no hazard to the company’s miners. Burton agreed with

---

<sup>8</sup> Burton recognized that the system as a whole might have a pressure relief valve and that if it did the likelihood of an injury would be much reduced, but in his opinion the presence of a valve or gauge elsewhere in the system did not invalidate the violation. Tr. 119. Burton also agreed that the PSI rating of the tanks was lower because they were part of a system and that this too reduced the likelihood of an injury arising from the cited conditions. Tr. 120-21.

Williams that because the tanks were each part of a system they had a PSI rating below the level that was necessary for the tanks to pose an explosion hazard. Tr. 120-21. Moreover, according to Williams, there were valves and gauges in the system which served the same purpose as valves and gauges on the tanks. Tr. 106, 114. Williams's suggestion that the standard be revised to apply to "air receiver systems" rather than to tanks, was reasonable, and it may well be that such a revision would provide miners with the same level of protection as the present regulation.

Burton was concerned about the portability of the tanks. He feared they could be moved and used when not part of an overall system and thus be totally without the protection afforded by the valves and gauges. Tr. 121, 125, 128. However, the court notes that while Williams agreed such use was possible (Tr. 115-16), there is nothing in the record to indicate it was likely. Rather, Williams's testimony establishes that the tanks were primarily used to provide pneumatic pressure to the rivet buster and that when used this way the system of which the tanks were a part was protected with the valves and gauges. Tr. 103-04. Further, while Williams agreed that an "odd ball" tank could be dangerous, nothing in the record indicates either of the cited tanks was structurally defective in a way that posed a danger. For many of these reasons Burton found that it was unlikely a miner would be injured due to the violation. Gov't Exh. 10 at 1. The court goes further and for all of these reasons finds that it was extremely unlikely.

The court also departs somewhat from Burton's negligence finding. Burton believed the company knew its tanks lacked the required valves and gauges because a miner told him the tanks could be operated without that equipment since the tanks were connected to a regulated compressor. Tr. 96. The court credits what Burton was told, but unlike Burton the court concludes it significantly mitigates the company's negligence. The court finds that the miner was conveying to Burton the same belief about which Williams testified, to wit that if the required valves and gauges are a part of the system they are not required on the tanks. Tr. 103-04, 114. The company's belief, although mistaken, was reasonable, and the court concludes that Newmont's genuine, good faith belief it was in compliance reduced the company's otherwise moderate negligence to low.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
8917959	8/25/15	56.12018	\$585

The citation states:

There were two circuit breaker panels . . . that had circuit breakers that were not labeled to show the units they controlled. First, the main mill, east splitting room circuit breaker had one 480 volt 30 amp breaker that was not labeled. Second, the new mill 480 volt circuit breaker panel had one 100 amp and one 15 amp circuit breaker that were not labeled. The circuit breakers were in the [“]on[”] position. This condition does not allow a miner to know which circuit to de-energize in an emergency. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh. 7 at 1. The citation contains the inspector's findings that the cited conditions were unlikely to lead to a fatal injury and were due to the company's moderate negligence.

During the course of his inspection Burton examined two circuit breaker panels that he found to be defective. One panel was in the main mill. The other was in a different mill, the “new mill.” Tr. 141; Gov’t Exh. 7 at 3. Each panel contained circuit breakers that were not properly labeled. Tr. 139. Therefore, Burton issued a citation to the company for violating section 56.12018, a mandatory safety standard requiring “the identification of power switches.” Tr. 140, Gov’t Exh. 7.

Burton described the first circuit breaker panel as the panel containing the breakers for the main mill’s east slate splitting room. In the panel there was one 480 volt 30 amp circuit breaker that was not labeled. *Id.* The unlabeled circuit breaker was in the “on” position, which indicated to Burton that the panel was energized. Tr. 141. The second panel was for the new mill building. It too was a 480 volt panel. The second panel contained two unlabeled circuit breakers, one for a 100 amp circuit and one for a 15 amp circuit. Tr. 140. These breakers also were in the “on” position. Tr. 141, 144. Burton testified that the lack of labels meant that a miner would not know which circuits to de-energize in an emergency or which breakers to lock out when making repairs. Tr. 141-42. Burton physically checked the unlabeled circuits with a “tick tracer” and confirmed that power was flowing to each of the three unlabeled circuits.<sup>9</sup> Tr. 142, 143-44; See Gov’t Exh. 7 at 3, 4.

Section 56.12018 requires the identification of “principal power switches.” In Burton’s view, both of the cited panels were principal power switches for the circuits controlled by the circuit breakers. Tr. 163-64. He explained when electricity enters the panels and comes to the circuit breakers, the breakers “[become] the principal power switch[es] for[the] circuit[s] from the circuit breaker panel[s] to the equipment.” Tr. 163-64. He stated, “[T]he power is subbed out from the panel and it is branched down to that circuit breaker which is the primary switch . . . for that circuit.” Tr. 155.

Burton described the hazard posed by the lack of labeling. “An unlabeled circuit breaker does not allow a miner to know which circuit to de-energize in an emergency, and it also does not allow [a] miner to know which circuit to de-energize, lock and tag out for repairs.” Tr. 141-42. However, Burton did not believe the conditions were likely to result in an injury. He noted that both panels were subject to main circuit breakers and that to de-energize the circuits in either panel “a miner could go to the main and switch that main breaker off in an emergency.” Tr. 149. Also, if work needed to be done on equipment on any of the subject circuits a miner would likely call on an electrician to do it. Referring the work to a knowledgeable electrician would reduce the chance of injury. Tr. 149. Nonetheless, were an injury to occur, Burton believed it was likely to result in a fatality. He noted that a “480 volt electric shock is often associated with fatal-type injuries.” Tr. 150.

Burton found the company was moderately negligent. There were numerous circuit breaker panels at the mine and the company knew the requirements of the standard since all but the cited circuits were labeled properly. Tr. 154. He also testified that although the company

---

<sup>9</sup> A “tick tracer” is a pocket tool designed to detect the presence of voltage in a wire or in a piece of equipment without actually making direct contact with the conductor or energized part.

subcontracted its electrical work, a management official told him that the company did not follow up with the subcontractor to ensure contracted electrical work was done correctly.<sup>10</sup> Finally, there is a requirement that the panels be inspected and none of the three unlabeled circuits was reported on a workplace examination report. Tr. 154-55.

Williams testified there are three safety features on the cited circuits. There is the main circuit breaker that cuts off power to all of the circuits, the individual circuit breakers that cut off power to the individual circuits and “fuse cut-offs” at the particular machines powered by the cited circuits. Tr. 159-60. In Williams’s view each protection reduced the likelihood of an electrical accident. Tr. 160.

### **THE VIOLATION, ITS GRAVITY AND NEWMONT’S NEGLIGENCE**

The standard is simply worded, “Principal power switches shall be labeled to show which units they control unless identification can be made readily by location.” It is certain that there were three circuit breakers in two panels that were not labeled. Burton’s oral testimony and the photographs introduced into evidence by the Secretary prove this. Tr. 139-42; Gov’t Exh. 7 at 3, 4. The unresolved issue is whether the circuit breakers were “principal power switches” within the meaning of the standard. Based solely on the record presented in this case, the court concludes they were.

As the court has previously noted:

[Q]uestions regarding the meaning of the phrase ‘principal power switch’ and whether particular cited equipment come within the meaning have repeatedly been brought to the Commission’s judges. While the judges have decided whether certain equipment is covered by the standard based on the facts of the cases before them, a definitive meaning of the phrase ‘principal power switch’ has yet to emerge. *See, e.g., Beverly Materials, LLC*, 35 FMSHRC 88, 95-97 (Judge Moran); *Cemex Construction Materials of Florida, LLC*. 34 FMSHRC 170, 174 (Jan. 2012 (Judge Zielinski); *Omya Arizona, A Division of Omya, Inc.*, 33 FMSHRC 2738, 2739-40 (Judge Miller); *Blue Mountain Production Co.*, 32 FMSHRC 1464, 1473-74 (Oct. 2010) (Judge Miller); *Tide Creek Rock, Inc.*, 19 FMSHRC 390, 399 (Judge Manning); *Walker Stone Co., Inc.*, 12 FMSHRC 256, 264 (Feb. 1990 (Judge Fauver); *FMC Corp.*, 6 FMSHRC 1294, 1299

---

<sup>10</sup> Williams seemed to agree with Burton that although work on the panels was subcontracted, the company should have known the circuits were not labeled. He stated that although it was the electrical contractor who “screwed up,” “I should have caught it.” Tr. 160; *see also* Tr. 162.

(May 1984) (Judge Vail) (decided under identically worded standard (30 C.F.R. § 57.12-18.)

*US Silica Company*, 36 FMSHRC 517, 519 (Feb. 2014) (*fn omitted*); *see also Northern Illinois Service Co.*, 37 FMSHRC 1225 (June 2015) (ALJ Barbour).

In this particular case the record establishes that, as Burton testified, the circuit breakers were power switches in that they were components that could break an electric circuit. While, as the court has noted, there is no accepted meaning of the phrase “principal power switch” there is an accepted meaning of the word “principal” when it is used as an adjective. It means “chief” or “leading.” See Houghton Mifflin Harcourt, *The American Heritage Dictionary of the English Language, Fourth Edition* (2009) at 1395. Here, as Burton testified, the cited circuit breakers were the first switch[es] in the line of the individual circuit[s]” (Tr. 156) so that each switch was “the primary switch . . . for [its] circuit.” Tr. 155. The court construes a primary switch as the chief or leading switch in a circuit, and the court concludes that each cited circuit breaker was a “principal power switch” for its circuit. It may be, as Williams’s questions on cross examination suggest, that there was a principal power switch for all of the circuits in each breaker box. See Tr. 155-58. Indeed, Burton himself alluded to the presence of such a switch when testifying that the cited conditions were unlikely to result in an accident because “a miner could go to the main and switch the main breaker off in an emergency.” Tr. 149. However, Williams did not offer oral or visual evidence regarding such a switch or switches, and the court must rule based on the record before it, not on speculation as to what the record might have been if Williams had pursued the issue. The court therefore finds that the Secretary proved the violation.

Burton found that the violation was unlikely to result in an accident, and the court fully agrees. There evidently were other ways to shut power off to the affected circuits prior to working on them and the employees of the company’s electrical subcontractor would have been much more likely to recognize this than the company’s employees who did not specialize in electrical work. However, had an accident occurred, the court agrees with Burton that a fatality was likely. Burton stated the obvious when he testified that “a 480 volt electric shock is often associated with fatal-type injuries.” Tr. 150.

Finally, the court concurs with Burton that the company was moderately negligent. While Williams may have been right when he testified the company’s electrical subcontractor “screwed up” and failed to ensure the three circuits were labeled, as Williams also recognized, the company should have “caught” the mistakes. Tr. 160. Further, and as Burton testified, the workplace examination forms for the panels did not record the missing labels. While the company may have relied on the “expertise” of its subcontractor, it still was under a duty to ensure compliance with the standards. The company failed in its duty.

<b>CITATION NO.</b>	<b>DATE</b>	<b>30 C.F.R. §</b>	<b>PROPOSED ASSESSMENT</b>
8917956	8/25/15	56.14112(a)	\$1,304

The citation states:

The guard for “The Beast” [trimmer] saw was not secured in place. The saw was equipped with a nine-inch (approximate)

cutting blade. The saw[']s sliding table top is (approximately) 22 inches wide. The trimmer saw[']s cord was plugged in and the saw was available for use. The saw is used at the mill to custom trim dimension slate as needed. This condition exposes a miner to contact with the trimmer[']s rotating blade. In the event an accident were to occur it would be reasonably likely that permanently disabling injuries would be expected.

Gov't Exh. 4 at 1. The citation contains the inspector's findings that the cited condition was S&S, was reasonably likely to cause a permanently disabling injury and was due to the company's moderate negligence. Gov't Exh. 4 at 1.

Burton stated that he issued the citation because the trimmer saw's guard had been removed.<sup>11</sup> Tr. 173. The trimmer saw has a nine-inch blade and a 22-inch-wide tabletop. *Id.* The saw is used to trim slate to order. Tr. 183-84. When Burton inspected the saw he noticed that the guard for the blade was off and was sitting on a shelf beside the saw. Tr. 173-74; Gov't Exh. 4 at 6. Burton believed the saw had been used. Tr. 174. The saw was plugged into an energized wall outlet, and near the saw Burton observed pieces of slate that were typical of slate trimmed with the saw. Tr. 174-75, 177; Gov't Exh 4 at 7. Burton also noted dust around and on the pieces of the guard, which indicated to Burton that the "guard [had] been off . . . for a particular period of time, long enough to accumulate dust on it." Tr. 175. During that time Burton thought it likely the saw had been used since it was usually used daily at the mine. Burton also recalled that the mine foreman told him the guard was purposefully removed because it "may have been sticking." Tr. 185. This was another reason Burton thought it was likely that the saw had been operated with the guard off. Tr. 204

Burton believed the lack of a guard violated section 56.14112(b), which requires that guards be securely in place while machinery is operated. Gov't Exh. 4. He was quick to point out, however, that he could have cited the company for a violation of section 56.14107(a), a standard requiring the guarding of moving machine parts that can cause injury to persons. Tr. 200. In view of Burton's testimony counsel for the Secretary moved to amend the Secretary's petition to plead in the alternative a violation of section 56.14107(a). Williams did not object, and the motion was granted. Tr. 205-08.

Burton testified that the danger presented by the condition was that a miner's hands might contact the rotating saw blade. Tr. 178. He explained that when a miner trims slate, the miner secures the slate piece to the saw's table top, places his hands on the hand holds of the table top and pushes the table top and slate through and past the saw's rotating blade. The procedure brings the miner's hands very close to the turning blade. Tr. 180-81. The lack of a guard means there was "direct exposure of a miner to the rotating and moving machine parts" of the saw. Tr. 183-84. While only the miner who operated the saw was likely to be affected by the alleged violation (Tr. 188), Burton thought an accident involving the miner was reasonably likely and that as a result of the accident the miner was likely to lose all or part of his or her hand, and possibly all or part of his or her limb. Tr. 186. Burton termed such an injury a "dismemberment-type injury." *Id.* Burton emphasized that the saw was not tagged out and that electricity was

---

<sup>11</sup> Burton described the guards as "'two pieces [of plastic] that join together.'" Tr. 176.

flowing to it. Tr. 184, 186. He also noted that the saw was typical of the type that is used daily at mine. Tr. 185. Because the lack of a guard meant that a miner was directly exposed to the moving saw blade and therefore was “reasonably likely . . . [to] make contact with [the saw’s moving blade]” and suffer a permanently disabling injury, Burton found that the alleged violation was S&S. Tr. 187-88.

Williams testified that the company owned the saw for approximately five years. Because the saw did not come with a guard the company manufactured and installed one. Tr. 197. Williams agreed the saw was “safer if it is guarded.” *Id.* Williams stated that one of his employees removed the guard on purpose. Tr. 198.

#### **THE VIOLATION, ITS S&S NATURE, ITS GRAVITY AND NEWMONT’S NEGLIGENCE**

Section 56.14112(b) requires guards to be “securely in place while machinery is being operated.” Although the standard can be read narrowly as requiring an inspector to observe cited machinery in operation without a required guard, the court believes a more expansive reading is equally valid, to wit that a violation can properly be cited if it is reasonable to infer cited machinery was operated without a required guard. A persuasive argument can be made that the dust that accumulated on the parts of the guard (Tr. 175, 190), the slate ready to be cut and trimmed that was near the guard’s parts (Tr. 174-75, 177; Gov’t Exh. 4 at 7), the fact that the saw was plugged into an energized outlet (177-78) and the fact that Burton and Williams were told the guard was purposefully removed (Tr. 204, 198), when coupled with the fact that the saw was of the type in daily use at the mill (Tr. 185), support the inference that the saw was used without the guard prior to Burton’s inspection. In the court’s opinion, this inference would establish the alleged violation of section 56.14112(b), and the court would find a violation of the standard were it not for the court’s belief that the Secretary’s alternative theory rests on an even more solid legal footing.

Section 56.14107(a) states that moving machine parts shall be guarded to protect persons from contacting “gears, sprockets, chain . . . pulleys, flywheels, couplings, shafts, fan blades and similar moving parts that can cause injury.” While saw blades are not specifically mentioned in the standard they are similar to the moving parts mentioned and contact with moving saw blades can cause injury. Therefore, saw blades must be guarded. The blade of the cited stripping saw was not guarded, and the court finds the failure to guard the blade violated section 56.14107(a).

An S&S violation is “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety . . . hazard.” 30 U.S.C. §814(d). In order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 53 F.3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power Co., Inc.* 861 F.2d 99, 103 (5<sup>th</sup> Cir. 1988) (approving the *Mathies* criteria). An experienced MSHA inspector’s opinion that a violation is S&S is an important element for the court to consider when making an S&S determination. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *ICG Illinois*, 38 FMSHRC 2474, 2475 (Oct. 2016) (*citing Newtown Energy Inc.*, 28 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the “particular hazard to which the violation allegedly contributes[.]” and then determine whether “there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.* at 2475-76. This determination must be made “based on the particular facts surrounding the violation[.]” *Id.* The third step requires the judge to assume the existence of a hazard and assess whether the hazard “was reasonably likely to result in a serious injury.” *Newtown* at 2038; *ICG Illinois* at 2476. Applying that test, the court concludes the violation of section 56.14107(a) was S&S.

First, as the court has found, the company violated section 56.14107(a). The second step requires the court to define the particular hazard to which the violation contributed and then to determine whether there existed a reasonable likelihood of the occurrence of the hazard. The hazard in this instance was of a miner being cut by a moving saw blade, and it is clear to the court that the lack of a guard for the blade contributed to this hazard. Therefore the question is whether there was a reasonable likelihood a miner would be cut by the moving, unguarded blade. Burton’s testimony established that there was. He described how a miner must place his or her hands on hand holds adjacent to the blade as the miner pushes the table top through and past the rotating blade. Tr. 180-81. A misplaced hand, a slip while pushing the table top, and a lack of attention to the task, singly or in combination, could result in the loss of a finger or hand or the maiming of an arm. In other words, the nature of the task and the closeness of the saw operator’s hands to the moving blade in the court’s view support Burton’s finding that it was reasonably likely the saw operator would be injured. It is obvious to the court that the injury would be serious. The saw operator would be lucky if he or she only lost a finger. The court affirms Burton’s opinion that the violation was S&S.

In addition to being S&S the violation was serious. A violation that places a miner in reasonably likely danger of being maimed or dismembered cannot be viewed otherwise.

There is also the question of Newmont’s negligence. The court accepts the inspector’s finding that the company’s lack of care was moderate. Management should have detected and corrected the violation. It was, as Burton testified, open and obvious. Tr. 189. Moreover, the dust on the pieces of the guard leads to the reasonable inference that the violation existed for some time. Management certainly understood that the guard should have been in place. After all, the company provided the protection in the first place. Tr. 197. The company was under a duty to ensure that the saw was guarded, and it failed to meet its duty.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
8917963	8/25/15	56.14103(b)	\$392
8917968	8/26/15	56.14103(b)	\$362

The two citations concern cracked windows, one on a haul truck and one on an excavator.

Citation No. 8917963 states

The front window of . . . [a] haul truck . . . was cracked creating a hazard to the operator. The front window had two vertical cracks and one horizontal crack spanning the width of the window. A pen tip test of the widow[']s cracks indicated the cracks had raised edges. A miner was observed touching the glass with finger tips. This condition creates a laceration hazard to a miner[']s hands while touching the glass. In the event an accident were to occur it would be likely that injuries resulting in lost work days or restricted duty would be expected.

Gov't Exh. 11 at 1. The citation contains the inspector's findings that the cited condition was S&S, was reasonably likely to lead to a lost workdays or restricted duty injury and was due to the company's low negligence.

Citation No. 8917968 states:

The lower window in the operator's station of the Volvo EC290CL . . . [excavator] was damaged creating a hazard to the operator. The lower window measured (approximately)  $32\frac{1}{4}$  inches by  $14\frac{5}{8}$  inches. The left side of the window and the upper right corner was taped with duct tape restricting an operator[']s vision and the lower right corner of the window had star shaped cracks with raised edges and divots in both sides of the glass. A miner was observed touching the glass with a bare hand. This condition restricts an operator[']s vision through the window and [creates] a laceration hazard to a miner[']s hands from contact with the broken window. In the event an accident were to occur it would be reasonably likely a miner would receive injuries resulting in lost work days or restricted duty.

Gov't Exh.16 at 1. The citation contains the inspector's findings that the cited condition was S&S, was reasonably likely to lead to a lost workdays or restricted duty injury and was due to the company's moderate negligence.

According to Burton, section 56.14103(b), the standard cited in both instances, requires that windows of the cabs of self-propelled mobile equipment be "maintained for visibility and also that [the windows] not create a hazard to the operator." Tr. 214-15. Burton described the subject front window of the haul truck as having "two vertical cracks and one horizontal crack. The horizontal crack spanned the width of the window." Tr. 215. See Gov't Exh. 11 at 6. He described the cracks as being toward the middle of the window. Tr. 221; See Gov't Exh. 11 at 6. He further observed that the cracks had "raised edges" that subjected the hand on anyone touching the window to cuts. *Id.* Burton knew the cracks had raised edges because he moved the tip of his ball point pen over the cracks and could hear the pen tip "click" when it traveled over a

raised crack.<sup>12</sup> He also testified that the company's maintenance foreman agreed that the edges of the cracks were raised. Tr. 218. According to Burton, the truck is used daily to move slate to the waste pile or to the mill. Tr. 220.

In Burton's view the raised cracks presented a cut hazard in that a miner would clean the window of the truck to maintain visibility. In addition, during the preoperational examination of the truck the truck driver would move his bare hand across the crack. Tr. 216. Burton testified that during his inspection of the truck, he saw the truck driver touch the crack with his bare hand, although this was in response to a pen tip test conducted by Burton. Tr. 217, 218-19. Burton also stated he determined "through interviews" that miners used "paper towels or rags to clean the glass," which would put a miner's hand directly on the cracks with only a piece of paper towel or a piece of cloth between the cracks and the miner's skin. Tr. 218. Burton believed that a miner was putting his bare hand "in close proximity" to the cracked glass every time he or she cleaned the windshield. Tr. 220. He further noted that the window needed to be cleaned frequently because of dust accumulating on it.<sup>13</sup> Tr. 221-22.

Burton believed an injury was reasonably likely because he "observed a miner reaching out and directly . . . exposing himself to [the] hazard" and because a miner put a bare hand in close proximity to the glass every time he or she cleaned it. Tr. 219-20. Burton found the resulting injury was likely to result in lost workdays or restricted duties because if a miner cut his or her finger the miner would first have to have someone look at the cut and then, perhaps, have the cut stitched. Also, if a glass shard lodged under the miner's skin the injury could lead to an infection and the infection could cause a miner to miss work. Tr. 220-21.

Burton found that the company's negligence was low. Burton testified he was told that two weeks prior to his inspection the truck had stopped abruptly, the hood had popped up hitting and cracking the front window, and the truck operator had not told mine management or noted the condition on his pre-shift report. Tr. 227. Burton learned that the haul truck driver was the only person who operated the truck and that the driver did not tell management because he did not believe the cracks interfered with his vision. Tr. 224. But, the condition had existed for two weeks and Burton thought that during the two weeks management officials should have seen the cracks and replaced the window. Tr. 225.

---

<sup>12</sup> Burton explained the "pen tip" test as follows:

I don't put my hand against the glass. I take [a] pen tip and I go across the glass, and if that pen tip clicks when it comes to a crack I know that the two pieces of glass are not on the same plane and it indicates that there is a raised crack in the glass and a cut hazard to a miner's hand.

Tr. 215-16.

<sup>13</sup> However, when Burton was asked how likely it was a miner would clean the windshield in August when the cab side windows would be rolled up to take full advantage of the cab's air conditioning system, Burton responded that it was "tough to say." Tr. 223.

With regard to the excavator, Burton stated that it was used multiple times a day to move slate, stone or rubble to the mill or to the waste dump (Tr. 231-32) and that he issued the citation because the lower window of the operator's compartment on the excavator was damaged and Burton believed that the damage created a hazard to the excavator operator and others. Tr. 229. The left side (when viewed from inside the compartment) of the window was half covered with duct tape. There was also a smaller amount of duct tape on the right side of the window. Tr. 230; Gov't Exh. 16 at 4. Under the duct tape on the lower right side were star shaped cracks with raised edges. Both sides of the window had divots. *Id.* According to Burton, the duct tape, cracks and divots obscured the excavator operator's vision. Tr. 230. He feared that "with [the] reduced visibility . . . a miner might not be able to effectively see to operate the equipment." Tr. 321. Burton testified that the lack of full visibility could cause a fatality in that when the excavator was operated near the edge of a highwall or drop off, the miner operating the excavator might not see the edge or might misjudge the distance resulting in the excavator over-traveling the edge and causing serious injury or death to the excavator operator. Tr. 233. Moreover, other miners worked in close proximity to the excavator and they could be hit and/or run over because the operator's vision was limited. Tr. 233-34. The possible injury would affect one person, either the operator of the excavator or a miner working near the excavator. *Id.*

Burton also feared the cracks created a hazard by exposing the excavator operator to cuts on his or her hands. Tr. 230. Burton thought it was reasonably likely a miner would suffer hand cuts because he actually saw a miner touch the cracks with his bare hand after Burton conducted a pen tip test on the window. Tr. 231. He further believed the condition of the window was likely to lead to lost workdays or restricted duty because if a miner cut his hand while making contact with the glass it could involve a trip to the doctor and the cut or imbedded glass shards might lead to an infection. Tr. 232.

Burton concluded that Newmont was moderately negligent. The fact the window was taped indicated someone knew of the condition but did not correct it. Tr. 235.

Williams did not challenge the existence of the defective windows but he was skeptical of the inspector's S&S findings. He questioned if, given the small elevation between the cracks in the haul truck's window, anyone touching the cracks was likely to get more than a minor cut or an abrasion requiring a Band-Aid. Tr. 239. Williams also disputed Burton's scenario that

A miner would receive a cut to the finger, he or she would have to go to a doctor [to] have it evaluated. There is the potential that bandaging would have to be applied, that there is a potential for infection to the cut and/or bandaging or stitches would have to be [applied and] a doctor would have to be visited a second time and those materials be removed and the cut inspected.

Tr. 243-244. Williams responded, "Pretty doomy and gloomy for a little cut. I've been cut a million times and never gone to a doctor for anything unless it was real deep." Tr. 244.

## **THE VIOLATIONS, THEIR S&S NATURE, THEIR GRAVITY AND NEWMONT'S NEGLIGENCE**

Section 56.14103(b) requires the replacement or removal of damaged windows on operators' stations of self-propelled mobile equipment if the damage obscures visibility necessary for the safe operation of the equipment or if the damage creates a hazard to the equipment operator. The court finds the Secretary proved both of the alleged violations, albeit for somewhat different reasons. Because there was no evidence to the contrary the court concludes that the front window on the haul truck was cracked as described by Burton. Tr. 215, 221, Gov't Exh. 11 at 6. The cracks caused the edge of the glass on one side of the cracks to be slightly raised above the other side. The raised nature of the cracks was confirmed by Burton's "pen tip" test. Tr. 215-16. The court agrees that the raised cracks presented a cut hazard to the haul truck operator as he cleaned dust from the windshield. Tr. 217-19. The hazard caused by the damage to the window established the violation with regard to the haul truck.<sup>14</sup>

The damage to the window of the excavator as described by Burton also was not disputed by Newmont. Therefore, the court finds that the lower window of the operator's compartment was extensively taped to the point where the left side of the window was totally covered and the right side had a rectangular block of tape covering the upper right side of the lower window. Tr. 229-30; Gov't Exh. t. 16 at 4. In addition, there were cracks with raised edges on the lower right side of the window. *Id.*

The court credits Burton's testimony that the damaged window presented a hazard to the excavator operator. The duct tape on the lower window obviously obscured his or her vision of the immediate vicinity in which he or she was operating the excavator. The court agrees with Burton that failing to see the ground near the equipment could lead to the equipment operator misjudging the room in which he or she had to maneuver. As Burton maintained, if the excavator was near a highwall or other drop off the operator might not see the edge or might mistakenly think there was more room to operate than in fact was the case sending the excavator and its operator over the edge. Tr. 233. Or, as Burton noted, the operator might not see a miner working in the immediate vicinity of the excavator and might because of his or her limited vision hit or run over the miner. Further, the court credits Burton's testimony that the raised cracks exposed the equipment operator to cuts as he or she tried to clear dust from the lower window. Tr. 230. Therefore, the court finds the damaged window of the excavator both created a cut hazard to the equipment operator and obscured the operator's visibility—visibility necessary to safely operate the excavator. Tr. 233.

While the court agrees with the inspector that the company violated section 56.14103(b) in both instances, it finds that only the damage to the excavator's lower window was an S&S violation. There is no gainsaying the fact that a haul truck driver would from time to time clean the inside of the haul truck's windshield to remove dust. However, as Burton testified the driver would have a rag or paper toweling between his fingers and hands and the glass. This minimized the chance of a severe cut and/or of a glass shard lodging in the driver's finger or hand. Even if

---

<sup>14</sup> The court discounts the hazard allegedly posed by the driver touching the cracks with his bare hand. Burton's finding of this hazard was primarily premised on the driver responding to Burton's pen tip test, an action that was unlikely to recur.

the operator was bare handed nothing more than a painfully annoying cut or splinter was reasonable to expect, and such injuries do not rise to the level of being reasonably serious as required by *Newtown*. The court concludes Williams was correct when he stated that the cracks in the haul truck's windshield were most likely to result in a cut or an abrasion requiring a Band-Aid. Tr. 238. Burton's scenario of a cut or splinter requiring a doctor's care, bandaging, possible stitches and a resulting infection with follow up doctor's visits is possible, but not reasonably so. Tr. 243-44.

On the other hand, the damaged lower window on the excavator was indeed an S&S violation. All of the *Mathies* criteria as explained in *Newtown* were met. There was a violation of section 56.14103(b). The excavator was used multiple times a day, and the danger created by the violation was that its operator being unable to see in full the ground to the front and to the side of the excavator, would not see the distance he or she had in which to maneuver or would misjudge the distance and would inadvertently send the excavator over a drop off. Tr. 231-32. Williams did not challenge Burton's testimony in this regard. Nor did he contradict Burton's belief that the excavator operator's lack of full vision subjected a miner working in the immediate vicinity of the excavator to the danger of being hit and/or run over. Tr. 233. The court concludes that the frequent use of the excavator made the occurrence of these hazards reasonably likely as mining continued and it is obvious that the occurrence of either scenario was reasonably likely to result in a serious injury.

