January 2020

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

January 16, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. KENT 2013-211
KENAMERICAN RESOURCES, INC.	

BEFORE: Jordan, Young, Althen, and Traynor, Commissioners[1]

DECISION

BY: Jordan, Young, Althen, and Traynor, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act") and concerns a citation issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to KenAmerican Resources, Inc. The Secretary alleges that KenAmerican's mine-phone dispatcher provided advance notice of an inspection in violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a).[2] The Secretary asserts that the mine dispatcher answered in the affirmative when a miner underground asked "do we have any company outside?"

KenAmerican contested the citation and the associated penalty of $18,742 before a Commission Administrative Law Judge. Initially, KenAmerican filed a motion for summary decision arguing that even if the Secretary's allegations were substantiated, the exchange did not violate section 103(a). The Judge granted summary decision and vacated the citation after finding that the Secretary did not establish a violation. 37 FMSHRC 1809 (Aug. 2015) (ALJ).

The Secretary filed a petition for discretionary review, which the Commission granted. On August 25, 2016, the Commission reversed the Judge and remanded the case with instructions that the Judge hold a hearing. 38 FMSHRC 1943 (Aug. 2016). The Commission concluded that there was a material fact at issue, i.e., whether the cited conversation referred to an MSHA inspection. *Id*. at 1951. Accordingly, the Commission held that summary decision was improper.

[1] Chairman Marco M. Rajkovich is recused from considering this matter.

[2] Section 103(a) states in pertinent part that "no advance notice of an inspection shall be provided to any person . . . ."

On December 14, 2018, the Judge issued a decision after a hearing, finding that the Secretary failed to establish a violation. 40 FMSHRC 1544 (Dec. 2018) (ALJ).

The Secretary filed a second petition for discretionary review, which we granted. On appeal, the Secretary contends that the Judge's factual findings and conclusions are erroneous. We agree and reverse the Judge's decision.

I.

Factual and Procedural Background

KenAmerican's Paradise No. 9 mine is a large underground coal mine in Kentucky. On April 19, 2019, someone filed an anonymous hazard complaint regarding conditions at the mine with MSHA pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 813(g).[3] On April 20, 2012, during the second shift, six MSHA inspectors arrived at the portal and informed the foreman of the complaint. Two inspectors then traveled to the dispatcher's shack and warned Lance Holz, the dispatcher, not to provide notice of the impending inspection. Holz called for a miner to return to the surface with a man-trip. Meanwhile, MSHA inspector Doyle Sparks surreptitiously monitored a mine-phone receiver from which he could hear Holz.

Sparks testified that he overheard an underground miner from the number four unit get on the phone and ask Holz "[d]o we have any company outside?" Tr. 23. Sparks heard Holz respond "yeah, I think there is." Tr. 24. Further, Sparks memorialized this conversation in his notes. Gov. Ex. 2.[4] Sparks asked the miner to identify himself, but received no response. Tr. 24.

Holz also testified that a miner asked him if "company" was outside. Tr. 163-64. Importantly, he understood the miner to be inquiring about MSHA inspectors.[5] Tr. 164-65, 172. Therefore, he knew the question presented a request for advance notice. Holz recalls responding "I don't know," but testified that it was "possible" that he instead said "yeah, I think there is." Tr. 163-64, 172. Holz heard Sparks ask who was on the phone and receive no response. Tr. 166.

In summary, Holz and Sparks both testified that an underground miner solicited advance notice of an MSHA inspection over the mine-phone and that Holz responded to the miner's solicitation. Sparks asked the miner to identify himself and was met with silence. The only material inconsistency between their testimonies concerns the substance of Holz's response.

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[3] Section 103(g)(1) provides that "[w]henever a representative of the miners or a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists . . . such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary . . . ."

[4] "While manning the phone communication someone on the #4 unit called dispatcher and asked if there was company outside and the dispatcher (Lance) told him yeah I think there is." Gov. Ex. 2, at 2-3.

[5] Holz inferred that the miner was referring to MSHA because it was a Friday after a shift change, a time when corporate representatives would be unlikely to visit. Tr. 165.

The Judge determined that Holz most likely stated "I don't know" and thus found no advance notice. 40 FMSRHC at 1549, 1552 ("This is dispositive and ends the inquiry.").
The Judge also made an alternative holding: even if Holz actually responded "[y]eah, I think there is" the Secretary failed to prove that Holz *intended* to provide advance warning of an inspection. *Id*. at 1554. Because Holz's response was intertwined with a request to procure transportation for the inspectors, the Judge believed that even an affirmative response would not have violated section 103(a).

On review, the Secretary contends that the Judge erred in his articulation of the law. The Secretary maintains that the Judge failed to properly weigh and address the record evidence. The Secretary also alleges that the record evidence leads to the conclusion that KenAmerican violated section 103(a).

KenAmerican maintains that the Commission should defer to the Judge's factual findings. In addition, KenAmerican argues that section 103(a) regulates only the Secretary's conduct and is applied inappropriately in this instance. Finally, KenAmerican maintains that the Secretary is infringing on its First Amendment rights.

II.

Disposition

A. The record compels the conclusion that Holz provided an affirmative response to a request for advance notice; the Judge abused his discretion in determining otherwise.

The outcome of this case hinges in large part on the Judge's determination of witness credibility. The Judge credited Holz's testimony that he said "I don't know" in response to the solicitation for advance notice. The Judge did not credit Holz's testimony that it was "possible" that he said "yeah, I think there is" in response, even though this particular response was corroborated by inspector Sparks' testimony and his contemporaneous notes regarding what had been said.

A Judge's decision to credit the testimony of a witness is entitled to great weight and may not be overturned lightly. *See Farmer v. Island Creek Coal Co*., 14 FMSHRC 1537, 1541 (Sept. 1992*)*. The Commission reviews a Judge's credibility determinations under an abuse of discretion standard. *See Jim Walter Res*., *Inc*., 37 FMSHRC 1868, 1871 (Sept. 2015). There must be "compelling reasons" to take the "extraordinary step" of reversing a Judge's credibility determination. *See Fort Scott Fertilizer-Cullor, Inc*., 19 FMSHRC 1511, 1516 (Sept. 1997) (quoting *Hall v. Clinchfield Coal Co*., 8 FMSHRC 1624, 1629 (Nov. 1986)).

However, the Commission will not affirm credibility determinations if they contradict record evidence or are supported by no evidence or dubious evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878, 1881 n.80 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp*., 151 F.3d 1096 (D.C. Cir. 1998). Although the Commission only overturns a Judge's credibility determination in rare

circumstances, we will not rubber stamp them.[6] *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1391-92 (Dec. 1999).

The Commission's approach is fully consistent with the approach taken by the courts of appeals. For example, the Fifth Circuit has recognized that "if a credibility determination is unreasonable, contradicts other findings of fact, or is 'based on an inadequate reason, or no reason at all,' [the court] will not uphold it." *NLRB v. McCullough Envtl. Servs., Inc*., 5 F.3d 923, 928 (5th Cir. 1993) (quoting *NLRB v. Moore Bus. Forms, Inc*., 574 F.2d 835, 843 (5th Cir. 1978)). Similarly, the D.C. Circuit has held that "utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible*"* may justify overturning a Judge's credibility finding. *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445 (D.C. Cir. 1996) (quoting *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984)) (alteration in original).

We conclude that there are compelling reasons to take the extraordinary step of overturning the Judge's credibility determination and to find an advance notice violation. The Judge failed to reconcile his factual finding regarding Holz's response against relevant conflicting record evidence, made contradictory findings, and provided a rationale that is otherwise unreasonable.

First, the Judge completely failed to consider the content of Sparks' contemporaneous notes. Sparks documented hearing Holz say "yeah I think there is." Gov. Ex 2, at 3. The content of the notes corroborates a factual account that is both consistent with Sparks' own testimony and the alternative testimony provided by Holz. The Judge's failure to attempt to reconcile the content of the notes against a credibility determination is an abuse of discretion.[7] *Morgan*, 21 FMSHRC at 1391 ("Before a judge credits any testimony, he must reconcile all record evidence that is inconsistent with that conclusion."); *Cf. Pappas v. CalPortland Co.*, 40 FMSHRC 664 (May 2018) (affirming the Judge's decision to credit a witness because the Judge considered and reconciled the record evidence that detracted from the witnesses' testimony).

Second, the Judge further erred in relying upon the testimony of KenAmerican's Director of Safety, Shannon Baker, that personnel did not use coded language or provide advanced notice at the mine. 40 FMSHRC at 1552 ("I find Baker's testimony to be credible, and it tends to support Holz' claims."). The only "claim" of Holz in dispute is the content of his response. Baker was not on the mine-phone during the call and has no knowledge as to what Holz said. Accordingly, Baker's testimony cannot support the Judge's decision.

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[6] The substantial evidence standard of review requires a weighing of all probative record evidence and an examination of the fact finder's rationale in arriving at the decision. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). A Judge must sufficiently summarize, analyze, and weigh the relevant record and explain their reason for arriving at a decision. *Consolidation Coal*, 11 FMSHRC 966, 974 (June 1989) (citations omitted).

[7] Instead of considering the content of the notes, the Judge focused his analysis on what was not in the notes. 40 FMSHRC at 1551. The Judge found that Sparks' failure to document his investigation into the identity of the anonymous miner detracted from the note's veracity, and accordingly the Judge disregarded the notes entirely. *Id*.

In fact, Holz's testimony regarding the use of coded language at the mine refutes Baker's testimony. Baker testified that coded language was never used at the mine in context with advance notice. *Id*. at 1552 (citing Tr. 140 ("we just never had any kind of euphemisms or anything, any kind of coded language . . . ."). The Judge credited Baker. *Id*. In contrast, Holz testified that he understood the question about "company" to be directed at determining whether MSHA was present.[8] Tr. 164-65, 172; *supra* at 2 n.5. The Judge credited Holz on this point. 40 FMSHRC at 1549 n.8 ("I credit Holz' statement and find 'company' was in reference to MSHA."). Therefore, the Judge himself recognized the inquiring miner was using coded language. The Judge's contradictory findings undermine his credibility determination.

Third, the Judge provided a rationale for his determination that is not supported by the record. The Judge believed that Sparks misunderstood the law and that Sparks had issued the citation merely because a miner had *solicited* advance notice.[9] *Id*. at 1549. In fact, Sparks testified that he considered the question *and answer* to constitute advance notice. Tr. 103 ("I don't necessary think it's a violation if they said we got company outside. I think what brought the problem on was when they said, yeah, I think there is.").

Fourth, the Judge made unreasonable assumptions. For instance, the Judge found that it was unlikely that Holz would have given an answer that violated the law in the presence of two MSHA inspectors. In so concluding, the Judge did not acknowledge that the inspectors at the dispatcher's shack were not on the mine-phone, could not hear the preceding question, and would not have been aware of the significance of Holz' response. In fact, Holz testified that it was "possible" that he had given the affirmative answer in the presence of the inspectors.[10]

Moreover, the Judge erred in finding no violation on the grounds that the miner might have asked the question for many reasons, such as the need to provide mantrips. He held that Holz's confirmation of visitors was only a violation if Holz intended to convey advance notice. That is incorrect. Advance notice of an inspection is a violation. Proof of intent is not required. *Wake Stone Corp*., 36 FMSHRC 825, 827 (Apr. 2014). If the effect of the communication is to

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[8] The Judge also found that Inspector Sparks was not able to substantiate that "the question he heard over the mine-[phone] system was consistent with such coded language." 40 FMSHRC at 1550. As previously stated, there is not a factual dispute on this issue; Holz understood the term "company" to mean MSHA. Tr. 25, 164-65, 172.

[9] Inspector Sparks testified as a fact witness. The legal conclusions of an inspector are neither binding nor dispositive. *Big Ridge, Inc*., 37 FMSHRC 213, 216 n.6 (Feb. 2015) (citing *Penn Allegh Coal Co*., 4 FMSHRC 1224, 1227 n.2 (July 1982)).

[10] We note that the Judge found that Holz had no reason to skew his testimony as he was longer employed by KenAmerican. In so finding, the Judge failed to consider that Holz faced the possibility of criminal prosecution. 30 U.S.C. § 820(e). The refusal to follow a Judge's credibility determination is particularly justified where the testimony in question is given by an interested witness and relates to his own motives. *Morgan*, 21 FMSHRC at 1391. Indeed, we note that two mine superintendents and a foreman working at the Paradise No. 9 mine were previously convicted of the crime of providing advance notice. *United States v. Gibson*, 409 F.3d 325, 333 (6th Cir. 2005).

convey advance notice then the violation is complete. Here, Holz thought the caller was asking whether MSHA inspectors were on site and Holz's statement informed him that inspectors were present. At that point, the violation occurred.[11]

Finally, the operator argued before the Administrative Law Judge and before us that the language of section 103(a) applies only to the Secretary. The Judge correctly rejected that argument. The Commission's application of section 103(a) to operators in *Topper Coal Co., Inc*., 20 FMSHRC 344 (Apr. 1998), is consistent with the statutory text and the Mine Act overall, including section 110(e), which provides that it is a crime for "*any* person" to provide advance notice of an inspection. 30 U.S.C. § 820(e) (emphasis added). In short, the plain language of the Act is flatly inconsistent with the operator's argument.[12]

For all the aforementioned reasons, we find that the Judge abused his discretion. While it is the province of the Judge to access credibility, it "involves more than a witness' demeanor and comprehends an overall evaluation of testimony in light of its rationality it's or internal consistency and the manner it hangs together with other evidence." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2586, at 578-79 (2d ed. 1995).

We conclude that the record evidence demonstrates that Holz said "yeah, I think there is" in response to the miner's question. *See ICG Hazard, LLC,* 36 FMSHRC 2635, 2640 (Oct. 2014) ("Where the evidence supports only one conclusion, remand on that issue is unnecessary.") (citations omitted).

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[11] Advance notice cases may not always be resolved easily. In some instances, if a miner seeks advance notice from a dispatcher or other employee, it may be difficult to discern whether a superficially noncommittal response is affirmative or affirmatively coded language. Operators must train miners not to seek advance notice. Ambiguities that may exist in any interchange can produce situations that are difficult to judge. In such cases, the Judge must exercise his/her discretion in light of the totality of the circumstances.

Second, we recognize that requests for mantrips and personal observations by miners may lead individual miners to infer the presence of inspectors. Inferences drawn by individual miners from their observations are not violations but such personal inference may not lead to advance notice to other miners. Operators must avoid to the extent possible the occurrence of such inferences.

[12] We similarly reject the Judge's attempt to limit *Topper Coal's* holding to mines of small size. *See* 40 FMSHRC at 1554-55. Section 103(a) by its plain language applies to "coal or other mines." 30 U.S.C. § 813(a). The definition of a "coal or other mine" in section 3(h) of the Mine Act is broad, sweeping and expansive. *See Jim Walter Res*., *Inc*., 22 FMSHRC 21, 24 (Jan. 2000). Section 103(a)'s prohibition against advance notice clearly applies to mines of all sizes.