Given the findings with regard to the S&S nature of the haul truck violation the court concludes the cracks in its windshield did not constitute a serious violation. While it is true one person was subject to possible injury, the court has found that the injury was likely to be minor in nature. This is not the case with regard to the damaged lower window of the excavator. The restricted visibility that resulted from the violation was likely to cause the serious injury or death of the excavator operator or of a miner working adjacent to the excavator. The court therefore finds the violation was serious.

Finally, the court concludes that both violations were caused by Newmont's moderate negligence. The defective windshields were visually obvious. Both the haul truck and the excavator were subject to pre-shift examinations. The violations should have been detected and corrected, and they were not. *See* Tr. 225, 227, 235.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8917967	8/26/15	56.6900	\$243

The citation states:

There were deteriorated explosives in magazine #2 of the mine. There was one box of explosive[s] containing 48 sticks of 1 – ¼ by 8 inch 60% explosive[s] (Lot number 08JA14J1). The explosive sticks['] wrapping paper was discolored and white crystals had begun to form on one of the sticks. This condition creates an uncontrolled detonation of

explosive materials hazard. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh. 15 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to a fatal accident and was due to the company's moderate negligence. Gov't Exh. 15 at 1.

On August 26 Burton examined the mine's Magazine Number 2, a magazine containing dynamite.<sup>15</sup> Tr. 255. Burton was accompanied by the company's blaster. Tr. 256. Burton noticed a box of explosives labeled "Lot No. 08JA14J1." Tr. 256. The label indicated the box contained 48 sticks of dynamite. To verify the number of sticks inside the box the inspector and the blaster opened the box. Each stick was an inch and a quarter in diameter by eight inches long. The sticks contained sixty percent explosive material. Tr. 254. Burton described the wrapping paper of the sticks as "discolored." Tr. 254. In addition, according to Burton, "White crystals had begun to form on the outside of one of the sticks." *Id.* The white crystals indicated to Burton that the explosive material in the stick had deteriorated to the point where, "The explosive agent on the inside [of the stick] had started to bleed out through the paper." *Id.* Because of the deterioration Burton questioned if the explosives were safe to handle. The blaster too felt uncomfortable because of the discoloration and crystal formation. Burton testified the blaster said that, "[T]he explosives contained in that box [are] unsafe." Tr. 257. Burton added that he was told by the blaster that agents from the Bureau of Alcohol Tobacco and Firearms ("ATF") visited the mine one week before Burton's inspection. The agents informed the company the explosives should be disposed of.<sup>16</sup> *Id.*, Tr. 261. The blaster added that the company planned to detonate the explosives in an on-site blast the next day, August 27. Tr. 262.

Despite the company's plan to dispose of the dynamite, Burton issued a citation to Newmont because of the deteriorated explosives. Gov't Exh. 15. The inspector cited the company for a violation of section 56.6900, which states that, "Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer." Burton recognized that under the standard the company needed to know who the manufacturer of the explosives was so as to conform to the manufacturer's disposal instructions. Tr. 259. Austin Powder was the manufacturer, and Burton called Austen Powder. Austin Powder's representative told Burton that the discolored and crystalized sticks had in fact deteriorated and that such explosives typically are consumed in a nonproductive blast or are burned. Tr. 259-60. In Burton's opinion the company "had been warned" by the ATF to eliminate the dynamite but they "had already let [them] set for six days." Tr. 266. He added, "When they have deteriorated explosives they need to take corrective actions to remediate that hazard. The fact that they were told days prior actually indicates . . . that the issue is not being taken seriously." *Id.*

---

<sup>15</sup> There are a total of five magazines at the mine. Tr. 277.

<sup>16</sup> Burton explained that ATF personnel from time to time inspect blasting operations at mines.

Burton recognized that the dynamite was being stored in an ATF approved magazine, which he stated was “about the safest place on the mine that explosives could be.” Tr. 263. However, should an unplanned explosion occur, a fatality could be expected. Tr. 263. The person most likely to be killed would be a miner accessing the magazine. Tr. 264. He noted that an unplanned explosion could result from just handling the explosives because once they start deteriorating, “They become potentially unstable . . . and merely even handling the explosive[s] could set [them] off.” *Id.*

Because the ATF put the company on notice and the company failed to act promptly Burton found the company to be moderately negligent. Tr. 265. Burton stated, “[O]ne week seems excessive.” *Id.*

Williams explained that explosives usually deteriorate during the summer when the heat causes the components of the dynamite to separate Tr. 272-73. He further explained that dynamite is not easy to detonate. To cause it to explode dynamite has to be “hit with quite a shock.” Tr. 273. In William’s opinion it is best to leave deteriorated dynamite in a static location and to dispose of it when the next regularly scheduled blast takes place. *Id.*

Williams explained that the company kept only one or two boxes of dynamite on hand to use for small projects. He speculated that the relatively infrequent use of dynamite at the mine was why the subject explosives deteriorated. Tr. 274. He was adamant the deteriorated dynamite was not dangerous. He stated, “There was no unsafe factor there. So, it was just an overeager inspector trying to get another citation.” *Id.* Williams added that a box of dynamite costs \$300.00 and because the company “didn’t feel like buying \$300 worth of dynamite for no reason at all” it was waiting “until the next shot . . . [which] hadn’t come yet.” Tr. 275.

When Burton returned to the mine on September 14, he was advised that the deteriorated explosives had been consumed in a blast before his return visit (Tr. 286), and he terminated the citation. Gov’t Exh. 15 at 2.

### **THE VIOLATION**

The court concludes the Secretary did not prove a violation. The court has no doubt the inspector identified a safety hazard. The court credits Burton’s description of the deteriorated dynamite and his explanation that the box and its contents posed a hazard. Tr. 254. The court also credits the blaster’s opinion as expressed to Burton that the dynamite was not safe. Tr. 257. When Burton wrote the citation he described the violative condition as the presence of the defective explosives. (“There were deteriorated explosives in magazine #2 of the mine.” Gov’t Exh. 15 at 1.) During his testimony he expanded his reason for issuing the citation by adding that when deteriorated explosives are present the standard requires an operator to “take corrective actions to remediate that hazard.” Tr. 266. In his view the company did not take the required corrective action in a timely manner. *Id.* The problem for the Secretary is that when drafting the regulation he said nothing overt about the time within which deteriorated explosives must be eliminated. Rather, the regulation addresses the manner in which such explosives must be destroyed or otherwise removed from the mine. The standard states that they must be eliminated, “in a safe manner in accordance with the instructions of the manufacturer.” 30 C.F.R. § 56.6900.

While it is conceivable a manufacturer would recommend a time within which a defective product should be removed or eliminated, the record does not reveal whether Austin Powder set or suggested such a time limit, or what that time limit otherwise was. *See* Tr. 260-66. Further, even if a “reasonable” time limit is implied in the otherwise silent standard, the court, like Burton, would credit the blaster’s statement that the deteriorated explosives would have been destroyed in a manner recommended by Austin Powder on August 27 [<sup>17</sup>], and the court would conclude that this was a reasonable time under all of the circumstances. Tr. 262, 266-67. The court notes the lack of any evidence the explosives would be handled before they were destroyed and the lack of evidence that their undisturbed presence in the magazine (“the safest place in the mine that explosives could be”) until August 27 would pose a hazard. Tr. 263. The Secretary needed to prove the passage of a week and a day was an unreasonable risk, and he did not do so.

<b>CITATION NO.</b>	<b>DATE</b>	<b>30 C.F.R. §</b>	<b>PROPOSED ASSESSMENT</b>
8917954	8/25/15	56.4201(a)(1)[ <sup>18</sup> ]	\$585

The citation states:

There were 4 fire extinguishers in the mill building at the mine that had not received monthly examinations. The [company’s] designee to conduct examinations had retired and [he had] not been replaced. Records located on the extinguishers showed exams had been performed through June of 2015. This condition does not allow a miner to know if the extinguisher will function in an emergency. In the event an accident were to occur it would be likely that injuries resulting in lost workdays would be expected.

Gov’t Exh. 2 at 1. The citation contains the inspector’s findings that the cited condition was unlikely to lead to an accident resulting in lost workdays or restricted duty and that the violation was due to the company’s high negligence. Gov’t Exh. 15 at 1.

During the course of the August 25 inspection Burton found four fire extinguishers in the mill that apparently had not been examined in more than a month. Tr. 295-96. According to Burton, under section 56.4200(a)(1) the extinguishers “are required to receive an exam on a monthly basis.” <sup>19</sup> Tr. 296. Burton stated that a tag on each of the four extinguishers recorded the last examination as taking place in June 2015. *Id.* Burton acknowledged that none of the extinguishers were functionally defective. *Id.* However, in Burton’s view a monthly examination

---

<sup>17</sup> Burton stated that he “took [the blaster] at his word.” Tr. 266.

<sup>18</sup> The inspector mistakenly cited the condition as violating section 56.4200(a)(1). At the hearing counsel for the Secretary moved to amend the citation to allege a violation of section 56.4201(a)(1). The company did not object, and the motion was granted. Tr. 310-11.

<sup>19</sup> Burton misspoke; he meant to say that monthly examinations are required under section 56.4201(a)(1).

is important because it “allows a miner to know that a . . . fire extinguisher will effectively function in an emergency situation.” Tr. 297. If an extinguisher malfunctions a miner can suffer prolonged exposure to smoke and fire and may lack the ability to control a fire in its early stages, which may in turn lead to smoke inhalation or burns. *Id.*

Burton found that the company was highly negligent. Gov’t Exh. 2 at 1. He stated the company knew the employee who conducted the examinations retired and Newmont should have assigned another miner to undertake the examinations. Tr. 298. Burton also observed that management officials traveled through the mill building daily. The fact the examinations had not been recorded was visually obvious given the last dates on the tags. *Id.* Burton stated that the only explanation he was given for the fact the inspections had not been conducted and recorded was that “the company had overlooked replacing the retired miner.” Tr. 299.

Williams maintained a person in fact examined extinguishers at the mine, and he asked Burton how many extinguishers Burton inspected. Burton stated he looked at “numerous” other extinguishers.<sup>20</sup> Tr. 299. Williams observed that “a new man missed [only] four of them.” *Id.* In Williams view failing to inspect and record the inspections of four of its many fire extinguishers was not egregious. Tr. 303-04.

Burton responded that Williams walked through the mill every day. In Burton’s opinion Williams knew the monthly examinations of the fire extinguishers had not been performed. Tr. 305-06. As Burton put it, “It is the mine operator’s responsibility to conduct [the] examinations or to designate somebody and follow up to make sure they have been done.” Tr. 308.

### **THE VIOLATIONS, ITS GRAVITY AND NEWMONT’S NEGLIGENCE**

The Secretary easily established that Newmont violated section 56.4201(a)(1) which requires that “fire extinguishers be inspected visually at least once a month to determine that they are fully charged and operable.” Burton’s testimony that the inspection tags on four extinguishers in the mill showed that the extinguishers were last inspected in June was not challenged by Newmont. Tr. 295-96. The court infers that Newmont’s failure to record the monthly visual inspections in July meant that the July inspections were not done with regard to the four extinguishers, just as Burton alleged, and it concludes Newmont violated section 56.4201(a)(1). While it is possible, as Burton testified, that the failure to monthly examine a fire extinguisher could lead to a miner suffering excessive smoke inhalation and/or burns, in the matter at hand the four extinguishers were in no way defective rendering the likelihood of injury somewhere between minimal and non-existent. Tr. 297. The violation was technical and non-serious in nature.

Further, the court concludes the company’s negligence was low. While Burton maintained the company should have assigned another employee to replace the missing examiner (Tr. 298, 299), the record supports finding that is exactly what the company did. Burton agreed that he examined “numerous” fire extinguishers at the mine and that only four were in violation of section 56.4201(a)(1). Tr. 299. The court concludes that someone conducted and recorded the

---

<sup>20</sup> Burton put the number between a dozen and twenty-five. Tr. 309.

monthly inspections for all of the fire extinguishers except four. In the court's opinion this mitigates Newmont's negligence to the point where its failure to comply was of a low degree.

<b>CITATION NO.</b>	<b>DATE</b>	<b>30 C.F.R. §</b>	<b>PROPOSED ASSESSMENT</b>
8917957	8/25/15	56.14100(b)	\$585

The citation states:

The manufacturer installed left hand seat belt on the #5 TMC forklift . . . was fastened to the manufactured mounting point by a knot tied in the seatbelt. The forklift is used to move slate products in the mill building of the mine. This condition exposes a miner to a fall/run over by mobile equipment hazard. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh. 5 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to an accident resulting in fatal injuries and was due to the company's moderate negligence. Gov't Exh. 5 at 1.

On August 25 Burton testified he inspected four or five forklifts at the mine. Tr. 325. All were manufactured by the same company, TCM. Tr. 325-26. Burton explained that when inspecting the No. 5 forklift he found that its left hand seat belt was fastened to the mounting point with a knot. The belt had "been cut off and . . . had been threaded back through the bracket and literally tied in a knot to hold it onto the forklift." Tr. 317. When seat belts are installed by TMC they are attached to a bracket and the bracket is bolted to the frame of the forklift. Tr. 317-18. Burton also explained that the No. 5 forklift was equipped with a falling object protection structure (a "FOPS") and that there is no standard requiring a forklift with a FOPS to have a seatbelt. However, Burton understood if the equipment comes from the manufacturer with a seatbelt, because the seatbelt affects safety, defects to the seatbelt must be timely corrected to prevent a hazard to the equipment operator. Tr. 318. Because the knot in the cited seat belt was hand tied, there was no way to ensure whether it would hold as intended by the manufacturer. Burton therefore believed that the hand tied seatbelt was defective and violated section 56.14100(b). Tr. 319.

The No. 5 forklift was used daily to move slate in and around the mill buildings. Tr. 319, 322. The danger posed by the condition was that in the event of an accident the seatbelt might not hold the forklift operator on the equipment. He or she could fall off and be hit or run-over by the forklift or by another piece of equipment. Tr. 319, *see also* Tr. 324

Burton checked and found that the defective seatbelt was not reported on any of the pre-shift examinations of the forklift. In his view this reflected management's misplaced belief that the seatbelt was not required to be maintained on the forklift, and he found that the company was moderately negligent. Tr. 325; Gov't Exh. 5 at 1.

Williams stated that only the No. 5 forklift came from the manufacturer with a seatbelt. Like Burton, Williams noted that seatbelts are not required on equipment with FOPS, and he

questioned why the company was required to maintain a seatbelt that was not a requisite component of the equipment. Tr. 327. Williams further stated that the mine's forklifts travel on level ground at about five miles per hour and that all have centers of gravity about one foot off of the ground, making them extremely unlikely to overturn. Tr. 328.

### **THE VIOLATIONS, ITS GRAVITY AND NEWMONT'S NEGLIGENCE**

Section 56.14100(b) states, "Defects on any equipment . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." When determining whether the standard has been violated the evidence must be evaluated in the light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *See e.g., Cannon Coal Co.*, 9 FMSHRC 667. 668 (April 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1614-1618 (September 1987). *Ideal Cement Co.*, 12 FMSHJRC 2409, 2415 (September 1990). Applying this test, the court finds that the Secretary established the violation. TMC manufactured the fork lift with a seat belt. In the court's opinion a reasonably prudent person would assume the seat belt served its intended purpose of keeping the fork lift operator in place in case the fork lift was involved in an accident or overturned. To provide the maximum amount of protection the seat belt had to be securely affixed to the frame of the fork lift. Tying the seatbelt to its mounting point offered less protection in that the knotted belt would tend to give in the event of a mishap. In the court's view a reasonably prudent person would have replicated the condition of the seat belt as it came from TMC by permanently reattaching the belt to the frame.

The Commission addressed the timeliness requirement in section 56.14100(b) in *Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001). The Commission determined that, "[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Id.* at 715. Little evidence was offered by the Secretary regarding "timeliness." However, a reasonable inference can be drawn that Newmont did not timely comply. Burton testified to his understanding that the forklift was used daily (Tr. 322). Williams did not dispute Burton or offer other evidence of the frequency of use, and the court concludes that the forklift was in fact used every day the mine operated. Burton also testified that he looked at the pre-shift examination reports for the forklift for several days prior to the inspection and found that the defective seatbelt was not reported. Linking the daily use with the non-reporting and with William's stated belief the company was under no obligation to return the seatbelt to its original condition, Burton inferred the defective seatbelt was not repaired in a timely manner. The court finds Burton's inference to be reasonable under the circumstances, and it affirms the violation.

The inspector found the violation was unlikely to result in a fatal injury. The court agrees and finds the gravity of the violation was nil. Williams's statement that the forklift was all but impossible to overturn because of its low center of gravity was not disputed, nor was his testimony that when in use the forklift traveled at about five miles per hour, a speed making collisions extremely unlikely. Tr. 328. Moreover, the fact that the parties agreed the forklift could have come from TMC without a seatbelt and not run afoul of any safety standards speaks volumes about the minimal hazard posed by the cited condition. Tr. 318, 327.

Burton found that Newmont was moderately negligent. The court finds the company's negligence was low. The violation was based upon the company's good faith belief compliance was not required because the seatbelt was not required. *See* Tr. 327. The company's conclusion was reasonable even though it was wrong. In the court's view Newmont's reasonable, good faith belief greatly mitigated its negligence.

### **OTHER CIVIL PENALTY CRITERIA**

Counsel for the Secretary asserted that in the 15 months prior to August 25, 2015, there were 43 cited, assessed and paid violations at Newmont's mine, which counsel described as an "average" number. Tr. 166-67, 25; Gov't Exh. 1. The court finds the company's history of previous violations not to be such as to increase or decrease the court's assessments. With regard to the size of the mine, counsel maintained that the company was "not small." Tr. 168. However, the court notes that in proposing penalties the Secretary appears to have regarded the mine as somewhere between a small and medium size facility. *See* Petition for Assessment of Civil Penalty, Exh. A. The court finds the size to be such as not to warrant assessments above those proposed. The court further notes that in proposing penalties the Secretary credited Newmont with good faith in attempting to achieve timely compliance. *Id.* Finally, the parties agreed that any penalties assessed will not affect Newmont's ability to continue in business. Relevant Fact 6.

### **ASSESSMENT OF CIVIL PENALTIES**

#### **THE CONTESTED CITATIONS**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>	<b><u>ASSESSMENT</u></b>
8917961	8/25/15	56.4101	\$263	\$263

The court finds that the violation was serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses the penalty proposed by the Secretary.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>	<b><u>ASSESSMENT</u></b>
8917962	8/25/15	56.13011	\$585	\$200

The court finds that the violation was not serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses a penalty of \$200 for the violation.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>	<b><u>ASSESSMENT</u></b>
8917959	8/25/15	56.12018	\$585	\$585

The court finds that the violation was moderately serious and that the company's negligence was moderate. The court's findings do not diverge significantly from Burton's, and the court assesses the penalty proposed by the Secretary.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917956	8/25/15	56.14112(a)	\$1,304	\$1,304

The court finds that the violation was moderately serious and that the company's negligence was moderate. The court's findings do not diverge significantly from Burton's, and the court assesses the penalty proposed by the Secretary.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917963	8/25/15	56.14103(b)	\$392	\$250

The court finds that the violation was not serious and that the company's negligence was moderate. The court further finds that the violation was not S&S. Accordingly, the court will modify the citation to reflect that an injury could reasonably be expected to result in no lost workdays. In addition it will delete the inspector's S&S finding and modify his negligence finding from low to moderate. Given these findings and the other civil penalty criteria the court assesses a penalty of \$250 for the violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917968	8/26/15	56.14103(b)	\$362	\$362

The court finds that the violation was S&S, was serious and was caused by the company's moderate negligence. The court's findings do not diverge from Burton's, and the court assesses the penalty proposed by the Secretary.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917967	8/26/15	56.6900	\$243	\$0

The court finds that the Secretary did not prove the violation. A penalty cannot be assessed.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917954	8/25/15	56.4201(a)(1)	\$585	\$200

The court finds that the violation was not serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses a penalty of \$200 for the violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917957	8/25/15	56.14100(b)	\$585	\$200

The court finds that the violation was not serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses a penalty of \$200 for the violation.

### THE UNCONTESTED CITATIONS

As noted above, during the course of the hearing and after a discussion with counsel, Williams in effect withdrew the company's contest of the citations set forth below. Tr. 135-36, 165-66. Given Newmont's withdrawal the court finds that the violations existed as charged. The penalties are assessed as proposed.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917955	8/25/15	56. 12032	\$176	\$176
<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917958	8/25/15	56.14115(b)	\$263	\$263
<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917969	8/25/15	46.9(a)	\$100	\$100
<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917966	8/25/15	62.170(b)	\$108	\$108
<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917965	8/25/15	56.6132(a)(6)	\$108	\$108
<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917964	8/25/15	56.4201(a)(1)	\$100	\$100
<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917960	8/25/15	56.9301	\$243	\$243

Tr. 135-36, 165-66.

## **ORDER**

The inspector's negligence finding in Citation No. 8917954 **IS MODIFIED** from "high" to "low," his negligence finding in Citation No. 8917962 **IS MODIFIED** from "moderate" to "low," his gravity and negligence findings in Citation No. 8917963 **ARE MODIFIED** from reasonably likely to result in "lost workdays or restricted duty" and "low" negligence to reasonably likely to result in "no lost workdays" and "moderate" negligence, his S&S finding in Citation No. 89817963 **IS DELETED**, and the inspector's negligence finding in Citation No. 8917957 **IS MODIFIED** from "moderate" to "low." Further, Citation No. 8917967 **IS VACATED.**

Within 30 days of the date of this decision, Newmont **SHALL PAY** civil penalties in the amount of \$4,462 (\$3,364 for the violations found in the contested citations and \$1,098 for the violations found in the uncontested citations).<sup>21</sup> Upon **PAYMENT** of the penalties, this proceeding is dismissed.

/s/ David F. Barbour  
David F. Barbour  
Administrative Law Judge <sup>22</sup>

Distribution: (Certified Mail)

Emily B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, MHSA Backlog, 1244 Speer Blvd., Suite 216, Denver, Colorado 80204

John Williams, President, Newmont Slate Company, Inc., 720 Vt. Rte. 149, West Pawlet, Vermont 05775

/db

---

<sup>21</sup> Payment shall be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, BOX 790390, ST. LOUIS, MO 63179-0390.

<sup>22</sup> This is the last decision the court will author. The court thanks all who have appeared before it for the civility and respect they have shown the court and one another. The court believes it is decorum grounded in the recognition that through playing our parts to resolve disputes that inevitably arise over the interpretation and implementation of the Mine Act and the regulations promulgated thereunder, we are furthering the law's fundamental purpose – to enhance "the health and safety of [the industry's] most precious resource – the miner." 30 U.S.C. § 802 (a). It has been a privilege for the court to be part of the process.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004

April 10, 2017

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

v.

CACTUS CANYON QUARRIES, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 2016-410  
A.C. No. 41-00009-410862

Mine: Fairland Plant and QYS Mine

## DECISION APPROVING SETTLEMENT AND ORDER TO PAY

Before: Judge Feldman

The captioned civil penalty proceeding is before me upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C. § 815(d). The single citation at issue, Citation No. 8864556, alleges that Cactus Canyon Quarries, Inc. (“Cactus Canyon”) violated 30 C.F.R. § 56.14207. Section 56.14207 provides:

Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

30 C.F.R. § 56.14207. Specifically, Citation No. 8864556 alleges:

The Ford F-150 XL Sample truck was left unattended and parked on an incline. The wheels were not choked and the provided park brake was not set. When the controls were set in neutral and the service brake released, the unit rolled downhill. No other mobile equipment and/or foot traffic was observed nearby.

The issuing Mine Safety and Health Administration (“MSHA”) inspector, Ramiro Jimenez, made the following determinations with respect to the gravity of the cited condition: “unlikely,” “lost workdays or restricted duty,” and one person affected. As a result of these findings, Inspector Jimenez designated this violation as non-significant and substantial (“S&S”). A violation is non-S&S if it is not reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum, 3 FMSHRC*

822, 825 (Apr. 1981). Inspector Jimenez attributed the cited condition to a “moderate” degree of negligence. The Secretary proposed a \$100.00 civil penalty for Citation No. 8864556.

On February 16, 2017, 19 days before the scheduled March 7 hearing,<sup>1</sup> the Secretary filed a Motion for Summary Decision, asserting that the following facts regarding Citation No. 8864556 are not in dispute:

1. Cactus Canyon is the operator of the Fairland Plant and QYS Mine ID 41-0009 (“the mine”) located in Marble Falls, Texas.
2. On March 16, 2016, Inspector Ramiro Jimenez arrived at the mine to conduct a regular E01 inspection.
3. Inspector Jimenez met with the plant manager and together (along with five other miners accompanying for learning purposes) they started walking the mine.
4. About an hour into the inspection, Inspector Jimenez came upon a Ford F-150 XL truck parked on an incline outside of the bagger room.
5. The truck was parked and unattended.
6. On closer inspection, Inspector Jimenez found that the truck’s operator set the automatic transmission to park but failed to engage the emergency parking brake.
7. Inspector Jimenez also determined that the truck’s operator left the vehicle without chocking the tires or turning the tires into a bank.
8. Inspector Jimenez then set the truck’s transmission to neutral and the vehicle rolled downhill on the incline.

---

<sup>1</sup> The relevant Commission Rule provides:

At any time after commencement of a proceeding and *no later than 25 days before the date fixed for the hearing* on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding. Filing of a summary decision motion and an opposition thereto shall be effective upon receipt.

9. The operator used the truck at some point earlier in the morning on the day of the inspection.

*Mot. for Summ. Dec.*, at 2-3 (Feb. 16, 2017).<sup>2</sup> Asserting that there are no genuine issues of material fact, the Secretary moves for summary decision affirming Citation No. 8864556 as issued.

Via email, counsel for Cactus Canyon objected to the Secretary's February 16 Motion for Summary Decision as untimely under Commission Rule 67(a), and expressed a desire to proceed with the scheduled March 7 hearing. With respect to timeliness, on February 17, 2017, I issued an order reflecting that the 25 day window for filing summary decision motions in Rule 67 is not jurisdictional or otherwise unwaivable, and that resolution by summary decision, if appropriate, will promote judicial efficiency. 39 FMSHRC 417, 418 (Feb. 2017). Consequently, the scheduled March 7 hearing was continued without date and Cactus Canyon was required to file, on or before March 10, 2017, a response to the Secretary's Motion for Summary Decision, if it so desired. *Id.*

Thereafter, on March 9, 2017, Cactus Canyon filed a Response and Objection to the Secretary's Motion for Summary Decision and its own Cross-Motion for Summary Decision.<sup>3</sup> Significantly, Cactus Canyon does not dispute the fact of the violation and the non-S&S designation. Furthermore, with regard to the Secretary's civil penalty proposal, in its cross-motion, Cactus Canyon requests that the Secretary's proposed \$100.00 civil penalty be affirmed as issued. *Resp. Cross Mot. for Summ. Dec.*, at 3.

However, Cactus Canyon disputes several of the Secretary's assertions with respect to gravity. Specifically, Cactus Canyon asserts that the citation should be designated with "no likelihood" of injury (rather than that injury is "unlikely"), "no lost workdays" (rather than "lost workdays or restricted duty"), and no persons affected (rather than one person affected). As a

---

<sup>2</sup> The Secretary submitted a sworn affidavit from Inspector Jimenez in support of these facts. *Mot. for Summ. Dec.*, Ex. 1.

<sup>3</sup> In its cross-motion, Cactus Canyon objects to Exhibits 2, 3, 4, and 5, attached to the Secretary's Motion as "not sworn or certified copies." *Resp. Cross Mot. for Summ. Dec.*, at 1 (Mar. 9, 2017). Exhibit 2 is a copy of the citation at issue, Exhibit 3 is a copy of Inspector Jimenez's inspection notes, Exhibit 4 are photographs taken by Inspector Jimenez of the cited vehicle, and Exhibit 5 is an MSHA "Fatalgram and Best Practices" notification regarding the failure to engage the parking brake or properly chock vehicle wheels. Cactus Canyon's objections are denied as the disputed exhibits were created within the scope of MSHA's performance of its enforcement duties.

final matter, Cactus Canyon argues that the cited condition was not attributable to any negligence, rather than the “moderate” degree of negligence asserted by the Secretary.<sup>4</sup>

The threshold material issues in this civil penalty proceeding are whether Cactus Canyon committed the violation of the cited mandatory standard and whether the cited condition was S&S in nature. As previously noted, Cactus Canyon concedes the fact of the violation and the Secretary’s non-S&S characterization.

With respect to the statutory penalty criteria in section 110(i),<sup>5</sup> Cactus Canyon’s violation history and the appropriateness and effect of the \$100.00 civil penalty are not material. Questions concerning the likelihood of lost workdays or restricted duty and the number of persons affected are only germane to the question of the degree of gravity. However, the agreed upon \$100.00 civil penalty, as well as the non-S&S designation of the cited condition, alone, sufficiently demonstrate that the gravity of the violation was not serious. Finally, a \$100.00 civil penalty is appropriate regardless of whether the cited violation is based on strict liability or the Secretary’s proposal of a “moderate” degree of negligence. Therefore, the parties’ dispute with regard to negligence and the above components of gravity are moot.<sup>6</sup>

Consequently, as the parties have agreed to all of the material issues with respect to the fact of the violation, S&S, and the appropriate civil penalty in their cross-motions, I construe the

---

<sup>4</sup> In objecting to the Secretary’s designations, Cactus Canyon contends disputed facts concerning Cactus Canyon’s training practices, the managerial responsibilities of the individual responsible for the cited vehicle, the speed and distance the truck would roll if the automatic transmission park gear failed, and the likelihood that individuals would be injured by such a circumstance. *Resp. Cross Mot. for Summ. Dec.*, at 2-3.

<sup>5</sup> Section 110(i) provides the statutory parameters for assessing civil penalties. Section 110(i) provides:

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider [1] the operator’s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] *whether the operator was negligent*, [4] the effect on the operator’s ability to continue in business, [5] *the gravity of the violation*, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. § 820(i) (emphasis added).

<sup>6</sup> Factors concerning the likelihood of lost workdays or restricted duty, the number of persons affected, and the degree of negligence are not recorded in MSHA’s public database and, as such, do not affect an operator’s history of violations.

parties' motions as a motion to approve settlement, which shall be approved as consistent with the penalty criteria in section 110(i) of the Mine Act.

**ORDER**

In view of the above, **IT IS ORDERED** that Cactus Canyon Quarries, Inc. pay, within 40 days of the date of this Order, **a civil penalty of \$100.00** in satisfaction of Citation No. 8864556.<sup>7</sup> **IT IS FURTHER ORDERED** that upon timely receipt of the \$100.00 payment, the civil penalty proceeding in Docket No. CENT 2016-410 **IS DISMISSED**.

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

Distribution:

Timothy J. Turner, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Andy Carson, Esq., 7232 Co. Rd. 120, Marble Falls, TX 78654

/acp

---

<sup>7</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> ST., SUITE 443  
DENVER, CO 80202-2500  
OFFICE: (303) 844-5266/FAX: (303) 844-5268

April 11, 2017

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

v.

ARNOLD STONE INC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. CENT 2016-0540  
A.C. No. 41-04407-416881

Mine: Arnold Stone Inc

## **DECISION AND ORDER**

Appearances: John M. Bradley, Attorney, United States Department of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;

Jules P. Slim, Attorney, Irving, Texas, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves one citation issued on April 12, 2016, pursuant to Section 104(d)(1) of the Mine Act with a proposed penalty of \$21,335.00. The citation was modified to a 104(d)(1) order prior to the filing of the penalty petition. The parties presented testimony and evidence regarding the citation at a hearing held in Dallas, Texas, on February 8, 2017.

## **I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Arnold Stone mine is a surface limestone mine located in Hill County, Texas. The parties have stipulated that Arnold Stone, Inc., is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and that the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission. Jt. Stips. ¶¶ 1-2, 5.

Order No. 8861391 was issued for a violation of 30 C.F.R. § 56.12016 for an exposed electrical component on a saw that was not locked out. The Secretary alleges that the violation was highly likely to cause a fatal injury, was significant and substantial, was the result of high negligence, and was an unwarrantable failure to comply with the relevant standard. The Secretary proposed a penalty of \$21,335.00. For the reasons set forth below, I find that the Secretary has proven that a violation occurred as alleged, that the violation was significant and

substantial, was the result of high negligence, and was an unwarrantable failure to comply with the standard.

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness's testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness's testimony in this decision should not be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

Inspector James Redwine has worked for MSHA for four years as an inspector. He has been in the mining industry for 30 years, working in safety as well as production and as a supervisor. On April 12, 2016, Redwine traveled to the Arnold Stone mine to conduct a regular inspection. He met Chris Crawford at the mine office, who identified himself as the supervisor and person in charge at the mine. The mine has several saws used to process limestone, and Redwine examined at least two of them as part of his inspection. The Eagle II saw, which is the subject of this citation, was located up a hill in a separate building from the mine office. Crawford indicated that he and some of the miners had been in that building working in the last few weeks, so Redwine included the saw in his inspection. The Eagle II saw is as big as a large room and can be moved forward and backward using a fixed control panel. The saw has a large blade that is used to cut up very large rocks into more manageable pieces so they can be moved to another saw. The controls for the saw include a 9 by 12 inch touch screen located on the operations panel. Prior to the inspection, the touch screen had been removed for repair, exposing various wires inside. The Secretary's Exhibit 1 is a photograph of the 9 by 12 inch area with electrical wiring exposed as observed by Redwine at the inspection. Redwine used a tic tracer to determine if the exposed wires were energized and found that they were. Crawford informed Redwine that the voltage of the saw was 480 volts, but the tic tracer used by Redwine does not provide a voltage reading. Redwine observed a disconnect box 20 or 30 steps from the control panel and saw that the handle was in the on position. He asked Crawford to put the handle in the off position. He then re-tested the panel with the tic tracer and determined that the wires were no longer energized. The Secretary's Exhibit 3 shows the disconnect box, as observed by Redwine, with the handle in the on position with no lock and tag or warning sign.

Crawford explained to the inspector that he had removed the touch screen control panel several weeks prior to the inspection, and that he had deenergized the control panel and put a lock on the electrical disconnect box while removing the screen. A shipping invoice from the mine indicated that the screen had been removed on March 4, 2016, over a month prior to the inspection. *See Resp. Ex. I.* However, once the control panel screen was removed, Crawford removed his lock, but left the disconnect box in the off position so that the exposed wires on the saw panel were not energized. Crawford explained that he removed his lock because he had only one and needed it for other pieces of equipment. There was no warning on the disconnect box or on the saw control panel to indicate the presence of exposed wires or ongoing work.

In addition to Crawford, the inspector spoke to other miners who worked at that location, including Tyler Colson, the assistant plant manager. Colson explained to the inspector that he and several others miners had been sent to the Eagle II saw to clean the area. It was unclear from the testimony exactly when the miners were assigned to work in the Eagle II building, but it was sometime after the touch screen had been removed, and the lock on the power switch removed. While cleaning around the saw, Colson had thrown the handle of the disconnect box into the on position because he planned to move the saw using the toggles below the exposed wires of the touch screen. He was unable to move the saw but left the power in the on position and the exposed wires energized. The Secretary's Exhibit 6 shows that the toggles were located directly below the missing touch screen. Thus Colson was directly in front of the touch screen area within a few inches of the energized wires when he tried to operate the toggles. Colson did not explain why he left the equipment energized, but clearly there was no lock on the machine and no tag to prevent him from energizing the equipment. The building was not locked and was accessible to anyone at the mine. No one was working in the saw building at the time of the inspection, but there were six miners on the property that day. Redwine testified that a person would be electrocuted and receive burns if he touched the energized wires.

The mine presented testimony from Michael Arnold, the owner of the operation. Arnold testified that he has worked in the business for 18 years. At one time the Arnold Stone mines employed nearly 100 miners, but today there are only eight employees. Crawford and Colson are no longer employed by the company. Arnold testified that in fact Colson left his job with Arnold Stone the week of April 3, 2016, prior to the inspection. Respondent's Exhibit D shows Colson's pay dates but is unclear as to when his employment ended.

Arnold was not present at the mine at the time of the inspection but testified that the building housing the saw was not being used at the time of the inspection. The company was in the process of shutting down the mine, and Arnold had the touch screen panel removed from the Eagle II saw for repair in order to prepare it for sale. Arnold asserts that he instructed an electrician to shut down the transformer to the Eagle II saw on April 5, 2016, thereby reducing the voltage on the saw from 480 to 110. The mine produced an invoice for the work but the invoice does not clearly indicate that the transformer was shut down or where the work was performed. *See Resp. Ex. J.* Arnold testified that while the saw operated on 480 volts, because the transformer was shut down on the day of inspection, it was operating on only 110 volts that day. He explained that it was his belief that Colson could not move the saw by using the toggles because only 110 volts remained. He did not discuss whether 110 volt wires would cause injury to a person who touched them. Arnold did state, however, that the wires in the box that were exposed after the screen was removed were insulated and therefore would not cause electric shock. Arnold explained that Crawford had access to more than one lock, as Arnold had purchased several locks in February after a separate MSHA inspection found issues at the mine with locking out equipment. Crawford, on the other hand, told the inspector that he purchased locks in April, shortly after the inspection for purposes of abatement.

## A. The Violation.

Based on his observations at the mine, Redwine issued Citation No. 8861391 for an exposed electrical component on equipment that was not locked out. The Secretary alleges a violation of 30 C.F.R. § 56.12016, which provides:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The Commission has stated that “electrically powered equipment” includes any equipment whose power source is electricity. *Cleveland Cliffs Iron Co.*, 4 FMSHRC 2141, 2143 (Dec. 1981) (interpreting a former standard identical to § 56.12016). The purpose of the standard is to protect against electrocution. *Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 710 (8th Cir. 2013); *Phelps Dodge Corp. v. Fed. Mine Safety & Health Review Comm'n*, 681 F.2d 1189, 1192 (9th Cir. 1982). Thus, to establish a violation of § 56.12016, the Secretary must demonstrate that a hazard of electrical shock was present. See *Northshore*, 709 F.3d at 710; see also *Ray, emp'd by Leo Journagan Constr. Co.*, 20 FMSHRC 1014, 1023-26 (Sept. 1998); *Magruder Limestone Co.*, 35 FMSHRC 1385, 1401-02 (May 2013) (ALJ).

Here, Inspector Redwine observed that the touch screen had been removed from the electrically powered saw, leaving energized wires exposed. He learned that the screen had been removed several weeks prior to the inspection and at some point during those weeks the power was restored to the saw. The supervisor at the mine, Chris Crawford, explained that he had deenergized the saw and locked it out while he removed the screen. However, he had removed his lock when he completed the work. Crawford told the inspector that he had left the power to the saw in the off position. Later, the assistant plant manager, Colson, entered the saw building with other workers to clean the saw area and turned the power to the saw back on in order to move it. The power was on and the saw energized when Redwine observed it. There were no warning notices posted at the power switch or in any other location in the area of the saw, and there was no lock or tag on the power center. Redwine believed that the exposed wires presented a risk of electric shock.

Arnold Stone argues that no violation of the standard occurred because when Redwine observed the saw, there was no “mechanical work” being done. Resp. Br. at 2. The term “mechanical work” is not defined in the regulations, but the Commission has found that the relocation and installation of light fixtures, including taking the fixtures down, handling them, and rehanging them, constitutes “mechanical work” within the meaning of this standard. *Cleveland Cliffs*, 4 FMSHRC at 2143. Consistent with the Commission language, I find that the removal and repair of the touch screen on the saw constituted mechanical work, and that work was not complete until either the screen was replaced or a suitable cover was put over the energized wires. To comply with the standard, the power switches needed to be locked out for

that entire time. I am not persuaded by the company's argument that "other measures" were taken to eliminate the hazard, in that the saw building was isolated from the rest of the mine, and only Crawford and Colson had access to the saw. I credit the inspector's findings that several employees had entered the building to clean the area, and anyone could access the saw and turn the power on.

The company also argues that the Secretary has failed to prove that the voltage present in the exposed wires exceeded the minimum amount allowed by MSHA's regulations. Resp. Br. at 3. A related standard to the one at issue provides that "The potential on bare signal wires accessible to contact by persons shall not exceed 48 volts." 30 C.F.R. § 56.12012. The company infers from this that exposed components with a voltage amount below 48 volts are permissible, and that the Secretary must therefore prove that a greater voltage was present in order to prove a violation of a standard relating to an electrical hazard. *See* Resp. Br. at 3. However, Redwine determined based on his conversations with the employees at the mine that the voltage in the wires when they were energized was at a minimum 110 volts, but 480 before the power to the saw was partially disconnected, nearly a month after the screen was removed. I credit the inspector's findings and thus find that the company's argument is not applicable.

Finally, Arnold Stone argues that a violation has not been proven because none of the exposed parts posed a risk of electric shock. Resp. Br. at 3. However, Redwine testified that the exposed wires, even those that were insulated, posed a risk of shock and electrical burns. I credit the inspector's testimony and find that the Secretary has proven a violation.

## B. Significant and Substantial

A "significant and substantial" ("S&S") violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation is S&S:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984).

The second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036 n.8 (Aug. 2016). The Commission has explained that “hazard” refers to the prospective danger the cited safety standard is intended to prevent. *Id.* at 2038. In *Newtown*, for instance, for a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed, the Commission considered the hazard of a miner working on energized equipment. *Id.* The likelihood of the hazard occurring must be evaluated with respect to “the particular facts surrounding the violation.” *Id.*; see also *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must assess whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2037. The existence of the hazard is assumed at this step. *Id.*; *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161-62 (4th Cir. 2016). As with the likelihood of occurrence of the hazard, the likelihood of injury should be evaluated with respect to specific conditions in the mine. *Newtown*, 38 FMSHRC at 2038. Finally, the Commission has held that the S&S determination should be made assuming “continued normal mining operations.” *McCoy*, 36 FMSHRC at 1990-91. The Commission has recognized that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

Redwine indicated that this violation was significant and substantial because the electrical disconnect box was not locked and tagged out and the switch had been moved to the on position, thereby energizing the exposed electrical wires. The energized wires were exposed in an opening of 9 by 12 inches in an easily accessible area. When Colson attempted to move the saw, he was within inches of the exposed energized wires. In Redwine’s view, it was highly likely that someone could contact those energized wires and suffer a severe burn or electrocution.

Arnold Stone argues that the violation was not S&S because no miners were present at the time of the inspection. Further, even if a miner came into contact with the exposed electrical wires that were energized, he would not be injured because the wires were insulated and contained only 110 volts.

The information Redwine received from Crawford at the inspection was that the exposed electrical wires contained 480 volts. Arnold Stone disputes the voltage amount for part of the time the wires were exposed, arguing that the exposure was only to 110 volts, and that a voltage of 110 would not cause injury to a person who came into contact with the energized wires. There is no dispute that the usual power source to the saw was 480 volts. But Arnold asserts that at some point after Crawford removed the screen, the transformer to the building was deenergized, removing the 480 volt power source and leaving only a 110 volt power source to the saw control panel. The mine supports its position with a receipt from an electrician, Exhibit J, showing only that one hour of work was performed at the mine sometime prior to April 5, 2016, and that a GFI was replaced. Arnold also suggested that when Colson tried to move the saw while cleaning the saw area, he was unable to because the voltage to the saw was only 110 volts. I do not find Exhibit J to be reliable, but even if I take Arnold at his word, the electrical work was done a month after Crawford removed the screen. It is clear that the control panel had 480 volts flowing into it after the screen was removed on March 4, 2016, for several weeks. Neither Crawford nor

Colson was called to testify by Respondent, and the only witness, Arnold, was not present at the mine at the time of the inspection, so I rely on the information provided to the inspector and find that the machine had 480 volts at the time Crawford removed the screen and at the time miners were working and cleaning up in the area.

Applying the *Mathies* criteria, the Secretary has proven a violation of § 56.12016, satisfying the first element. I find that the Secretary has also demonstrated a discrete safety hazard contributed to by the violation. The standard is designed to prevent miners from coming into contact with energized wires or otherwise being electrocuted while working on energized equipment. Here, I find that the work was ongoing. Although Crawford had removed his lock and left the area, the repair work continued while the wires remained exposed until the touch screen was replaced, and the equipment was returned to its normal operating condition. Failure to deenergize and lock out the machine exposed miners to the energized wires and components in the uncovered 9 by 12 inch area. The manual controls were located just below the touch screen area. Regarding the likelihood of injury, Redwine spoke to several miners and learned that several people had been working in the saw building while the electrical parts were not locked and tagged out. One miner had actually turned on the power, energizing the exposed wires and components. The exposed area was easily accessible to anyone working in the area. At a height of 58 inches, the miners who were assigned to clean the saw building could easily have tripped or fallen or otherwise come into contact with the wires. Redwine explained the severity of potential injury, for at least part of the time, was great because the exposed wires and components were energized by 480 volts. Touching or grabbing live wires at 480 volts would be reasonably likely to seriously injure or kill a miner.

Finally, I credit Redwine's finding that the violation was S&S. Redwine is certainly experienced and reviewed a number of fatalgrams regarding the danger of working around 480 volts and energized wires. While the mine asserts that the area around the saw was not busy, and that it was unlikely that anyone would come into contact with a bare, exposed wire, I credit the testimony of Inspector Redwine. There were people working in and around the saw while it remained unlocked and while it was energized. The miners were exposed to energized wires and components in a location that was easily accessible. Hence, I find the violation to be significant and substantial.

### C. Negligence and Unwarrantable Failure

The Commission has recognized that “[e]ach mandatory standard … carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider “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.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

The standard of care is higher for mine management. *Newtown*, 38 FMSHRC at 2047. The Mine Act places primary responsibility for maintaining safe and healthful working

conditions in mines on operators, and they are thus expected to set an example for miners working under their direction. *Id.*; *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *see also* 30 U.S.C. § 801(e). “Such responsibility not only affirms management’s commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care.” *Wilmot*, 9 FMSHRC at 688.

The negligence of an operator’s agent is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009); *Whayne Supply Co.*, 19 FMSHRC 447, 450 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). The Mine Act defines an “agent” as “any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine.” 30 U.S.C. § 802(e). In analyzing whether an employee is an agent of an operator, the Commission has considered factors including “the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine.” *Nelson Quarries*, 31 FMSHRC at 328. In the instant case, there is no dispute that Crawford was the person in charge at the mine, and an agent of Arnold Stone.

The inspector designated the citation at issue as resulting from high negligence. The Secretary also argues that the violation was the result of the operator’s unwarrantable failure to comply with a mandatory standard.

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is “aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as ‘reckless disregard,’ ‘intentional misconduct,’ ‘indifference,’ or a ‘serious lack of reasonable care.’” *Consol. Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2007) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citations omitted). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include

the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation.

*IO Coal Co.*, 31 FMSHRC 1346, 1352 (Dec. 2009); *see also* *Consol.*, 22 FMSHRC at 353. Additionally, Section 104(d) of the Act requires that a 104(d)(1) withdrawal order like the one in this case be preceded by a separate 104(d)(1) citation within 90 days. The so-called “predicate citation” in this case is No. 8867117, which became a final order of the Commission on June 15, 2016.

In this case, Crawford, a supervisor, left electrical wires and components exposed without locking and tagging out the equipment. Colson, who was also a supervisor, later energized the equipment and left it energized with the wires exposed for some time. The violation existed for a long period of time and nothing was done until the inspector advised the mine to deenergize and lock and tag out the equipment. Based upon the factors enumerated by the Commission, I find that the Secretary has proven an unwarrantable failure in this case.

Length of time that the violation has existed. In *IO Coal Co.*, the Commission emphasized that the duration of time that the violative condition existed is a “necessary element” of the unwarrantable failure analysis. 31 FMSHRC at 1352. However, the brief duration of a violative condition is not a mitigating factor. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2371 (Sept. 2016). Even where the record does not permit the judge to make a conclusive finding as to the duration of the condition, “imperfect evidence of duration in the record should be taken into account.” *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010). The condition in *IO Coal* had existed for four or five days, and the Commission remanded to the judge to consider whether such a duration was an aggravating factor. 31 FMSHRC at 1352. The Commission noted that analysis of the duration factor may be affected by the operator’s good-faith, reasonable belief that the condition did not exist. *Id.* at 1352-53.

Here, Crawford removed the control screen to have it repaired near the beginning of March. Although he deenergized the equipment, he did not lock and tag it out after the screen was removed. At some point before the inspector arrived more than a month later, the saw had been energized. The equipment was not locked or tagged out for more than a month, and it was energized for a part of that time. I find that the violation existed for a long period of time and that this was an aggravating factor.

Extent of the violative condition. The extent factor is intended to “account for the magnitude or scope of the violation” in the unwarrantable failure analysis. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014). Facts relevant to the extent of the condition include the size of the affected area and the number of persons affected. *Id.* at 3079-80. In *Dawes*, the Commission found that where only one miner endangered himself by walking under a suspended load, the violation was not extensive. *Id.* at 3080. Here, the inspector testified that all persons working at the mine were exposed to the violation. The saw house was open and available to everyone, and the two managers, along with several other miners, were told to work in the saw house during the time the screen from the control panel was missing. I consider that the violation was somewhat extensive.

Whether the operator has been placed on notice that greater efforts were necessary for compliance. A mine operator may be put on notice that it has a recurring safety problem in need of correction where there is a history of similar violations. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *IO Coal*, 31 FMSHRC at 1353; *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (Aug. 1992). Prior violations may be relevant even though they did not involve the same regulation or occur in the same area of the mine within a continuing time frame. *IO Coal*, 31 FMSHRC at 1354; *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007); *Peabody*, 14 FMSHRC at 1263. It is not required that the past violations were the result of unwarrantable failure. *IO Coal*, 31 FMSHRC at 1354; *Consolidation Coal Co.*, 23 FMSHRC

588, 595 (June 2001). Past discussions with MSHA can also serve to place the operator on notice that greater efforts were necessary to assure compliance with the safety standard. *Consolidation Coal Company*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing cases). Evidence that a particular standard is frequently cited in the industry as a whole is not relevant to the operator's notice. *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007).

Exhibit 8 is a copy of a citation that was issued to Crawford at this mine in February, just a month before he removed the touch screen. The citation indicates that a saw had not been blocked against motion prior to work on the blades. This citation put the mine on notice that greater efforts were necessary in complying with regulations regarding equipment repairs, including the lock out and tag out requirements.

*Operator's efforts in abating the violative condition.* An operator's efforts in abating the violative condition are also relevant as to whether a violation is unwarrantable. *Consol.*, 35 FMSHRC at 2342; *IO Coal*, 31 FMSHRC at 1356; *San Juan*, 29 FMSHRC at 134. Abatement efforts prior to or at the time of the inspection may support a finding that the violation was not unwarrantable. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1933-34 (Oct. 1989). Conversely, where the operator has notice of a condition, such as through previous violations or conversations with an inspector, a failure to remedy the problem weighs in favor of an unwarrantable failure finding. *Consol.*, 35 FMSHRC at 2343; *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). A lack of abatement efforts may be excusable if the operator had a reasonable, good faith belief that the condition did not exist. See *IO Coal*, 31 FMSHRC at 1356. Abatement efforts relevant to the unwarrantable failure analysis are those made prior to the issuance of the citation or order. *Consol.*, 35 FMSHRC at 2342; *IO Coal*, 31 FMSHRC at 1356.

Here, Arnold Stone made no effort to abate the violation prior to the inspection. While Crawford initially locked out the saw while he removed the touch screen, he then removed the lock and left the machine unlocked for several weeks. Arnold had purchased locks for the mine after a previous MSHA inspection, but the staff on site did not realize that other locks may have been available to them. Crawford, instead, left the mine to purchase another lock in order to abate the April violation.

*Whether the violation posed a high degree of danger.* A high degree of danger posed by a violation can be an aggravating factor that supports an unwarrantable failure finding. *IO Coal*, 31 FMSHRC at 1355-56. In some cases, the degree of danger may be "so severe that, by itself, it warrants a finding of unwarrantable failure. However, the converse of this proposition—that the absence of significant danger precludes a finding of unwarrantable failure—is not true." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). The degree of danger is greater when there is a chronic problem that is ignored. *Consol.*, 35 FMSHRC at 2343.

The condition observed by Redwine posed a high degree of danger to anyone working or passing through the area. There were six workers at the mine on the day of the inspection, and the saw building was open for anyone to enter. Some miners had been assigned to clean up the building, and while they were there, someone had energized the touch screen panel with the exposed electrical components. Redwine had equipment to demonstrate that the wires were energized, but miners in the building did not have the same equipment, and might have assumed

that the power was off. Further, someone could have tripped and touched the wires by accident. A miner who touched the energized wires could be shocked or receive a severe burn.

Whether the violation was obvious. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1356. However, when a condition is non-obvious because of actions of the operator, the Commission generally does not recognize lack of obviousness as a mitigating factor. *Consol.*, 35 FMSHRC at 2343 (upholding judge's unwarrantable failure finding where the operator deliberately ignored testing requirements in the mine's ventilation plan).

Here, both Crawford, who removed his lock and left the panel without a cover, and Colson, who energized the equipment, could see the obvious exposed wires and the potential for someone to energize the wires and to come into contact with energized wires.

Operator's knowledge of the existence of the violation. In *IO Coal*, the Commission reiterated the well-settled law that an operator's knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator "reasonably should have known of the violative condition." *IO Coal Co.*, 31 FMSHRC 1346, 1356-1357 (Dec. 2009); *see also Drummond Co.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991); *E. Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991); *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987).

In this case, Crawford, a supervisor, knew of the condition because he was the person who removed the screen and left the power supply unlocked. This knowledge is imputed to the operator and shows that the condition should have been abated much sooner. *See San Juan Coal Co.*, 29 FMSHRC 125, 134 (Mar. 2007) (finding that knowledge of a condition is "critical to the evaluation of the operator's subsequent efforts, or lack thereof, in abating the violative condition").

In conclusion, I find that supervisory personnel at Arnold Stone knew of the violation at issue but failed to abate it. The violation posed a high degree of danger to numerous people at the mine, and based on the violation history at the mine, management should have been aware of the need to correct it. Based on this analysis, I find that the violation was an unwarrantable failure.

## II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission Judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that

in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission requires that its judges explain any substantial divergence from the penalty proposed by the Secretary. *Am. Coal*, 38 FMSHRC at 1990. However, the judge's assessment must be de novo based upon her review of the record, and the Secretary's proposal should not be used as a starting point or baseline. *Id.*

The history of assessed violations has been admitted into evidence and shows 15 violations that became final orders in the 15-month period prior to Redwine's inspection. Sec'y Ex. 10. The mine also received a citation in February 2016 for a violation of a standard similar to the one at issue here, although that citation is currently under contest. The negligence and the gravity of the violation have been discussed above. Arnold Stone did not raise the issue of ability to pay prior to the hearing and therefore did not provide the Secretary with information to determine its financial situation. However, Arnold Stone argues that the financial impact of the proposed penalty is significant and supplied a financial statement illustrating their financial position. Resp. Ex. M. The company has recently emerged from bankruptcy, reduced its work force, and is in the process of closing some operations. I take from the limited evidence provided that the mine is a small operation and the proposed penalty of \$21,335.00 may be difficult to pay. Therefore, I deviate slightly from the Secretary's proposed amount and assess a penalty of \$18,000 for the violation.

### III. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of \$18,000.00 within 30 days of the date of this decision for the violation at issue here.

/s/ Margaret A. Miller  
Margaret A. Miller  
Administrative Law Judge

Distribution: (U.S. First Class Certified Mail)

John M. Bradley, Attorney, Office of the Solicitor, U.S. Department of Labor, 525 Griffin St,  
Suite 501, Dallas, TX 75202

Jules Slim, Attorney, P.O. Box 140307, Irving, TX 75014

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 27, 2017

MATTHEW BANE,  
Complainant,

v.

DENISON MINES (USA) CORP., now  
known as ENERGY FUELS RESOURCES  
(USA) INC.,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2012-1224-DM  
RM-MD-12-07

Mine: La Sal Complex  
Mine ID: 42-00769

## **DECISION AND ORDER**

Appearances: Matthew Bane, pro se, Dolores, Colorado, Complainant

Charles W. Newcom, Esq., Sherman & Howard, LLC, Denver, Colorado,  
for Respondent

Before: Judge L. Zane Gill

### **I. STATEMENT OF THE CASE**

This proceeding arises from section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 815(c)(3). Matthew Bane (“Bane” or “Complainant”) alleges here that Denison Mines (USA) Corp., now known as Energy Fuels Resources (USA) Inc. (“Denison” or “Respondent”), terminated his employment because he engaged in protected activity. Procedurally, Respondent argues that Bane’s discrimination complaint is untimely. Substantively, Respondent argues that Bane has failed to meet his burden to establish a *prima facie* case because no adverse employment action was taken against him and, even if Bane’s termination were deemed adverse employment action, there is no causal nexus between the adverse action and the protected activity.

For the reasons that follow, I find that Bane engaged in section 105(c) protected activities and that his termination was an adverse action. However, I find that there was insufficient evidence to infer a causal nexus between Bane’s protected activities and his termination. For this reason, I find that Bane has failed to state a *prima facie* case for a section 105(c)(3) discrimination claim. Even if Bane were to have met his *prima facie* burden, ultimately, I also find that Respondent has provided sufficient evidence to rebut the *prima facie* case, or,

alternatively, to provide an affirmative defense that Bane's layoff was motivated by an unprotected activity.

## **II. STIPULATIONS**

The parties' Prehearing Report dated October 6, 2015, included three stipulations:

1. The Administrative Law Judge ("ALJ") and the Commission have subject matter jurisdiction over this action pursuant to section 113 of the Mine Act, 30 U.S.C. § 823.
2. The parties stipulate as to the authenticity and admissibility of Bane exhibits B-1 through B-27 and Denison exhibits R-1 through R-23.
3. The parties stipulate that the following parties would be allowed to testify: Bane, Jennifer Thurston, Kirk Kennedy, Larry Phillips, Race Fisher, Jim Fisher, and David Turk.

## **III. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Background Facts<sup>1</sup>**

#### **1. The Mine**

The La Sal Mine Complex<sup>2</sup> is an underground uranium and vanadium mine located near La Sal, Utah. (Tr.103:9–24; Ex. B-27, p. 2)<sup>3</sup> The mine is spread out over nine miles of surface

---

<sup>1</sup> The findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness's testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (ALJ is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

<sup>2</sup> The La Sal Mine Complex's Mine ID is 42-00769. However, the parties have referred throughout the record to the Pandora Complex (Mine ID: 42-00470). (Tr.142:7, 15; Ex. R-20) La Sal and Pandora are actually one mine with different portals. (Tr.103:12–13) The Pandora Complex was operated by a contractor. (Ex. B-17, p. 2; Tr.103:18–19)

<sup>3</sup> For the sake of clarity, the following abbreviations will be used in referencing evidence in the record: "Ex. B" will refer to Complainant Bane's exhibits; "Ex. R" will refer to Respondent Denison's exhibits; "Tr." will refer to the hearing transcript; "AR" will refer to any document in the Administrative Record that is not part of Complainant's exhibits, Respondent's exhibits, or part of the hearing transcript.

area and is only visible on the surface through 27 boreholes and four major openings: Snowball Portal; Pandora Complex; La Sal Incline; and, Beaver Shaft. (Tr.73:19–21, 103:9–24, 105:3) While Bane was working at La Sal, ore was extracted from the mine entrance at the Pandora Complex and the Beaver Shaft. (Ex. B–27, p. 2) Vent shafts drilled in various locations allowed the mine operators to control the level of radon in the mine. *Id.* These vents could be adjusted to bring air into or out of the mine, depending on radon levels and where workers were working in the mine. *Id.*

Before Denison operated the mine, it sat vacant for approximately 16 years.<sup>4</sup> The mine was ultimately shut down on October 18, 2012. (Ex. B–17, p. 3; Tr.17:20–22, 104:2–5)

## **2. Bane's Work History at Denison Mines**

Bane began working as an apprentice electrician at Denison on July 15, 2008. (Ex. R–9, p. 1; Ex. R–11, p. 2; Ex. R–23, p. 3, line 34) He was tasked with helping the head electrician fix and install ventilation fans and pumps. (Ex. R–23, p. 4, lines 3–4) While at Denison, Bane worked in the Sunday Mines (Topaz, Sunday, West Sunday, Saint Jude) in Colorado, the Egnar Office in Colorado, the Rim Canyon Mine (Rim Shaft) in Utah, and the La Sal Complex (Beaver Shaft) in Utah. (Ex. R–23, p. 4, lines 28–30; Ex. R–9) Bane estimates that he spent approximately fifty percent of his time underground and fifty percent of the time above ground. (Ex. R–23, p. 10, line 9) Prior to starting at Denison, Bane worked nearby at Lisbon Valley Copper Mine for 10–12 months. (Ex. R–23, p. 3, line 39)

During the 18 months he worked for Denison, Bane alleges that there were eight key events that constituted protected activity: (1) reporting Supervisor Hoffman's dangerous actions; (2) complaining about possible PCB contamination; (3) complaining about radon and dust exposure in the skip; (4) complaining about his respirator not working; (5) red-tagging a crane; (6) refusing to perform an unsafe heat taping; (7) developing mine-related health problems; and, (8) making an anonymous report to MSHA.