B. The Secretary did not infringe on KenAmerican's First Amendment Rights.

KenAmerican argues that section 103(a) has been applied in a manner which infringes on its freedom of speech in violation of the First Amendment. We disagree.[13]

The Commission has jurisdiction to consider constitutional challenges raised against the enforcement of the Mine Act. *Sec'y of Labor v. Kenny Richardson*, 3 FMSHRC 8, 18-21 (Jan. 1981). The First Amendment guarantees that "Congress shall make no law abridging the freedom of speech." U.S. Const. amend 1. The First Amendment requires a heightened scrutiny whenever the government regulates speech because of a disagreement with the message it conveys. *See Sorrell v. IMS Health Inc*., 564 U.S. 552, 566 (2011) (citations omitted). Content-based restrictions on speech may be justified only if the government proves that it is narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992).

Even if we were to assume that sanctioning KenAmerican for providing advance notice of an impending inspection is a restriction on protected expression, we conclude it is narrowly tailored to allow a meaningful inspection of the mine. The Supreme Court's decision in *Donovan v. Dewey*, 452 U.S. 594 (1981), made clear that unannounced inspections of mines under the Act are vital and fully constitutional. Congress enacted the Mine Act to ensure the health and safety of all miners. 30 U.S.C. § 801(a)-(f). In order to comply with Congress' directives, MSHA must conduct inspections that reflect the normal day-to-day working conditions of the mine. Such meaningful inspections cannot occur when the mine environment is altered by advance notice of an inspection. *Donovan v. Dewey*, 452 U.S. at 603 ("[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential."); *see also Solis v. Manalapan Min. Co.,* No. 10-115-GFVT, 2010 WL 2197534, at 5 (E.D. Ky. May 27, 2010)[14] ("The giving of advance notice prevents the discovery of safety and health violations and allows potential hazards to be concealed."); S. Rep. 95-181, at 27 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act*

[13] The Secretary did not respond to this argument. Instead, he contends that KenAmerican is impermissibly attempting to enlarge its rights on review. The Secretary is incorrect; KenAmerican had previously presented this argument to the Judge. 40 FMSHRC at 1556 n.15; KA Post-Hearing Br. at 22-25. On appeal, a prevailing party may defend a decision based on anything in the record without filing a cross-appeal. *Mass. Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976); *Jim Walter Res., Inc*., 12 FMSHRC 1521, 1528-29 (Aug. 1990).

[14] In *Manalapan*, a federal district court judge granted the Secretary's motion for a preliminary injunction ordering the defendant mine operators to comply with section 103(a)'s prohibition against advance notice. MSHA cited the mine operators for violations of section 103(a) after its inspectors allegedly overheard advance notice of an inspection provided over the mine's phones. Slip op. at 2, 5.

of 1977, at 615 (1978) (recognizing the "notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained.").[15]

III.

Conclusion

In summary, we conclude that the evidence in the record compels the conclusion that advance notice of the MSHA inspection was provided by the operator. For the reasons herein, we reverse the decision of the Judge and find that KenAmerican violated section 103(a). The case is remanded to the Judge so that he may assess a civil penalty for the violation consistent with section 110(i) of the Mine Act, 30 U.S.C. § 820(i).[16]

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

[15] Furthermore, KenAmerican has not demonstrated that the Secretary is applying the law in a way that inhibits its statutory right, pursuant to section 103(f), for an escort to accompany the inspection. Section 103(a) does not prohibit the mine operator from simply calling a miner to return to the surface.

[16] The Judge's analysis regarding whether KenAmerican was negligent in violating the Act is more appropriately confined to the penalty assessment for the violation.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710

January 22, 2020

MICHAEL K. McNARY	
v.	Docket No. CENT 2015-279-DM
ALCOA WORLD ALUMINA, LLC	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY THE COMMISSION:

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), is before the Commission a second time. At issue is a complaint filed by Michael McNary alleging that Alcoa World Alumina, LLC ("Alcoa") discriminated against him and interfered with the exercise of his statutory rights in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1).[1] The complaint arose from an incident between McNary and Alcoa Digestion Department Superintendent, Steve Emig.

During its first review, the Commission determined that the Administrative Law Judge erred in entering summary decision in favor of Alcoa and remanded the matter for further proceedings, including an evidentiary hearing. 39 FMSHRC 433, 440 (Mar. 2017). After the hearing, the Judge dismissed the complaint, holding that there was no cognizable Mine Act discrimination or interference by Alcoa against McNary. 39 FMSHRC 2083 (Dec. 2017) (ALJ). For the reasons that follow, we affirm the Judge's dismissal.

[1] Section 105(c)(1) of the Mine Act provides in relevant part:

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

I.

Factual and Procedural Background

Alcoa operated the Bayer Alumina Plant in Point Comfort, Texas, to produce alumina. Alumina was produced by a process that involved miners working in four departments: digestion, clarification, precipitation, and calcination.[2] In the digestion department, where the incident occurred, the material being treated was caustic, corrosive, and heated under pressure to temperatures of 400 to 450 degrees Fahrenheit.

In January 2014, McNary was a gland[3] manager in the digestion department. McNary's job as gland manager was to check the pumps, making daily rounds and troubleshooting. 39 FMSHRC at 2095.

McNary was also the No. 2 miners' representative ("miners' rep.").[4] Carlos Delgado was the lead miners' rep. at the plant. When Delgado was unavailable for any reason, McNary assumed the responsibilities of the lead miners' rep. for the plant.

On January 8, 2014, McNary was checking the pumps in the digestion area while performing his daily safety rounds. McNary saw hot slurry spewing out of a valve on a pump in the L-5 area and two employees walking toward him wiping off slurry. Miners were suiting up in clothes variably described as Tyvek suits, Tychem suits, paper suits, and raincoats.

While the miners were putting on their suits, Emig approached McNary and Delton Luhn, the miners' rep. for the digestion area. Emig asked them if they had any duct tape. Both men answered, "No." McNary asked why he needed tape, and Emig said that he wanted to put tape around the wrists of the employees who were suited up. Emig instructed that one of them should go to the tool room to get some tape. McNary went to the tool room but did not find tape.

McNary asked a miner to contact Health and Safety Manager Kelly Grones. McNary then went to a different area to see if another valve was blowing out. He determined that there were no problems in that area and returned to the L-5 area.

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[2] A description of the production process is set forth in the Commission's first decision. 39 FMSHRC at 434.

[3] A gland is two pieces of metal on a pump that hold packing in place. If the packing fails, the valve may blow out. *See* 39 FMSHRC 2095 n.12.

[4] A miners' representative has various rights and responsibilities under the Mine Act. Among them are the right to accompany an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") during inspections of a mine, to be involved in pre- or post- inspection conferences (30 U.S.C. § 813(f)), and to request an immediate inspection of a mine (30 U.S.C. § 813(g)).

While McNary was away, miners accessed the area of the blowing valve.[5] Tr. 70, 241. The miners were unsuccessful in resolving the problem.

When McNary returned to the L-5 area, he motioned for Emig, who was then managing the situation, to join him. McNary informed Emig that he had called Grones, who was coming to the area.

There is conflicting evidence as to what occurred next in this conversation. Although we recite both versions below, the Judge credited Emig's version.[6]

According to McNary, Emig replied that McNary should not have called anyone, that it was Emig's department, and that he directed the workforce. McNary asked why he had directed the miners into the hot slurry after sending him off to get tape. Emig replied that he did not send the miners in and that they had volunteered. McNary stated that Emig had watched the miners go into the area without stopping them and had helped them suit up. Emig replied that McNary should not be involved in these matters, to which he disagreed, stating that he was the miners' rep. and concerned for the miners' safety. McNary stated that Emig replied that he would remove him as miners' rep., from the department, and from the plant. Tr. 145-46.

In contrast, according to Emig, McNary stated that he had contacted some people to come down, assess the situation, and instruct him on what to do. Emig informed McNary that they were in a "full stand-down mode," he also had contacted Grones, he was directing the group, and McNary could be involved. McNary responded that as a miners' rep. he did not have to listen to Emig. Emig replied that he did have to listen to him, as the department superintendent and as an employee of the department. Emig stated that McNary's behavior ultimately became unsuitable and irate and he told him that he (Emig) could or would have him removed. They had a brief argument about whether Emig had the right to do that. Tr. 246-48.

At that point, Lead Miners' Rep. Carlos Delgado and an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), Brett Barrick, arrived. Delgado and Barrick started to discuss the situation with Emig. McNary had stepped aside momentarily but then interrupted the discussion to complain that Emig had sent him on a wild goose chase and directed miners into danger. Emig denied both accusations. Then, McNary challenged Emig, "Oh, you're through with me for good?" Emig stated, "No, just right now." Tr. 149, 253. Emig made no effort to remove McNary and McNary remained on the scene with Delgado, Barrick, and Emig until the emergency was over. There were no further acrimonious interactions between McNary and Delgado.

Health and Safety Manager Grones arrived at the scene. Grones, Delgado, Emig, and Barrick discussed how to resolve the emergency. McNary continued to remain with that group considering the situation. After Grones left the scene to speak with engineers and gather more

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[5] Miners had also accessed the area before Emig had arrived at the scene. Tr. 239.

[6] In discussing the interaction between McNary and Emig, the Judge opined, "To be specific, for this moment, which involves an important credibility determination, and having heard Emig's and McNary's versions of their interaction, the Court finds Emig's recounting to be the more credible telling." 39 FMSHRC at 2112.

information, the emergency resolved itself when the valve pressure died out without further intervention.

After these events, McNary continued as an employee of Alcoa and a miner's representative. He did not claim that he suffered any discipline, loss of wages or any other form of retribution after and/or because of his actions toward Emig on the day of these events.

McNary filed a complaint with MSHA under section 105(c)(2) of the Mine Act alleging that Alcoa had violated section 105(c)(1) of the Mine Act. After investigation, MSHA declined to pursue any charges. McNary then filed a claim on his own behalf under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3).

After discovery, the Judge granted a motion for summary decision filed by Alcoa and dismissed the proceeding. The Commission later granted McNary's petition for review of the summary decision, vacated the decision, and remanded the matter to the Judge for further proceedings, including an evidentiary hearing. The matter then proceeded to hearing, and the Judge issued this decision currently under review.

As noted above, after the hearing, the Judge credited the testimony of Emig and discredited the testimony of McNary. 39 FMSHRC at 2112, 2118. The Judge held that there had been no cognizable Mine Act discrimination or interference in violation of section 105(c) against McNary. *Id*. at 2083, 2118.[7]

McNary filed a petition seeking review of the Judge's decision. The Commission granted the petition and heard oral argument.

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[7] The Judge summed up the evidence:

> [T]he Court concludes that, under the totality of the circumstances, *it was McNary's own conduct* which brought about the exchange with Emig.
>
> The Court would note again that, in its view, it is a mischaracterization to label McNary's actions and statements with the words used by his Counsel, as *discussing* a safety situation. McNary was not discussing a safety situation. Rather, he was making assertions about Emig's conduct and attempting to orchestrate which management official would control the event.

39 FMSHRC at 2100 (emphasis in original).

II.

Disposition

Section 105(c)(1) states in relevant part that "[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner [or] representative of miners . . . because of the exercise by such miner [or] representative of miners . . . of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1). Section 105(c)(3) permits an individual to file a complaint charging "discrimination or interference" in violation of section 105(c)(1). 30 U.S.C. § 815(c)(3). McNary's claim was that Emig's conduct could chill his exercise of his miner's rights.

Commission case law is clear that unless McNary can provide sufficient evidence that Emig's statements would dissuade a reasonable miner from engaging in protected activity, McNary's claims must fail. *Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012) (citing *Burlington No. & Santa Fe Ry Co. v. White*, 548 U.S. 53, 57 (2006)). Thus, McNary needed to prove, as a threshold matter,[8] that his interaction with Emig would dissuade a reasonable worker from exercising his protected rights. We conclude that substantial evidence in the record supports the Judge's determination that McNary failed to establish that the incident with Emig would deter a reasonable miner from engaging in activity protected under the Mine Act.[9]

The sole basis of McNary's claim is his allegation that Emig threatened him during the brief heated conversation during the emergency. The Judge applied the factors set forth in *Multi-Ad Services, Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001) in evaluating the brief encounter between McNary and Emig. These include the tone and setting of the encounter; the relative positions of the employees; the duration of the conduct; and whether the subject was brought up repeatedly.

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[8] In *Secretary of Labor on behalf of Greathouse v. Monongalia Coal Co.*, 40 FMSHRC 679 (June 2018), a four-member Commission divided evenly regarding the proper analytical framework for interference claims. Two Commissioners stated that they would apply a test developed by two Commissioners in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (Aug. 2014), in which protected activity need not cause the operator action giving rise to an interference claim. The other two Commissioners concluded they would apply *Secretary of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 14, 1980*), rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981), and its progeny to claims of interference. *Id.* at 681, 708-16. Because the outcome of this case does not depend on which standard should be applied, it is not necessary for the Commission to consider this issue. No inference should be drawn from our decision not to address it herein.

[9] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

After a thorough review of the entire record, the Judge discredited McNary's account of the event and found the incident involved a single, isolated event of quite brief duration precipitated by heated accusations by McNary toward Emig and a refusal to accept Emig's supervisory authority. 39 FMSHRC at 2126-27. The Judge further found that McNary initiated the incident by calling Emig away from direct handling of the emergency to tell him that he called others asking to replace him, accusing him of misconduct, and asserting that he did not have to take instructions from his supervisor.[10] Indeed, Lead Miners' Rep. Delgado agreed that, if McNary had told Emig that he could not tell him what to do, this would have been a reason for Emig to have been upset with McNary. Tr. 93-94

As noted above, the evidence is also undisputed that the brief, one-time conversation initiated by McNary occurred during a stressful situation involving a significant valve failure in Emig's department, while Emig was responsible for dealing with the situation and needed to focus his attention and concentration upon the emergency. At the time of the confrontation, the valve was still "blowing out pretty good." Tr. 53. The testimony demonstrated to the Judge that McNary was upset and angry when he interrupted Emig's handling of the event and informed him that he, McNary, was initiating action and disregarding Emig's authority. Considering the exchange between McNary and Emig from the perspective of a reasonable miner, it is significant that robust, heated discussions about safety between miners' reps. and management were not uncommon at the mine. Tr. 75-77, 100-02.

Moreover, even if one could view Emig's initial response to McNary's refusal to accept his authority as intemperate, Emig quickly walked back any negative aspect, and McNary continued within the same event to participate without restraint or hindrance. A reasonable miner would not see interference with his protected rights under these circumstances. Further, Delgado, the lead miners' rep., arrived at the scene near the end of Emig and McNary's conversation and heard the end of that conversation. The Judge found that when Delgado then made complaints to Emig about the handling of the actual situation rather than about his authority or lack thereof, Emig responded in a calm and professional manner.

When McNary questioned Emig regarding whether he was done with him, Emig replied that he was just done with McNary for "right now" and the follow-up indicated, as the Judge found, that Emig had no further concern with the incident. Tr. 53, 149, 184, 253; 39 FMSHRC at 2114. Importantly, McNary never left the scene with the group of management, union, and MSHA personnel discussing solutions. He continued to be present with the group discussing the handling of the emergency throughout the duration of the emergency.

The Judge's opinion turns in part on his credibility determinations. The Commission has recognized the Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1196-97 n.8 (Oct. 2010); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010). McNary has not provided a basis for overturning the Judge's credibility determinations.

[10] A complainant's demeanor and tone as he approaches a supervisor, standing alone, do not necessarily prove that his statements are unprotected. But, as here, they are appropriately considered by the Judge along with other evidence as part of the "totality of the circumstances."

In summary, therefore, the incident involved a brief, spontaneous event arising from a provocative challenge by McNary to Emig's supervisory authority and accusations made by McNary against Emig in an extremely stressful situation. Emig did not take any action to remove or dissuade McNary's continued participation. 39 FMSHRC at 2126-27; Tr. 53, 79-80, 93, 165, 214.

We conclude that substantial evidence supports the Judge's determination that, in light of the totality of the circumstances, Emig's words did not chill nor would they tend to chill a reasonable miners' rep. from making safety complaints in the future nor would they have chilled the exercise of protected rights by those miners who may have witnessed the encounter. Accordingly, we affirm the Judge's dismissal of the interference complaint.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's dismissal of McNary's complaints alleging discrimination and interference under section 105(c) of the Mine Act.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 22, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. SUNBELT RENTALS, INC.	Docket No. VA 2013-291-M

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Young and Althen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). At issue is a citation issued to Sunbelt Rentals, Inc., ("Sunbelt") by the Department of Labor's Mine Safety and Health Administration ("MSHA") after an accident at a concrete plant. The citation alleged that Sunbelt failed to conduct an adequate examination of a "working place" in the pre-heat tower, which processed limestone to make concrete. MSHA charged a violation of 30 C.F.R. § 56.18002(a)[1] and designated the violation as significant and substantial ("S&S")[2] and a result of high negligence. MSHA also proposed a penalty of $51,900.

An Administrative Law Judge of the Commission was assigned to this matter. The Judge granted Sunbelt's motion for summary decision, reasoning that the standard does not explicitly require that exams be "adequate" and therefore that an exam need not necessarily identify all hazards which a reasonably prudent person would identify. 35 FMSHRC 3208 (Sept. 2013) (ALJ).

Subsequently, the Commission vacated the summary decision and remanded the case to the Judge, holding that the regulatory requirement that a "competent" person conduct the examination means that the examination must be adequate. 38 FMSHRC 1619, 1625-28, 1629 (July 2016).

[1] Section 56.18002(a) provides that "[a] competent person . . . shall examine each working place at least once each shift for conditions which may adversely affect safety or health." 30 C.F.R. § 56.18002(a) (2017) (amended Apr. 9, 2018).

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

After a hearing on remand, the Judge determined that the operator had failed to examine adequately the working place at issue. He held that the violation was S&S and a result of the operator's high negligence. He assessed a penalty of $23,750. 40 FMSHRC 573, 578-79 (Apr. 2018) (ALJ).

The operator petitioned the Commission for review, which was granted, and challenged the Judge's findings regarding the violation, S&S, and negligence.[3] Upon review, a majority of Commissioners affirms the Judge's finding of a violation and the S&S finding because they conclude that substantial evidence supports the Judge's ruling that the operator did not conduct an adequate examination.[4] Chairman Rajkovich, writing separately, would find no violation. Commissioners Jordan and Traynor would affirm the Judge's finding of high negligence, while Commissioners Young and Althen conclude the violation was instead the result of ordinary negligence. Chairman Rajkovich, while finding no violation, concurs with Commissioners Young and Althen solely for the purpose of forming a majority decision of ordinary negligence to remand for a new penalty assessment. The Judge's negligence determination and penalty assessment are reversed, and the case remanded for a new penalty.

I.

Background

Roanoke Cement Co. ("Roanoke") operated a cement plant that included a pre-heat tower. The inside of the pre-heat tower contained six numbered, vertically connected conical vessels – each about 50 feet tall. The accident resulting in the citation occurred in a vessel denominated as the fourth vessel. That vessel consisted of an upper and a lower compartment connected through an opening, called a "thimble," between them. The inspector did not measure the compartments or the thimble and did not testify to their size. An operator witness testified that each floor in the tower was about 20 to 30 feet high and that the upper compartment of the fourth vessel was smaller than the lower compartment.

[3] The operator also claims that it lacked notice that exams of working places must be "adequate." However, as set forth below, this issue was already resolved in our prior decision on this matter.

[4] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Under the substantial evidence test, the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Sec'y on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (citation omitted).

Nine floors were located on the outside of the tower, adjacent to the vessels on the inside. A miner could use an exterior staircase or elevator to reach each floor. The floors outside the vessels were numbered in ascending order. The sixth floor was adjacent to the lower compartment of the fourth vessel while the seventh floor was adjacent to the upper compartment of the fourth vessel. Tr. 118.

The interior walls of each vessel were lined with heat-resistant refractory brick to prevent corrosion. Over time, some of the limestone could adhere to the refractory, resulting in limestone building up inside the vessels. There were three two feet by two feet portholes ("large portholes") and an one inch by one inch porthole ("small porthole") on the sixth floor, outside the lower compartment of the fourth vessel. The smaller upper compartment of that vessel also contained two large portholes, two feet by two feet in size. Tr. 256-58. The small porthole in the lower compartment allowed miners to clear buildup of loose material in each vessel with an air lance.[5] The large portholes allowed miners to look into each vessel while standing on an adjacent floor of the tower.

Sunbelt contracted with LVR, Inc. ("LVR") to erect scaffolding inside the vessels of the tower. Once the scaffolding was erected, LVR would perform annual maintenance on the tower, as per its contract with Roanoke. However, before scaffolding was erected, a miner could examine the inside of each vessel by standing on an adjacent floor and looking through the corresponding portholes.

On December 30, 2012, the tower was shut down. On that day or shortly afterwards, each vessel of the tower was air lanced through the small portholes. Subsequently, an employee of Roanoke, Jason Oedel, inspected the tower through the portholes in early January 2013. He looked through the portholes on the seventh floor in the upper compartment of the fourth vessel and did not observe any loose hanging material in the vessel. Instead, he testified that if there was any potentially loose material, it was indistinguishable from the solid refractory of the vessel.

A few days later, Sunbelt began to work in the fourth vessel. As stated a large open tube (the "thimble") was located between the lower and upper compartments of the fourth vessel. Sunbelt planned to erect scaffolding in the lower compartment of the fourth vessel between the sixth and seventh floors, after which LVR would replace the thimble in the vessel.

On January 8, at approximately 7:30 a.m.,[6] Kendrick Davis examined the interior of the fourth vessel by looking through portholes on the sixth floor. At the time, Davis, an employee of

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[5] An air lance uses "compressed air . . . blown . . . to free choked passages." U.S. Dep't of Interior, *A Dictionary of Mining, Mineral and Related Terms* 21 (1st ed. 1968).

[6] The pre-shift hazard assessment form indicated that Davis conducted his exam at 7:00 a.m. However, the Judge credited Davis's testimony that he met with an individual at 7:00 a.m. for approximately 20 to 30 minutes and began to examine the fourth vessel afterwards. 40 FMSHRC at 583.

Sunbelt, had been designated by Sunbelt as its examiner for working places inside the fourth vessel and had received site-specific training from Roanoke to inspect for falling material hazards in the vessel.

Unlike Oedel, Davis did not examine the top of the vessel by looking through any seventh floor portholes. It is undisputed that instead, he simply examined this portion of the vessel while standing on the sixth floor, 20-30 feet below. The interior of the vessel lacked a lighting system, and Davis did not use any portable lights to examine the top of the fourth vessel. Instead, he relied on the early morning sunlight to inspect the portion of the vessel above the seventh floor. 40 FMSHRC at 579-80, 83-86.

During his examination, Davis did not observe any loose hanging material in the part of the vessel above the seventh floor. *Id.* at 584-85. Davis documented his examination of the fourth vessel in his Pre-Shift Hazard Assessment. While filling out the Pre-Shift Hazard Assessment, Davis listed falling material and poor lighting as potential hazards. Gov't Ex. 6. Subsequently, on Davis's instruction, other employees of Sunbelt beat the side of the fourth vessel to dislodge any loose material.

Shortly afterwards, at 10:30 a.m. on January 8, loose material fell from the top of the vessel. The falling material struck and knocked unconscious an employee of Sunbelt, Brian Tyler, while he was helping to erect scaffolding in the fourth vessel. At the time of the accident, Tyler was on a platform in the scaffolding below the open thimble. Material in the upper compartment of the vessel, above the adjacent seventh floor of the tower, fell and knocked Tyler unconscious. Three of the four straps on the headband to his hard hat were broken. The exact nature of the material that struck Tyler is unclear. Subsequently, a "headache board"[7] was installed to protect miners from falling material. *Id.* at 589.

After being notified of the accident that morning, MSHA issued an order at 11:00 a.m. under 30 U.S.C. § 813(j) to preserve the conditions of the tower.[8] MSHA Inspector David Nichols arrived at the tower soon afterwards, just after Tyler had been placed into an ambulance following his injury. Subsequently, Inspector Nichols peered through portholes on the seventh floor and observed a buildup of material on the walls of the fourth vessel above the seventh floor of the tower.

Inspector Nichols inferred that the buildup indicated that loose, hanging material was present in the upper compartment of the vessel, above the seventh floor, during Davis's examination. Following his inspection, the inspector issued a citation to Sunbelt for a violation of 30 C.F.R. § 56.18002(a). The citation was issued for failure to conduct an adequate examination based upon the failure of Davis to look through portholes on the seventh floor.

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[7] A "headache board" is a board placed above the point where miners would be working to protect them from falling material.

[8] This provision of the Mine Act authorizes the Secretary to supervise and direct rescue and recovery activities in a mine.

The standard provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." 30 C.F.R. § 56.18002(a). The citation alleged that Sunbelt "did not do an adequate work[ing] place exam in the [relevant area] as there [was] hanging material overhead that had not been noted on the work[ing] place exam. The area above was never checked." Gov't Ex. 8. MSHA proposed a penalty of $51,900. 40 FMSHRC at 573.

As set forth at the outset, the Judge initially granted summary decision in favor of Sunbelt. On appeal, the Commission vacated the citation and instructed the Judge, on remand, to consider whether the area of the fourth vessel above the seventh floor was a "working place" and whether Sunbelt violated the standard by failing to conduct an adequate exam of such area. 38 FMSHRC at 1628. More specifically, the Commission held that the examination "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize."[9] *Id.* at 1627.

II.

Judge's Decision on Remand

On remand, the Judge applied the standard identified by the Commission and determined that the standard required Davis to (1) examine the upper compartment of the fourth vessel, (2) look through the seventh floor portholes while conducting such an exam, and (3) identify and correct the hazard of loose hanging material in the upper compartment above the adjacent seventh floor of the tower. 40 FMSHRC at 599.

The examination requirement under section 56.18002(a) applies to a "working place." The Judge found that the area of the upper compartment of the fourth vessel above the seventh

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[9] The Commission further found:

> The Commission has consistently applied the reasonably prudent person test to broadly worded standards. *See U.S. Steel Mining Co.*, 27 FMSHRC at 439. The reasonably prudent person test provides that an alleged violation is appropriately measured against whether a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting correction within the purview of the applicable standard. *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 711 (Aug. 2008); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

38 FMSHRC at 1626 (footnote omitted).

floor (the area at issue) was a working place. Therefore, the Judge determined that the operator was required to conduct an exam of this area. *Id.* at 598.

The Judge ruled that Sunbelt's examiners failed to adequately examine a working place – that is, the vessel's walls and ceiling above the seventh floor. *Id.* at 600. He rejected Davis's testimony that he could see the entire upper compartment of the vessel while standing on the sixth floor. *Id.* at 584. The Judge found that the sixth floor portholes provided an incomplete view of the area of the upper compartment above the adjacent seventh floor of the tower. Therefore, the Judge agreed with Inspector Nichols' determination that a reasonable examiner would have looked through the seventh floor portholes when examining the area of the upper compartment above the seventh floor. *Id.* at 597-99.

Furthermore, the Judge found that if Davis had looked through the seventh floor portholes, he would have seen loose material in the area at issue above the seventh floor and would have identified such loose material as a falling material hazard. He concluded that a reasonably prudent examiner would not only have examined the area at issue from the seventh floor portholes, but would have identified and corrected the hazard. *Id.* at 599.

In addition, the Judge determined that the violation was S&S and resulted from the operator's high negligence. The Judge found that Sunbelt was highly negligent because it failed to identify and correct a loose material hazard despite being informed by another operator, Roanoke, of potential hazards of falling material in the pre-heat tower. Specifically, the Judge noted that Roanoke had provided site-specific training to Davis, which alerted Davis to a potential hazard of falling material in the tower. The Judge assessed a penalty of $23,750. *Id.* at 601, 604-05, 608.

On appeal, Sunbelt challenges the Judge's conclusion that there was a violation, that the violation was S&S, and that it was the result of high negligence. Sunbelt also claims that it lacked notice that its examination of the working place at issue – the area of the fourth vessel above the seventh floor – needed to be adequate. In its subsequent reply brief, the operator claims for the first time that the Judge was not appointed in accordance with the Appointments Clause of the U.S. Constitution.

III.

Disposition

A. The Appointments Clause Issue Has Not Been Properly Raised Before the Commission on Review.

Judges deemed to be officers of the United States are subject to the Appointments Clause of the Constitution of the United States. U.S. Const. Art. II, § 2, cl. 2. In *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2053 (2018), the Supreme Court ruled that administrative law judges of the Securities and Exchange Commission were subject to the Appointments Clause because they were "inferior officers" of the United States. In *Jones Bros. Inc. v. Sec'y of Labor*, 898 F.3d 669, 679 (6th Cir. 2018), a decision rendered a month after *Lucia*, the Sixth Circuit concluded that administrative

law judges of this Commission are officers of the United States. As such, they are subject to the Appointments Clause and must be appointed by the President, a Court, or the Head of a Department. *Id.*

In its reply brief in this case, Sunbelt claimed for the first time that the Judge who presided over this case was not constitutionally appointed, as he had not been appointed by the President, a court, or the head of a department when he conducted the hearing in this matter in May 2017. Sunbelt Reply Br. at 10-13.

Sunbelt failed to raise the issue in its petition for discretionary review ("PDR"). If an issue is not raised before the Judge, the Mine Act allows a party to raise the issue before the Commission only if the party shows there is "good cause" to excuse its failure to raise the issue below. 30 U.S.C. § 823(d)(2)(A)(iii). Going further, however, the Mine Act limits the Commission's appellate authority to those issues that were raised in the PDR. Specifically, the Mine Act states that "if [a PDR is] granted, review [by the Commissioners] shall be limited to the questions raised by the petition." *Id.* Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g), reiterates that the scope of appellate review by the Commission is limited to issues which were raised in the PDR unless Commissioners decide to review additional issues on their own motion, pursuant to the rule.[10]

Contrary to Sunbelt's argument, our disposition of the Appointments Clause issue is fully consistent with the Sixth Circuit's decision in *Jones Bros.* In that case, the court concluded that the operator had forfeited the appointments clause issue because it had failed to properly raise the issue in its PDR. *Jones Bros*., 898 F.3d at 677-79. The operator had briefly mentioned the issue in a footnote in its PDR, but the court ruled that the footnote language was not sufficient to constitute a developed argument that could be acted upon by the Commission.