### **a. Supervisor Hoffman's Dangerous Actions**

For the first four months, Bane primarily worked in the Sunday Mines, the Egnar Office, and Rim Shaft under the immediate supervision of Robert Hoffman. (Ex. R–9; Ex. R–23, p. 10, lines 31–43) Bane's personal notes state that "Bob acted strangely at times[.] [H]e would become angry, scream, throw things over stuff that wasn't really important." (Ex. B–18, p. 1) Bane stated that he observed Hoffman abusing painkillers, sometimes taking up to six Percocet a day. *Id.* (Ex. R–23, p. 10, lines 31–34) Bane's notes state that Hoffman injured himself after he decided to scale an unsafe heading with a scaling bar that was not long enough. (Ex. B–18, p. 3) Bane also reported that Hoffman had a near fatal accident when he forgot to shut off a 50 horsepower ("hp") fan while doing a continuity check on the bonding of a liquid switch. *Id.* In a separate incident, Hoffman became suspicious of other miners rewiring motor starters and "became angry and locked out the fan which shut down that section of the mine." *Id.* at 4. Management

---

<sup>4</sup> Race Fisher testified that the mines on the Colorado Plateau were shut down between 1989 and 1991 and were reopened in 2006. (Tr.103:5–8)

inspected the event, and ultimately found that Hoffman had wired up the motor starters a few months earlier but forgot that he had done it. *Id.* Bane recalled other disconcerting occurrences, including Hoffman hearing voices when nobody was around, slamming on his brakes to avoid a power line that he thought had fallen across the road, and failing to safely install and energize a pump. *Id.* at 2–7.

Bane considered Hoffman’s actions a “danger.” (Ex. R–23, p. 10, lines 31–39) On an unspecified date in October or November 2009, Bane made his first safety complaint. (Ex. R–23, p. 10, lines 31–34; Ex. B–18, p. 6) Bane asserts that he complained directly to Mine Foreman Race Fisher of his concerns. (Ex. R–23, p. 10, lines 36–37) Bane contends that in response to his complaint, he was transferred to La Sal to work at the La Sal Incline (Beaver Shaft) in December 2008, under the supervision of Albert Sagrillo, the head of the electrical department at the La Sal Incline. (Ex. R–23, p. 4, line 23 and p. 10, lines 38–39; Tr.49:17–18)

**b. Possible PCB Contamination from the 4160 Volt Transformer Liquid Switch**

Bane detailed in his personal notes that Hoffman negligently forgot to shut off a 50hp fan before attempting a continuity check on a 4,160 volt transformer at the St. Jude mine. (Ex. B–18, p. 3) When Hoffman tried to shut off the liquid switch, it went to ground, energizing “the casing on the liquid switch until it burnt the string fuse at the power line.” *Id.* The cause of the explosion was found to be contaminated oil in the liquid switch. (Tr.47:15–16) Bane alleges that he was ordered by management to remove and replace all of the oil from the liquid switch. (Tr.47:17–19)

Bane subsequently complained to Sagrillo that he had to perform the oil removal with only “[his] coveralls and gloves on,” (Tr.47:19–20) and, therefore, was not given proper personal protective equipment (“PPE”) to handle a liquid switch potentially contaminated with polychlorinated biphenyls (“PCB” or “PCBs”). Bane recounts that he was present when Sagrillo relayed this complaint to Mine Superintendent Jim Fisher. (Tr.120:9–11) According to Bane, “Jim Fisher guaranteed that no equipment on this property contained PCBs,” (Tr.50:1–2), and “refused to have testing done [...]” (Bane Prehearing Br. 1) Bane recalls that Race Fisher then brought non-PCB stickers from the main office and instructed Bane to place them on all electrical equipment containing di-electric fluid. *Id.* At the hearing, Bane admitted that it was impossible to ascertain whether the di-electric fluid in the liquid switches contained PCBs because the oil was disposed of. (Tr.49:1–4)

**c. Radon and Dust Exposure in the Skip<sup>5</sup>**

From approximately December 2008 until April 2009, Bane worked at Beaver Shaft with Kirk Kennedy, the Denison lead mechanic in charge of skip repair. (Tr.20:4) The Beaver Shaft Skip Station was a ventilation area designed to flush radon out of the mine, and Bane and

---

<sup>5</sup> The Kentucky Coal and Energy Education Project’s Glossary of Mining Terms defines “Skip” as “A car being hoisted from a slope or shaft.” KY. COAL EDUC., *Glossary of Mining Terms*, <http://www.coaleducation.org/glossary.htm#S> (last visited Mar. 22, 2017). In Kennedy’s words, it is “[l]ike an elevator on a large cable.” (Tr.25:16)

Kennedy were tasked with welding and reinforcing the main frame and pipes to stabilize the skip and allow air to be supplied to the bottom of the mine shaft. (Tr.23:21–24:12) Kennedy testified at the hearing that work on the skip at Beaver Shaft resulted in “extreme amounts of exhaust passing by our faces daily.” (Tr.23:20) Bane described the conditions of the area at the time as having “approximately two inches of talcum powder like dust on the floor” from years of not being ventilated. (Ex. R–23, p. 9, lines 19–23)

In addition to the potentially high levels of radon and dust that Bane and Kennedy were exposed to during this period, Kennedy testified that “we had no safety apparatus to wear. We tied ourself [sic] onto the cable of the skip with ropes, et cetera, so that a fall wouldn’t happen, we hoped.” (Tr.24:1–7) Kennedy estimated that a fall from the skip would have been 800 to 900 feet. (Tr.24:5) It appears that Kennedy and Bane began to take safety matters into their own hands. At the hearing, Kennedy stated that “at one particular time, we were able to get some steel plate [sic] and cover the thing up so that it wouldn’t blow that all right in our faces as we worked on that upper shaft or upper structure.” (Tr.32:13–16) Prior to the steel plate, the miners in the skip had no real relief from “the winds coming up out of the mine right in our face.” (Tr.32:16–17) Bane’s personal notes mention that Kennedy procured the steel sheets from his house in Cahone, Colorado. (Ex. B–18, p. 12)

Between January and March 2009, Mine Safety and Health Administration (“MSHA”) investigators issued nine citations relevant to this case. (Ex. B–5; Ex. R–20) Notably, MSHA issued Citation No. 6424411 on January 14, 2009, alleging that Denison failed to monitor the concentrations of radon gas and that “employees working at this location were continually exposed to high readings of radon gas while traveling to their working areas.” (Ex. B–5A, p. 6)

In response, Denison had Terry MacKinnon, its Director of Mine Health and Safety, initiate a company-wide series of interviews with employees to inquire into employee health and safety concerns. (Ex. R–23, p. 6, lines 15–19) During his interview with MacKinnon in March 2009, Bane alleges that he complained about the “really bad dust conditions.” (Ex. R–23, p. 6, lines 39–41) Bane did not disclose, however, whether he or anyone else complained to MacKinnon about the lack of proper safety apparatuses to protect miners from falling in the skip.

It is not clear from the record whether remedial safety changes were made prior to or as a result of the MSHA inspection, but Kennedy recounted that “we were given masks after we had been there quite some time for the higher radon levels [...] I don’t remember for sure, but I don’t remember being pulled off of that position for any long times at all — pretty well there because this thing had to work.” (Tr.32:8–12)

On March 31, 2009, MSHA conducted an E04 inspection in response to a verbal hazard complaint. (Ex. B–5B, p. 1) During the inspection, the MSHA investigator issued Citation No. 6425248 for high radon levels and exposure. (Ex. B–5B, p. 25) In April 2009, after the safety interviews with MacKinnon, seven miners were laid off. (Ex. R–8) Shortly thereafter, Bane alleges that he asked Race Fisher why people were being laid off when they were just opening up the mine. (Ex. R–23, p. 8, lines 18–20) Bane alleges that Race Fisher responded that it was “to get rid of the trouble makers.” (Tr.174:3–6; Ex. R–23, p. 8, line 20)

**d. Bane's Respirator was not Fitted Properly**

In March 2009, during his health and safety interview with MacKinnon, Bane also complained that his respirator was not working properly. (Ex. R-23, p. 6, lines 17–19) Due to an unknown error—whether management oversight or accidental equipment switch by the miners—Bane got a respirator that was a size too large. (Ex. R-23, p. 7, lines 14–16 and p.10, lines 13–14) Bane did not recall ever receiving or being fit-tested for a respirator when he first started working at Denison. (Ex. R-23, p. 7, lines 36–37) As a result of the wrong fit, Bane reported having about as much dust on the inside as on the outside while wearing it. (Ex. R-23, p. 7, lines 14–15) Bane only realized that he was supposed to get fit-tested after observing two other crew members get fit-tested in early May 2009. (Ex R-23, p. 8, line 30–32 and p. 18, lines 8–9) After stating that he had not been fit-tested, Sagrillo sent Bane to get fit-tested for his respirator. (Ex. R-23, p. 8, lines 30–33)

On May 4, 2009, Bane was fit tested for a respirator by Darren Lee, Denison's radiation/safety officer. (Ex. B-3A) Bane asserts that it was the first time he was fit tested for a respirator at Denison, and that Lee acknowledged that the failure to fit-test Bane was a "major safety deal." (Ex. R-23, p. 20, lines 18–19) Bane alleges that he never refused to be fit-tested for a respirator at any time during his tenure at Denison. (Ex. R-23, p. 20, line 23) According to Bane, Lee said that he had informed Mine Foreman Race Fisher that Bane "hadn't been fit tested [for a respirator] for approximately a year [...]." (Ex. R-23, p. 9, lines 4–6)

**e. Red-Tagging the Crane**

In either June or July 2009, the bearings on a hoist at the Beaver Shaft in La Sal had to be replaced. (Ex. R-23, p. 11, lines 1–5) Bane alleges that Race Fisher assigned him to operate a fixed cab crane that, according to Bane, had no brakes, a tangled wire rope, a malfunctioning rear-stabilizer, bald tires, and had not been clean inspected for years. (Ex. R-23, p. 11, lines 18–21) Bane alleges that Race Fisher was aware of the crane's brake problems when he was assigned the task. (Ex. R-23, p.11, lines 33–41) To his knowledge, Bane was the only person at the site with past experience and certified to operate a crane. (Ex. B-8; Ex. R-23, p. 11, lines 9–10) Bane agreed to do the job, which required a "blind pick,"<sup>6</sup> because he believed he was most able to perform the job safely. (Ex. R-23, p. 12, lines 15–18) Bane testified that he told Lee about the safety issues prior to agreeing to operate the crane. (Tr.158:10–12) According to Bane, Lee stated that he would relay the safety concerns to Race Fisher after Bane performed the job. (Ex. R-23, p. 11, line 25)

In September 2009, after waiting approximately six to eight weeks for management to address the crane's safety issues to no avail, Bane alleges that he red-tagged the crane and marked it unsafe to operate. (Ex. R-23, p. 14, lines 3–5) According to Bane at the hearing, Sagrillo had run the crane the day before Bane allegedly red-tagged it. (Tr.160:5–6) Bane stated that he then informed Mike Palmer, the head mechanic, that he had taken the initiative to red-tag the crane. (Ex. R-23, p. 12, lines 34–35) Allegedly, Palmer then informed Race Fisher who

---

<sup>6</sup> In his MSHA interview, Bane described the "blind pick" as having to "[take] the roof of the hoist-room and I had to ah lower the hook down back behind the wall where I wasn't ah in directly [sic] view of what I was picking up." (Ex. R-23, p. 12, lines 22–24)

thereafter confronted Bane to explain why he red-tagged it. (Ex. R-23, p. 12, lines 39–40) Bane alleges that he explained and pointed out the problems with the crane to Race Fisher (Ex. R-23, p. 13, lines 28–38) From Bane’s perspective, there was no indication that Race Fisher was upset with Bane’s actions. (Ex. R-23, p. 13, 38)

#### **f. The Heat Tape Incident**

During the fall of 2009, Bane asserts that he and Terry Lynn, a master electrician, were assigned to hook up electrical heat tape to a waterline close to a bore hole that was freezing. (Ex. R-23, p. 14, lines 24–33) Lynn allegedly refused, claiming it was against the National Electrical Code’s standards and unsafe. *Id.* Lynn subsequently found a new job elsewhere. *Id.* With Lynn gone, Bane alleges that management told him to do the job, but he also refused. *Id.* According to Bane, shift supervisor Jerry Goode threatened to fire him for refusing to hook up the electrical tape, and took him to Race Fisher to explain his refusal. *Id.* Bane claims that after justifying his refusal, Race Fisher told him to “go ahead and do it.” (Ex. R-23, p. 15, lines 1–2) In the end, Bane alleges that the job was ultimately performed by Hoffman. (Ex. R-23, p. 15, lines 1–5)

#### **g. Bane’s Health Problems**

Bane alleges that he was in good health prior to being transferred to Beaver Shaft, but thereafter quickly developed health problems. (Ex. B-18, p. 29) The record indicates that Bane did not use any sick leave prior to Spring 2009. (Ex. R-9, pp. 1–20) Bane’s personal notes state that all of the employees who worked on the skip, with the exception of Sagrillo, began developing flu like symptoms. (Ex. B-18, p. 13) Bane sought treatment at the nearby Dolores Medical Center in Colorado and at the clinic in Blanding, Utah. *Id.*

Between April and May of 2009, having spent four months at Beaver Shaft, Bane took sick leave on seven occasions. (Ex. R-9, pp. 20–23) Notably, Bane was out sick for an entire week starting May 19, 2009. (Ex. R-9, p. 23) The timesheet for that week has a note written on it stating “out until Doctor Releases.” *Id.* During this time, Bane was prescribed Prednisone burst therapy, which considerably mitigated the flu-like symptoms he was experiencing. (Ex. B-18, p. 13)

On July 23, 2009, Bane saw Dr. Opie Hainey, D.C., for approval for his respiratory protection equipment. (Ex. R-12, p. 1) Dr. Hainey wrote in his medical notes, “History –allergic to dust –severe reaction approx. two months previous.” *Id.* at 2. This appears to be a reference to the period in Spring 2009 when Bane took sick leave. On the same day, Bane completed and signed a Respirator Medical Evaluation Questionnaire citing an “allergic reaction to dust.” *Id.* at 1.

In late 2009, Bane complained of symptoms including hoarseness of voice, flu-like symptoms, uncontrollable coughing fits, and extreme pain and ringing in his left ear. (Ex. R-23, p. 15, lines 29–32) Bane took sick leave on December 9, 2009, for the first time since the spring. (Ex. R-9, p. 37) In the two weeks that followed, Bane missed work most of the days. (Ex. R-9, pp. 38–39)

On December 31, 2009, Bane sought medical attention at a nearby clinic in Monticello, Utah. (Ex. R-23, p. 15, line 36) He was treated by Blen Freestone, a Certified Physician’s

Assistant (“PA-C”). (Ex. R-23, p. 15, line 40) PA-C Freestone wrote Bane a doctor’s note instructing that Bane “needs to stay out of the mine for the next week or two secondary to illness which aggravates when he goes into the mine.” (Ex. R-6; Ex. B-12, p. 13) During this period, Bane worked above ground, but was not assigned any meaningful work. In his interview with MSHA Investigator Funkhouser, Bane described this period as “kind of a dead time [...] I really had no job duties to speak of, no one told me what to do. I kind of wandered around helping whoever was around” performing “odd little make work jobs.” (Ex. R-23, p. 16, lines 12–15)

On January 13, 2010, Bane had a follow-up visit with PA-C Freestone and reported that he felt “much better” during the two-week period above ground.<sup>7</sup> (Ex. R-7) Freestone concluded that the dusty conditions in the mine were likely the cause of Bane’s ailments. (Ex. R-6) Freestone subsequently gave Bane a doctor’s note, which stated, “Please excuse Matthew from work that involves dust, mine shafts, boreholes, etc.” (Ex. R-6; Ex. B-12, p. 13)

#### **h. Bane’s Anonymous Complaint to MSHA**

On January 12, 2010, at 7:23 p.m., Bane filed an anonymous complaint about working in areas with high levels of radon with MSHA’s Utah Field Office. (Ex. R-23, p. 16, lines 38–40; Ex. B-5; Tr.140:18–24) The call to MSHA was made from an off-site Shell gas station in Moab, Utah. (Ex. R-23, p. 16, lines 33–34) Bane did not tell anybody at work that he had generated the anonymous complaint. (Ex. R-23, p. 16, line 42–p. 17, line 1; Tr.140:25–141:2) MSHA investigators inspected the La Sal Incline between January 19 and 21, but did not find radiation levels in violation of the standard. (Ex. B-5; Tr.141:3–9) Bane insists that the reason for the negative finding was due to the inspectors incorrectly inspecting a collapsed portal at the La Sal Incline despite his intention for them to inspect “the actual mine of La Sal Incline mine.” (Tr.141:14–15)

At some point shortly after his anonymous complaint to MSHA, Bane alleges that Goode grabbed him by the front of his coveralls and asked Bane “what [he] was going to do now [...].” (Ex. R-23, p. 18, lines 18–23) Bane alleges that he defended himself by opening his hunting knife, which he used to strip electrical cable, between Goode’s legs. *Id.* The alleged event took place during a safety meeting and was witnessed “by Tim Howe ah directly, indirectly it was witnessed by the whole crew [...].” *Id.* Bane recalls that the crew “all ah became laughing about him trying to intimidate me [...].” *Id.* At least once in the record, Bane stated that the incident also “took place in front of mine foreman Race Fisher [...].” (Bane Prehearing Br. 5)

---

<sup>7</sup> Bane’s recollection of his improvement after the two weeks above ground was less enthusiastic than PA-C Freestone’s notes. In his section 105(c) discrimination complaint, Bane stated that he did “improve somewhat” after staying out of the mine for two weeks. (Ex. R-1) Similarly, Bane described his condition during this time as having “improved slightly” during his interview with Investigator Funkhouser. (Ex. R-23, p. 16, line 7)

### **3. Bane's Termination<sup>8</sup>**

On January 18, 2010, Bane audiotaped a conversation he had with Sagrillo and Race Fisher. (Ex. R-15; Ex. R-17; Ex. B-19A; Ex. B-20) Sagrillo stated that earlier that morning he had asked Race Fisher about giving Bane medical leave, but was told that he could not do that. (Ex. R-15, p. 1) Bane also intimated that he had had a similar conversation with Race Fisher that morning about what his options were. *Id.* at 2. Bane told Albert, “I asked Race this morning and he says well what do you want done and I said well I don’t know. I don’t, I have no idea. And he says well, we can lay you off and I said well, that’d be all right.” *Id.* Bane and Sagrillo then discussed the ambiguity of Bane’s medical diagnosis along with the dusty conditions of the mine. *Id.* at 3–6. Toward the end of their discussion, Bane stated, “All I need to do is get well and I don’t really give a shit what it takes [...].” *Id.* at 6.

Immediately after this discussion, Bane and Sagrillo met with Race Fisher. *Id.* at 7. Race Fisher stated to Bane, “What are we gonna do? [w]e’ll get you laid off.” *Id.* Race Fisher’s stated rationale was that a layoff would allow Bane to “get signed up for unemployment, but where you got some money comin’ in while your doctor stuff [inaudible].” *Id.* at 9. Bane ultimately responded, “Yeah. Well, we’ll go with that. That sounds as good as anything I can think of, so. And we’ll just, I’ll keep in touch with you and tell you what [the doctors] say and whatever, you know [...] That sounds good to me. Well I appreciate it.” *Id.* at 9–10.

Later that day, Race Fisher signed a Personnel Action Form requesting Bane’s layoff. (Ex. R-11, p. 3) The stated reason for the layoff was a “Reduction in Force.” *Id.* Jim Fisher and Philip G. Buck also signed the Personnel Action Form on the same day. *Id.* On January 20, 2010, by way of letter, Bane was laid off by Denison due to “a continuing decline in commodity prices [...] and a need to reduce its work force.” (Ex. R-5)

On February 1, 2010, Bane went to the head office in Egnar, Colorado, to return his work keys. (Ex. B-18, p. 27; Ex. R-16) While there, Jamie Huskey, the office secretary, asked Bane whether he had decided to sign a release and waiver form that would release Denison Mines from all legal liability in exchange for a two week severance pay.<sup>9</sup> (Ex. B-18, p. 28) Bane declined to sign the letter, stating, “I don’t want to sign anything away until the doctor says well you’re good to go.” (Ex. R-16, p. 1) Instead, Bane requested a “green card” to file a notice of injury with Denison in order to collect workers’ compensation in the event that he did not

---

<sup>8</sup> The parties do not dispute that a series of conversations took place regarding what to do about Bane in light of PA-C Freestone’s note prohibiting Bane from working in dusty areas. However, the specifics of what was said in these discussions, notably whether Bane initiated the conversation about quitting and, indeed, wanted to quit, are highly contested by the parties and will be discussed in greater detail in the sections that follow.

<sup>9</sup> Reference to the severance pay policy can also be found in Denison Mines’ termination letter. It states: “In addition to the foregoing, the Company is willing to pay you an additional amount equivalent to two weeks wages, less applicable deductions, upon execution of the attached Release and Waiver releasing the Company from any and all liability arising out of your employment and the cessation of your employment.” (Ex. R-5)

recover from his illness. *Id.* at 2. Immediately thereafter, MacKinnon along with Jim Fisher, the Mining Superintendent, arrived. MacKinnon stated that he did not have any green cards. *Id.* A heated exchange ensued over whether Bane's allergic reactions to dust were contracted prior to working at Denison Mines or during his tenure at Denison. *Id.* at 2–4. The conversations from this day were audio recorded by Bane. (Ex. R-17; Ex. B-20A)

## B. Procedural History

On May 18, 2012,<sup>10</sup> Bane filed an MSHA Form 2000-123 Discrimination Complaint, and alleged that he was discharged in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). (Ex. R-1) The complaint listed four persons responsible for discriminatory action: Race Fisher, Jim Fisher, Randy Marsing, and Terry MacKinnon. *Id.* On June 6, 2012, Bane was interviewed by MSHA Special Investigator David B. Funkhouser in Cortez, Colorado. On July 2, 2012, the Secretary declined to pursue a discrimination case on behalf of Bane after investigating the allegations. On July 19, 2012, Bane filed a section 105(c)(3) claim appealing MSHA's determination. On November 14, 2012, Denison filed a motion to dismiss the complaint on the grounds that Bane filed his 105(c) complaint outside the allowable time limit. With the Court's permission, Bane responded to the FMSHRC request for additional information on May 9, 2014.<sup>11</sup> On June 20, 2014, this Court denied Respondent's motion to dismiss the complaint.

On October 14, 2015, the parties presented testimony and documentary evidence at a hearing in Durango, Colorado. After the hearing, both parties submitted briefs which have been received and considered in rendering this decision.

## IV. LEGAL PRINCIPLES

Under section 105(c)(1) of the Mine Act, a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Chapter, including a complaint notifying the operator [...] of an alleged danger or safety or health violation." 30 U.S.C. § 815(c).

To establish a *prima facie* case of discrimination under section 105(c)(1), Bane must show: (1) that he engaged in a protected activity; and, (2) that the adverse action he complains of

---

<sup>10</sup> Although the statement of discrimination that Bane submitted to MSHA was dated April 11, 2012, it was not received and filed until May 18, 2012. (Ex. R-1, pp. 1–2)

<sup>11</sup> Bane was given additional time to file because it was discovered that both the Court and opposing counsel had been sending case documents to the wrong address.

was motivated, at least in part, by that activity.<sup>12</sup> *Drisken v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal, Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981).

The Commission has noted that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action; (2) knowledge of the protected activity; (3) hostility or animus toward the protected activity; and (4) disparate treatment. *Id.* at 2510–12. The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2511. In *Bradley v. Belva Coal Company*, with regard to the issue of motivation, the Commission found that “circumstantial evidence [...] and reasonable inferences drawn therefrom may be used to sustain a prima facie case.” 4 FMSHRC 982, 992 (June 1982) (citing *Chacon*, 3 FMSHRC at 2510–12). Furthermore, the Commission has held that “inferences drawn by judges are ‘permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.’” *Colo. Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)).

Under section 105(c), 30 U.S.C. § 815(c), the operator may rebut the miner’s prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799–800. If the operator cannot rebut the prima facie case, it may nevertheless defend affirmatively by proving that it was motivated by the miner’s unprotected activity. It is not enough under section 105(c) for the operator to show that the miner deserved to be fired for engaging in the unprotected activity. The operator must show that it did, in fact, consider the miner deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817–18; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

---

<sup>12</sup> The legitimacy of the *Pasula-Robinette* framework was recently challenged in *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914 (Aug. 2016). In *Riordan*, the respondent mine operator argued that the *Pasula-Robinette* test was no longer appropriate because the Supreme Court invalidated the burden-shifting framework in the ADEA and Title VII contexts. *Id.* at 1919. The Commission, citing the legislative history and intent of the Mine Act, found that the burden-shifting framework of the *Pasula-Robinette* test is still applicable and appropriate. “Congress envisioned such a burden-shifting framework when drafting the discrimination protections of section 105(c)(1) [...] Given the distinct history and legislative intent of the Mine Act, we do not find *Gross* and *Nassar* to be controlling for discrimination proceedings under the Mine Act. The Commission’s reasoning in *Pasula* was sound, and we decline to overturn it.” *Id.* at 1921.

In analyzing a mine operator's asserted justification for taking adverse action under the *Pasula-Robinette* framework, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The ALJ may not impose his own business judgment as to an operator's actions. *Chacon*, 3 FMSHRC at 2516–17. Additionally, the ALJ may not substitute his own justification for disciplining a miner over that offered by the operator. *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sept. 2001).

The Commission has explained, however, that “pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator’s normal business practices.” *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). Further, “[a] plaintiff may establish that an employer’s explanation is not credible by demonstrating ‘either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.’” *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1073 (May 2011) (emphasis in original) (citations omitted). Additionally, a company’s failure to follow its own policies can be evidence of pretext. *See Rudin v. Lincoln Land Cnty. Coll.*, 420 F.3d 712, 727 (7th Cir. 2005) (failure to follow company’s own procedures may be evidence of pretext); *see Giacoletto v. Amax Zinc Co.*, 954 F.2d 424, 427 (7th Cir. 1992) (determining that employer’s proffered justification was pretextual when company failed to follow its own procedures). While the intermediate steps of the *Pasula-Robinette* test include shifting burdens, the ultimate burden of persuasion on the question of discrimination remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

## V. PRIMA FACIE DISCRIMINATION

As part of his burden to make a prima facie showing of discriminatory intent, Bane must show that his termination was motivated, at least partially, by his engagement in protected activity under section 105(c). I must determine whether the evidence in total, including the inferential evidence, has sufficient circumstantial weight to satisfy his prima facie burden to show discrimination.

### A. Bane Engaged in Protected Activity

To satisfy the first prong of the *Pasula-Robinette* test for a prima facie case of discrimination, Bane must show that he engaged in protected activity. *Driissen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 803; *Pasula*, 2 FMSHRC at 2786. Protected activity under the Act has been found to include tagging out equipment because it may be unsafe, *see Sec'y of Labor on behalf of Schafer v. Consolidation Coal Co.*, 8 FMSHRC 1568 (Oct. 1986) (ALJ), making a complaint to an operator or its agent of “an alleged danger or safety or health violation,” *see Sec'y of Labor on behalf of Davis v. Smasal Aggregates, LLC*, 28 FMSHRC 172, 175 (Mar. 2006) (ALJ), and reporting potential safety or health hazards to MSHA or an MSHA inspector, *see Sec'y of Labor on behalf of Chaparro v. Comunidad Agricola Bianchi, Inc.*, 32 FMSHRC 206 (Feb. 2010) (ALJ). The language of the statute prohibits discrimination against a miner for filing complaints under sections 105(c) or 103(g), which in and of itself qualifies as protected

activity. 30 U.S.C. § 815(c)(1). Additionally, a miner “subject to a medical evaluation and potential transfer” may qualify as protected under section 105(c) under limited circumstances. *Id.*

When a complainant asserts that he engaged in a protected activity that is not expressly enumerated under the Mine Act, the activity may still be protected if it furthers the purpose of the legislation. *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1323 (June 2016) (citing *Pasula*, 2 FMSHRC at 2789). In determining whether an activity is to be considered protected activity, the legislative history makes clear that Congress intended for courts to liberally construe the Act. Congress stated that “[t]he Committee intends that the scope of the protected activities be broadly interpreted by the Secretary” and that “[t]he listing of protected rights contained in section 10[5](c) is intended to be illustrative and not exclusive.” S. Rep. No. 181, 95th Cong., 1st Sess. 35–36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623–24 (1978). It further stated that section 105(c) was to be construed “expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” *Id.* at 36.

For the reasons that follow, I find that Bane engaged in five instances of protected activity between July 15, 2008, and January 21, 2010, the day he was terminated.

## **1. Relevant Health and Safety Complaints**

Bane alleges that he made seven health and safety complaints to management during his tenure at Denison. Although the basic factual backgrounds of all seven complaints were outlined above to establish a timeline of events, the following includes the contested factual details along with my analysis and findings. It is fundamental that the ALJ, as trier-of-fact, assess the credibility of all witnesses and determine the weight their testimony deserves. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (“[A] Judge’s credibility resolutions cannot be overturned lightly.”).