The court then addressed the question of whether the operator's forfeiture could be excused pursuant to section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), which allows appellate courts to excuse forfeiture "because of extraordinary circumstances." The court determined that because of confusion about whether the Commissioners could entertain this constitutional claim, it would excuse the forfeiture in that case under the "extraordinary circumstances" provision.

In contrast to the court in *Jones Bros.*, the Commission is bound to apply the twin requirements that the Commission may only consider an issue not raised before a Judge upon a showing of "good cause," and that the Commission may only review issues raised in the PDR. Second, the operator in *Jones Bros.,* unlike Sunbelt in this case, did raise the appointments clause issue in its PDR. Therefore, the Mine Act did not foreclose review. In short, *Jones Bros.* provides no support for Sunbelt's position.

[10] Applying this rule in *Central Sand and Gravel Co.,* 23 FMSHRC 250, 261 (Mar. 2001), the Commission declined to consider an issue which the petitioner did not raise in its PDR, even though the petitioner belatedly raised the issue in a subsequent appellate brief.

Here, Sunbelt did not raise the Appointments Clause issue in its PDR (or in its opening appellate brief). Only in its reply brief responding to the Secretary did Sunbelt raise the Appointments Clause issue. Furthermore, Sunbelt failed to ever address, in its reply brief or in subsequent oral argument, the statutory provision (30 U.S.C. § 823(d)(2)(A)(iii)) which limits the Commission's scope of review to issues raised in the PDR.

For the foregoing reasons, we decline to review the Appointments Clause issue.

B. The Judge Properly Held That The Area of the Vessel above the Seventh Floor Was a "Working Place."

The standard in question, 30 C.F.R. § 56.18002(a), provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health" (emphasis added). MSHA's regulations define a "working place" as any place in or about a mine "where work is being performed." 30 C.F.R. § 56.2.

The Judge found that the upper compartment of the fourth vessel above the adjacent seventh floor of the tower was a working place because the entire vessel was the working area, rendering the upper compartment part of the working area. In addition, the Judge noted that the area of the vessel above the seventh floor was directly above miners who were working between the sixth and seventh floors. 40 FMSHRC at 598. In contrast, Sunbelt claims that on the day in question, it planned to erect scaffolding to the top of the lower compartment of the fourth vessel and did not plan to work in the upper compartment.

The regulatory definition of "working place" in a surface metal and nonmetal mine is "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. It is undisputed that Tyler was a miner working in the lower compartment of the double-compartmented fourth vessel. PDR at 13-15. The thimble created a large opening between the lower and upper compartments of the vessel through which materials could fall. In fact, the very reason for the thimble was to allow passage of materials from the upper to the lower compartment. Therefore, the fourth vessel clearly constituted one integrated work site in which falling material from the upper compartment would threaten a miner below it within the vessel. Without a doubt, that entire vessel was a place where work was being performed.

Indeed, the Pre-Shift Hazard Assessment form, completed by Davis, indicated that the entire fourth vessel, not just a particular area in that vessel, constituted the "designated work area" on January 8. Gov't Ex. 6. Moreover, Davis testified that while standing on the sixth floor, he raised his head to look through the thimble at the top of the vessel above the seventh floor. Tr. 350-51. That was a natural act demonstrating that the upper compartment of the vessel was a working place. Given the opening from that area, there obviously was a danger of material falling though the thimble that required an examination of the upper compartment.

C. The Judge Correctly Concluded that the Operator Violated 30 C.F.R. § 56.18002(a).

In the Commission's earlier decision, the Commission found that under 30 C.F.R. § 56.18002(a), the operator must conduct "adequate" exams of any working place. 38 FMSHRC at 1625-29. The Commission further defined such adequate exams as those which would identify all hazards which a reasonably prudent examiner would recognize. In addition, the Commission concluded that Sunbelt had notice that 30 C.F.R. § 56.18002(a) contains an adequacy requirement, *i.e.*, that the reasonably prudent examiner test would be used to determine violations of the standard. 38 FMSHRC at 1627-28. The Commission's prior decision on this exact issue is the "law of the case." *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1311-12 (June 2016). Under the Commission's prior decision, the operator had notice of the adequacy requirement, for the reasons set forth in that decision.

On appeal, the operator argues that there was no violation because the Secretary conceded that the hazard in the working place at issue – the portion of the fourth vessel above the seventh floor — was "latent"[11] rather than "obvious" during Davis's examination and that an operator cannot be required to identify a latent hazard. However, it is unnecessary to resolve this issue because the Judge's finding of a violation is supported by substantial evidence even if the hazard was latent during Davis's exam.

Sunbelt's argument misapprehends the nature of the violation in this case. It is not necessary for the Secretary to prove that there was loose material that would have been noted by Davis in his examination. Rather, the Secretary need only prove that the examination was inadequate – that is, that a reasonably prudent examiner would have gone to the seventh floor and examined the vessel from those portholes.

The Judge predicated his determination that Sunbelt failed to conduct an adequate exam on "Sunbelt's . . . [failure] to identify conditions which a reasonably prudent and competent examiner would recognize as hazardous." 40 FMSHRC at 599. While substantial evidence supports the Judge's conclusion as to the *consequences* of the inadequate examination, he, too, misses the fundamental deficiency. It is a failure to *look*, not a failure to *see.* The operator's examiner must perform a complete examination of the entire working place. That required Davis to place himself in a position to identify hazards in the working place at issue – the upper compartment of the vessel above the adjacent seventh floor. In other words, Sunbelt needed to examine this working place from all vantage points a reasonable examiner would use, *i.e.*, all vantage points that were reasonably necessary for an examination of such area. In a nutshell, an adequate exam must include areas where a hazard might endanger miners – which here includes the area from which objects could fall on miners working below.

The Judge concluded that Sunbelt did not adequately examine the seventh floor walls and ceiling. *Id.* at 600. The Judge found that the portholes on the seventh floor were reasonably

[11] By "latent" the operator apparently meant that material that later fell could not have been discovered before the material fell. But there is no evidence to support this theory because neither Davis nor any other qualified person examined the area from the seventh floor portholes before the accident.

necessary vantage points because the sixth floor portholes provided an incomplete view of the working place at issue. *Id.* at 584. In turn, this factual determination was predicated on a credibility determination, where the Judge "discredited Davis's testimony that he could see any loose material hanging [in the upper compartment] from the sixth floor [portholes]." *Id.* at 604. We find no basis for overturning this credibility determination.[12]

The Judge's finding that the examination was not adequate is supported by his credibility determination, as well as by facts recounted in the decision.[13] First, the Judge noted that Davis examined the portion of the fourth vessel above the seventh floor while standing on the sixth floor approximately 20 to 30 feet below. Tr. 339; 40 FMSHRC at 580-84. Second, the Judge noted that there was no lighting system inside the vessel and that Davis did not use any portable light during his exam.[14] While some natural light came into the vessel through the portholes, artificial light was only installed following Davis' examination. Tr. 101-02, 371-72, 392; 40 FMSHRC at 580, 586.

The Judge discredited Davis's testimony that his view of the upper compartment of the vessel would be partially restricted if he looked through the seventh floor portholes.[15] However, it is unnecessary for us to discuss this credibility determination. As stated above, the Judge found that the sixth floor portholes provided an incomplete view of the working place at issue. Therefore, even if Davis's view from the seventh floor portholes was restricted, a reasonably prudent examiner would have used these portholes to further examine the working place rather than simply relying on the sixth floor portholes.

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[12] Credibility determinations "reside in the province of the administrative law judge's discretion, are subject to review only for abuse of that discretion, and cannot be overturned lightly." *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010) (citing *Buck Creek Coal Co.*, 52 F.3d 133, 135 (7th Cir. 1995)); *see also Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (Sept. 1992). When reviewing a Judge's credibility determination, we simply review whether his credibility determination was amply supported by factual evidence, not whether we would have made the same credibility determination as the Judge.

[13] The record contains evidence that another Sunbelt employee, Douglas Redmond, examined the fourth vessel before the shift began on the day of the accident. However, the operator does not appeal the Judge's decision to ignore the alleged working place exam of the upper compartment of the vessel conducted by Redmond. Therefore, there is no dispute in this appellate proceeding that Davis bore the responsibility to conduct Sunbelt's working place exam of the fourth vessel. 40 FMSHRC at 583, 596.

[14] The Judge credited Davis's testimony that during his exam there was first light at daybreak over Nichols' testimony suggesting that the working place would have been dark during Davis's exam. However, the Judge did not discuss the exact amount of light in the fourth vessel during Davis's exam. 40 FMSHRC at 583.

[15] Davis claimed that he could only see straight across through the seventh floor portholes. 40 FMSHRC at 584.

The inspector testified that he issued the citation for failure to perform an adequate workplace examination because:

> After surveying the area, and looking at the seventh floor, sixth floor, I determined that it would have been very easy for them to have went [sic] to the seventh floor as part of their inspection, since it was overhead of the sixth level.

Tr. 152, 40 FMSHRC at 593. The inspector added that "Anytime you are in that area, if there could possibly be a hazard overhead, then you should examine that." Tr. 154.

Roanoke and LVR employees examined the area at issue from the seventh floor portholes. As previously noted, during a walkthrough in early January, Jason Oedel, Roanoke's pyro supervisor (who was responsible for the pre-heat tower and kiln system), inspected every open porthole throughout the tower (although he was not performing or documenting any formal workplace examination at that time). He testified that he was looking "for any damage [that he] didn't know about, or work that needs to be replaced, and any type of buildup that we need to remove before contractors showed up on site." Tr. 264; 40 FMSHRC at 579, 582. After this initial walkthrough, he testified that he conducted an additional walkthrough of each floor of the tower with construction supervisor Gary Snyder from LVR, and that Roanoke and LVR inspected each level of the pre-heat tower, including the seventh floor, by looking through the exterior doors for loose refractory and build-up. 40 FMSHRC at 582. The Judge also pointed out that right after the accident, Oedel and Gary Snyder from LVR went to the seventh floor to look at the area above where the miners had been working. Tr. 271. When they looked at the upper compartment of the vessel through the seventh floor portholes, they saw buildup. 40 FMSHRC at 598.

Moreover, the Judge found, and the operator does not dispute, that the seventh floor portholes were reasonably accessible to Davis on February 8. *Id.* at 600. Rather, Davis claims that he did not look through the seventh floor portholes simply because none of the miners would be physically standing or walking in the area of the vessel above the seventh floor.

We respectfully disagree with the Chairman's dissenting/concurring analysis of the examination standard at issue. As previously stated, the standard requires that "a competent person . . . shall examine each working place . . . for conditions which *may* adversely affect safety or health." The standard thus mandates that an operator conduct an examination (which the Commission has interpreted as an "adequate" examination) for *potential* hazards. To prove a violation, therefore, the Secretary need only show that this adequate examination was not conducted. Nothing in the language of the standard requires a showing that the Secretary present evidence of hazards missed by the examiner. But this is exactly what the Chairman's dissent/concurrence would require as he emphasizes that "the focus should hone in on what was loose, or fractured, or on the point of material failure at the time of the examination." Slip op. at 22. This approach would eviscerate the protective purpose of examinations, and jeopardize miner safety.

For example, what if a Sunbelt examiner failed to look into the sixth floor portholes (which no one disputes is required for an adequate examination here), but the evidence at trial revealed that no hazards had existed in the vessel? Clearly, the operator is liable for a failure to examine a working place "for conditions which may adversely affect safety and health." *Manalapan Mining Co.*, 18 FMSHRC 1375, 1396 (Aug. 1996) ("[T]he determination of risk to be accorded to a failure to conduct the pre-shift exam should not turn on the fortuitous circumstance that the unexamined area did not contain the hazardous conditions the exam was designed to detect") (opinion of Chairman Jordan and Commissioner Marks); *Jim Walter Res., Inc.*, 28 FMSHRC 579, 604 (Aug. 2006) ("because pre-shift examinations have a prophylactic purpose and because certain mine conditions are transitory in nature, later examinations are not sufficiently indicative of the conditions that may have existed at the time the area should have been examined").

The Chairman's dissent/concurrence asserts that the Secretary is imposing a "presumption . . . that something could have been seen from the seventh floor that would have indicated the presence of a hazard." Slip op. at 22. This is incorrect. We do not know what a competent examiner would have seen from the seventh floor before the accident occurred, because Davis did not view the tower from that perspective – as we hold a reasonably prudent, competent person should have done. But, more significantly, the conditions that might subsequently have been discovered are not relevant to the inquiry of whether an adequate examination was conducted in the first place.

The Chairman's dissent/concurrence also relies repeatedly on Davis's assertion that he could see to the top of the vessel, beyond the seventh floor, from port holes on the sixth floor. Slip op. at 20. This ignores the fact that the Judge explicitly rejected this testimony ("I do not credit Davis's testimony that he could see any loose material hanging from the sixth floor [portholes] and that he could only see straight across from the portholes on the seventh floor"). 40 FMSHRC at 584.

Finally, our dissenting/concurring colleague's reliance on *Asarco, Inc.,* 14 FMSHRC 941 (June 1992), is misplaced. In *Asarco*, which involved a roof examination, the examiners testified that they had looked at the relevant area, and the Secretary did not dispute this assertion. The violation was based on the fact that a roof fall had occurred, rather than on evidence that an exam had not adequately been conducted. In contrast, Sunbelt's liability centers on its failure to examine a portion of the "working place" – the finding of violation is not based on the fact that an accident occurred.

The Judge's finding that the portholes on the seventh floor were a reasonably necessary and accessible vantage point is supported by substantial evidence. Therefore, we affirm the Judge's finding that Sunbelt violated the standard because Davis failed to act as a reasonably prudent examiner and did not perform an adequate examination.

D. The Judge Did Not Err in Finding that the Violation was S&S.

The Judge determined that the violation at issue was S&S. 40 FMSHRC at 603. The operator argues that because there was no violation, the Judge erred in finding that the violation was S&S. Crucially, the operator did not claim that any of the other elements of the S&S analysis were not met.

As set forth above, substantial evidence supports the Judge's finding of a violation, which was the only element of the S&S analysis challenged by the operator. Furthermore, the exhibits and the operator's own witnesses noted the potential hazard of falling material, and the standard requires the examination in order to identify such hazards. Finally, the serious injury that resulted from an identified hazard here demonstrates the significant potential for serious injury here. Therefore, the Judge's S&S determination should be affirmed.

E. The Judge Erred in Finding that the Violation was a Result of High Negligence.

The Judge found high negligence. The bases for his finding are that Sunbelt "ignored" site-specific training requiring it to inspect working places for falling material hazards and breached its duty to identify loose hanging material. 40 FMSHRC at 604-05.

The Judge below correctly stated that Commission Judges are not bound by the Secretary's characterizations and that in assessing negligence, a 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." 40 FMSHRC at 603 (citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015)). This is, of course, the same as the normal civil law definition of negligence. The Judge further correctly found that "the gravamen of high negligence is 'an aggravated lack of care that is more than ordinary negligence.' *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998))." 40 FMSHRC at 603.