### **a. Supervisor Hoffman’s Dangerous Actions**

After witnessing Hoffman’s behaviors while taking painkillers on several occasions, Bane alleges that he complained directly to Race Fisher about the incidents and, as a result, was transferred to work at the La Sal Incline (Beaver Shaft) under Sagrillo, his new immediate supervisor. (Ex. R-1, p. 2; Ex. R-23, p. 4, line 19)

In *Secretary of Labor on behalf of Long v. Island Creek Coal Company*, the judge found that a complaint to management about a co-worker carrying powder and blasting caps in a truck not equipped to haul explosives, without a warning sign, and across a highway was protected activity. 2 FMSHRC 1529 (June 19, 1980) (ALJ). Similarly, here, Bane complained to Race Fisher after witnessing three to four months of what he considered reckless and dangerous behavior by Hoffman. While Hoffman’s actions allegedly ranged in severity—from having erratic mood swings to hearing voices—at least one of Hoffman’s actions, e.g., his failure to shut down a 50hp fan before running a continuity check, was potentially fatal. As Hoffman’s subordinate and supervisee, Bane’s safety was reasonably likely to be directly impacted by Hoffman’s actions. I find Bane’s recollection of these events credible. The timeline in Bane’s

personal notes is consistent with his work reports, (Ex. B-18; Ex. R-9), and Denison did not directly dispute the events.

I conclude that Bane's complaint to Race Fisher regarding Hoffman's unsafe behavior constitutes protected activity.

**b. Possible PCB Contamination from the 4160 Volt Transformer Liquid Switch**

Hoffman's failure to shut down a 50hp fan while running a continuity check resulted in a liquid switch exploding. (Tr.47:12–13) The cause of the explosion was found to be contaminated oil in the liquid switch. (Tr.47:15–16) Bane testified that he was then ordered by management to remove and replace all of the oil from the liquid switches at the mine. (Tr.47:16–18) Bane further testified that he conducted the cleanup without PPE, and that it was unknown whether the oil was contaminated with PCBs. (Tr.47:19–20)

In *Hatfield v. Colquest Energy, Inc.*, the Commission recognized that a miner cannot expand his pro se claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA. 13 FMSHRC 544, 546 (Apr. 1991). The Commission recently reiterated that *Hatfield* stands for the proposition that “it [is] not the terms of the initial complaint to MSHA that [control] whether the amended complaint [can] go forward, but the *Secretary’s investigation of the initial complaint.*” *Hopkins Cty. Coal, LLC*, 38 FMSHRC at 1323 n.9 (emphasis added).

In Bane's discrimination complaint filed with MSHA as well as his interview with Investigator Funkhouser, there was no mention of PCBs or adverse effects from PCB exposure. Additionally, and notably, there is no evidence in the record that the Secretary investigated anything related to PCB exposure, contaminated oil, or exploding transformers. I find that Bane's claims of possible PCB exposure are tenuous and speculative at best and are an attempt to broaden the original basis for his complaint. For this reason, I conclude that Bane's claim of possible PCB exposure is outside the permissible scope of section 105(c)(3).

**c. Radon and Dust Exposure in the Skip**

Bane told Investigator Funkhouser that he complained to MacKinnon about the dusty conditions in the Skip.<sup>13</sup> (Ex. R-23, p. 6, lines 17–18) In his affidavit, MacKinnon did not confirm or deny the occurrence of the March 2009 health and safety interview with Bane or any subject matter discussed as part of such an interview. (Ex. R-4) With regard to the conditions of the skip, Race Fisher testified at the hearing that he was aware of the high radon levels in certain areas of the mine while they were “getting the mine flushed out, opening new areas in the mine” between 2008 and 2010. (Tr.72:11–12) Fisher further testified that “[a]nytime you open a mine

---

<sup>13</sup> At the hearing, Bane stated, “[R]adon is a dust basically. It’s a radioactive dust—real, real small particle of dust.” (Tr.82:18–20) Although it appears that Bane only complained to MacKinnon about “dust” in the safety interview, for purposes of establishing his prima facie case, I will assume that Bane intended that his complaint about “dust” to MacKinnon to include radon.

that's been closed, there is [sic] going to be hazards that have developed over the years if it's sitting idle, and when it's opened, you systematically take care of the hazards as you find them." (Tr.68:11–12)

On January 14, 2009, MSHA issued Citation No. 6424411, alleging that Denison failed to monitor concentrations of radon gas and that "employees working at this location were continually exposed to high readings of radon gas while traveling to their working areas." (Ex. B-5, p. 6) It appears that Denison responded immediately. Under the "Action to Terminate" section, MSHA noted, "[Denison] has pulled the miners from the location and will concentrate on correcting the ventilation problem." *Id.* Additionally on March 25, 2009, miners made a verbal complaint to MSHA alleging, among other things, high radon levels in the Pandora mine. (Ex. B-5B, p. 1) On March 31, 2009, MSHA conducted an E04 inspection in response to the complaint. (Ex. B-5B, p. 1) During the inspection, the MSHA investigator issued Citation No. 6425248 for high radon levels and exposure. (Ex. B-5B, p. 25)

Kennedy testified at the hearing that "we were given masks *after* we had been there quite some time for the higher radon levels." (Tr.32:8–9) (emphasis added) It is not clear, however, whether these PPE changes were made directly in response to Bane's complaints, the MSHA citations, or for some other reason. Regardless of the actual impetus for change, the fact that safety changes *were* eventually implemented in the skip suggests that management became aware of radon and/or dust problems at Beaver Shaft at some point *after* the skip detail had begun working at the location.

Reviewing the totality of the evidence —Race Fisher's testimony, MSHA Citation Nos. 6424411 and 6425248, and Kennedy's testimony —I find that that the conditions of the mine were likely as Bane described them. Notably, Bane's alleged health and safety complaint to MacKinnon about the dusty conditions in the mine was not disputed. Therefore, I conclude that Bane's complaint to management regarding potentially high levels of dust constituted protected activity.

#### **d. Bane's Respirator was not Fitted Properly**

Bane contends that he was never fit tested for a respirator when he started at Denison and was, therefore, exposed to dust and radon while working in the Beaver Shaft skip. Bane told Investigator Funkhouser that he complained about his respirator not working to MacKinnon in his March 2009 safety interview. (Ex. R-23, p. 6, lines 15–19) When asked by Investigator Funkhouser whether MacKinnon gave "any indication that he could replace [Bane's] respirator or anything of that nature," Bane responded in the negative. *Id.*

MacKinnon's affidavit states that he started at Denison at the same time as Bane and took the same MSHA training course. (Ex. R-4, p. 1) Contrary to Bane's recollection of events, MacKinnon's affidavit states that Bane, like all newly hired miners, *was* issued a respirator and fit tested by means of both irritant smoke and breathing/head movement/talking tests at the beginning. *Id.* at 3. In his affidavit, MacKinnon did not confirm or deny the occurrence of the March 2009 health and safety interview with Bane. Additionally, MacKinnon did not confirm or deny that Bane made a complaint about his respirator not fitting.

To bolster his claim that he was not fitted with a respirator upon starting at Denison, Bane produced a “Respirator Fit Test Record” dated May 4, 2009, and signed by Lee. (Ex. B-3A) Respondent provided a “Certificate of Training” form dated July 17, 2008, showing the “Self-Rescue & Respiratory Devices” box checked, (Ex. B-3B; Ex. R-10), but failed to produce a “Respirator Fit Test Record” that corroborates MacKinnon’s statement that Bane was actually fit tested for a respirator when he first started at Denison in July 2008. Additionally, Bane’s contention that he was not timely fitted for a respirator was corroborated by Kennedy’s testimony. At the hearing, Kennedy testified that he was only fitted for a respirator during the last “two or three months at the outside.” (Tr.51:21–22) While Kennedy’s testimony does not establish a pattern of Denison failing to properly fit respirators, it does serve to diminish the credibility of MacKinnon’s unqualified statement that “newly hired miners are issued respirators.” (Ex. R-4, p. 2) I also recognize that more than a month passed between Bane’s safety interview with MacKinnon (March 2009) and when he was ultimately issued a new, properly-fitted respirator by Lee (May 4, 2009).

The lack of a record showing that Bane was actually fit tested when he first started, in conjunction with Kennedy’s testimony, compels me to find that Denison failed to fit test Bane in violation of 30 CFR § 57.5005.<sup>14</sup> Accordingly, Bane’s complaint to Denison management about his respirator not working was a protected activity.

#### e. Red-Tagging the Crane

In his discovery request, Bane requested all crane safety certifications possessed by Denison. (Ex. B-8, p.1) Denison’s initial response stated, “[t]here are no such certifications for areas where Mr. Bane worked. The La Sal complex did not have any crane that would require inspection or certification.” *Id.* At the hearing, however, Denison changed its position, stating that they “don’t dispute there was a crane.” (Tr.96:22) Race Fisher also acknowledged that the crane was red-tagged and relocated. (Tr.96:23–24) It is, therefore, undisputed that the crane existed and that it was red-tagged. However, the critical question of whether Bane engaged in protected activity by either complaining to management about the crane’s safety issues or by red-tagging it himself remains. As mentioned above, tagging out equipment has previously been

---

<sup>14</sup> Section 57.5005 dictates the control of exposure to airborne contaminants in metal/nonmetal mines:

Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, *while establishing controls [...]*) employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels *if they are protected by appropriate respiratory protective equipment.*

found to constitute protected activity. *See, e.g., Schafer*, 8 FMSHRC at 1586 (“Tagging out equipment believed to be unsafe is a safety activity protected by the Act and required.”).

MacKinnon challenged Bane’s allegations that Bane made complaints about the crane. MacKinnon’s affidavit stated that “Pursuant to Denison procedures, and 30 C.F.R. § 56/57.14100, Mr. Bane would have completed a pre-operation check of the crane before operating it and that paperwork should have listed any defects affecting safety, if indeed there were any.” (Ex. R-4, p. 3) The affidavit further stated that “no pre-operation check records created in 2009 for equipment had been retained as of April 11, 2012.” *Id.* MacKinnon’s statement about the nonexistence of a preoperation check as evidence that Bane never expressed safety concerns is not convincing. When asked by Investigator Funkhouser whether Bane documented any of the defects on the crane, Bane replied that workers at the mine were not in the habit of filling out daily walk-around sheets on a frequent basis. (Ex. R-23, p. 12, lines 3–4) Other evidence in the record suggests that Denison’s procedures were not always perfectly executed, as MacKinnon would claim. For example, Denison’s biweekly employee time report sheets are missing dates and required signatures, (Ex. R-9), dates were incorrectly printed on worksheets, (Ex. R-9, pp. 23, 34), and, as noted above, PPE was not always timely issued.

Although Bane admits that he cannot provide documented evidence that he complained about the crane or red-tagged it, (Ex. R-23, p. 12, lines 3–4), I find that Bane engaged in protected activity here, at least for the limited purpose of establishing his *prima facie* case.

#### **f. The Heat Tape Incident**

The Commission has determined that among the statutory rights protected by section 105(c) is the right to refuse to work in dangerous conditions and the refusal to comply with orders which are violative of the Act or any related standard. *Pasula*, 2 FMSHRC at 2791. However, Bane failed to provide any corroborating testimony or other evidence to support his version of the incident. Notably, Bane did not question Fisher at the hearing about the event despite having an opportunity to do so.<sup>15</sup> Consequently, I am unable to find that Bane engaged in protected activity here.

#### **g. Bane’s Anonymous Complaint to MSHA**

On January 12, 2010, at 7:23 p.m., Bane filed an anonymous complaint with MSHA’s Utah Field Office alleging that he was required to work in areas with high levels of radon. (Ex. B-5, pp. 109–11) Reporting potential safety or health hazards to MSHA or an MSHA inspector has consistently been found to constitute protected activity. *See, e.g., Sec’y of Labor on behalf of McKinsey v. Pretty Good Sand Co., Inc.*, 36 FMSHRC 1177, 1186 (May 2014) (“There is no

---

<sup>15</sup> It appears that Bane was planning to discuss the electrical heat tape issue while questioning Race Fisher at the hearing. (Tr.99:2–7) However, Counsel for Denison requested and was granted permission to ask voir dire questions. The voir dire dealt with the unrelated issue of an audiotape that Bane recorded. (Tr.99:19–21, 100:11–15) After this, Bane did not come back to ask Race Fisher about the electrical heat tape incident despite having a clear opportunity to do so.

question the sending of a complaint to MSHA to discuss a safety concern is protected activity. In fact, this is precisely the interaction between miner and MSHA that §105(c) was drafted to protect.”); *Sec'y of Labor on behalf of Bragg v. Maple Coal Co.*, 35 FMSHRC 70, 82 (Jan. 2013) (ALJ) (“An anonymous complaint to MSHA about a health or safety violation is protected activity.”); *Chaparro*, 32 FMSHRC at 210 (“Speaking with an MSHA inspector about conditions at a facility where the complainant works is protected under the Act.”); *Sec'y of Labor on behalf of Nelson v. U.S. Steel Mining Co., Inc.*, 9 FMSHRC 346, 351 (Feb. 1987) (ALJ) (finding that a miner telling MSHA inspectors about the failure of the company to properly rock dust the face of the coal bed was protected activity). Accordingly, I conclude that Bane’s anonymous complaint to MSHA on January 12, 2010, constituted protected activity.

## **2. Medical Evaluation and Potential Transfer**

Although the majority of section 105(c) cases focus on unsafe work refusals, health and safety complaints to management, or health and safety complaints to MSHA,<sup>16</sup> there is a narrow line of case precedent involving section 105(c) protections for miners who develop health problems. Section 105(c)(1) provides that: “No person shall discharge or in any manner discriminate against [...] [any miner] [...] because [such miner] is the *subject of medical evaluations and potential transfer* under a standard published pursuant to section 101 of this title.” 30 U.S.C. § 815(c)(1) (emphasis added).

During Bane’s interview with Investigator Funkhouser, Bane twice stated that he believed that the reason he was laid off from Denison Mines was fifty percent attributable to health issues. (Ex. R-23, p. 6, lines 7–9 and p. 19, lines 21–24) At the hearing, Bane insisted that he had a right to a medical evaluation and right to transfer to a different position at Denison, citing an MSHA webpage titled “Miners’ Rights and Responsibilities[:] A Guide to Miners’ Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977.” (Tr.85:13–15; Ex. B-12) Under the sub-heading “What Are My Rights?”, the webpage states that miners have a right to:

A medical evaluation or to be considered for transfer to another job location because of harmful physical agents and toxic substances. (For example: a coal miner has the right to a chest x-ray and physical examination for black lung disease [pneumoconiosis] and potential transfer to a less dusty position if the miner has a positive diagnosis.)

*Miners’ Rights and Responsibilities A Guide to Miners’ Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977*, U.S. DEP’T OF LABOR, <http://arlweb.msha.gov/S&HINFO/minersrights/minersrights.asp> (last visited Oct. 26, 2016).

The problem with the MSHA webpage is that it fails to include the phrase “under a standard published pursuant to section 101 of this title.” 30 U.S.C. § 815(c)(1). This conditional language serves as an important limitation on the types of medical conditions that trigger medical

---

<sup>16</sup> “The vast majority of cases arising under Section 105(c) of the Mine Act concern matters of safety.” *Atkins v. Cyprus Mines Corp.*, 8 FMSHRC 279, 290 (Feb. 1986) (ALJ).

evaluation and potential transfer (“ME&PT”) protection. Furthermore, the use of the phrase “For example” on the MSHA webpage is misleading, as it suggests that the protection extends generally and broadly to harmful physical agents and toxic substances. To date, it appears that the ME&PT clause has only been successfully used in cases that have involved workers who developed pneumoconiosis in an underground coal mine. *See, e.g., Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 10 FMSHRC 152 (Feb. 1988); *Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891 (May 1987); *Goff v. Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 1776 (Nov. 1985). In all of the cases where ME&PT protections were found, either 30 CFR Part 90 (“Part 90”) or its predecessor, 30 U.S.C. §843(b), were cited. Part 90 grants coal miners who work at underground coal mines and develop pneumoconiosis the right to wage protections after being transferred to less dusty environments.<sup>17</sup>

An analysis of ME&PT case law shows how Part 90 is to be understood. First, Part 90 is not to be interpreted expansively to include protections for non-coal miners. *See Atkins*, 8 FMSHRC at 291 (“But there was no indication in the decision that the Commission intended to extend the doctrine any further than to encompass those situations where the Secretary specifically addressed, by his rulemaking authority, the issues of medical evaluations and transfers.”) (emphasis added); *Janoski v. R&F Coal Co.*, 7 FMSHRC 402, 408 (Mar. 1985) (ALJ) (“As correctly pointed out by the respondent, [Part 90] only [applies] to miners who are employed at underground coal mines or at surface work areas of underground coal mines.”); *Clemens v. Anaconda Minerals Co.*, 5 FMSHRC 1434, 1437 (Aug. 1983) (ALJ) (“Since no similar regulations (allowing transfer for medical reasons with no reduction of pay) have been promulgated for non-coal mines [...] I concur with Anaconda’s arguments and conclude that no statutory right to medical evaluation, and resulting transfer with maintenance of pay, exists for non-coal mines.”).

Second, Part 90 is not to be interpreted expansively to include protection for miners who suffer from ailments other than pneumoconiosis. *See Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491, 496 (Apr. 1988) (finding that industrial bronchitis is not covered by Part 90); *Cullinan v. Peabody Twentymile Mining LLC*, 36 FMSHRC 205, 210 n.3 (Jan. 2014) (ALJ) (finding that asthma does not constitute protected activity under Part 90); *Atkins*, 8 FMSHRC at 291 (finding that medical evaluations or potential transfers do not apply to miners suffering from high levels of mercury).

Third, Part 90 protection does not guarantee a dust-free transfer, but is instead triggered only in areas with respirable dust levels of 1.0 mg/m<sup>3</sup> or greater. *See Perando*, 10 FMSHRC at

---

<sup>17</sup> 30 C.F.R. § 90 states:

This part 90 establishes the option of miners who are employed at coal mines and who have evidence of the development of pneumoconiosis to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift is continuously maintained at or below the applicable standard as specified in § 90.100.

496 (“Exposure to some amount of respirable dust is inherent in virtually all underground coal mining.”).

Fourth, Part 90 is an example of the Secretary promulgating a regulation pursuant to section 101(a)(7), but does not preclude the creation or existence of other similar mandates. *See id.* at 495 (“*To date*, the Secretary has implemented this statutory mandate by providing under 30 C.F.R. Part 90[...].”) (emphasis added); *Goff*, 7 FMSHRC at 1777 (“The Part 90 standards, promulgated pursuant to section 101(a)(7) of the Act, *are clearly the kind of standards* to which that clause applies.”) (emphasis added); *Clemens*, 5 FMSHRC at 1437–38 (“However, such mandatory health and safety regulations have only been promulgated for coal mines, under 30 C.F.R. 90[...] no similar rule pertaining to non-coal mines has been promulgated.”).

Given the metes and bounds of Part 90, I conclude that Part 90 cannot extend to cover Bane, a uranium miner who suffers from a dust allergy. I recognize that the mere fact that a scenario similar to Bane’s has never successfully supported such a claim in the past does not preclude the possibility of a successful ME&PT claim for a non-coal miner suffering from something other than pneumoconiosis in the future. However, I am not aware of, and Bane has not cited to, any regulation or authority similar to Part 90 that supports the recognition of ME&PT rights for non-coal miners or miners who suffer from medical conditions similar to his. Simply put, the only authority Bane offers is the MSHA webpage that misinterprets section 105(c)(1).

Because there is no authority outside the MSHA webpage to support the contention that a uranium miner who suffers from a dust allergy qualifies for protections under the ME&PT clause of section 105(c)(1), there was no protected activity here.

## **B. Bane’s Termination Constitutes Adverse Employment Action**

The second prong of the *Pasula-Robinette* test for a prima facie case of discrimination requires a showing that Denison took an adverse action against Bane that was motivated, at least in part, by Bane’s protected activity. *Drissen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev’d on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). This second prong of the *Pasula-Robinette* test may be further separated into two sub-questions: (1) whether there was an adverse action; and, if so, (2) whether there was a motivational nexus, at least in part, between the adverse action and the Complainant’s protected activity. This section will address the “adverse action” sub-question, and the following section will address the “motivational nexus” sub-question.

The Commission has defined “adverse action” as:

“[A]n action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” 601 F.3d at 428 (quoting *Sec’y on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 (Aug. 1984)). [...] [T]he Commission has recognized that, while “discrimination may manifest itself in subtle or indirect forms of adverse action,” at the same time “an adverse action ‘does not

mean any action which an employee does not like.”” *Hecla-Day Mines Corp.*, 6 FMSHRC at 1848 n.2 (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981)). Consequently, where the action alleged to be adverse against the miner is not self-evidently so -- such as a discharge or suspension would be -- the Commission will closely examine the surrounding circumstances to determine the nature of the action. *Id.* at 1848. “Determinations as to whether an adverse action was taken must be made on a case-by-case basis.” *Id.* at 1848 n.2.

*Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012).

The Commission has found that a discharge, demotion, or termination is an adverse employment action. *See McKinsey*, 36 FMSHRC at 1186 (citing 30 U.S.C. § 815(c)(1)); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). The plain language of section 105(c), which expressly lists “discharge,” does not address whether a layoff is treated, for discrimination purposes, as an adverse employment action. Section 105(c) case law, however, makes it clear that the layoff of a miner falls within the ambit of adverse employment action. *See, e.g., Sec'y of Labor on behalf of Ratliff v. Cobra Nat. Res., LLC*, 35 FMSHRC 394, 397 (Feb. 2013) (“This is because the layoff itself, as a termination of employment, must at that point be evaluated as a potentially wrongful adverse action.”); *Sec'y of Labor on behalf of Hyles v. All Am. Asphalt*, 21 FMSHRC 119, 129 (Feb. 1999) (stating that four miners suffered an adverse employment action when they were permanently laid off); *Sec'y of Labor on behalf of Harper v. Kingston Mining Inc.*, 37 FMSHRC 1577, 1589 (July 2015) (ALJ) (“It is uncontested that Harper was laid off on April 10, 2015. Therefore, Harper’s claim that he suffered an adverse employment action is not frivolous.”).

In the recorded conversation between Bane and Race Fisher on January 18, 2010, Race Fisher stated to Bane, “What are we gonna do? We’ll get you laid off.” (Ex. R-15, p. 7) Race Fisher then filled out a Personnel Action Form marking “layoff” as the reason for termination and noting “Reduction in Force” in the comments section. (Ex. R-11, p. 3) Consistent with Race Fisher’s statements and actions, Denison’s termination letter cited a “continuing decline in commodity prices” and a “need to reduce its work force” as the reason that Bane’s “services with the Company are no longer required and your employment with the Company will be terminated, effective January 21, 2010.” (Ex. R-5) Given the above, I find that, at least for purposes of establishing Bane’s *prima facie* case, Bane was laid off, and, thus, suffered an adverse employment action.

### C. **Bane was not Terminated Because he Engaged in Protected Activity**

Having established the existence of both a protected activity and an adverse action, the complainant must next show that the adverse action was motivated, at least in part, by the protected activity. *Drissen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev'd on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). The Commission has noted that “direct evidence of motivation [for termination] is rarely encountered; more typically, the only available evidence is indirect.” *Chacon*, 3

FMSHRC at 2510. Such indirect, circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action; (2) knowledge of the protected activity; (3) hostility or animus toward the protected activity; and, (4) disparate treatment. *Id.* These four “*Chacon* factors” are not the exclusive means of proving a mine operator’s motivation in taking an adverse action against an employee. The Commission has stated that “inferences drawn by judges are ‘permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.’” *Colo. Lava, Inc.*, 24 FMSHRC at 354 (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)).

## **1. Coincidence in Time Between the Protected Activity and the Adverse Action**

The Commission has stated that “[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer’s motive [...].” *Chacon*, 3 FMSHRC at 2511. The Commission has also stated, “[W]e ‘appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.’” *Hyles*, 21 FMSHRC at 132 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). Often, improper motivation is found “where the complainant proved that the operator knew of the protected activities and that only a short period of time elapsed between the protected activity and the discharge.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 958 (Sept. 1999) (citing *Sec’y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997)).

Improper motive has been found in cases with varying periods between the protected activity and the adverse action, ranging from a few hours to a few months. *See, e.g., McGill*, 23 FMSHRC at 986–87 (finding that the ALJ was correct in inferring a discriminatory motive from adverse action taken less than two hours after complainant’s safety complaints); *Sec’y of Labor on behalf of Houston v. Highland Mining Co., LLC*, 35 FMSHRC 1081, 1093 (Apr. 2013) (ALJ) (finding that a five-day gap between the adverse action and protected activity constituted circumstantial evidence of a nexus); *Baier*, 21 FMSHRC at 961 (finding that two weeks between complainant’s discussion with MSHA inspector and discharge was sufficiently coincidental in time to support a finding of discriminatory motive); *see also Sec’y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009) (finding that three weeks between the protected activity and adverse action was sufficient to find discriminatory motive); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (Commission found that an adverse employment action four months after a protected activity constituted close temporal proximity where the operator had knowledge of the protected activity); *Hyles*, 21 FMSHRC at 120–21, 132 (finding temporal proximity despite 16-month gap between miners’ contact with MSHA and the failure to recall miners from layoff where only a month had passed from MSHA’s issuance of penalty as a result of the miners’ notification of the violations and given evidence of intervening acts of hostility, animus, and disparate treatment).

However, where there is a long gap between the protected activity and adverse action, judges have often found no causal connection. *See, e.g., Lee v. Genesis, Inc.*, 32 FMSHRC 1392, 1399 (Sept. 2010) (ALJ) (finding no improper motive for seven-month gap even though employer’s knowledge of protected activity was established); *Sec’y of Labor on behalf of*

*Beckman v. Mettiki Coal (WV), LLC*, 33 FMSHRC 258, 278 (Jan. 2010) (ALJ) (finding no improper motive for gaps of 17 months and six months where there was no evidence of any material intervening hostility); *Dowlin v. W. Energy Co.*, 28 FMSHRC 23, 30 (Jan. 2006) (ALJ) (finding no improper motive for 19 month gap even though employer had knowledge of protected activity); *Haro v. Magma Copper Co.*, 4 FMSHRC 1948, 1954 (Nov. 1982) (ALJ) (finding no improper motive for 31 month gap even though employer had knowledge of protected activity).

During Bane's interview with Investigator Funkhouser, Bane twice stated that he believed that the reason he was laid off from Denison Mines was fifty percent attributable to his "constant complaining about [...] unsafe conditions and refusal to do certain unsafe acts." (Ex. R-23, p. 6, lines 7–9 and p. 19, lines 21–24) Bane stated at the hearing that "once a guy starts complaining over and over and over again, the company gets tired of it [...]." (Tr.43:23–25) Although Bane admitted that he was unable to point to any specific evidence that Denison deemed him to be a problem, he contended that his constant complaining established a pattern of him being perceived as a troublemaker. (Tr.44:4, 51:11–17) In Bane's words, the complaints "finally broke the camel's back." (Tr.137:1–2)

In *Turner*, the Commission held that this "last straw" theory of discrimination (i.e., a series of complaints followed by a "last straw" event resulting in termination) is permissible as a means of connecting various protected activities. 33 FMSHRC at 1071; *see also, Hyles*, 21 FMSHRC at 132 ("These penalties provide the proverbial 'straw that broke the camel's back [...].'"'); *Sec'y of Labor on behalf of Carter v. Kino Aggregates, Inc.*, 34 FMSHRC 417, 428 (Feb. 2012) (ALJ) ("The MSHA inspection on December 22, 2009 [...] was the 'straw that broke the camel's back,' Mr. Carter having lodged multiple complaints to Mr. Plant over a variety of safety issues over his two-and-one-half-year employment by Kino Aggregates."). The Commission in *Turner* stated:

Turner made a string of complaints in the months preceding his termination [...] Considering the evidence as a whole, a judge could reasonably conclude that there is a coincidence in time between Turner's safety complaints and his termination. Given Turner's history of safety complaints, *his most recent complaints in the days immediately preceding his termination could have been the last straw for the operator. Thus, the close proximity in time between Turner's latest complaints and his termination could support an inference that National Cement may have been improperly motivated by Turner's complaints when it fired him*, and the judge therefore should have considered the proximity in time and whether it indicated any improper motivation.

*Turner*, 33 FMSHRC at 1070–71 (emphasis added).

With *Turner* as guidance for how to link Bane's history of safety complaints to the most recent complaint before termination, I will consider whether Bane's protected activities, either alone or together, were sufficient to establish a causal connection with the adverse action in the analysis that follows below.

## **2. Knowledge of the Protected Activity**

The Commission has held that “an operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case.” *Baier*, 21 FMSHRC at 957 (citing *Chacon*, 3 FMSHRC at 2510). Whether the operator had knowledge of the protected activity may be “proved by circumstantial evidence and reasonable inferences.” *Id.* The Commission has also held that “discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1).” *Moses*, 4 FMSHRC at 1480. Additionally, the Commission has held that “a supervisor’s knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner’s employment.” *Sec’y of Labor on behalf of Pappas v. CalPortland Co.*, 38 FMSHRC 137, 146 (Feb. 2016); *see also Turner*, 33 FMSHRC at 1067–68 (imputing knowledge and animus of miner’s direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that “[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.”).

At the outset, Denison denies that management had any knowledge of any of Bane’s “complaints that were made to MSHA or any internal complaints that Mr. Bane may have made with regard to conditions of either safety or health at the mine.” (Tr.14:18–21) As stated above, I am aware of the time gap between Bane’s protected activities and his bringing of the discrimination case. While it is true that memories fade and details blur, I do not find Denison’s blanket statement denying knowledge to be persuasive. As such, I will analyze each of Bane’s protected activities on a case-by-case basis in order to determine whether Denison management had knowledge of Bane’s protected activities.

## **3. Hostility or Animus**

The Commission has held that “[h]ostility towards protected activity – sometimes referred to as ‘animus’ – is another circumstantial factor pointing to discriminatory motivation. The more the animus is specifically directed toward the alleged discriminatee’s protected activity, the more probative weight it carrie[s].” *Chacon*, 3 FMSHRC at 2511. Animus can take the form of action or inaction. *Turner*, 33 FMSHRC at 1069 (Commission noted possibility of animus where operator was not responsive to the miner’s safety concerns).