The Judge found that Sunbelt demonstrated an "aggravated lack of care," asserting Sunbelt "ignored" site-specific training requiring it to inspect working places for falling material hazards and did not identify a buildup of materials on the inside of the upper compartment of the vessel. 40 FMSHRC at 605. We disagree. The record simply does not support the notion that Davis showed an aggravated lack of care, "ignored" the danger of falling material or that, had Davis gone to the seventh floor, he would have observed loose and hanging material.

While we accept that substantial evidence supports the Judge's decision that Sunbelt erred by Davis' failure to go to the seventh floor and therefore, was negligent, substantial evidence does not support the claim that Sunbelt "ignored" the hazards of falling material or would have found loose material if the Sunbelt inspectors had looked through the portholes on the seventh floor. The totality of the evidence shows a measure of respect for safety inconsistent with a finding of an aggravated lack of care.

Jason Oedel, the Safety Manager for Roanoke who at the time of the accident was the Pyro Manager in charge of the pre-heat tower, inspected the pre-heat tower twice before the day

of the accident. On the latter of those inspections, Gary Snyder, a manager for LVR, the subcontractor charged with cleaning the pre-heat tower, accompanied him. Oedel looked through portholes on the seventh floor. He clearly testified that he did not see any loose material that was in danger of falling. Tr. 260, 282, 294-95, 298, 308-09.

Oedel testified that the inside of the upper compartment appeared to be a monolith — that is, poured shotcrete over bricks used to form a consistent smooth surface near the bottom of the chamber. Oedel explained that before the accident, the interior material all "looked one color, one shape. It was completely smooth." Tr. 308. He further testified:

> Like I said, when we went through — well, I went through twice myself — neither did Gary Snyder — neither one of us saw that as a potential hazard, because we thought it was all part of the monolithic. We didn't know until after it had fractured that there was buildup on there.

Tr. 298.[16]

This testimony undercuts the view that going to the seventh floor certainly would have revealed problems. Further, these views are consistent with LVR Foreman Snyder's view. Davis testified that he went to Snyder the morning of the accident, which would have been after Snyder had examined the pre-heat tower with Oedel. According to Davis, "I always go to him in the mornings at 7:00 to meet with him about our next work area and what we are going to be doing. So I went to meet with him that morning, and ask him what areas would he like us to proceed with for our work. And he referred to stage four. And I asked him, had it been inspected by him, Roanoke Cement? Was it safe for us to go in? And he said, '[Y]es, everything is safe.' You can go ahead and proceed with your work." Tr. 343.

Snyder's answer did not relieve Sunbelt of the obligation to do an adequate pre-shift inspection. However, it does demonstrate that both LVR and Roanoke had inspected the stage four vessel and did not see any danger of material falling as the Judge simply speculates Davis would have found. Further, separate from the Judge's unfounded speculation of what Sunbelt would have seen through the seventh floor portholes, many acts by Sunbelt demonstrate that it did not engage in an aggravated lack of care or wholly fail to examine the upper compartment.[17]

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[16] The opinion notes that at one point during the hearing, Oedel testified that Sunbelt inspectors should have gone to the seventh floor. It does not note that Oedel separately testified that it was not necessary to go to the seventh floor. During a lengthy examination by the Judge himself, the Judge and Oedel had the following colloquy, "Q. Do you know whether he went to the seventh level? A. Me personally? Q. Yeah. A. No. Q. In your judgment, should he have done so? A. No." Tr. 313.

[17] It appears that the occurrence of a serious injury weighed heavily on the Judge's negligence consideration. The Judge said, "The opening statement, although it is not evidence in this Court, said a serious injury occurred, which is high negligence." Tr. 233.

Davis testified that he could see the upper compartment of the fourth vessel through the thimble. Indeed, he testified he had a better look at it from the sixth than the seventh floor. Although the Judge discredited the latter testimony, there is no doubt that Davis could see through the thimble to the upper compartment. Pictures taken by the MSHA inspector depict views of the upper compartment through the thimble. Indeed, photographs taken by the MSHA inspector from the sixth floor porthole through the thimble show an area that witnesses believed may have been the point from which material fell. Tr. 75-77, 91-92, 307. Clearly, because it is visible in the photograph, that area was visible from the sixth floor porthole and may have been part of the monolith referred to by Oedel.

Davis in fact testified that he believed he could see the area above better from the sixth level because of the inability to see parts of the upper compartment of the vessel from the seventh floor. Tr. 421. He also testified that there was sufficient light to conduct the examination. He had 26 years' experience conducting workplace examinations. Tr. 325. Indeed, Davis had conducted approximately 100 to 130 workplace examinations at the Roanoke cement plant.[18] When asked, Davis supplied a cogent reason for his examination from the sixth floor. He explained:

> And my thoughts was, looking from the sixth up through the seventh, I can see any loose material hanging from there, and also I could see the thimbl[e] from the inside and outside and the brick on the outside of the thimble.

Tr. 350-51.

We accept the Judge's decision on the violation but it is clearly not correct that Davis "ignored" safety. Indeed, although the absence of testimony by Foreman Douglas Redmond renders his participation immaterial to the adequacy of the investigation, he conducted a second inspection. Multiple inspections the same day show a concern for safety rather than a lack of care.

Moreover, even after Davis' examination did not disclose hazards, he had workers beat the sides of the vessel in an effort to dislodge any material he had not seen. This was not an aggravated lack of care and additionally undercuts the notion that Sunbelt was blindly cavalier about safety.

Further, two exhibits belie the Judge's notion that Sunbelt "ignored" overhead dangers. The Judge refers to Government Exhibit 6, a pre-shift hazard assessment given to Sunbelt by Roanoke. 40 FMSHRC at 604. The Judge fails to note, however, that it was Davis, the Sunbelt examiner, who filled out the report. Davis expressly included "loose objects falling" in his List of Potential Hazards. Thus, far from ignoring the hazard of falling materials as the Judge asserts, Sunbelt's examiner expressly noted it in writing for the crew. Separately, Respondent's Exhibit 10 is a Job Safety Analysis used by Sunbelt to provide for the safety of workers. Sunbelt

[18] Davis had worked at Roanoke for the past 13 years during which time he conducted 8 to 10 examinations each year. Tr. 335.

Foreman Redmond completed it and specifically noted the danger of falling material. Rather than ignoring task training by Roanoke, therefore, Sunbelt trained its own employees on the concern for falling material. It is simply incorrect to assert that Sunbelt "ignored" the concern of falling material because Davis later examined the upper compartment through a position he thought was appropriate.

Although an examiner should avail himself of every reasonably accessible perspective when examining for the type of hazards present here, the actions of this experienced safety inspector do not reflect aggravated misconduct. The steps Davis did take go significantly beyond the Judge's mischaracterization of the evidence as showing "a standard of care slightly surpassing not conducting the examination at all." 38 FMSHRC at 1625.

We therefore find that the violation here was a result of the operator's ordinary negligence.[19]

IV.

Conclusion

As discussed above, we affirm the Judge's finding of a violation on the ground that a reasonably prudent examiner would have used the seventh floor portholes to examine the portion of the fourth vessel above the seventh floor. We also affirm the Judge's finding that the violation was significant and substantial. However, we reverse the Judge's finding of high negligence and instead find that the violation was a result of ordinary negligence. Therefore, we remand this matter for a reassessment of the penalty.

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

/s/ William I. Althen
William I. Althen, Commissioner

[19] The Judge made a laudably thorough and independent penalty assessment in which he considered and evaluated the facts and circumstances in the context of his findings on the penalty criteria. Nonetheless, because a change in the degree of negligence is an important penalty consideration, we remand the case for reassessment of the penalty.

Commissioner Jordan, Concurring in Part and Dissenting in Part:

I join my colleagues, Commissioners Young and Althen, in declining to consider the Appointments Clause issue and in affirming the Judge's finding that the area at issue was a working place. I further join them in affirming the Judge's finding of a violation and the Judge's finding that the violation was S&S, for the reasons set forth in their opinion.

However, I respectfully disagree with their analysis of the negligence issue and subsequent reversal of the Judge's high negligence determination. Instead, I would affirm the Judge's ruling that the violation was the result of Sunbelt's high negligence. High negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Mach Mining*, *LLC,* 40 FMSHRC 1, 5 (Jan. 2018). Here, the Sunbelt supervisor, who was fully aware of the potential hazard of falling material, chose not to go up to the seventh level of the tower while conducting his examination. The supervisor's actions "involved[d] a conscious choice to take actions with knowledge of facts that would disclose to a reasonable foreman an unjustifiably high risk of potentially fatal injury to a miner." *Lehigh Anthracite Coal, LLC*, 40 FMSHRC 273, 283 (Apr. 2018) (holding that operator's conduct amounted to reckless disregard).

Substantial evidence supports the Judge's finding that Sunbelt knew that the nature of the work exposed miners to falling materials. 40 FMSHRC 573, 604 (Apr. 2018) (ALJ). The Judge noted that Roanoke had provided the Sunbelt supervisor and his crew with training instructing them to remain alert and check for overhead hazards. Roanoke had instructed the supervisor, as well as all contractors performing work inside the pre-heat tower that "[p]rior to vessel entry, *inspect vessel overhead* and remove any potential loose material" (emphasis added). Tr. 149-50, Tr. 288 (testimony of Roanoke safety manager), Tr. 384. In fact, Jason Oedel, a Roanoke supervisor responsible for the pre-heat tower, testified that material could fall due to the cooling of the tower. Tr. 276-77. Thus, Sunbelt was on notice that an adequate examination was especially important because of these possible overhead safety hazards. In addition, as previously noted, Davis' pre-shift hazard assessment documenting the exam at issue listed potential hazards of loose objects falling and dust. Gov't Ex. 6. Nonetheless, "Davis said he never thought of the area on the 7th level." 40 FMSHRC at 604.

A finding of high negligence is also supported by the fact that, when Roanoke and LVR personnel conducted an inspection, they inspected each level of the pre-heat tower, including the seventh floor. This indicates that going to the seventh floor was considered an integral part of the inspection process.

In short, the Judge here could reasonably conclude that the violation was due to high negligence, and his finding is supported by substantial evidence. *See, e.g.*, *Mach Mining*, 40 FMSHRC at 15 (affirming Judge's high negligence determination partly because an examiner conducted his inspection while driving on a travelway, and stating that "the operator should have at least ensured that a closer examination was made in areas more prone to accumulations, especially in light of what the operator acknowledged as an ongoing problem"); *Matney, employed by Knox Creek Coal Corp.*, 34 FMSHRC 777, 786 (Apr. 2012) (finding aggravated

conduct in a section 110(c) case[1] for failure to conduct an adequate pre-shift examination in part because the examiner observed the relevant area from 65 feet away and from behind equipment approximately 45 feet away).

For the foregoing reasons, the Judge's negligence ruling should be affirmed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

[1] Section 110(c) of the Mine Act, 30 U.S.C. § 820(c), provides for individual liability under certain circumstances.

Chairman Rajkovich, Dissenting on Part III C, D and Concurring on Part III A, B, and in Result Only, on the Issue of Negligence:

I join the majority with regard to the Appointments Clause and "working place" issues. I dissent with respect to whether a violation of the standard was established by the Secretary. Considering the split of opinion among my colleagues with respect to the issue of negligence, I find no support in the record warranting a label of "high negligence." Accordingly, and in order to form a majority on that issue, I concur in result only in the opinion of Commissioners Young and Althen.

A. <u>The Appointments Clause Issue was Waived by the Respondent and an Adequate Examination of the "Working Place" Includes the Area Above Both the Sixth and Seventh Floors of the Fourth Vessel</u>.

I join my colleagues in their rejection of the issue raised by the Respondent regarding the Appointments Clause of the Constitution. U.S. Const. Art. II, § 2, cl. 2. Our appellate proceedings are governed by section 113(d)(2)(A)(iii) of the Mine Act. *See* 30 U.S.C. § 823(d)(2)(A)(iii). Accordingly, Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g), mandates that the scope of appellate review is limited to issues that were raised in the Petition for Discretionary Review. Given that this particular issue did not debut until the Respondent's Reply Brief to the Commission, it is waived.

I also agree with the majority in their analysis of what constitutes a "working place" under these particular facts. Under 30 C.F.R. § 56.2, a "working place" is any place in or about a mine "where work is being performed." The complicating factor, in this instance, is that this particular structure is a multi-leveled facility with six vertically connected conical vessels, each chamber-like with offsets and approximately fifty feet tall. Regarding the examination at issue in this case, Sunbelt employee-examiner Kendrick Davis testified that he conducted a working place exam of the fourth vessel by standing on the sixth floor, looking through the sixth floor portholes, and raising his head to look at the top of the vessel beyond the seventh floor. 40 FMSHRC at 573, 583-84 (Apr. 2018) (ALJ).

As we unanimously found in the previous appeal of the Judge's summary decision in this case (38 FMSHRC 1619, 1626 (July 2016)), the examination standard[1] requires "adequate" working place exams in the sense that such exams must identify all hazards that a reasonably prudent examiner would identify. That is just plain common sense. Common sense also dictates that any examiner must look to the conditions around, below, and above to insure that any area is safe for work to be performed. Davis, by his own testimony, looked above the sixth floor level and therefore, defined the "working place" to include more than just the sixth floor. Accordingly,

[1] The standard provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." 30 C.F.R. § 56.18002(a).

the "working place" delineated by the majority as the fourth vessel, including the areas above the sixth and seventh floors, is proper in this case.[2]

B. <u>There was No Substantial Evidence of a Violation</u>.

I cannot agree, however, with the majority finding that there was a violation in this case. There was no substantial evidence of a violation of 30 C.F.R. § 56.18002(a) here.

1. <u>The Facts Show that there was an Adequate Examination</u>.

On or about December 30, 2012, Roanoke Cement Co., operator of the cement plant, which included this pre-heat tower, shut it down and conducted its last workplace examination of the area as part of the shutdown activities. Tr. 121-23. Once the tower began cooling, Roanoke employees commenced air-lancing through one-inch square portholes in an effort to blow down any "build-up" material. Tr. 108, 123-25, 259-60. Because of the intense heat, no one performing the air lancing could enter the tower at that time. Tr. 122.

On January 2, 2013, Sunbelt arrived on site and started preparing to construct the scaffolding inside the preheat tower. Gov't Ex. 3, at 4. Roanoke instructed Davis, as well as all contractors performing work inside the preheat tower, that "[p]rior to vessel entry inspect vessel overhead and remove any potential loose material." Gov't Ex. 7, at 3; Tr. 149-50, 288-92.

Davis[3] testified that he took the elevator to the sixth floor of the pre-heat tower, walked the floor looking for tripping hazards, and then visually inspected the interior of the vessel through the three port holes on the sixth floor, "looking for loose material, missing refractory, loose brick, loose thimbles - anything out of the ordinary." Tr. 348-49. Davis testified (credited by the Judge) that there was daylight when he performed his workplace examination. 40 FMSHRC at 583. Davis testified that he could see inside the vessel. Tr. 363. He testified that he could see all the way up to the ceiling of the seventh floor and could see the roof from the sixth floor up to the seventh. Tr. 349-50. Davis noted that the sixth floor port holes gave a better vantage point to examine the seventh since from the sixth floor, "you can see the under-roof of the sixth floor, and you can see the top roof of the seventh floor from the sixth." Tr. 349-50. As to this examination, Davis testified that he did not see any "hanging material" nor did he see "any hazard." Tr. 351.

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[2] While it would be optimum to establish defined boundaries of a "working place" for concentration of efforts on examination, a general rule is difficult to formulate for multi-leveled facilities like this one. However, again, common sense dictates that conditions around, below, and above must be examined to insure safety.

[3] Davis had 26 years of experience working with scaffolding, safety supervision, and workplace examinations (Tr. 324-25) and was trained to recognize potential hazards related to scaffold erection. Tr. 326-27, 329; R. Ex. 9. Davis testified that he had never received any reports of material falling inside the preheat tower, and never had an injury or accident on his crew. Tr. 335-37.

The Secretary presented one witness for testimony in his case-in-chief—MSHA Inspector David Nichols. Nichols testified that he had never been trained on how to look for hazards in a pre-heat tower. Tr. 180. He had never been trained on how to look for hazards in cyclones. *Id*. He had never performed any work in a cement plant. *Id*. He had never performed any work in a cyclone. *Id*. He had never performed any work related to scaffolding. *Id*. He did not know that the accident site was "stage four" of the unit.[4] Tr. 177. He had never seen the inside of the cyclone prior to the accident. Tr. 172. He had no evidence as to what the inside of the cyclone looked like prior to the accident. Tr. 179-80. Nichols did not know whether Davis could see all the way to the top of the vessel, above the seventh floor, from portholes on the sixth floor. Tr. 189. Nichols was not aware of any other employee ever being struck by falling material at the facility. Tr. 183. He did not find any issues with Sunbelt's training program nor the training of its personnel. Tr. 182-83.

Nichols began his investigation at the accident site *on the sixth level* and took a series of photographs through *those* port holes. Tr. 91. He testified that "[o]n the sixth floor, the concrete and everything *looks like the seventh*." Tr. 96 (emphasis added). He further noted that:

> There is no way to get inside at the seventh level. There was no floor. There was no scaffolding. There is nothing in there. There is an elbow. So I just basically reached in through the open door and took the pictures from my camera.

Tr. 111.

There was no evidence presented in the record of any direct concerns about conditions that needed to be immediately remedied during the course of Nichols' investigation. There was no evidence of any Section 107(a) Imminent Danger orders issued or even discussed. At the conclusion of his inspection on January 8th, Nichols was on a telephone call at which he was purported to have said, "*Well, I didn't find anything that Sunbelt did* wrong" (emphasis added). Tr. 380. This quotation was cited in the Judge's Decision (40 FMSHRC at 594) and never refuted at the hearing.

Two days later, on January 10th, Nichols issued the citation, which is the subject of this litigation, citing that Sunbelt "did not do an adequate work place exam in the area they were working as there were hanging material overhead" and that "the area above was never checked." Gov't Ex. 8. Yet, on cross-examination, Nichols did *not know*, for a fact, that the material hitting the victim actually *came from the seventh floor*, nor did he know how much the material actually weighed. Tr. 178-79, 191. He could not pick out the exact area from which anything fell. Tr. 206. More importantly, however, is that Nichols admitted that, regarding the "build-up" that he saw, *there was no way to tell when or if it would ever fall.* Tr. 179. That statement was never refuted at the hearing.

[4] Nichols did not know the height of the tower or the height of each stage. Tr. 183. Other than the dimensions of the porthole into which he peered, he took no measurements, at all, during his investigation. Tr. 186-87.

2. <u>The Secretary has Failed to Prove a Violation</u>.

The Secretary is required to prove a violation by a preponderance of the evidence. *See Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989). Regarding this evidentiary standard, we have stated: "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Here, the Secretary's burden was to persuade the Judge that it was more likely than not that an inadequate examination occurred through a combination of direct and circumstantial evidence. The Secretary has fallen far short.

The Secretary claims that the violation here is that Sunbelt's examiner should have gone to the seventh floor on his inspection. The presumption is that *something* could have been seen on the seventh floor that would have indicated the presence of a hazard. Therein lies the problem. The real question in this case is – *what should have been seen from the seventh floor?*

The Secretary's only witness could not identify *that* "*something*," nor could he say where it was. His own testimony was about the presence of "build-up." Yet, the presence of "build-up" was no secret in this situation. That was precisely what this entire operation was focused upon. The whole idea of this project was that some "build-up" was going to be removed, any needed repairs would be done to the "monolith," and damaged "refractory bricks" were going to be repaired.

Obviously, this examiner actually saw the build-up, and the monolith, and the refractory.[5] The examiner saw things that the following clean-up crew was charged to remedy. The purpose of the examination – what the examiner was really supposed to be looking for – was whether the area was safe enough to install the scaffolding so that the whole tower could be cleaned and/or repaired. Even Nichols, himself, admitted there was no way to tell when *or if* the build-up that he saw would *ever* fall.

By no means is the accident and serious injury here to be discounted. *Something* fell from *somewhere* and hit this miner. The prime focus should be to determine what happened and to take measures to insure that it does not happen again.[6] Further, the focus should hone in on what was loose, or fractured, or on the point of material failure at the time of the examination.

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[5] Both the monolith and refractory were part of the design and not excess build-up of material.

[6] Subsequent remedial measures (Tr. 124-25) were taken in the manner in which the removal/repair process proceeded post-accident. While this goes to the heart of making sure this situation does not occur again via another process, it still leaves unanswered as to what should have been seen on an examination.

That is the question that went unanswered here. That is the key cadre of evidence that is completely missing in this case.

To assert that something hit this miner, in and of itself, is not dispositive of an inadequate examination. In *Asarco, Inc.*, 14 FMSHRC 941 (June 1992) we concluded that:

> Neither the presence of loose materials, nor the fact that the roof fell, by themselves, indicate that the area was not properly examined. Roof conditions in a mine are dynamic; a miner can perform a thorough and competent examination as required by the standard and determine that the roof is secure and yet, at a later time, material can become loose and fall.

Id. at 946. In *Asarco*, an underground drill operator conducted an examination of his surroundings by making a "visual examination of the area and found no cracks, discoloration, loose ground, or fallen material on the floor." *Id*. at 942. That same operator was later found crushed under a slab that had fallen from the mine roof and he died of the injuries sustained. *Id*. at 943. An MSHA Inspector who arrived at the scene shortly after the incident concluded that the ground fall that killed the victim was unpredictable. *Id*. at 944. On the day after the accident, however, two MSHA investigators issued a citation charging Asarco with a violation of failure to examine and test for loose ground prior to the accident. *Id*. In *Asarco*, we stated:

> The Secretary introduced no evidence to show that the area was not examined before Norton started working there on the day of the accident. The only evidence that the roof was not examined is (a) the fact that part of the roof fell and (b) the testimony of MSHA inspectors that they observed some areas of loose roof in the heading at the time of the accident investigation.

Id. at 946.

In this case, there *was* evidence of an examination. Davis, the examiner, testified that he could see all the way up to the ceiling above the seventh floor and could see the roof from the sixth floor up to the seventh. Tr. 349-50. Nichols did not refute Davis' testimony that he could see all the way to the top of the seventh floor from portholes on the sixth floor. Tr. 189. The Secretary only asserts that Davis did not physically go to the seventh level. Unlike *Asarco,* the MSHA inspector, here, had no evidence or any way to tell when or if anything would ever fall.

No witnesses were specifically called to provide expert testimony in this case. No testifying witness pointed to any cracks anywhere in the structure to predict a failure. No witness pointed to any stress points. Regarding any differences in coloration, no witness testified as to what any such variations would mean regarding any imminent failure.

There was a spot on the inside wall speculated to be an area from which some material had fallen. Tr. 75-77, 91, 307. Given that the exhibit photo of that area was taken by Nichols

from the sixth floor, obviously this area was visible from the sixth floor. Even if that were the actual area from which this material had fallen, there is still no analysis of that spot. There was no expert testimony of the strength of material at that spot. There was no discussion of any cracking or stressing *seen* around that spot. To the point, there was no expert testimony to say, "this material was likely to fall and here's why it should have been seen on an examination."

3. <u>An Examiner must be given Specific Guidance On Where an Examination was Deficient and Why</u>.

As noted in the Preamble to the Mine Act:

> [T]here is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines.

30 U.S.C. § 801(c). A workplace examination is crucial to providing the most effective means and measures for assessing working conditions and practices. It is therefore imperative that an examiner be given thorough training on what conditions to observe. It is also imperative to give an examiner a thorough explanation of where his or her examination has been deficient. That is my concern with the majority opinion in this case. There is no guidance.

The examiner, here, is told only that he should have gone to the seventh floor of the tower – but he is not being told what, if anything, that he missed. What were any signs of material failure that he should have seen? What conditions of the "build-up" signaled imminent failure? What were any signs of loose monolithic structure? What indicated any break-down of the refractory bricks?

The investigating inspector actually went to the seventh floor, and purportedly looked directly at the seventh floor area from that vantage point. From that vantage point, looking straight into the seventh floor area, the inspector could not find the source of the falling material. He found nothing but the existence of build-up, monolith and refractory brick. At the time of these observations, Nichols gave no indication of anything that needed to be corrected immediately to prevent others from encountering hazards. The inspector's own conclusion, after direct visual inspection, was that there was no way to tell when or if it would ever fall. His initial unrefuted statement was that he did not find anything that Sunbelt did wrong. Tr. 380. We cannot blame the examiner for something no one else could find.

The Secretary has failed to prove a violation by a preponderance of the evidence. In fact, the evidence, as a whole, shows quite the opposite. There was no substantial evidence of a violation of 30 C.F.R. § 56.18002(a) and I would reverse the Judge's findings on that issue and respectfully dissent.

C. Alternatively, Even if There Was a Violation, it was Due to No More than Ordinary Negligence.

If my view had prevailed—that there was no violation—that would be the end of the matter. When there is not a finding of violation, the issue of negligence is never reached, as a finding on operator negligence is only necessary when the Commission assesses a penalty. *See* 30 U.S.C. § 820(i). My colleagues, however, have upheld the finding of violation, and both parties have raised important concerns regarding an operator's duty of care under section 56.18002(a). As noted earlier, I find nothing in the record to support the notion of an aggravated lack of care, warranting a label of "high negligence," and neither do Commissioners Althen and Young.

It defies logic that if a majority of Commissioners find no evidence of "high negligence" in this case, the ultimate decision would be a finding of "high negligence." Moreover, given my view that there was no violation, it would be wholly inconsistent for me to find that the record supports the notion of an aggravated lack of care, warranting a label of "high negligence."

In its Petition for Discretionary Review, Sunbelt specifically requested review on the finding of negligence. As an appellate body we are obligated to, whenever possible, fully vote on all issues presented, regardless of the resolution of underlying issues. In *Douglas v. Comm'r of Internal Revenue*, 322 U.S. 275, 287 (1944), the Supreme Court stated "[t]he members of this Court who join in the dissent do not reach this question but their position on other issues results in their voting for a reversal of the entire judgment of the" court below, thus determining the result of the appeal. More recently, however, in *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S. Ct. 2551, 2596, 2606 n.15 (2019), Justice Alito, concurring in part and dissenting in part, explained that "[a]lthough I would hold that the Secretary [of Commerce]'s decision is not reviewable under the [Administrative Procedure Act], in the alternative I would conclude that the decision survives review under the applicable standards. I join Parts IV–B and IV–C on that understanding," thus determining the outcome of those parts of the case.

With the other Commissioners having split on the issue of the degree of negligence that the Secretary established, my vote in the alternative is with Commissioners Althen and Young on the lower level of negligence. Contrary to my concurring colleague's opinion set forth below, *Douglas* and, most recently, *Dep't of Commerce* are precisely on point and consistent with my reasoning to reach this opinion. Following Justice Alito's lead, I dissent on Part III C, D and concur on Part III A, B, and in result only, on the issue of negligence.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

Commissioner Traynor, Concurring with Commissioner Jordan:

I join Commissioner Jordan's opinion in its entirety. However, I write separately to note the Commission in this case has not arrived at a valid majority necessary to reverse the Judge's negligence determination.

For the first time, a Commissioner attempts to cast two "votes" on a single issue. We arrived at a 2-2 split on the question of whether the operator's violation was the result of high or ordinary negligence, with a fifth dissenting Commissioner deciding no violation occurred and therefore the operator was not at all negligent. Unhappy as we all are with split decisions, my dissenting colleague purports to cast a second vote in an attempt to form a majority decision finding *de novo* that the record evidence compels the conclusion that the operator exhibited ordinary negligence. This second vote to find ordinary negligence is plainly inconsistent with his principal decision that the operator was not at all negligent.

And it is this inconsistency that prevents my dissenting colleague's decision that there was no negligence from counting toward a majority finding the operator was negligent. The cases he cites in support of his claim to a second vote are inapposite, as neither involves a jurist taking two inconsistent positions on a single issue.

In *Douglas v. Comm'r of Internal Revenue*, 322 U.S. 275 (1944), the Supreme Court took review of an Eighth Circuit decision affirming a tax agency's rule counting a capital depletion deduction as reportable income in four consolidated administrative tax cases. But in one of the four cases, the Eighth Circuit had reversed the tax agency's decision to exclude the depletion deduction from the income of a taxpayer who saw "no tax benefit" from the deduction due to a net negative income. *Douglas*, 134 F.2d 762, 766 (8th Cir. 1943). In disposing of the fourth case, the Court counted the votes of two dissenting Justices who had not reached the issue in dispute – but had voted to reverse the Eight Circuit's decision in its entirety – as votes to reverse as to the fourth case.[1]

The Supreme Court more recently counted a dissenting Justice's view to form a majority on which the other Justices were split. *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551 (2019). In *Dep't of Commerce*, the dissenting Justice's decision that a regulation was

[1] More specifically, in *Douglas*, the Supreme Court voted 6-2 to affirm the Court of Appeals decision approving the depletion deduction rule, with one Justice recused from the case. 322 U.S. at 281, 287, 291. But on the question presented in the fourth case, whether a taxpayer who received 'no tax benefit' must report the deduction, the Supreme Court split. The two Justices who dissented from the majority affirming the Court of Appeals' approval of the depletion deduction rule were counted with the vote of two other Justices who would reverse the Court of Appeals only on the agency's decision that the deduction should be excluded from income where the taxpayer sees "no tax benefit" due to negative net income. With four Justices on the other side of the "no tax benefit" issue, the Court arrived at a split 4-4 decision. In sum, the Court added two dissenting Justices' votes to reverse the Court of Appeals in its entirety with two other Justices' votes to reverse the Court of Appeals in the fourth case to arrive at a split decision affirming the fourth case.

not subject to judicial review was counted to form a majority reaching the same result in a consistent decision that the regulation survives judicial review. *Id.* at 2596, 2606 n.15.