## **4. Disparate Treatment**

Disparate or inconsistent treatment is another, indirect indicium of discrimination. “Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter.” *Chacon*, 3 FMSHRC at 2512. It has been recognized that “precise equivalence in culpability between employees” is not required in analyzing a claim of disparate treatment under traditional employment discrimination law. *Pero*, 22 FMSHRC at 1361, 1368 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)). Rather, the complainant must simply show that the employees were engaged in misconduct of “comparable seriousness.” *Id.* at 1368.

Although disparate treatment is often asserted by a complainant to show that a mine operator's justification for termination is pretextual, here, Bane suggests that he was treated disparately by not being transferred in the same fashion as a co-worker who suffered from a knee injury. On direct examination, Bane questioned Race Fisher why he was not transferred to another work area while another miner, Trent Davis, was granted a temporary transfer to the Egnar Office until his knee injury healed. (Tr.87:11–15) Fisher responded that miners who sustained on-the-job injuries were placed on light duty; however, if the miner sustained off-the-job injuries, they probably would not be allowed to come back to work absent a full doctor's release. (Tr.88:5–10) Although identical circumstances are not necessary to show disparate treatment, I find Bane's and Davis' situations to be sufficiently distinguishable.

First, Bane did not address whether Denison had a policy of allowing permanent transfers, let alone permanent transfers removed from dusty conditions. Indeed, it is undisputed that Denison temporarily transferred Bane out of the mine after PA-C Freestone's first doctor's note. While the first doctor's note read, “[Patient] needs to stay out of the mine *for the next week or two*,” the second doctor's note read, “[p]lease excuse Matthew from work that involves dust, mine shafts, bore holes, etc.” (Ex. R-6) (emphasis added) Thus, without the same short-term, temporary language (e.g., “for the next week or two”), PA-C Freestone's second doctor's note was tantamount to a total, permanent prohibition of Bane engaging in work involving “dust, mine shafts, bore holes, etc.” (Ex. R-6) Such a prohibition would require Denison to permanently transfer Bane —something beyond the scope of what was contemplated in Davis' case.

Second, although Bane contends that management incorrectly categorized his condition as a non-occupational illness (“NOI”), he did not provide any evidence that management knew or suspected otherwise at the time. The record indicates that during Bane's employment, he was only listed as sick with an NOI on the following days: December 17, 2009, December 20, 2009, December 21, 2009, December 22, 2009, December 23, 2009, and December 24, 2009. (Ex. R-9, p. 38) However, the record shows that Bane first went in for treatment with PA-C Freestone a week later on Dec 31, 2009. (Ex. R-6) Bane's personal notes state, “I started to miss work during Dec 09. PAC Freestone ordered numerous tests *but wasn't able to come up with a firm diagnosis for my condition.*” (Ex. B-18 p. 25) (emphasis added)

At the hearing, Bane surmised that the reason his work sheet listed his days off as NOI was because “the company was trying to separate themselves from me and the dust issue because at that time, Mr. PAC Freestone had no idea what it was.” (Tr.182:4–6) However, although Bane points a finger at Denison and management, it appears that Sagrillo, arguably Bane's closest ally at Denison, was the individual actually responsible for either filling out or, at the very least, certifying the biweekly time report sheet that listed Bane as having an NOI. (Ex. R-9, p. 38) Based on his close interaction and intimate knowledge of Bane's health complaints and concerns, had Sagrillo believed that Bane's sickness was in fact an occupational illness, it seems reasonable that he would have indicated that on the time sheet.

Because Bane has failed to provide evidence that he was treated differently than other employees in a similar situation, I cannot find that Bane was the recipient of disparate treatment. Since I have already addressed the issue of disparate treatment here, I will not mention it in great detail in the analysis that follows.

## **5. Denison's Pattern of Firing "Troublemakers"**

Bane contends that Denison engaged in a pattern of firing miners who made health or safety complaints. In his prehearing statement, Bane states that every employee at the La Sal Incline was called in for a safety meeting in March and instructed not to call MSHA. (Bane Prehearing Br. 6) After miners were laid off in March and April, Bane states that “[t]he message was clear[:] speak up and you would be laid off.” *Id.* At the hearing, Bane stated that when the mine was first opened, a group of miners complained to MSHA and were subsequently laid off. (Tr.172:6–8) Kennedy also testified at the hearing that he believed safety complaints by miners played a significant role in the termination decisions at Denison. (Tr.54:13–15) Additionally, Bane alleged at the hearing that Race Fisher told him that the seven layoffs in April 2009 were done “to get rid of the trouble makers.” (Tr.174:3–6; Ex. R–23, p. 8, line 20) In his post-hearing brief, Bane wrote, “Denisons [sic] had used lay offs [sic] to handle past trouble with miners who complained about working conditions to MSHA.” (Bane Post-Hearing Br. 1)

While it is true that six miners were laid off on April 24, 2009,<sup>18</sup> only a few days after an MSHA inspection, (Ex. R–8; Ex. B–5, p. 53), this coincidence in time alone does not indicate causation. Without further information, there is no way to know or infer that the individuals who were laid off were the same miners who made safety complaints to MSHA or that Denison had reason to be suspicious of these particular individuals. The only corroborating support for Bane’s contention that Denison engaged in a pattern of impermissible layoffs was Kennedy’s testimony that he believed his own layoff was due to his complaining to Jim Fisher. (Tr.44:10–14) However, when questioned, Kennedy acknowledged that he could not point to any evidence beyond his own belief that Denison had terminated Bane because of his safety complaints. (Tr.55:6–15) Likewise, there is nothing in the record to corroborate Bane’s claim that Denison’s prohibition on calling MSHA was presented at a “company[-]wide meeting.” (Bane Post-Hearing Br. 1)

Contrary to Bane’s allegations, Race Fisher denied ever making a statement or any related statement to Bane that the April layoffs were to “get rid of the trouble makers.” (Tr.174:20–25) Irrespective of Race Fisher’s denial, Bane’s accusation raises doubts. A manager who explicitly tells an employee that other employees were fired because they were “troublemakers” would be temerarious and unwise. Nothing in the record or my in-court observations suggests that Race Fisher is either of those things.

## **6. Analysis of Bane’s Protected Activities**

### **a. Supervisor Hoffman’s Dangerous Actions**

Bane’s complaint to management that Hoffman was abusing painkillers and making the workplace unsafe took place approximately 14 months prior to his being laid off. It can be inferred from the record, notably Bane’s time sheets, that management was aware of the problems since Bane was moved to another work location. However, because Denison complied with Bane’s safety concerns by moving him to work in a safer environment with Sagrillo, I am

---

<sup>18</sup> Seven miners were laid off in April 2009. One miner was laid off on April 9, 2009, while the other six were laid off on April 24, 2009. (Ex. R–8)

unable to find hostility or animus here. Additionally, Bane did not assert any disparate treatment in this instance.

Without evidence of intervening hostility, animus, or disparate treatment, I cannot infer the existence of a nexus between this protected activity and Bane's layoff 14 months later.

#### **b. Radon and Dust Exposure in the Skip**

Bane complained to MacKinnon about the dusty conditions in the skip in his March 2009 safety interview, approximately ten months prior to Bane's termination.

In his affidavit, MacKinnon did not deny Bane's allegations that he complained about the dusty conditions in the skip during the health and safety interview. While MacKinnon's personal knowledge of Bane's protected activity is not disputed, it is unclear whether either Jim or Race Fisher were aware of Bane's complaint. Although it is reasonable to infer that management was informed to some degree of the complaints gleaned from the March 2009 safety and health interviews, the record does not indicate or imply whether management was told which miners actually provided safety and health complaints that would constitute protected activity. Additionally, MacKinnon's personal knowledge cannot be imputed to upper-management since there is no sign that he was consulted or in any part influenced the decision to terminate Bane. *See Colo. Lava*, 24 FMSHRC at 359 (Commissioner Jordan, concurring) (discussing the "cat's paw" theory of a supervisor's imputed prejudice).

Although Bane alleged that Race Fisher told him that the seven layoffs in April 2009 were done "to get rid of the trouble makers," (Tr.174:3–6; Ex. R–23, p. 8, line 20), Fisher denied ever making any such statement to Bane. (Tr.174:20–25) I do not find Bane's recollection credible.

The circumstantial evidence of Denison management's knowledge and any animus arising from Bane's protected activity are too tenuous to infer a nexus between this protected activity and Bane's layoff ten months later.

#### **c. Bane's Respirator was not Fitted Properly**

According to Bane, Lee said that he had informed Mine Foreman Fisher that Bane "hadn't been fit tested [for a respirator] for approximately a year [...]." (Ex. R–23, p. 9, lines 4–6) However, Fisher testified that he had no personal knowledge that Bane was fitted for a respirator by Lee on May 4, 2009. (Tr.70:20) Given the seeming importance of this safety violation (i.e., failing to fit Bane with a respirator when he was first hired), it is not unreasonable to conclude that Lee likely shared this procedural error with Race Fisher consistent with Bane's testimony. For this reason, and for the purposes of establishing Bane's *prima facie* case, I find that Race Fisher likely had personal knowledge of Denison's failure to properly fit Bane for his first nine months as well as his subsequent protected activity.

Regarding animus, the Commission has noted that inaction may constitute animus. In *Turner*, the complainant had made various safety complaints that were ignored. *Turner*, 33 FMSHRC at 1083. The Commission remanded the case, noting the importance for the judge to

address “whether [the supervisor’s] characterization of Turner as ‘difficult’ may have, at least in part, represented animus for his safety complaints.”<sup>19</sup> *Turner*, 33 FMSHRC at 1070.

Here, even given the six-week delay between Bane’s first report to MacKinnon that his respirator did not fit and the ultimate fitting of the respirator by Lee, I am unable to find convincing indicia of hostility. This inaction to furnish Bane with a properly fitted respirator, unlike those contemplated in *Turner* above, does not necessarily implicate ill-will, hostility, or animus. Essentially, the delay was caused by MacKinnon’s failing to act after Bane complained that his respirator was not working. This appears to be a consequence of procedural sloppiness rather than animus. It is reasonable to suspect that MacKinnon did not fully appreciate the severity of the problem at the time of Bane’s complaint during the March 2009 safety and health interview for two reasons: (1) Bane himself did not realize the seriousness of the situation; and, (2) MacKinnon was not put on alert because Bane’s Certificate of Training form incorrectly stated that Bane was trained in “Self-Rescue & Respiratory Devices.” (Ex. B-3) In fact, the record shows that once Denison was actually aware of the gravity of the problem, it acted immediately to remedy the error. (Ex. R-23, p. 9, lines 1-2)

Even assuming that Race Fisher knew of Bane’s protected activity here, I find that the length in time between the protected activity and adverse action —ten months for the initial complaint and eight months for the subsequent fitting —is too long to infer an improper motive absent a more concrete showing of hostility, animus, or disparate treatment.

#### **d. Red-Tagging the Crane**

Bane first used the crane and noted safety issues in June or July of 2009. However, he estimates that he waited until September 2009 to red-tag the crane. Therefore, the protected activities took place between four and seven months before Bane was terminated. Bane does not allege any disparate treatment or incidents of hostility related to his crane-related protected activities.

Regarding management’s knowledge of the protected activities, Bane asserts that Race Fisher was aware of the problems with the crane before, when, and after Bane red-tagged it. However, when questioned about it at the hearing, Race Fisher testified that he did not recall Bane ever telling him that there were safety problems with the crane. (Tr.94:23) Fisher admitted knowing that the crane was red-tagged, (Tr.96:23–24), but denied ever knowing Bane’s role in red-tagging the crane. (Tr.95:1–3) I recognize that Race Fisher is not a disinterested witness. And despite the possibility that he testified to protect his employer, I also note that six years passed between the hearing and the incident in question. Memories do honestly fade and details blur. What might have seemed like a critical exchange for a miner might have been only one of many issues on the mind of the foreman. For these reasons, I find Race Fisher’s testimony on

---

<sup>19</sup> At the hearing, Turner’s supervisor testified that Turner “doesn’t listen. He’s very hard to communicate with and he takes a lot of things personal [sic] that shouldn’t be personal.” *Turner v. Nat'l Cement Co. of Cal.*, 31 FMSHRC 1179, 1185 (Sept. 2009) (ALJ). Additionally, Turner’s supervisor stated that Turner “didn’t follow instructions [...]. The few other people in the shop expressed the concern that they would not work with him. They didn’t like working with him.” *Id.*

this point believable, at least insofar as he was unable to recall knowing about the crane's problems or who specifically red-tagged it.

The question remains, however, whether management knew or suspected that Bane had made complaints or red-tagged the crane at the time that he was terminated. Despite Bane's claims that multiple people knew about Bane's safety complaints regarding the crane and his role in red-tagging it (e.g., Lee, Sagrillo, and Palmer), Bane did not call anyone to verify his version of the events. Bane also told Investigator Funkhouser that he did not have any documented evidence of any of the crane's alleged defects or that he had complained to anybody. (Ex. R-23, p. 12, lines 3-4) Additionally, I am cautious to rely exclusively on Bane's testimony due to an inconsistency with Bane's rendition of the incident. During his interview with Inspector Funkhouser, Bane stated that, to his knowledge, the crane was never operated after he completed the blind pick. (Ex. R-23, p. 13, lines 1-4) However, at the hearing, Bane recalled that he and Sagrillo used the crane on multiple occasions after the blind pick. (Tr.159:16-17, 160:3-6) In the absence of evidence corroborating Bane's rendition of the incident in question, and given the inconsistencies in his own statements, I find that Bane's testimony alone is insufficient to establish that management was aware of his protected activities.

Consequently, given the totality of the circumstances and lack of credible evidence, I am unable to find a nexus between the crane-related protected activities and Bane's termination.

#### e. **Bane's Anonymous Complaint to MSHA**

The decision to lay Bane off was made on January 18, 2010, six days after the protected activity. (Ex. R-11) In response to questioning from the bench, Bane stated that the only evidence he could present on this point was the coincidence in time between his anonymous complaint to MSHA and the layoff. (Tr.29:14-24) While a short period between a protected activity and subsequent adverse action can suggest an improper motive, I cannot conclude that Denison was motivated by animus toward Bane in response to this protected activity.

First, there is no evidence of knowledge. As stated above, "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Baier*, 21 FMSHRC at 957 (quoting *Chacon*, 3 FMSHRC at 2510). Bane admitted that he did not tell anybody at work that he filed the anonymous complaint. (Ex. R-23, p. 16, line 42 and p. 17, line 1; Tr.140:25-141:2) Both Jim and Race Fisher testified that they were not aware of Bane having ever contacted MSHA. (Tr.94:17-95:3, 178:3-5) Additionally, there is no evidence from which to impute knowledge. Bane was asked by Denison's counsel whether anyone from management "ever approached you or accused you of contacting MSHA at any point in time?" (Tr.150:6-8) Bane responded, "Albert Sagrillo had a conversation with me about it, and he was my manager, so [...]. But I don't believe it went any farther than him." (Tr.150:12-19)

Even without actual or imputed knowledge, "discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." *Moses*, 4 FMSHRC at 1480. Here, however, it is unlikely that Denison management would have been suspicious of Bane. Bane could not recall ever expressing any health or safety concerns at the weekly safety meetings. (Tr.156:23-157:16; Ex. R-23, p. 19, lines 1-4) Also, both Jim and Race Fisher testified that they believed at the time that

Bane had never raised any safety concerns. (Tr.94:17–95:3, 178:3–5) David Turk also testified that he had never heard any reports of Bane being a “troublemaker of any sort.” (Tr.124:13–18) Furthermore, in accordance with his doctor’s note, in the weeks leading up to his layoff, Bane was physically removed from working in the underground area ultimately investigated by MSHA. (Ex. R–23, p. 16, lines 1–15) Because Bane was working on the surface and away from the mine shafts, management would have less reason to suspect that he was the one who made the complaint. *See, e.g., Jim Causley Pontiac, Div. of Jim Causley Inc. v. NLRB*, 620 F.2d 122 (6th Cir. 1980) (where the discharged employee was one of only three people working at the specific area cited in a MiOSHA complaint, and was the only employee who had complained to management about the specific issue cited to the inspector). It is also unlikely that Denison eavesdropped on Bane’s call to MSHA. Bane reported to Investigator Funkhouser that he made the anonymous phone call to MSHA from a Shell gas station in Moab, Utah. (Ex. R–23, p. 16, lines 33–34)

Most notably, Denison had no reason to suspect that Bane was responsible for anonymously contacting MSHA because the decision by Denison management to terminate Bane was finalized *before* MSHA began their on-site investigation. The MSHA inspectors responding to Bane’s anonymous MSHA complaint conducted their inspection/investigation from January 19, 2010, until January 21, 2010. (Ex. B–5, p. 109) However, as shown on Bane’s personnel action form, the decision to lay Bane off was finalized and approved by Race Fisher, Jim Fisher, and Denison Vice President of Mining Philip G. Buck on January 18, 2010. (Ex. R–11) Given the temporal propinquity, had this sequence of events been switched—with the MSHA on-site investigation immediately preceding the layoff decision—it would have raised a red flag. However, because the layoff decision preceded the MSHA on-site investigation, I cannot conclude that Denison knew or even suspected that Bane was responsible for the MSHA complaint.

Second, there is no credible evidence of animus. When asked by Investigator Funkhouser whether anybody from management ever approached or accused him of contacting MSHA at any point in time, Bane responded in the negative. (Ex. R–23, p. 20, lines 3–6) Bane reiterated this position at the hearing. (Tr.152:4) The only suggestion in the record of animus directed at Bane was Topaz shift boss Jerry Goode’s alleged threat at a weekly safety meeting in January 2010. At some point shortly after his anonymous complaint to MSHA, Bane alleges that Goode grabbed him by the front of the coveralls and asked Bane, “what [Bane] was going to do now [...].” (Ex. R–23, p. 18, lines 17–21) Bane alleges that he defended himself by opening his hunting knife between Goode’s legs. *Id.* Bane interpreted Goode’s action as Denison’s “attempt to intimidate me.” (Tr.166:14–15) Despite Bane’s multiple statements throughout the record that “the whole crew” witnessed the incident, he failed to provide a corroborating witness. Additionally, the fact that Bane changed his story with each telling undercuts the weight of this evidence. In one version, Race Fisher and the whole crew witnessed the altercation directly. (Bane Prehearing Br. 5) In another, mechanic Tim Howe viewed it directly, but the rest of the crew only viewed it indirectly. (Ex. R–23, p. 18, lines 21–23; Ex. B–18, p. 27) When asked about the incident at the hearing, Race Fisher testified that he had not known about the Goode incident until a few weeks prior to the hearing after receiving Bane’s prehearing statement. (Tr.180:6–7)

Even if the event in question did happen as Bane alleges, Goode only stated, “what are you going to do now?” when he grabbed Bane. On their face, the words are too ambiguous to

explain why Goode assaulted Bane. Given the proximity in time between Bane's anonymous MSHA complaint and Goode's alleged action, this language could reasonably be seen as a threat or retaliation from management *if* Denison had known about Bane's anonymous MSHA complaint. However, as stated above, it is unlikely that Denison was aware or even suspicious that Bane had engaged in protected activity in January 2010. Without Denison's knowledge or suspicion that Bane engaged in the protected activity, I cannot infer that Goode's alleged conduct was intended to send a message from Denison management.

The Commission has stated that "inferences drawn by judges are 'permissible provided they are *inherently reasonable* and there is a *logical and rational connection between the evidentiary facts and the ultimate fact inferred.*'" *Colo. Lava, Inc.*, 24 FMSHRC at 354 (citing *Mid-Continent Res. Inc.*, 6 FMSHRC 1132, 1138 (May 1984)) (emphasis added). Based on the limited evidence Bane provided, and given the unique facts of this case, I cannot find the six-day gap between Bane's protected activity and management's adverse action, by itself, to be sufficient evidence of management's improper motive. Bane argues that his MSHA complaint was the final straw. Although the "straw that broke the camel's back" argument in a series of safety complaints was found to be acceptable in *Turner*, the facts here are distinguishable. I cannot conclude that Bane's anonymous call to MSHA resulted in or motivated his termination. Notably and critically, the "final straw" in *Turner* was a safety complaint *to management* a mere four days before his discharge. Here, the last protected activity was done without management's knowledge.

Because Bane's earlier protected activities rely on his last protected activity, and because his anonymous MSHA complaint fails to sufficiently establish that the adverse action he complained of was motivated, at least in part, by his protected activity, I conclude that Bane has not established a prima facie case of discrimination.

## **VI. RESPONDENT'S REBUTTAL OF COMPLAINANT'S PRIMA FACIE CASE**

Once the complainant has established a prima facie case, the operator may rebut it by showing that no protected activity occurred or the adverse action was not motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. While I have already found that Bane failed to provide sufficient evidence to meet his prima facie burden, I will nevertheless address Denison's rebuttal.

### **A. Denison Unable to Rebut Occurrence of Protected Activity**

In its post-hearing brief, Denison stated that "[w]hile Denison does not admit these [events] occurred, it is simply not in a position to now dispute Bane's assertions, and has thereby been prejudiced by Bane's inordinate delay." (Resp't Post-Hearing Br. 10) As discussed above, Bane engaged in five instances of protected activity.

### **B. Denison's Decision to Lay Off Bane was not Motivated by his Protected Activity**

#### **1. Bane's Layoff was Adverse Action**

Denison argues that Bane initiated the termination discussion when he "spoke with managers Jim Fisher and Race Fisher at Denison's mine" and allegedly "[told] both of them that

he was quitting his employment with Denison.” (Resp’t Post-Hearing Br. 2) Denison contends that it conferred a benefit to him in the form of unemployment compensation and continuation of health insurance benefits under COBRA by laying him off. *Id.* at 2, 8–9. It further argues that leaving Bane in a better position than he would have been in had he quit “is not adverse action. It is certainly not discriminatory in violation of Section 105(c) [...] it demonstrates no animus against Bane, but rather shows a willingness to benefit him.” *Id.* at 8. Respondent’s contention necessarily rests upon the credibility of witnesses who appeared at the hearing and the weight I give their testimony.

In *Secretary of Labor on behalf of Carter v. Kino Aggregates, Inc.*, a similar argument was made by the respondent. 34 FMSHRC at 417. In *Carter*, the respondent contended, *inter alia*, that “no discrimination claim may be made because no adverse action had actually ever occurred. The Complainant voluntarily withdrew from employment [...] and was never, in fact, fired by [the company].” *Id.* at 428. In *Carter*, the complainant walked off the worksite after being told to leave by the owner of the mine for assisting an MSHA inspector. *Id.* at 421. After receiving no callback from the company, the complainant concluded that he had been terminated. *Id.* Here, unlike in *Carter*, Denison management discussed the layoff with Bane, (Ex. R-15), filed a Personnel Action Form terminating Bane via layoff, (Ex. R-11, p. 3), and furnished Bane with an official termination letter. (Ex. R-5) These actions leave no ambiguity that Bane was being laid off. As discussed above, the Commission has consistently found that a layoff is an adverse action. *See, e.g., Ratliff*, 35 FMSHRC at 397; *Hyles*, 21 FMSHRC at 129; *Harper*, 37 FMSHRC at 1589. Accordingly, I find that Bane’s layoff by Denison constituted adverse action.

## **2. No Connection Between the Adverse Action and Bane’s Protected Activity**

In assessing an operator’s reasons for discharge, “[t]he inquiry turns on what the operator actually believed at the time, not what the Commission later reasons the operator *could* have relied upon in making its disciplinary decision.” *Pendley v. FMSHRC*, 601 F.3d 417, 426 (6th Cir. 2010) (emphasis in original) (citing *Pasula*, 2 FMSHRC at 2800). Denison contends that it laid off Bane in accordance with statements he made to Race Fisher intimating his intention to quit. Therefore, the critical issues in evaluating Denison’s argument are as follows: (1) whether Bane communicated an intention to quit or resign to Denison; and, (2) whether that communication was the sole motivating factor for his layoff. For the reasons that follow, I find that Bane communicated his intent to leave Denison to Race Fisher on January 18, 2010, and that the communication was the sole motivating factor in his layoff.

### **a. Bane Communicated his Intent to Leave Denison to Race Fisher**

#### **(1) The First Conversation (January 18, 2010)**

There is no dispute that two conversations took place on January 18, 2010, between Bane and Race Fisher. (Ex. B-18A; Ex. B-19; Ex. R-15; Ex. R-17) Although Bane surreptitiously recorded the second conversation with Race Fisher on January 18, 2010, it appears that no audio recording of the first conversation was made. The parties’ recollections of what was said during the first conversation largely conflict. I realize that the parties are not disinterested, and I am fully aware of the nearly six years between the events in question and the hearing.

At the hearing, when asked about the events surrounding the first conversation, Race Fisher stated:

Matt had came in [sic] in the morning and said he was going to have to quit. He just couldn't work at the mines anymore. He was tired of being sick, and we talked about the issues a little bit, and I knew we were going to be cutting back. We were overstaffed a little bit. So I told him that, why don't [sic] he give me a chance to see if we could get him laid off. That way, he could draw some unemployment, give him some options on the insurance, stay on the COBRA plan and stuff. And he left, went back over to the electric shop. I talked to Mr. Marsing, and he called whoever he had to call with Human Resources, I'm sure, and said, "Yeah, we could do that."

(Tr.109:10–22) On recross examination, Race Fisher reiterated his version of the events:

Matt came into my office that morning, said he was going to have to quit because of his health issues, that the doctor was not going to let him work around a mine or anywhere that was dusty, smoke [sic]. Talked a little bit about the places in the mines that were dust-free, smoke-free, and there really isn't. I mentioned to him that rather than quit that I knew we were going to have some reductions later coming up in a week or two, that we could get him on that list. But I would have to check with upper management and see if that was a possibility. And he left. And I checked with upper management, and they said, "Yeah, it was about numbers, not individuals."

(Tr.176:4–16)

Bane's recollection of what was said during the first conversation on January 18, 2010, was dramatically different. Bane denied ever telling Race Fisher that he was quitting. (Tr.123:24, 162:4–6, 195:17–20) Likewise, Bane wrote in his personal notes, "The following Monday, I went to Race Fisher and asked what they were going to do about the situations [sic], transfer me or what. He stated that the company was going to lay off several employees, and he would put me on the layoff list." (Ex. B–18, p. 25) Bane's personal notes ended with the statement "[t]his is true and correct as far as my memory serves me," dated November 4, 2011, and signed by Bane. *Id.* at 30. It is clear that Bane's personal notes were prepared in anticipation of litigation, and I have factored this into my weighing of the evidence.

Here, the parties' recollections of what was said during that first conversation on January 18, 2010, are in direct contradiction. Unlike the conversation that took place later in the day, the first conversation was not recorded and without witnesses. Ultimately, I will need to make a credibility determination. In order to better assess what was said in the conversation between

Bane and Race Fisher, I will analyze the events and representations that were made prior and subsequent to January 18, 2010.

## (2) PA-C Freestone's Notes

On January 13, 2010, a week prior to meeting with Race Fisher, Bane went to the San Juan Clinic for a follow-up checkup with PA-C Blen Freestone. In his notes, PA-C Freestone wrote the following:

On our last visit, which took place approximately a week to ten days ago, [Bane] was instructed to stay out of the mines. He thought he could work it so that he could do basically office work and not have to go into the mines. He was given a medical order for this. He comes in today reporting that he is much better. He states that everything has cleared up except for the ringing in his ears, and a little bit of sinus pressure, but otherwise he feels much better. *On my inquiry as to whether he will be able to continue this at his existing place of employment, he stated that he has already made arrangements to work elsewhere, and will be working as an electrician in the oil fields beginning the first of next week [...].*

(Ex. R-4, p. 7; Ex. R-7; Tr.168:1-5) (emphasis added) In response to PA-C Freestone's notes, Bane stated the following at the hearing:

This is kind of hearsay, and it's kind of screwed wrong. *I told him that I was planning on applying for Newby Electric and trying to get a job there at the time*, and he is kind of misscrewed [sic] a little bit of the deals here because it was quite a while later that I did get on with Newby Electric. I was *planning* to go to work there –or *hoping*.

(Tr.168:24–169:5) (emphasis added)

Because Freestone is an objective third-party and because the note was contemporaneously written, I find Freestone's personal note to be a highly persuasive piece of evidence corroborating the theory that Bane intended to leave Denison when he spoke with Race Fisher a week later. Here, Bane not only planned to leave Denison prior to his conversation with Race Fisher, but he also communicated that intent to a third-party. As an ancillary consideration, Bane's credibility is also at issue here since the record indicates that, contrary to what he told

Freestone, he did not begin working in the oil fields the following week.<sup>20</sup> However, even if I were to accept Bane's statement that Freestone misunderstood his words during the follow-up checkup, Bane's in-court statement that "I was *planning* on applying for Newby Electric and *trying* to get a job there at the time [...] I was *planning* to go to work there—or *hoping*" implies, at the very least, an intention to leave Denison. (Tr.168:24–169:5) (emphasis added) In either case, Bane's intention to leave Denison is evident.

### (3) The Second Conversation (January 18, 2010)

Although two conversations occurred between Bane and Race Fisher on January 18, 2010, Respondent notes that Bane only recorded what appears to be the second conversation.<sup>21</sup> In its post-hearing brief, Respondent argues that Bane's selectivity in not recording or, alternatively, not submitting the earlier conversation on January 18, 2010, between Race Fisher and Bane "necessarily raises significant issues as to Bane's overall credibility." (Resp't Post-Hearing Br. 9) I have taken this point into consideration in assessing the weight the audio recording deserves.

I nevertheless find the audiotape recording of the second conversation—a contemporaneous piece of direct, physical evidence—to be credible and objective. This audiotaped conversation, standing alone, does not support Denison's argument. While it is clear that there was much uncertainty that day—the phrase or a variant of "I don't know" was used 35 times—nothing in the recorded discussion directly supports Denison's theory that Bane initiated the conversation in which he said he wanted to quit earlier that morning. (Ex. B-19A; Ex. R-15) Bane stated at the hearing that "[a]t no time did I say I was going to quit because I knew I was in trouble and if I quit, or was fired, I believed that that would have cut me off from any further actions." (Tr.195:17–20) Consistent with this statement, the words "quit" or "resign" were never

---

<sup>20</sup> I note that the ALJ in Bane's Social Security Administration case also noted credibility issues after finding that Bane was attempting to claim both disability benefits and unemployment benefits concurrently:

Although the claimant alleged total disability beginning in January 2010, he collected unemployment benefits until at least the second quarter of 2012. The Colorado unemployment insurance program is based on the principle that only those persons who are willing and able to work are entitled to unemployment benefits. It is reasonable to conclude that claimant would have been telling the State of Colorado that he was willing and able to work throughout the time period he was collecting unemployment benefits. This does not reflect well on his credibility.