In both of these cases, the decision of a dissenting jurist was incorporated by the majority as a vote that was consistent with the result of the dissent. But my dissenting colleague in this case seeks to have his decision that the operator was not negligent and therefore should pay no civil penalty counted toward a decision that the operator was in fact negligent and liable for a penalty. There is no coherent logic or precedent for resolving a split this way. Neither *Douglas* nor *Dep't of Commerce* is authority for the counterintuitive proposition that a dissenting jurist may be counted to form a majority position that is inconsistent with the decision he reached in dissent.

My dissenting colleague could have formed the majority he seeks. Jurists who would prefer to dissent often nevertheless file a "reluctant concurrence" to create a majority and avoid a split decision while nevertheless expressing their disagreement with that majority decision. *See e.g.*, *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 354 (1974) (Blackmun, J., concurring) ("If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount"). Had he filed a "reluctant concurrence" with the opinion of Commissioners Althen and Young, my dissenting colleague would have been able to set forth in that opinion every one of the views he expresses in dissent. And there would be no cause to question the existence of a valid majority on the issue of negligence, which I reluctantly must.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

January 29, 2020

ROBERT THOMAS	
v.	Docket No. WEST 2018-402-DM
CALPORTLAND COMPANY	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). It involves a complaint filed by miner Robert Thomas alleging that CalPortland Company ("CalPort") discriminated against him in violation of the Mine Act.[1] After a Commission Administrative Law Judge found that CalPort discriminated against Thomas, CalPort filed a petition for discretionary review challenging the Judge's decision on the ground that the miner had failed to establish a prima facie case of discrimination.

For the reasons discussed below, we hold that the Judge erred in concluding that Thomas established a prima facie case of discrimination. Accordingly, we reverse the Judge's decision and dismiss this case.

[1] The Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter . . . .

30 U.S.C. § 815(c)(1).

I.

Factual and Procedural Background

A. Factual Summary

The Sanderling Dredge is a surface sand mine located in Vancouver, Washington. CalPort is the owner and operator of the dredge and is a mine operator subject to the jurisdiction of the Mine Act. Robert Thomas worked for CalPort in Oregon and Washington from March 2002, through the beginning of 2018. At the beginning of 2018, Thomas worked as a dredge operator on the Sanderling dredge with deckhand Joel McMillan and Roger Ison, a contractor and captain of the Johnny Peterson tugboat. The Johnny Peterson pulls the Sanderling Dredge up and down the Columbia River between Vancouver, Washington, and Scappoose, Oregon. The Dredge requires two miners to operate it, and one person to operate the tugboat. Thomas was the most senior of the two dredge miners and was designated the Person in Charge ("PIC").[2] Tr. 40, 289; 40 FMSHRC 1503, 1504 (Dec. 2018) (ALJ).

At the beginning of 2017, when the mine changed from two shifts to a single day shift, the miners on the Sanderling Dredge began working long hours, sometimes around 80 hours per week. 40 FMSHRC at 1504. In July 2017, Dean Demers took over the job as Marine Manager, which gave him management authority over four sand and gravel barges, as well as the Sanderling Dredge. The barges under Demers' management are subject to the jurisdiction of the Occupational Safety and Health Administration ("OSHA") and the Sanderling Dredge is subject to the jurisdiction of the Mine Safety and Health Administration ("MSHA").

1. Thomas' Concerns and the Phone Call Hang-up

Thomas and McMillan grew concerned that working so many hours had resulted in them being exhausted, which caused difficulty in paying attention while working with equipment. The two men eventually voiced their concerns to Demers and asked for help to avoid the long days and safety concerns. *Id*. Thomas had expressed his concerns to Demers as recently as November 2017. Tr. 118-20; 40 FMSHRC at 1504. Demers responded that he "was working on it" and subsequently brought in personnel from the rock barges to work some of the shifts. This alleviated the problem of long hours for Thomas. Tr. 120-21.

Thomas also believed that the barge workers were not receiving adequate task training to safely perform their work on the Dredge. Tr. 121-22. When asked by Demers to sign the task training sheets of the barge workers, Thomas refused, responding that the barge workers were not being properly trained in his view.[3] Tr. 122.

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[2] 30 C.F.R. § 56.18009 requires that: "When persons are working at the mine, a competent person designated by the mine operator shall be in attendance to take charge in case of an emergency."

[3] Generally, Demers signed off on task training records as the "person responsible for health and safety training," while Thomas or McMillan were the competent persons conducting the training. Tr. 414-16.

In November 2017, Thomas called Demers saying that he would not be coming into work the following day and would be taking a sick day. Tr. 123-24. A disagreement ensued and Thomas abruptly hung up the phone on Demers. Tr. 47-48, 123-24, 371, 445. McMillan testified that the next day Demers said to him that "after the way Rob talked to him on the phone that Rob Thomas was done, he was f****** done at CalPortland." Tr. 48, 88. Thereafter, Thomas met with Demers and Candy Strickland in CalPort's Human Resources Department ("HR") to resolve the incident, which included discussing protocol, the proper way to call out sick, and how to communicate with your manager and peers in a professional manner. Tr. 445. CalPort did not discipline Thomas for this incident, and Thomas testified at the hearing that after the meeting "everything was fine." Tr. 202.

2. The Personal Flotation Device Incident and Suspension

At the end of the shift on January 24, 2018, the Sanderling Dredge was traveling downriver on its return to the dock in Vancouver. Thomas and McMillan were changing out a valve above deck on the dredge, which sits 14 feet above the waterline. Thomas stood on the ladder to help lower the valve down from its position. He and McMillan testified that they were both wearing their personal flotation devices ("PFDs") during the change out. McMillan then climbed up on the ladder in order to weld the studs while Thomas went to perform another task. As McMillan was welding, Thomas removed his PFD and hung it outside of the lever room, then walked over to the welding table, in the middle of the barge, to use the cutting torch.

At some point, McMillan had to pause his work and go over to the tugboat to help Ison with a transmission problem. He was gone for about 30 minutes during which he did not see Thomas working. As McMillan was returning to the dredge, and as Thomas had just completed cutting and was putting his PFD back on, they noticed MSHA Inspector Mathew Johnson standing on the dock. Tr. 51-57, 61, 124-25, 131-34; 40 FMSHRC at 1505.

As the dredge neared the dock, Inspector Johnson called out and asked if it was company policy to *not* wear a PFD. Thomas responded that CalPort's policy requires miners to wear PFDs. Once in port, Thomas admitted to Inspector Johnson that he had not worn his PFD while operating the cutting torch at the welding table. Thomas then called Demers, who was working at a different location, to explain what had happened and then handed the phone to Inspector Johnson. After speaking with Demers, Inspector Johnson completed his inspection of the dredge and issued a citation to CalPort for Thomas' failure to wear a safety device or to be tied off while working on the open portion of a dredge.[4] 40 FMSHRC at 1506. The inspector determined that Thomas engaged in aggravated conduct. He deemed the action an unwarrantable failure and a significant and substantial violation that could reasonably likely result in a fatality.[5]

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[4] 30 C.F.R. § 56.15020 states that: "Life jackets or belts shall be worn where there is danger from falling into water."

[5] McMillan also testified that Johnson told Thomas that he could be cited personally for the violation and that it could be a fireable offense, although unlikely, given Thomas' history of having no safety violations. Tr. 62.

The next day, Thomas told Demers that he was not on the ladder without his PFD.[6] Tr. 139. Inspector Johnson returned that day and met with Demers to discuss the previous day's violation. Demers called Thomas to join them. Thomas and Inspector Johnson disagreed about whether Thomas was on the ladder without his PFD. Tr. 141, 380-81. After Inspector Johnson left, Thomas returned to the tugboat to help McMillan, and Demers called David McAuley, CalPort's Regional Operations General Manager, to discuss the matter. Based on the differing versions of events by Inspector Johnson and Thomas, McAuley and Demers decided to suspend Thomas, without pay, pending further investigation. Having decided to suspend Thomas, Demers called the dock and instructed McMillan not to let Thomas go because he needed to come down to "get rid of him." Tr. 67.

During the course of Thomas' career at Calport, the record reflects that he had been involved in a previous disciplinary incident in 2012. He received a verbal warning, as well as a three-day suspension for violating company work rules after it was determined that he lied to government and CalPort officials during an investigation. Decl. of Erik M. Laiho, Ex. L at 1; Tr. 203-04.

3. The Draft Disciplinary Recommendation and Premature E-mail

Demers returned to the Dredge to notify Thomas that he was suspended pending an investigation. Tr. 142, 179, 180, 182-83. Thomas gathered his things and punched out for the day. The next morning, Demers contacted Thomas and asked him to provide a written statement about the incident that led to the citation. Thomas prepared and emailed his statement to Demers two days later. Tr. 142; Thomas Ex. 19. On Saturday, January 27, Demers called Thomas and asked him to come to the office on Monday, January 29, at 8:00 a.m.

When Thomas arrived that Monday, he met with Demers and Safety Manager Jeff Woods. Demers read the narrative portion of the MSHA citation aloud to Thomas. Thomas disagreed with the inspector's statement, proclaiming that: "This whole thing is nothing but a sham[]. . . . It's completely false." Tr. 145, 386. Woods asked Thomas if it was common practice for Thomas to not wear his PFD. Thomas refused to answer the question saying that he did not believe they would listen to him and he did not want to "incriminate [him]self." Tr. 145, 385-86, 438. While at the meeting, Thomas was asked to fill out an employee incident report and to submit a lengthier statement, which he completed at home and emailed to Demers that afternoon. McMillan also completed an employee incident report that same day.

Following the meeting with Thomas, Demers met with McAuley and Strickland to discuss the matter further. McAuley asked Demers to work with Strickland to prepare a draft disciplinary recommendation. Demers sent the first draft of his recommendation in an email to Strickland entitled "Wordsmith Please" the same day. Tr. 306-07, 387, 443, 448; CPC Ex. N at 1. On January 30, Strickland, Demers, and McAuley participated in a meeting with upper management to brief them on the situation with Thomas. Demers was asked to set up another meeting with Thomas for 11:00 a.m. the next day, which he did.

[6] McMillan's position on whether or not Thomas was on the ladder without his PFD was inconsistent. Thomas Ex. 5; Tr. 54-55, 82-83.

After the management meeting, Demers sent a second draft of his recommendation to Strickland in an email entitled "Wordsmith Take II," attaching an unsigned and undated draft corrective action form. CPC Ex. N at 2-7. The form contained Demers' recommendation to discharge Thomas based on Thomas' violation of the PFD rule, his lack of cooperation with the company investigation, and his perceived lack of candor.[7] CPC Ex. N at 4-5. Mistakenly, Demers' had also sent the same email to the barge scheduling list, which included Thomas, other employees of CalPort, and contractors. Demers attempted to recall the email immediately. He then sent a follow-up email, which stated "Please delete last e-mail it was sent by mistake." Tr. 389-93; CPC Ex. N at 8. He also contacted McAuley and Strickland to let them know what had happened.[8]

4. <u>The Engagement of Thomas' Attorney</u>

Around 6:30 a.m. the following morning, January 31, Thomas was preparing to go to the 11:00 a.m. meeting when he received a phone call from Ison, the tugboat captain, telling him to check his email. When Thomas checked, he saw the email from Demers containing the corrective action stating "that [he] was terminated effective immediately," and that the email had been sent to his co-workers and to contractors. Tr. 149; Thomas Exs. 1 and 2, 71; CPC. Ex. N at 4-6. Thomas notified his wife that he had been terminated and then texted Demers to let him know that he would not attend the 11:00 a.m. meeting. There is no evidence that Thomas told Demers that he had seen his termination email. That same afternoon, Thomas hired an attorney and directed his attorney to send a letter to Demers and CalPort about his intent to file a discrimination claim against them.[9] Tr. 155-56. CalPort witnesses testified that they did not receive anything from Thomas' counsel until February 13. Tr. 158, 191.

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[7] In part, the memorandum states:

> Your explanation of what took place does not match what others had to say. During the interview, you were asked 'if it was normal policy to take off your PFD to conduct hot work' and you refused to answer the question. During the interview, you were uncooperative and aggravated with the questioning. You also stated that you thought that the whole process was 'a sham.' However, you admit to being on deck conducting work underway without wearing a PFD. It is impossible to work on that valve without a ladder or something to stand on.

CPC Ex. N at 5.

[8] Demers thereafter received a written warning from McAuley for his mishandling of the sensitive email. Tr. 314-15; CPC Ex. O.

[9] Counsel for Thomas alleged that on February 2, 2018, he sent an email to Demers containing a letter notifying CalPort that Thomas was now being represented by an attorney. Demers testified that he did not receive the email until February 13 and that it did not have a letter attached. Tr. 157-160, 421-22.

The following morning, Thomas received a call from McAuley on his personal cell phone. With his stepdaughter present, and before hanging up, Thomas told McAuley that he should not be calling him on his personal phone, not to call him again, and to contact him by mail or contact his attorney.[10] Tr. 156-57, 186, 318-19, 452; CPC Ex. P. There is no evidence that the termination email was mentioned during the call. After speaking with Thomas, McAuley contacted Strickland the same day to discuss the situation, and they collectively determined that the matter was now one for HR to address. In light of Thomas' comments to McAuley and his failure to come in for the meeting, Strickland immediately began working on a letter advising Thomas that a failure to contact the company would result in his discharge.

5. The Voluntary Resignation

On February 2, Strickland was directed to begin processing a "voluntary resignation" for Thomas based on his actions foreshadowing violation of the company's attendance policy. CPC Ex. FF at 3. That same day, she drafted the letter to Thomas informing him that his continued silence would result in his voluntary resignation. That Monday, February 5, Strickland sent the letter to Thomas via standard mail and UPS, which stated that if Thomas did not contact HR by Thursday, February 8, "he will be considered to have voluntarily resigned." Tr. 456-57; CPC Ex. R. Thomas refused receipt of both copies of the letter and did not forward them on to his attorney. 40 FMSHRC at 1507-08.

On February 5 and 6, Demers spoke with MSHA Special Investigator Diane Watson who indicated that "she wasn't going to open a 101 case against Rob because she knew he had been terminated," and that he may be filing a "decimation" law suit.[11] Tr. 106-07, 403-05; Thomas Ex. 61. The following day, Demers called Watson back, in accordance with McAuley's instructions, to tell her that Thomas had not been "terminated."[12] On February 9, after Thomas did not respond to the letter of February 5, CalPort sent Thomas another letter, notifying him of his voluntary resignation.

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[10] McAuley testified that he did not recall hearing Thomas mention an attorney during that phone call. Tr. 319-20.

[11] While the Judge stated in her finding of facts that Watson said "discrimination" complaint, CalPort refutes the Judge's description and maintains that Watson said "defamation" complaint. Demers wrote "decimation" law suit in his notes. CPC PH Br. at 17-19; PDR at 22; CPC Op. Br. at 5, 17; Tr. 405-06; Ex. 61; 40 FMSHRC at 1508. The Judge did not resolve the discrepancy in her decision.

[12] The Judge inaccurately stated that "Demers told McAuley that Thomas thought he had been terminated *based on Demers' January 30 email*." 40 FMSHRC at 1508 (emphasis added). According to Demers' testimony, which is consistent with McAuley's, Demers simply stated that Watson said that she understood that Thomas had been terminated. Tr. 323-24, 404. Demers never stated that Thomas believed he was terminated based on Demers' action.