(Ex. R-13, p. 7) (citations omitted)

<sup>21</sup> In addition to being recorded, the second conversation also involved Sagrillo as a participant in the discussion; whereas the first, unrecorded conversation that day appears to have only involved Bane and Race Fisher.

uttered by Bane, or any party, in the January 18, 2010, recorded conversation. (Ex. B-19A; Ex. R-15)

There is also no indication from the audiotaped conversation that Bane initiated the idea of leaving Denison. In fact, the audiotaped conversation suggests the opposite. While referencing the first conversation Bane had with Race Fisher that day, Bane told Sagrillo,

I asked Race this morning and he says well what do you want done and I said well I don't know. I don't, I have no idea. And he says well, we can lay you off and I said well, that'd be all right. Lay me off and then *if I get better I come back*, if not, I go down the road and find another job [...].

(Ex. R-15, p. 2) (emphasis added) This suggests that Bane, while aware of the possibility that he might not be able to work at Denison if his health condition did not improve, hoped to go back to work at Denison if he recovered from his dust allergy. This implied possibility of a continued relationship with Denison is also supported later on in the recorded conversation. In response to Race Fisher's statement that Bane would be laid off, Bane responded, "I'll keep in touch with you and tell you what [the doctors] say and whatever, you know." (Ex. R-15, p. 10)

However, Bane's statements in the audio recording also indicate that Bane had no objection to the layoff. In response to Race Fisher's statement that they would lay off Bane so he could sign up for unemployment and insurance benefits and focus on recovering from his illness, Bane responded, "Yeah. Well, we'll go with that. *That sounds as good as anything I can think of, so [...] I don't know. That sounds good to me. Well[,] I appreciate it.*" (Ex. R-15, p. 7, 9-10) (emphasis added)

#### **(4) The Egnar Office Conversation (February 1, 2010)**

Bane also surreptitiously recorded the conversation that took place on February 1, 2010, between Bane, MacKinnon, and Jim Fisher at the head office in Egnar, Colorado. (Ex. B-20A; Ex. R-16) While turning in his keys and requesting a "green card," a heated exchange ensued over whether Bane's allergic reaction to dust was contracted prior to or during his tenure at Denison Mines. (Ex. R-16, pp. 2-4) I note that Bane never challenged or expressed discontent with his layoff during this exchange despite having an opportunity to do so.

#### **(5) Other Considerations**

Bane's acceptance of the layoff option was also conveyed during the June 2012 MSHA investigation interview. In the interview, Bane stated, "I saw Race as I was coming to work and I asked him what are we gonna do about this situation here, he stated he could lay me off, I says [sic] alright that would be fine [...]." (Ex. R-23, p. 18, lines 24-26) When asked by Investigator Funkhouser if he "truly want[ed] to be laid off," Bane responded, "at the time I was ill and I hated to be there and ah I wanted an end to the situation, ah, I didn't really care if it was being laid off, being transferred, what I was trying, what I was hoping for was they to give me ah sick leave but they refused to." (Ex. R-23, p. 18, lines 34-39) Likewise, in response to Race Fisher's offer to lay him off, Bane wrote in his November 2011 personal notes that "[t]his was alright with me because I was still ill and didn't want to be around anything at mine [sic], as everything

agrivated [sic] my condition.” (Ex. B-18, p. 25) Based on these two sources, it is evident that Bane understood and accepted the layoff.

However, Bane appears to have changed his narrative during the period between filing his section 105(c) complaint with MSHA in June 2012 and the hearing in November 2015. In an email correspondence sent to FMSHRC on June 20, 2014, Bane wrote, “I never asked to be laid off. I went along with it because the only other options [sic] I had was to be fired. Federal sick leave was asked for and denied. They wouldn’t change my position to one were [sic] I could work.” (AR. “Bane Letter June 11, 2014”, p. 2) During the hearing, Bane stated that he only accepted the layoff by Denison because his requests for medical leave or a workplace transfer were refused. (Tr.89:5–13, 92:14–25, 97:14–22, 121:22–25, 195:11–13)<sup>22</sup> In his post-hearing brief, Bane reiterated his hope for medical leave and his having “no choice in the [layoff].” (Bane Post-Hearing Br. 1) What matters here, however, are Bane’s intentions and thoughts at the time of the layoff, not years later in contemplation of litigation. Therefore, with regard to Bane’s change in feelings regarding the layoff, I credit Bane’s statements made closer in time to January 18, 2010.

In any case, it is not clear whether his requests for medical leave or transfer actually made their way to management. Bane testified that he asked Race Fisher for medical leave on one occasion. (Tr.93:5–7) Additionally, Bane stated that he had requested additional medical leave from Sagrillo, who, acting as an intermediary, asked management on Bane’s behalf. (Tr.92:20–24) In his post-hearing brief, Bane wrote, “I gave the [doctor’s] note to my supervisor Albert Sagrillo. He then tried to get management to change my work location, grant me sick leave, anything to keep me working until I became better [...] Albert Sagrillo had tried everything to keep me working but management refused.” (Bane Post-Hearing Br. 1) This is corroborated by the audio recording from January 18, 2010, in which Sagrillo told Bane, “I asked [Race Fisher] about giving you a medical leave [inaudible] said couldn’t do that.” (Ex. R-15, p. 1) However, Race Fisher testified that he did not remember ever being asked about medical leave, (Tr.92:3–10, 93:11–17), and was not aware that Denison ever denied medical leave for Bane. (Tr.88:12)

As a general matter, I note Bane’s continuous reliance on statements that Sagrillo allegedly made as an intermediary between Bane and Denison management. For example, although Bane alleges that he made complaints about being in dusty conditions to Sagrillo, he admitted at the hearing that he was not sure if Sagrillo actually conveyed the message to management. (Tr.90:22–24) Similarly, here, although Sagrillo stated in the recording from January 18, 2010, that he asked management for medical leave on Bane’s behalf, I am hesitant to accept its veracity without reservation. Without Sagrillo to testify about what he told mine management in the days and weeks prior to the layoff, assuming that those conversations

---

<sup>22</sup> As outlined in great detail above, the medical evaluation and potential transfer clause in section 105(c) does not pertain to a uranium miner suffering from dust allergies. 30 U.S.C. § 815(c)(1). Additionally, although Bane frequently cited Denison’s alleged failure or refusal to grant him medical leave, the issue of whether Denison violated the Federal Family and Medical Leave Act, 29 U.S.C. § 2601, is outside the jurisdiction of this court.

actually occurred, Bane's reliance on the unknown content of Sagrillo's conversations with upper management is insufficient to carry Bane's ultimate burden of persuasion. For this reason, I credit Race Fisher's testimony over Sagrillo's recorded statement, and find that there is no reliable evidence that medical leave was requested from management.

In addition to his medical leave claims, Bane alleges that Denison refused to grant him a transfer. He insinuated that this was out of line with Respondent's normal business practices, citing to another miner, Trent Davis, who was temporarily transferred for an occupational knee injury. (Tr.87:11–20) I have already disposed of this matter in the sections above. Nevertheless, even assuming that Bane did request a transfer and that it was communicated to management, it is not clear whether a transfer would have been realistically possible. Bane himself was unable to suggest an appropriate position that he could be transferred to. In the recorded conversation on January 18, 2010, Bane stated, “I don’t, I don’t have a clue what to do either, Al. There’s, *I can’t see that there’s anything around here that you can’t get in dust ‘cause there’s just dust everywhere.*” (Ex. R-15, p. 2) (emphasis added) Sagrillo was also unable to suggest a transfer post for Bane. In the same conversation, Sagrillo stated, “So, I asked well what am I going to do ‘cause I don’t know where to send [Bane] to what he can do and what he can’t do [...] Everywhere you go. Can’t go in that hole [inaudible] can’t go in that [inaudible] over there ‘cause [inaudible] there, that bother you.” (Ex. R-15, pp. 1–2) The fact that neither Bane nor Sagrillo were able to suggest a place where Bane could be transferred where he would be able to continue to perform the essential functions of his job as an electrician supports the notion that a permanent transfer was not feasible. Indeed, during the two weeks that Bane was temporarily transferred away from the mine, Bane admits that he was unproductive and that he had a limited ability to perform the functions of his job. He described it to Inspector Funkhouser as a “dead time” in which he “kind of wandered around” looking for “odd little make work jobs.” (Ex. R-23, p. 16, lines 12–15, 27–29) Bane’s personal notes also state, “For about a week, I just hung out, helped mechanics, had no clear job duties.” (Ex. B-18, p. 26)

I also note a glaring inconsistency between Bane’s insistence at the hearing that he wanted medical leave or a workplace transfer and his statements and actions contemporaneous with the layoff. In response to Race Fisher’s announcement that Bane would be laid off during the second conversation on January 18, 2010, Bane stated, “that sounds as good as anything I can think of [...].” (Ex. R-15, pp. 9–10) Bane had a second opportunity to challenge his layoff when he met with MacKinnon and Jim Fisher at the Egnar Office a few weeks later on February 1, 2010. Bane surreptitiously recorded that conversation as well. (Ex. B-20A; Ex. R-16) At no point in the recorded conversations on January 18, 2010, or February 1, 2010, did Bane mention the possibility of extra medical leave or a workplace transfer to Race Fisher, Jim Fisher, or MacKinnon. A reasonable person who did not want to accept the terms, particularly one who was knowingly recording the conversation, would likely take these opportunities to express opposition to being laid off or, at the very least, interject with a counter proposal. Instead, here, Bane appears to have been content with the layoff option and found it to be “as good as anything” he could think of.

For the reasons stated in the sections above —notably, Bane’s representations to PA-C Freestone in conjunction with the pattern of inconsistencies between Bane’s statements at hearing regarding his feelings about the layoff and his actions contemporaneous with the layoff—I find Race Fisher’s testimony to be more credible. While I note that it is entirely

possible that Bane did not explicitly use the words “quit” or “resign” consistent with his testimony, (Tr.195:17–20), I nevertheless find that he sufficiently expressed to Race Fisher his intent to leave Denison during the first conversation on January 18, 2010.

**b. Bane’s Communication was the Sole Motivating Factor in Denison’s Decision to Lay Off Bane**

Race Fisher testified that the decision to lay off Bane was motivated by Bane’s communication about leaving. (Tr.109:1–3) In response to Bane’s communication, and anticipating upcoming workforce reductions due to Denison being overstaffed, Race Fisher sought to add Bane to the layoff list so that Bane could collect unemployment compensation and have continued health insurance benefits under COBRA. (Tr.109:14–18, 176:11–12) Race Fisher testified that Denison was not producing a lot of uranium at the time, so it had to reduce costs steadily from the time they opened until closing up in October 2012. (Tr.176:25–177:5) Consistent with this testimony, Bane’s termination letter discussed “a continuing decline in commodity prices [...] and a need to reduce its work force.” (Ex. R–5) After getting approval from Marsing and the Human Resources Department to add Bane to the layoff list, Race Fisher met with Bane and Sagrillo. (Tr.109:19–24) After discussing that Bane had been added to the layoff list, Bane stated, “I appreciate it.” (Tr.110:4–5; Ex. R–15, p. 10)

The record supports Race Fisher’s statements. According to Denison’s termination records, on January 22, 2010, the day that Bane’s termination was finalized, Mark Ward, an electrician helper, was also laid off. (Ex. R–8) On April 14, 2010, a few months after Bane was laid off, fourteen other employees were laid off. *Id.* Among those laid off was Lee, whom Bane had listed in his prehearing brief as one of the people responsible for his alleged discrimination. *Id.* On June 21, 2010, Marsing, whom Bane officially named as one of the people responsible for his layoff in his complaint to MSHA, was also laid off. *Id.* Jim Fisher, who was also officially named in Bane’s MSHA complaint, retired on February 28, 2012. (Ex. R–4, p. 3) By mid-October 2012, the complex was shut down, and all remaining employees other than a few managers were laid off. (Tr.104:4–5) None of the retained miners were electricians. (Tr.104:15–16)

Notably, there is no credible indication in the record that Denison planned to terminate Bane at any time prior to his discussion with Race Fisher on January 18, 2010. On the contrary, during the two weeks immediately before Bane’s conversation with Race Fisher, Denison had temporarily transferred Bane to work aboveground in compliance with PA-C Freestone’s first doctor’s note. This appears to be a good-faith effort to keep Bane at Denison, and directly conflicts with Bane’s theory that Denison harbored ill-will towards him for his protected activities.

The most persuasive pieces of evidence —the contemporaneous note written by PA-C Freestone along with the recorded conversations with Denison management on January 18, 2010, and February 1, 2010— strongly suggest that Bane ultimately intended to leave Denison. Although Bane changed his position on how he felt about the layoff years later, his own contemporaneous, recorded statements from 2010, personal notes from 2011, and statements to Inspector Funkhouser from 2012 all indicate that he intended to leave, he communicated his intent to management, and he accepted the terms of the layoff. Finally, the record and credible

evidence establish that Denison's decision to lay off Bane was motivated solely by Bane's representations to Race Fisher on January 18, 2010, that he was planning on leaving.

For the reasons stated above, I conclude that Denison would have successfully rebutted Bane's prima facie case.

## VII. RESPONDENT'S AFFIRMATIVE DEFENSE

If the operator cannot rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity, it may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800; *see also E. Assoc. Coal Corp.*, 813 F.2d at 642–43 (applying *Pasula-Robinette* test). However, an operator's business justification defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). An asserted reason may be found to be pretextual "where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Price*, 12 FMSHRC at 1534. In the context of other federal discrimination statutes, "[a] Plaintiff may establish that an employer's explanation is not credible by demonstrating either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge." *Turner*, 33 FMSHRC at 1073 (emphasis in original) (citations omitted).

### A. Denison would have Laid Off Bane for the Unprotected Activity Alone

As discussed above, I find that Denison discharged Bane in response to Bane's decision to leave. However, even assuming that Denison was partially motivated by Bane's protected activities, there is sufficient evidence to find that Denison was motivated by Bane's unprotected activity and would have conducted the layoff for the unprotected activity alone. The unprotected activity in this case was Bane's representation to Race Fisher on January 18, 2010, that he wanted to leave Denison. It is reasonable that an employer mine operator would be willing to lay off an employee who directly expressed his intent to leave, especially if the employer was already anticipating workforce reductions.

Additionally, I find that Denison's reason for terminating Bane was plausible and not pretextual. First, although Bane and Race Fisher offered contradicting accounts of what was said during the first conversation on January 18, 2010, for the reasons discussed above, I credit Race Fisher's testimony that Bane communicated his intent to leave. Accordingly, I find that the proffered reason has a basis in fact. Second, Race Fisher credibly testified that he was motivated by Bane's communication on January 18, 2010, that he intended to leave. Additionally, Bane provided no credible evidence that Denison contemplated terminating his employment prior to communicating his intent to leave to Race Fisher. Accordingly, I find that the proffered reason actually motivated the discharge. Finally, I find that it is reasonable that an employer mine operator might lay off an employee who expressed an intention to leave. Accordingly, I find that the proffered reason was sufficient to motivate discharge. Given these findings —that the proffered reason had a basis in fact, actually motivated the discharge, and was sufficient to

motivate the discharge—I find that Denison's reason for terminating Bane is plausible and not pretextual.

For the reasons stated above, I find that there is substantial evidence to support the plausibility of Denison's stated reason for discharging Bane.

**B. Procedural Argument: Bane's Section 105(c) Filing was Untimely**

Because Respondent ultimately prevails on the substantive merits of the case, I decline to address its procedural arguments that Bane's section 105(c) complaint to MSHA was untimely under the Mine Act.

**VIII. CONCLUSIONS OF LAW**

In conclusion, Bane failed to establish a prima facie case of discrimination under section 105(c)(3) of the Mine Act. Denison's stated reasons for discharging Bane were plausible and not pretextual. Denison affirmatively defended its termination of Bane. Therefore, based on a thorough review of the record, I conclude that Bane failed to prove, by a preponderance of the evidence, that Denison discriminatorily terminated him in violation of section 105(c) of the Act.

**IX. ORDER**

Matthew Bane's complaint and this proceeding are **DIMISSED**.

/s/ L. Zane Gill  
Judge L. Zane Gill  
Administrative Law Judge

Distribution: (Certified Mail)

George Matthew Bane, 15380 County Road 22, Dolores, Colorado, 81323

Charles W. Newcom, Esq., Sherman & Howard, LLC, 633 Seventeenth Street, Suite 3000, Denver, Colorado 80202-3622



# **ADMINISTRATIVE LAW JUDGE ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> ST. SUITE 443  
DENVER, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

April 5, 2017

SHELLEY KELHI,  
Complainant,  
  
v.

ALPHA COAL WEST, INC. and  
CONTURA COAL WEST, LLC,  
Respondents.

## DISCRIMINATION PROCEEDING

Docket No. WEST 2017-38-D  
DENV-CD-2016-06

Mine: Belle Ayr Mine  
Mine ID: 48-00732

## ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Before: Judge Simonton

This case is before me upon a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. The Complainant, Shelley Kelhi, worked for Alpha Coal West, Inc.<sup>1</sup> (“Alpha” or “Respondent”) as a haul truck operator at the time of her injury in 2014. In the early morning of January 19, 2014,<sup>2</sup> a shovel loaded a large rock onto Kelhi’s haul truck and jarred the truck. Kelhi sustained a concussion and bloody nose and later developed various physical and cognitive complications from the accident. Though she briefly returned to work, when Kelhi developed complications from her injuries she was eventually placed on disability leave, where she remained for 365 days until her termination under Alpha’s disability policy. Kelhi alleges various instances of harassment prior to and after the injury because of her reputation as a safety advocate at the mine. Due to deficiencies in Kelhi’s claim and her *pro se* status, the court required both parties to submit multiple motions and briefs to explain the timeliness of Ms. Kelhi’s complaint under 30 U.S.C. § 805(c)(3) and clarify the facts surrounding Kelhi’s allegations.

For the reasons explained below, the case must be dismissed because the Complainant did not offer sufficient justification for the extremely late filing of her section 105(c)(3) complaint. The court finds first that January 19, 2014 is the proper violation date for the purpose

---

<sup>1</sup> In August 2015, Alpha filed for bankruptcy, and Contura Coal West LLC (“Contura”) acquired Alpha’s assets, including the Belle Ayr Mine. *See* Respondent’s Reply to Kelhi Explanation (“Resp. Reply.”) at 9. When MSHA informed Kelhi that it would not be taking on her case, it included Contura instead of Alpha as the responsible operator. *Id.* Kelhi never worked for Contura.

<sup>2</sup> In the court’s Order Requesting Additional Information, the court characterized the inquiry date as “on or around January 18, 2014.” The evidence demonstrates that Kelhi started her shift on January 18 and was injured in the early hours of January 19. Because Kelhi alleges that Alpha denied her medical treatment following her injury, the violation date for purposes of the brief will be January 19, 2014.

of assessing the timeliness of Kelhi's complaint because Kelhi failed to provide sufficient detail of any allegations of adverse action that took place after that date. The court also finds that Kelhi failed to provide a justifiable explanation sufficient to excuse the 684-day filing delay. 30 U.S.C. 815(c)(2) (requiring miners to file discrimination claims with the Secretary of Labor within sixty days of the date of discrimination); *see also Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999) (ALJ) (dismissing 105(c) claim filed over two years late because Complainant's serious injuries did not prevent him from filing worker's compensation claim and thus did not excuse the delay in filing with MSHA).

#### Commission Procedural History

Kelhi was injured on January 19, 2014 and was terminated on January 24, 2015, following her 365<sup>th</sup> day on disability leave. Kelhi filed a discrimination complaint with MSHA on February 1, 2016. She alleged multiple instances of harassment due to her reputation as a safety advocate at the mine. While Kelhi does not allege that she was improperly terminated under Alpha's disability policy, she identified multiple instances of harassment prior to her injury, claims that mine management denied her prompt medical treatment following her injury and without specificity that Alpha's Human Resources Department harassed her when she contacted them after her termination.

On September 14, 2016, MSHA notified Kelhi that it would not pursue the claim on her behalf. Ms. Kelhi subsequently filed a *pro se* section 105(c)(3) complaint on October 12, 2016. The Respondent filed a motion to dismiss the claim on November 16, 2016, alleging that Kelhi's complaint was untimely and that she did not provide evidence that Alpha committed any adverse actions. On November 28, 2016, the court issued an Order to Show Cause requiring Ms. Kelhi to explain why she failed to file her complaint within the 60-day limit and to provide a more detailed description of the instances of alleged harassment and discrimination.

On December 19, 2016, Kelhi submitted her response to the court's Order to Show Cause. Kelhi explained that the filing delay was due to the development of complications stemming from her head injury. Specifically, Ms. Kelhi explained that she had developed expressive aphasia and other cognitive issues that inhibited her ability to collect and express her thoughts. Kelhi December 19, 2016 Response to Order to Show Cause ("Kelhi Explanation"). The severity of the injury forced Kelhi to focus on her recovery and undergo extensive therapy, and thus delayed her ability to file a complaint. *Id.*

Kelhi also elaborated upon three instances of adverse action that stemmed from her reputation as a safety advocate and her submission of numerous safety complaints at the Belle Ayr Mine. *Id.* She stated that she was harassed prior to the accident due to this reputation. *Id.* She also alleged that Alpha denied her prompt medical attention following the incident, in contravention of the mine's protocol. *Id.* Finally, Kelhi alleged that she was mistreated by Alpha's Human Resources Department when she contacted the mine after she was terminated under Alpha's disability leave policy. *Id.*

On January 9, 2017, the Respondent filed a reply and renewed its motion to dismiss the case. The Respondent argued that Kelhi's claim was untimely and that Kelhi was never

employed by Contura Coal, Alpha's successor, and therefore did not have a cause of action or available remedy against it. *See generally* Respondent's Response to Kelhi Explanation. Due to a lack of detail concerning the specific claims of alleged adverse actions and Ms. Kelhi's medical condition, the court issued an order requiring Kelhi to provide (1) a detailed, factual explanation of how the Respondent denied Ms. Kelhi timely medical treatment after the accident; (2) medical information describing Kelhi's diagnosis, therapy, and treatment of expressive aphasia following the injury; and (3) a detailed, factual explanation of Kelhi's alleged harassment by the mine's Human Resources Department following her termination.

On February 1, 2017, Ms. Kelhi responded to the Order and provided a short answer to each question, as well as medical records and witness statements. Shelley Kelhi Response to Order for More Information ("Kelhi Response"). The Respondent filed a Reply on February 17, 2017 reiterating its previous arguments and provided a January 26, 2017 decision concerning Ms. Kelhi's workers compensation contest. Respondent's Reply to Kelhi Response ("Resp. Reply"), at 1-2. The Respondent argued that Kelhi again failed to demonstrate instances of adverse action and did not provide adequate justification for the significant filing delay. *Id.*

After careful review, the court finds that the Complainant has not demonstrated that an adverse action occurred when Ms. Kelhi contacted Alpha's Human Resources Department. Thus, the most recent date of alleged discrimination is January 19, 2014, the date that Kelhi alleged that she was denied medical treatment. The length of the delay following the 60-day period amounts to 684 days. The Complainant has not provided a justifiable explanation sufficient to excuse a filing delay of 684 days. Having made this determination, analysis of the Respondent's alternate grounds for dismissal is unnecessary.

#### Section 105(c)(2) Discrimination Claim Filing Requirements

Under 30 U.S.C. § 815(c)(2), "Any miner...who believes that [s]he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination." After a miner files a complaint, the Mine Safety and Health Administration (MSHA) investigates it on behalf of the Secretary of Labor. *See, e.g., Simpson v. Fed. Mine Safety & Health Review Comm'n*, 842 F.2d 453, 456 n. 3 (D.C. Cir. 1988). If the Secretary finds that a violation occurred, the Secretary may pursue the claim on the miner's behalf before the Commission. 30 U.S.C. § 815(c)(2). If not, the miner may file a claim with the Commission on her own behalf under 30 U.S.C. § 815(c)(3).

The Mine Act's legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or his employer, or the miner

fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted* in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978).

Accordingly, the Commission does not consider the 60-day time limit of § 815(c)(2) to be jurisdictional. *See Morgan v. Arch*, 21 FMSHRC 1381, 1386 (Dec. 1999) (“Commission case law is clear that the 60-day period for filing a discrimination complaint under section...§ 815(c)(2), is not jurisdictional”). It will hear cases in which a complaint’s untimely filing is due to “justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect.” *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996).

On the other hand, “[e]ven if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal.” *Id.* at 1922; *see also Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999) (ALJ) (“the lengthier the delay, the stronger the justification required to overcome it”); *Sinnott v. Jim Walter Res., Inc.*, 16 FMSHRC 2445, 2448 (Dec. 1994) (ALJ) (delay of over three years is “inherently prejudicial”). The Commission places the burden of proving justifiable circumstances on the miner, and places the burden of demonstrating material legal prejudice on the mine operator. *See id.; Schulte v. Lizza Indus. Inc.*, 6 FMSHRC 8, 13 (Jan. 1984).

### Analysis

In order to determine whether to proceed with this case, this court must identify the date of the most recent adverse action and determine whether justifiable circumstances excuse the Complainant’s failure to file her 105(c)(3) complaint within the 60-day deadline. I find that the proper tolling date is January 19, 2014, the date of Ms. Kelhi’s injury, because she did not provide the court with the requested additional information to support her allegation of harassment at the hands of Alpha’s Human Resources Department in February of 2015. Even if Kelhi had properly established her January 2015 interaction with Alpha’s Human Resources Department as the latest violation date, I find that Kelhi failed to justify the delay because she was not fully incapacitated and was able to apply for and defend her workers’ compensation claim during that period.

### The Violation Date

The Complainant alleges that Alpha employees harassed her prior to her injury, immediately after her injury, and following her termination under Alpha’s disability leave policy. These events occurred as early as 2009 and up to Kelhi’s termination on January 24, 2015. *See Kelhi Explanation, Kelhi Response.* Kelhi did not file a discrimination complaint until February 1, 2016. The court must discern the most recent violation date from which to calculate the length of the delay, and the Complainant bears the burden of demonstrating that justifiable circumstances excuse that delay. *See Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130

(Oct. 1999) (ALJ) (“the lengthier the delay, the stronger the justification required to overcome it”).

The Respondent argues that Kelhi has not provided any evidence of discrimination occurring after her injury. Alpha argues that Ms. Kelhi’s allegation that she was told “all the incidents have to stop,” occurred in 2009, well before her injury, and is thus irrelevant to the claims at issue. Resp. Reply at 5. The Respondent also asserts that the witness statements provided do not provide first-hand information of specific instances of harassment. *Id.* It maintains that two of the witnesses were not employed by Alpha at the time of the injury, and that the third statement identifies Kelhi’s complaints, but no instances of retaliation. *Id.*

Kelhi alleges that she was harassed by Alpha’s Human Resources Department over the phone following her termination on January 24, 2015.<sup>3</sup> Kelhi Explanation. Accepting this instance as the violation date would place the delay at 314 days past the 60-day limit.<sup>4</sup> I find that this date cannot serve as the violation date for purposes of determining timeliness because Kelhi failed to provide any details regarding the alleged harassment.

Kelhi failed to explain or identify any facts that lend credit to her alleged claim of harassment against Alpha’s Human Resources Department. The court explicitly requested additional information regarding this allegation in its Order to Show Cause and its Order Requesting Additional Information. In her initial explanation to the court, Kelhi alleged, without additional detail, that she was “harassed and will be able to provide proof – including witness to a conversation from Kim Coleman (Human Resources) on the 365<sup>th</sup> day following [her] injury.” Kelhi Explanation. Kelhi did not mention the event at all in her response to the Order Requesting Additional Information, however. Instead, Kelhi touched upon her reputation as a reporter of potential safety issues and discussed a series of events that occurred prior to her injury. Kelhi Response, at 2. She also noted being clicked out during radio communications, and that she was told by mine management that “all the incidents have to stop.” *Id.* It is clear that these events occurred well before the termination of her disability and employment on January 24, 2015, and do not speak to harassment or discrimination by Alpha’s Human Resources Department or its representatives. In fact, Kelhi does not mention Alpha’s Human Resources Department at all in her Response.

---

<sup>3</sup> Kelhi does not allege in any of her statements that she was improperly terminated. While the witness statement of Dale Britton opines that she was terminated because of the injury, the court sees no actual evidence to support that claim, and plenty of evidence suggesting the contrary. See Kelhi Response, statement of Dale Britton. The Respondent provides a form letter stating that Kelhi was terminated in accordance with Alpha’s disability policy because she was unable to return to work after 365 days on disability. See Resp. Reply at 6. The Respondent asserts, and Ms. Kelhi does not challenge, that it did not contest nor participate in her worker compensation claims and the recent hearing. Thus, the only adverse action under consideration is her allegation of harassment by the mine’s Human Resources Department.

<sup>4</sup> The court calculated the duration date from March 24, 2015 to account for the 60-day time period outlined in 30 U.S.C. § 805(c)(3).

Nor do Kelhi's witness statements materially substantiate a claim of harassment following her termination. Two of Kelhi's witness statements, provided by Sue Torres and Scott Lindblom, do not discuss any incidents taking place after Kelhi's injury. *See* Kelhi Response. The third witness statement, from Kelhi's spouse Dale Britton, alleges that the "secretary-HR supervisor" told Kelhi that she was no longer the mine's problem. *See* Kelhi Response, Statement of Dale Britton. The statement also alleges that the secretary was short and unhelpful, and did not give Kelhi the retirement or company benefits to which she was entitled. *Id.* While the Court is inclined to accept the complainant's allegations as valid for purposes of determining whether the delay is justified, it cannot accept a claim that Ms. Kelhi did not herself identify, elaborate upon, or provide evidence for in any of her previous statements. *See generally* Kelhi Explanation; Kelhi Response. Thus, the court finds that there is insufficient detail to consider this allegation.

The Court does, however, find that Kelhi provided sufficient detail to support a claim of adverse action on the date of her injury. Kelhi alleges that she was denied prompt and required medical treatment immediately following her head injury on January 19, 2014. Accepting this instance as the violation date would place the delay at 684 days past the 60-day limit.

Kelhi argues that the injuries she sustained were visible and clearly required medical assistance. Kelhi Response, at 1-2. While Kelhi refused treatment immediately after the injury, she argues that Alpha should not have taken her at her word, and forced her to undergo an examination. *Id.* at 1. Kelhi also explains that the next step in treatment, her drug and alcohol test, was not administered until nearly four hours after the injury. *Id.* Testing was not finished until over five hours after the injury. *Id.* Kelhi argues that this is contrary to company protocol, and that she was denied prompt assistance because of her reputation as a safety advocate at the mine. *Id.* I find that she presents sufficient evidence that an adverse action occurred. I credit Kelhi's claim that her visible injuries should have alerted Alpha's management to require medical assistance as a possible example of adverse action. Thus, the violation date is January 19, 2014, for purposes of determining whether circumstances justified Kelhi's filing delay.

I therefore find that the violation date is January 19, 2014, the time of Ms. Kelhi's head injury and the alleged failure to provide proper medical treatment.

#### Justifiable Circumstances

Even if Kelhi properly established that the violation date should be January 24, 2015, Kelhi's injury complications do not justify the length of either delay because she was still able to pursue relief. The Commission has identified "excusable neglect" as a justifiable circumstance that may excuse a late filing, but held that "the fair hearing process does not allow us to ignore serious delay." *Hollis v. Consolidation Coal*, 6 FMSHRC 21, 25 (Jan. 1984).

Kelhi does not dispute that she was aware of her right to file a 105(c) complaint with MSHA, and the Respondent has provided numerous records of MSHA training that demonstrate that Kelhi attended training and knew of her right to file a complaint with MSHA. *See* Resp. Reply. Kelhi's primary argument is that the complications of her head injuries rendered her incapable of filing a complaint with MSHA sooner than she did. *See* Kelhi Explanation; Kelhi

Response. Kelhi argues that she sustained multiple post-concussion symptoms following the accident, including but not limited to migraines, seizures, expressive aphasia, slowed response times, and some loss of memory. *See* Kelhi Response. Kelhi claims that her injuries were debilitating and required her full focus on her health and recovery, and thus justify the delay. *Id.* at 3.

Kelhi's medical records indicate that her post-concussive complications were serious but not permanently incapacitating. Records from Thunder Basin Orthopedics suggest antegrade and retrograde amnesia, post-concussion syndrome, and headaches during a January 31, 2014 appointment. *See* Kelhi Response. On a June 23, 2016 checkup, records show Kelhi continued to experience headaches, unsteadiness on her feet, and memory disruptions, all related to her injury. *Id.* Sheridan Neurology identifies Kelhi's complications in March and October 2014 checkups, including decreased attentional functions, speed of information processing, simple reaction time, bilateral motor functions, and severe microsmia and depression. *Id.* Sheridan cited improvement in a June 2015 checkup, but still noted deficits in response control, working memory, and information processing. *Id.* It also notes that Kelhi expressed that her condition was not improving, and may have gotten worse. *Id.* Kelhi also provides letters from Clear Creek Counseling and Central Wyoming Neurologists, dated January 24, 2017 and February 2, 2017 respectively. These letters suggest that Ms. Kelhi was being treated for posttraumatic headaches, acquired cognitive dysfunction, expressive aphasia, and localization related epilepsy. *Id.* Clear Creek Counseling expressed that Kelhi was able to do most daily activities, but not on a consistent basis due to her migraines and other complications. *Id.* It found that Kelhi's injuries are substantial enough to prevent her from seeking and keeping employment. *Id.*

The court sympathizes with the Complainant's health issues, but cannot find that they prevented her from filing a complaint with MSHA for the entire 684-day period. Administrative law judges have found that even significant injuries, surgery, and other noteworthy life events do not excuse significant filing delays, especially if the complainant demonstrated an ability to pursue remedies through other means. *Hacking v. Staker & Parson Companies*, 38 FMSHRC 851 (Apr. 2016) (ALJ) (holding that Complainant's complications from surgery, divorce, and caring from her son were not sufficient justifications for a 900 day filing delay because she nonetheless managed to testify before Utah Labor Board in that time); *Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127 (Oct. 1999) (ALJ) (holding that Complainant's significant injury was not a justifiable circumstance for a delay of over two years because he was not incapacitated and continued to pursue a worker's compensation case).

The instant case falls squarely within this line of precedent. To this court's knowledge, a 684 day filing delay would be much longer than any similar delay excused by the Commission. Such delays have only been justified when the Respondent, MSHA, or another agency is responsible for the delay. *See Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 909 (June 1986) (Commission upheld a two year delay because the complainant timely filed his complaint, but the Secretary delayed filing the complaint for over two years).

Kelhi's injuries were not permanently incapacitating, and no external cause of the delay exists in this case. A significant and compelling reason is therefore needed to justify a delay of 684 days. There is no doubt that the Complainant sustained serious injuries, and was likely

incapacitated for some time. However, her injuries did not permanently incapacitate her or prevent her from applying for and defending her claim for worker's compensation. Thus, I find she could have filed her discrimination complaint as well in a timely fashion. Ms. Kelhi's symptoms did not prevent her from performing daily activities, but prevented her from consistently performing those tasks. *See Kelhi Response.* The 105(c)(3) process does not require consistent daily work or demanding work on a daily basis. Even given Kelhi's injuries the 60-day statutory limit provided ample time to make such a claim which, at the outset for timeliness purposes, merely requires that she contact MSHA at their 1-800 hotline number or via email.

Furthermore, Kelhi challenged and testified in a denial of workers' compensation case over the past two years. The Wyoming Office of Administrative Hearings' recent workers' compensation decision indicated that Kelhi was denied compensation for pharmacy and medical benefits on October 27, 2015, November 4, 2015, and November 12, 2015, and thus was working on her claim at least before those dates. Kelhi filed her 105(c) complaint with MSHA on February 1, 2016, 684 days after allegedly being denied timely medical treatment. The court declines to accept that filing a 105(c) complaint is more difficult than applying for worker's compensation, is the equivalent of a full-time job, or requires intensive daily work. It is therefore evident that Ms. Kelhi has failed to provide justifiable circumstances for the significant delay in filing her discrimination complaint.

I therefore find that allowing the Complainant to proceed without a justifiable excuse would exceed the permissible limits of delay under the Mine Act.

### **ORDER**

The Respondent's Motion to Dismiss is **GRANTED**. Accordingly, this matter is **DISMISSED** with prejudice. The Complainant may appeal this matter to the Commission within 30 days of the date of this order.

/s/ David P. Simonton  
David P. Simonton  
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Shelley Kelhi, 2602 Meadow Lane, Gillette, WY 82718

Laura E. Beverage, Jackson Kelly PLLC, 1099 18<sup>th</sup> Street, Suite 2150, Denver, CO 80202

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004

April 17, 2017

ROBERT C. HALL,  
Complainant  
  
v.

GMS MINE REPAIR & MAINTENANCE,  
INC.,  
Respondent

## DISCRIMINATION PROCEEDING

Docket No. PENN 2016-228-D  
MSHA Case No. PITT-CD-2016-01

Mine: Emerald No. 1  
Mine ID: 36-05466 MVK

## DISMISSAL ORDER

Before: Judge Feldman

This matter is before me based on a May 10, 2016, Complaint of Discrimination filed by Robert C. Hall against GMS Mine Repair & Maintenance, Inc. ("GMS"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act" or "the Act").<sup>1</sup> Hall's employment as a Sales, Services, Field and Development Engineer with GMS was terminated on January 25, 2016, contemporaneous with a widespread company layoff. GMS is a contractor that provides construction and maintenance services at mines. Hall's complaint is based on his allegation that he was not subsequently reinstated as a consequence of his disagreement with GMS management concerning the beneficial explosive characteristics of AutoStem, as compared to NXBurst. AutoStem and NXBurst are two competing explosives products, apparently neither of which has yet been approved by MSHA.

This matter was scheduled for an April 25, 2017, hearing. During the course of telephone conferences held with the parties in preparation for the hearing, the parties advised that Hall has a pending related civil suit against GMS in which he seeks to recover alleged past-due compensation.

---

<sup>1</sup> Hall's Complaint of Discrimination, which serves as the jurisdictional basis for this matter, was filed with the Secretary on April 5, 2016, in accordance with section 105(c)(2) of the Mine Act. Hall's complaint was investigated by the Secretary's Mine Safety and Health Administration ("MSHA"). On April 22, 2016, MSHA advised Hall that the investigation did not disclose any section 105(c) violations.

On April 4, 2017, Hall filed a Motion to Dismiss this proceeding without prejudice, reportedly for the purpose of allowing him to “further pursue the matters alleged herein in any court or tribunal which may be available to me as a matter of law.” *Mot. to Dismiss*, at 1 (Apr. 4, 2017). Hall represents that GMS does not object to dismissal of Hall’s complaint without prejudice.

In view of the above, **IT IS ORDERED** that Hall’s Motion to Dismiss **IS GRANTED** and the captioned discrimination proceeding in Docket No. PENN 2016-228 **IS DISMISSED** without prejudice.<sup>2</sup>

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

Distribution:

Robert C. Hall, 116 Cedar Lane, Houston, PA 15342

William C. Means, GMS Mine Repair & Maintenance, Inc., 224 Moyers Road, Bruceton Mills, WV 26525

/acp

---

<sup>2</sup> Although Hall’s discrimination complaint has been dismissed without prejudice, section 105(c)(3) of the Mine Act requires complainants bringing discrimination actions in their own behalf to file such complaints within 30 days of the Secretary’s notification that his investigation did not disclose any violations of the anti-discrimination provisions of section 105(c). 30 U.S.C. § 815(c)(3). As previously noted, on April 22, 2016, the Secretary advised Hall of his investigation findings that no discrimination occurred. Thus, while Hall may subsequently elect to refile his discrimination complaint, it may be precluded as untimely.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19TH STREET, SUITE 443  
DENVER, CO 80202-2536  
303-844-3577 FAX 303-844-5268

April 28, 2017

KLONDEX MIDAS OPERATIONS, INC.,  
Contestant

v.

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

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

v.

KLONDEX MIDAS OPERATIONS, INC.,  
Respondent

v.

KLONDEX GOLD AND SILVER  
MINING COMPANY,  
Respondent,

**CONTEST PROCEEDING**

Docket No. WEST 2014-777-RM  
Order No. 8697481; 06/16/2014

Mine ID 26-02314  
Midas Mine

**CIVIL PENALTY PROCEEDINGS**

Docket No. WEST 2015-416-M  
A.C. No. 26-02314-372746

Docket No. WEST 2015-0607-M  
A.C. No. 26-02314-361821

Docket No. WEST 2015-742-M  
A.C. No. 26-02314-384346

Midas Mine

Docket No. WEST 2016-039-M  
A.C. No. 26-02691-390994

Fire Creek Mine

**ORDER DENYING MOTION FOR PARTIAL SUMMARY DECISION**

Before: Judge Manning

These cases are before me on one notice of contest filed by Klondex Midas Operations, Inc. (“Klondex”) and four petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) 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”). By notice dated January 4, 2017, these cases were set for hearing commencing on May 9, 2017.<sup>1</sup>

---

<sup>1</sup> The hearing in these cases was originally scheduled to commence on January 24, 2017. The hearing was continued until May 9, 2017 upon the request of Klondex.

On April 14, 2017, after the close of business, Klondex filed a motion for partial summary decision. Under Commission Procedural Rule 67(a), a motion for summary decision or partial summary decision may be filed “no later than 25 days before the date fixed for hearing on the merits[.]” 29 C.F.R. § 2700.67(a). Thus, Klondex filed its motion at the last possible moment.

The motion asks that I vacate the citations and orders discussed below. The following documents accompany the motion: (1) a 37 page “Memorandum of Points and Authorities” in support of the motion; (2) a 31 page “Statement of Undisputed Material Facts” in support of the motion that includes 203 numbered paragraphs; and (3) 20 exhibits, one of which contains numerous subparts. Many of these exhibits consist of portions of deposition transcripts. The paper copy of the motion with accompanying documents is about two inches thick.

These cases arise out of a fatal accident that occurred at the Midas Mine, an underground gold mine and a later inspection at Klondex’s Fire Creek Mine. Exactly what happened at the time of the accident at the Midas Mine is not clear. According to the motion, an experienced miner was operating a jackleg drill on April 28, 2014.<sup>2</sup> Later during the shift, a co-worker found the miner sitting on the ground in an unusual location and position. He was unresponsive and facing the “wrong direction” over 15 feet from the working face with his jackleg drill in his lap and his coveralls wrapped around the smooth shaft of the drill steel.

The Secretary issued one citation and several orders (hereinafter “citations”) following his investigation of the accident. In its motion, Klondex argues that MSHA has no evidence to support its enforcement actions and the citations have no merit as a matter of law. “Without knowing how the accident occurred, MSHA cannot support its speculative” post-accident conclusions that it used as the basis for the citations. (Klondex Memorandum 3). Klondex states that there is “no evidence to rule out the possibility that [the miner] ‘suffered a medical event that could have caused him to lose his balance, his ability to handle the drill that he was using, or his consciousness, thereby resulting in his clothes becoming entangled.’” (Klondex Memorandum 14).

In a response filed after the close of business on April 26, 2017, the Secretary opposed Klondex’s motion for partial summary decision. He argues that there are genuine issues of material fact with respect to each citation and that Klondex is not entitled to summary decision as a matter of law. He asks that the motion be denied.

Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

---

<sup>2</sup> Jackleg drills are frequently used in underground metal mines, especially in headings that are too tight for a jumbo drill. The drill is supported by a hydraulic leg that rests on the ground. Because the leg is generally angled so that the bottom of the leg is behind the drill, the leg can also be used by the miner to help provide pressure against the rock face that is being drilled.

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission has long recognized that “[s]ummary decision is an extraordinary procedure.” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)). The Commission has analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)). Summary decision “is authorized only upon proper showings of the lack of a genuine, triable issue of material fact.” *Hanson Aggregates New York, Inc.*, 29 FMSHRC at 9 (citations omitted). When the Commission reviews a judge’s summary decision under Rule 67, it looks ““at the record on summary judgment in the light most favorable to … the party opposing the motion,’ and that ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.”” *Id.* (citations omitted).

## ANALYSIS

A few preliminary matters must be noted. First, it is important to understand that the parties have not stipulated to any facts. In response to Klondex’s Statement of Undisputed Material Facts the Secretary filed his Statement of Disputed Facts. He alleges that most of Klondex’s undisputed facts are actually immaterial and he referenced evidence to support his position that the “undisputed” material facts presented by Klondex are actually in dispute.

Second, it is also important to understand that the issue in these cases is whether the Secretary established the violations set forth in the citations and related issues such as whether any of the violations were of a significant and substantial nature or were the result of the operator’s unwarrantable failure to comply with the safety standard. This court is not charged with determining the exact sequence of events that led to the miner’s death. Of course, the citations were issued as a result of the fatal accident, which is relevant, but exactly what happened in the moments prior to the accident is unlikely to be fully resolved in these cases and such resolution is not necessary to adjudicate the issues raised in the citations.

I find that there are genuine disputes as to the material facts with respect to each citation. Given that the hearing is scheduled for May 9 and it is incumbent on me to rule on the motion in a prompt manner, I have not discussed every dispute of fact or issue of law in this order. I have also not referenced every exhibit used by the parties to support their claims.

### **A. Citation No. 8697488, Section 57.18025, Working Alone.**

The subject miner was assigned to operate a jackleg drill. Although other miners checked on him from time to time, he was working alone in the heading. Klondex argues that the Secretary cannot establish a violation of the working alone standard because jackleg drilling is a

routine mining operation and does not present a hazardous condition under the working alone standard. (Klondex Memorandum 18-27). It argues that undisputed facts demonstrate that the Secretary cannot establish a violation of the safety standard.

In his response, the Secretary presented facts to show that jackleg drilling can present a hazardous condition that invokes the requirements of the standard and that such hazardous conditions existed in the heading in which the miner was working. (Sec'y Opposition 12-14; Sec'y Statement of Disputed Facts 2-5). In addition, he argues that there is a dispute as to whether large rocks and other tripping hazards were present on the floor of the heading that contributed to the hazardous conditions. (Sec'y Opposition 15). Assuming that hazardous conditions were present, there is a genuine dispute over whether the deceased miner had sufficient contact with other miners during his shift commensurate with the hazards presented. *Id.* at 15-16.

I agree with the Secretary that there are genuine issues of material fact with respect to this citation and that, as a consequence, summary decision cannot be granted.

Klondex also raised issues concerning the Secretary's alleged new interpretation of the safety standard that makes jackleg drilling a *per se* hazardous activity no matter how experienced or skillful the jackleg operator is. That issue is discussed in sections D and F, below.

**B. Order Nos. 8697489 and 8697490, Sections 57.7052(b) and 57.20003, Insecure Footing While Drilling and Housekeeping.**

These orders allege that large and loose rocks, air and water hoses, drill steels, an axe, and an oil container were strewn about the ground in the miner's work area as he was drilling. As a result, the miner did not have secure footing as he was drilling and secure footing was not provided to keep the leg of the drill from moving or sliding while in operation. Klondex maintains that the undisputed facts demonstrate that, while such conditions may have existed after the first responders arrived and moved things around, the Secretary has no proof that these conditions existed while the miner was working. (Klondex Memorandum 27-31). It offered deposition evidence that the miner's work area was clean and unobstructed at the time he was drilling.

The Secretary disputes Klondex's contention that the miner's heading was clean and orderly before the accident. He points to other deposition testimony as well as other evidence that contradicts the evidence that Klondex provided with its motion. (Sec'y Opposition 19-21; Sec'y Statement of Disputed Facts 5-7).

I find that at least two photographs show that the cited conditions existed at the time of MSHA's investigation of the accident. (Sec'y Exs. 14 & 17). Whether some or all of these conditions existed at the time of the accident is in dispute. The Secretary presented sufficient evidence to deny the motion. At least one miner, who was in the heading before the accident, testified that rocks shown in a photograph may have been present earlier in the shift. (Sec'y Ex. 5). In addition, an MSHA inspector testified that during the investigation he saw large rocks near the face where the miner was drilling that looked like they had been in that position for a while.

(Sec'y Ex. 16). A genuine, triable issue of material fact exists as to the conditions in the heading at the time of the accident. As the trier of fact, I must analyze the evidence and determine how much weight and credibility I should give to the evidence presented by each party. As stated above, whether these alleged conditions contributed to the fatal accident is relevant but will not determine whether a violation was established.

### **C. Citation No. 8697468, Section 103(a), Failure to Provide Documents.**

This citation alleges that Klondex failed to provide “all documentation of dispatch logs” for a specified period of time after the MSHA investigators requested them. The Secretary subsequently issued Section 104(b) Order No. 8697481 for Klondex’s continued failure to provide these documents. Klondex argues that it produced all the existing dispatch records and that the additional records that the Secretary is seeking do not exist. (Klondex Memorandum 32-36; Klondex Statement of Undisputed Facts 20-25). It states that it made a diligent, extensive, and timely search for the materials requested and produced all it could locate. Klondex maintains that there is no evidence to establish that it failed to comply section 103(a) of the Mine Act.

The Secretary responds that MSHA requested the records in large part to create a timeline of the events on the day of the accident and because MSHA believed that the mine required anyone working alone to call into the dispatcher every two hours. (Sec'y Opposition 22-23). The Secretary asserts that there is a genuine factual dispute over the existence of dispatch records for Crews A and C. He states that the miner who was acting as a dispatcher on April 28, 2014 “has given varying accounts as to whether he took notes on the day of the incident.” (*Id.* at 23; Sec'y Statement of Disputed Facts 8-11). The Secretary relies upon this miner’s deposition testimony. (Sec'y Statement of Disputed Facts 9-11; Sec'y Ex. 23).

As stated above, I must look at the record on summary decision in the light most favorable to the party opposing the motion. It may well be that Klondex produced all requested documents in its possession, but there is sufficient murkiness in the record to raise questions on this issue. The Commission has stated that in a motion for summary decision the moving party must establish “a right to judgment with such clarity as to leave no room for controversy” and must affirmatively prove “that the adverse party cannot prevail under any circumstances.” *KenAmerican Resources, Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (citation omitted). The evidence provided by the moving party cannot simply allow the court to find in the movant’s favor, “it must *require* the court to do so.” *Id.* (citation omitted) (emphasis in original). In this instance, Klondex’s evidence may be stronger than the Secretary’s but I am unable to hold that the Secretary cannot prevail under any circumstances.

### **D. Citation Nos. 8876233 and 8876236, Section 57.18025, Working Alone at the Fire Creek Mine.**

In July 2015, MSHA Inspector Pat Barney issued two citations at Klondex’s Fire Creek Mine under section 57.18025 because in each instance a miner was working alone while operating a jackleg drill. In filing the motion for these citations, Klondex relies on Inspector Barney’s testimony that jackleg drilling is a hazardous condition, no matter what the circumstances. (Klondex Memorandum 21). He testified that it “is inherently hazardous.” (*Id.*;

Klondex Statement of Undisputed Facts ¶ 177). Klondex argues that the inspector's position is contrary to current law. (Klondex Memorandum 21; *Cotter Corporation*, 8 FMSHRC 1135 (Aug. 1986)). It argues that in *Cotter*, the Commission ruled that operating a jackleg drill is not *per se* hazardous. Because the citations were based on the Secretary's new, impermissible interpretation of section 57.18025, Klondex maintains that it is entitled to summary decision as a matter of law.

Klondex also argues that even if the safety standard is applicable as alleged in the citations, the Secretary failed to offer evidence that it was not in compliance. The inspector recognized that supervisors checked on the jackleg operators three or four times per shift. (Klondex Memorandum 24). Two Fire Creek miners told the inspector that, in addition to supervisors, other miners stop by on a regular basis. As stated by the Commission in *Cotter*, if a condition is determined to be hazardous, the safety standard requires a level of "communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation." 8 FMSHRC at 1139. Klondex contends that the evidence demonstrates that it met the requirements of this test.

The Secretary maintains that Klondex is misreading *Cotter*. The Commission clearly limited its holding to the facts of that case. In addition, there is disputed evidence as to whether there were "regular and dependable" contacts with the miners operating the jackleg drills. (Sec'y Opposition 26). Inspector Barney testified that Klondex should have established a check-in policy to make sure that the contacts were dependable and that more frequent contacts were necessary to comply with the safety standard. *Id.*

I find that genuine issues of law and fact need to be resolved with respect to these citations. First, the coverage of the safety standard must be determined as applied to the particular facts of the case. The issue is not whether, in the abstract, the safety standard prohibits the operator of a jackleg drill from working alone, as alleged by Klondex, but rather whether the safety standard prohibited these particular miners from working alone given the totality of the circumstances. The record is simply not fully enough developed to resolve these issues on summary decision. In addition, Klondex relies heavily on the Commission's holding in *Cotter*, but I agree with the Secretary that the Commission was careful to limit its holding to the facts. That decision does not resolve the issues in these cases as a matter of law.

#### **E. Unwarrantable Failure and Negligence Issues.**

Klondex also maintains that there is no factual or legal basis for the Secretary's allegations that the accident citations were the result of Klondex's unwarrantable failure or aggravated conduct. (Klondex Memorandum 31-32). It points to the fact that the conduct of a rank-and-file miner is not imputable to the operator. It further states that without knowing how the accident occurred, the Secretary cannot establish that Klondex should have done something more to prevent it. All the evidence suggests that his accident was entirely unforeseeable and unexpected. *Id.*

The Secretary contends that multiple disputes of material fact preclude summary decision with respect to unwarrantable failure issues. (Sec'y Opposition 21-22). There is a dispute as to

the degree of danger posed by the alleged violations. Without resolving these disputes, the court cannot decide whether the violations were unwarrantable. There are also disputes concerning whether Klondex had adequate policies in place to protect the subject miner. For example, there are disputes as to whether Klondex had policies in place concerning how clean jackleg drillers should “keep their headings.” (Sec’y Opposition 22) (citations omitted). There was deposition testimony that the rocks on the floor of the subject miner’s heading were typical at the mine. *Id.*

I agree with the Secretary that there are genuine issues of material fact that must be resolved before unwarrantable failure and negligence issues can be addressed. In addition, I note that the issue in these cases is whether the citations should be affirmed, modified, or vacated. These proceedings were not designed to determine what caused the accident.

#### **F. Klondex Reply Brief**

After the close of business on April 27, Klondex filed a motion to file a reply brief in support of its motion for summary decision along with a copy of the reply brief. For good cause shown, the motion is **GRANTED**.

Klondex seems not to understand the purpose of summary decision in Commission jurisprudence. Klondex argues that because the evidence it presented to support its motion is stronger and more convincing than the evidence submitted in opposition, it is entitled to summary decision as a matter of law. When considering a motion for summary decision, a Commission judge is not permitted to evaluate the relative strength or credibility of the evidence presented by the parties and enter findings of fact and conclusions of law after weighing this evidence. I agree with Klondex that, at least with respect to some of the citations, the evidence it presented to support its motion appears to be stronger and more persuasive than the evidence presented by the Secretary in opposition. Nevertheless, I am unable to conclude that the evidence presented *requires* me to grant the motion for partial summary decision in any respect.

With respect to the working alone citations, the safety standard provides that no miner shall be allowed to perform work alone “in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen.” 30 C.F.R. § 57.18025. Klondex maintains that the sole issue is whether the operation of a jackleg drill automatically invokes the requirements of the standard such that a jackleg drill operator can never work alone unless the operator can be seen or heard. That is, the only legal issue is whether the operation of a jackleg drill is *per se* hazardous. Based on Commission precedent and undisputed evidence, it argues that it is entitled to summary decision on this issue as a matter of law. (Klondex Reply Br. 2-6). Klondex seemingly disregards that it is possible for a judge to hold that the facts in a particular case warrant a finding that the use of a jackleg drill created a hazardous condition thereby establishing a violation of the safety standard without holding the operation of a jackleg drill is an inherently hazardous activity and can never be operated alone.<sup>3</sup>

---

<sup>3</sup> Klondex also argues that the evidence establishes that it did not violate the safety standard even if it is assumed that operating a jackleg drill alone is considered to be hazardous. (Klondex Reply 6-7). I find that there are significant factual disputes concerning this issue as discussed above in sections A and D.

With respect to the housekeeping and secure footing citations, Klondex argues that the Secretary in his response “tries to create factual disputes where they do not exist.” (Klondex Reply 7). It argues that the “Secretary’s alleged factual issues depend on selective quotations” in the deposition testimony he presented. *Id.* It maintains that there is no credible evidence to support a conclusion that the conditions in the heading where the accident occurred were the same as shown the post-accident photos. It presented evidence that “everyone who saw the [heading] that morning, before the accident, thought it was in good condition.” *Id.* at 7-8. I tend to agree with Klondex that the evidence presented by the Secretary on these citations does not appear to be particularly strong or convincing, but he presented sufficient evidence to raise a genuine issue of material fact as discussed in section B, above.

Klondex argues that this court “can rule that there was no violation of [section 103(a) of] the Mine Act relating to documents as a matter of law even based on the Secretary’s version of events.” (Klondex Reply 8-9). It states that the evidence clearly shows that any notes that were taken and not produced do not exist. The deposition testimony proves that the miner who was acting as the dispatcher at the relevant time discarded any notes taken at the end of each shift or left them on the dispatch office desk. *Id.* at 9. Klondex represents that it promptly and thoroughly searched for any of the records requested by the Secretary. As stated above in section C, there is sufficient murkiness in the record presented by the parties to raise questions of fact that must be resolved. I agree with Klondex, however, that based on the evidence presented by the Secretary in response to the motion, the Secretary’s evidence appears to be weak on this issue.

Finally, Klondex argues that the Secretary’s alleged disputes of fact regarding negligence are not supported by the sources he cites. (Klondex Reply 9-10). Klondex states that there can be no dispute that Klondex miners were properly and extensively trained and the deceased miner was a highly skilled jackleg drill operator. Klondex argues that there is simply no evidence upon which a judge could conclude that Klondex’s negligence was high or that the citations were the result of its unwarrantable failure to comply with the safety standards. I find that there are some disputes of fact as discussed in section E above and, more importantly, there are legal issues that must be resolved when applying the facts to established precedent concerning negligence and unwarrantable failure. Evidence necessary to establish high negligence and unwarrantable failure is inexorably related to the evidence necessary to establish a violation and the gravity of any violation. Issues surrounding the negligence of an operator cannot be resolved in a vacuum.

## **OTHER CONSIDERATIONS**

Given that I had to issue this order in a prompt manner, I have not addressed all of the issues raised by the parties. Although I reviewed the relevant exhibit evidence presented by the parties, I have not referenced each of them in this order. To the extent any issues raised by Klondex are not discussed herein, I hold that they do not meet the standard for granting summary decision.

For the reasons set forth above, I hold that there are genuine issues of material fact and that Klondex is not entitled to partial summary decision as a matter of law. Klondex did not establish that it has a right to partial summary judgment “with such clarity as to leave no room for

controversy” and it did not establish that the Secretary “cannot prevail under any circumstances.” *KenAmerican Resources* 38 FMSHRC at 1947.

## **ORDER**

The motion for partial summary decision filed by Klondex is **DENIED**. The hearing will commence on May 9, 2017 as previously scheduled. I strongly urge the parties to attempt to negotiate a settlement of as many of the citations as possible and to enter into stipulations of fact on as many issues as possible that cannot be settled.

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

### Distribution:

Cheryl L. Adams, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7<sup>th</sup> Street, Suite 3-700, San Francisco, CA 94103-6704 (Adams.cheryl.l@dol.gov)

Tara E. Stearns, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103-6704 (Stearns.Tara.E@dol.gov)

Sean Allen, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3518 (Allen.sean.j@dol.gov)

Avi Meyerstein, Esq., Husch Blackwell, LLP, 750 17th Street, NW Suite 900, Washington, DC 20006-4675 (Avi.Meyerstein@huschblackwell.com)

Mark Savit, Esq., Husch Blackwell, LLP, 1801 Wewatta Street, Suite 1000, Denver, CO 80202 (Mark.savitz@huschblackwell.com)

Mark Hill, Esq., Husch Blackwell, LLP, 13330 California Street, Suite 200, Omaha, NE 68154 (Mark.Hill@huschblackwell.com)

RWM