6. The Discrimination Complaint

Thomas filed his written discrimination complaint with MSHA on February 13, 2018, pursuant to section 105(c)(2) of the Act.[13] Tr. 206; Thomas Ex. 46; 40 FMSHRC at 1508-09. He did not request temporary reinstatement. His attorney reviewed the complaint before it was filed. Oral Arg. Tr. 63. On February 21, 2018, MSHA Investigator Watson emailed Demers to notify CalPort that Thomas had filed a section 105(c)(2) complaint. Two months later, on April 23, 2018, MSHA declined to pursue a discrimination case on Thomas' behalf. *See* Thomas Compl. Ex. 1. On May 23, 2018, Thomas filed a section 105(c)(3) complaint with the Commission, which was contested by CalPort on June 18, 2018.[14]

B. The Judge's Decision

After a hearing on the merits, the Judge issued a decision finding that CalPort had discriminated against Thomas in violation of the Mine Act and awarded Thomas back pay, lost benefits, and attorney's fees. 40 FMSHRC at 1517-18. The Judge found that Thomas engaged in four activities protected by the Act. First, she determined that Thomas' discussions with Inspector Johnson, beginning on January 24 arising from his unwarrantable failure to wear his PFD, were protected. Second, she found that he complained to Demers that he was tired from working so many hours, and that he could not concentrate, making it unsafe. Third, she found that Thomas expressed concern about the lack of task training for the rock barge employees. Lastly, she determined that Thomas let the mine know that he had hired an attorney and the mine was alerted that Thomas was filing this discrimination complaint with MSHA.[15] 40 FMSHRC at 1509.

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[13] 30 U.S.C. § 815(c)(2) states that: "Any miner . . . who believes that 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 alleging such discrimination. Upon receipt of such complaint, the Secretary . . . shall cause such investigation to be made as he deems appropriate."

[14] 30 U.S.C. § 815(c)(3) states that:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

[15] The Judge did not find the call between Thomas and Demers regarding sick leave to be protected activity.

The Judge also determined that there was adverse action against Thomas demonstrated by his suspension pending investigation, his termination under the company's voluntary resignation policy, and the accidental termination email sent out by Demers. In finding the elements of knowledge and timing most persuasive, she concluded that there was "sufficient circumstantial evidence to demonstrate a connection between Thomas' discharge and his protected activity." *Id*. at 1512.

II.

The Standard of Review

A. Substantial Evidence

When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Under the substantial evidence test, the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Sec'y on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996).

B. Prima Facie Case of Discrimination

The Commission has held that a complaint alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Jayson Turner v. Nat'l Cement Co*., 33 FMSHRC 1059, 1064 (May 2011); *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817-18 (Apr. 1981).

The Complainant bears the burden of establishing protected activity. *Pasula*, 2 FMSHRC at 2797-2800, *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *SOL on behalf of Riordan v. Knox Creek Coal Corp*., 38 FMSHRC 1914, 1920-21 (2016). "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).

In evaluating whether there exists a causal connection between the protected activity and the adverse action, the Commission has identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Id.* at 2510.

It is upon these standards that we find that the Judge erred in concluding that Thomas had established a prima facie case of discrimination.

III.
Disposition

Thomas failed to introduce any evidence that his suspension and eventual discharge were in any way motivated by protected activity. In fact, the available evidence strongly suggests that the adverse actions he experienced were direct results of his own unprotected and dangerous activity of failing to wear a PFD and his walking away from the operator's necessary investigation.

Citing *Hatfield v. Colquest Energy, Inc*., 13 FMSHRC 544 (Apr. 1991), the operator argued before the Judge and the Commission that Thomas' claim must be limited to the protected activities alleged in his initial section 105(c)(2) complaint because issues regarding his work hours, task training, and intent to file suit were not included in his section 105(c)(2) complaint, and thus, not investigated by MSHA. In *Hatfield*, the Commission held that a miner's section 105(c)(3) complaint could include any matter investigated by MSHA in response to the section 105(c)(2) complaint. *Id*. at 545-46. We need not address the operator's *Hatfield* objection. We do address those claims below only for the purpose of completeness and in case of appeal to show that even were we to consider activities beyond those arising out of Thomas' responding to the Inspector in January 2019, substantial evidence could not support a finding in Thomas' favor. Consequently, our discussion of those alleged activities does not portend any change in *Hatfield*. It only demonstrates that the evidence does not support the Judge's decision under any conceivable theory.

A. Cooperation with MSHA Inspection

The Judge found Thomas' cooperation with the MSHA inspection on January 24, to be protected. However, neither Thomas nor the Judge was able to identify any signs of hostility, circumstantial or direct, displayed by CalPort regarding Thomas' cooperation with MSHA Inspector Johnson. 40 FMSHRC at 1510-12. Instead, CalPort engaged in the necessary task of evaluating the circumstances resulting in issuance of an unwarrantable failure order.[16]

Thomas conceded at the hearing that the company did not display any animus or hostility towards his participation in the inspection. Tr. 208. Additionally, given Inspector Johnson's eyewitness account of Thomas' unsafe and violative conduct, the circumstances compelled Thomas' cooperation. There is no evidence that CalPort officials were upset with or suspended

[16] As to the factors set forth in *Chacon* that might demonstrate motivation, CalPort obviously learned almost immediately from the MSHA Inspector that Thomas had committed a violation by failing to comply with CalPort's PFD policy and acted, as it should, to investigate such wrongful misconduct. Such events, therefore, were necessarily close in time and do not indicate any discrimination.

him because of his necessary cooperation in MSHA's investigation. Clearly, their investigation and meetings with him arose out of, and only out of, his failure to wear a PFD.[17]

B. Complaints about Long Hours

The evidence does not support a finding of any adverse action motivated by the complaint over hours. The Judge did not consider Thomas' continued testimony where he explained that "he knew [Demers] had a lot on his plate. . . . [H]e was trying to man – take care of three barges, shorthanded, and taking care of a new item, the dredge, Sanderling." Tr. 120-21. Demers explained to McMillan that he had a stack of applications, that he was trying to find someone, and that several successful applicants made it through the hiring process but turned out to be uninsurable due to DUIs. Tr. 79. McMillan did not testify that he felt or saw animus towards his request.

Thomas was asked if he thought that Demers did anything to alleviate his concerns about the hours, and even Thomas testified: "Yes, he started bringing out the rock barge guys . . ." Tr. 121; *see also* Tr. 43-44. He further stated that Demers' solution to this complaint resolved the issue of excessive hours for him. Tr. 210. Thomas conceded that Demers' response to his request to work fewer hours was not one of animosity or hostility. Tr. 208-11. Contrary to the Judge's determination, there was more than ample evidence through Thomas' own words that Demers did not develop animus toward Thomas as a result of his complaint about the hours being worked.[18]

C. Complaint about Task Training

The Judge found that the barge workers worked under OSHA regulations, and that they required task-training and "an introduction to MSHA regulations." 40 FMSHRC at 1505. However, the record shows that while the barge workers may have required task training for the Dredge, CalPort's dredge and barge workers are all trained miners. Tr. 210, 229. CalPort's Corporate Safety Director Chad Blanchard testified, without contradiction, that its employees undergo MSHA new employment training during their new-hire orientation and are trained in waterborne safety and their discrimination rights. There is undisputed testimony that CalPort had its task training records inspected by MSHA in December 2017 and March 2018, with no

[17] Moreover, Thomas was well aware that company policy required his full participation with government investigations. In the 2012 incident, Thomas was disciplined for making false statements to government investigators and failing to cooperate with an investigation. He was specifically warned that such behavior could lead to termination in the future.

[18] The Judge relied on Demers' statement that "Rob Thomas is f---ing done." 40 FMSHRC at 1511. But this was not in response to the conversation involving hours. Rather, it resulted from a discussion of a sick day not found by the Judge to be protected activity. Moreover, the facts suggest the comment resulted from Thomas' insubordinate behavior of hanging up on Demers in the middle of the conversation on the prior day. There is no evidence to link that statement to any safety complaints. Finally, Thomas testified that after he and Demers discussed the telephone call "everything was fine." Tr. 202.

citations issued. Tr. 418; CPC Exs. DD, EE. There is no indication that MSHA found it improper that the person signing off on the task-training sheets was different from the "competent person" conducting the training.

There is no testimony or other evidence regarding Demers' response to Thomas' complaints about the lack of task training for the substitute miners. Obviously, there are many reasons unrelated to animus towards safety that might lead to not discussing Thomas' action, including, most likely, that Demers was not concerned by Thomas' refusal. Establishing discriminatory motivation as part of a complainant's prima facie case requires more than a lack of responsiveness to a miner's action. Again, it is most compelling that Thomas explicitly testified that he did not sense animus from Demers regarding his complaints, and he agreed that he did not believe anything MSHA-related motivated CalPort to take an adverse action against him. Tr. 205-08.

Moreover, McMillan made the same complaints and refused to sign task training sheets, just as Thomas. McMillan did not suffer any adverse action by Demers or any other CalPort official. *See Metz v. Carmeuse Lime*, 34 FMSHRC 1820, 1827 (Aug. 2012) (finding operator lacked animus against complainant's safety-related complaints where other employees complained of same safety issue and none of them experienced retaliation).

D. Notice of Legal Action

The first sign that Thomas was involving an attorney occurred on February 1, 2018, two days *after* Demers had already made his recommendation to terminate Thomas' employment on January 30, 2018. That was also six days *after* he was suspended pending investigation. Thus, any adverse action experienced by Thomas prior to February 1 cannot be attributed to Thomas' decision to involve his lawyer. According to the Judge's finding of fact, CalPort became aware of the discrimination complaint by February 6. 40 FMSHRC at 1509. That was four days *after* the decision was made to process Thomas as a voluntary resignation based on the company's last communication with Thomas about CalPort's attendance policy.

Thomas has not presented any evidence demonstrating that, after his February 1 statement that he was involving his lawyer, Demers, McAuley, Strickland, or any other CalPort official even knew of, let alone, harbored or directed any animus towards Thomas' decision to involve an attorney. Since February 1, Thomas had refused to communicate with his employer. Prior to issuing the voluntary resignation on February 9, CalPort made several attempts to reach Thomas to resolve the communication breakdown. He refused to communicate or even open his mail thereby choosing to forego the possibility of being retained as an employee.

Thus, there is insufficient evidence to support a finding that any animus resulted from Thomas' alleged protected activity. To the contrary, the evidence demonstrates that Thomas' suspension and then discharge arose from actions other than protected activity. These actions are, at least, the commission of an unwarrantable failure, his uncooperative and disrespectful conduct in a meeting with company personnel, and, ultimately, his ill-considered refusal to take or respond to calls and mail asking that he come to the office to discuss his situation.

III.

Conclusion

In conclusion, we hold that there is not substantial evidence in the record to establish that any protected activity by Thomas motivated the operator in any part to take any adverse action toward him. For the reasons set forth above, we reverse the Judge's finding of discrimination by CalPort and dismiss this case.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ William I. Althen
William I. Althen, Commissioner

Commissioners Jordan and Traynor, concurring:

We concur with the majority, but write separately to address more fully the Respondent's argument that our decision in *Hatfield v. Colquest Energy Inc.*, 13 FMSHRC 544 (Apr. 1991), precludes our Judges from considering evidence of certain protected activities when examining what motivated a properly pled adverse action.

Section 105(c) of the Mine Act provides to miners a full administrative investigation and evaluation of an allegation of discrimination, as well as the right to commence a private action before the Commission in the event that the Secretary's administrative evaluation results in a determination that there is not evidence that the provisions of section 105(c) were violated. Section 105(c)(2) provides that, upon receipt of a complaint of discrimination or interference, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission. . . . " 30 U.S.C. § 815(c)(2). Section 105(c)(3) of the Act provides that, if the Secretary determines he has not found evidence that a violation has occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Though section 105(c) contains no explicit restriction on the subjects a miner may include in the action he files on his own behalf, the structure of the subsection necessarily implies that an action a miner brings on his own behalf must be related to his initial complaint submitted for administrative investigation.

On occasion, we must determine whether a private action under section 105(c)(3) concerns matters that were first submitted for investigation and evaluation as required by section 105(c)(2). In *Hatfield*, an operator argued on interlocutory appeal that certain discrete allegations of protected activity a *pro se* miner included for the first time in his amended section 105(c)(3) complaint should be stricken for his failure to explicitly allege them in his initial administrative complaint. 13 FMSHRC at 544. We interpreted section 105(c) expansively to hold that a miner could allege in his private right of action any matter investigated by the Secretary, not merely those allegations explicitly alleged in the four corners of the administrative complaint. We therefore directed the Judge to determine whether protected activities alleged in the miner's amended complaint "were part of the matter that was investigated by the Secretary in connection with [the miner's] initial discrimination complaint to MSHA."[1] *Id*. at 546. Our decision

[1] Notably, the Secretary of Labor did not participate in the *Hatfield* case and had no opportunity to file an *amicus* brief as the Commission granted the operator's petition for interlocutory review, vacated the Judge's order, and remanded the proceeding without taking briefs. The Secretary has not had occasion to offer the agency's view as to how Mine Act provisions requiring him to investigate administrative complaints filed pursuant to section 105(c)(2) should be interpreted to accommodate his own investigatory role with the Congressional directive that we should "expansively" construe section 105(c) "to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 35-36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human

(continued…)

preserved and balanced both the Secretary's investigatory role and a miner's right to file and process a complaint of discrimination through a system intended for use by laypersons unfamiliar with the technical science of pleading.

The *Hatfield* decision served to shelter from summary decision those allegations advanced in a section 105(c)(3) private right of action that were not explicitly referenced in the section 105(c)(2) complaint submitted for investigation, but were investigated. *See, e.g., Saffell v. National Cement Co.,* 14 FMSHRC 1053, 1055 (June 1992) (ALJ); *Womack v. Graymont Western U.S. Inc.*, 25 FMSHRC 235, 248 (May 2003) (ALJ). Under *Hatfield*, a miner's lay explanation in an administrative complaint of why he or she "believes that he has been discharged, interfered with, or otherwise discriminated against," 30 U.S.C. § 815(c)(2), is not scrutinized like a formal pleading in order to preclude a miner from advancing a related allegation the Secretary investigated. We extended this approach to hold a section 105(c)(2) complaint filed by the Secretary on behalf of a miner could include any allegations addressed in the administrative investigation. *Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp*., 19 FMSHRC 1009, 1017 (June 1997).

Our approach in *Hatfield* and *Pontiki* was intended to preserve miners' rights to an administrative investigation and evaluation, while ensuring they are not denied their right to pursue a private section 105(c)(3) action for reasons unrelated to the merits of their claims. However, recent ALJ decisions applying *Hatfield* reveal miners are too frequently denied access to specific proof of the scope and content of the administrative investigation. *See, e.g., Willis v. Jeffrey Tyler for Heart of Nature (NV), LLC*, 2018 WL 2529561, Unpublished Order at 3 (May 11, 2018) (ALJ) (recounting Secretary's refusal to produce a transcript of the investigatory interview); *Justice v. Gateway Eagle Coal Co.*, 36 FMSHRC 2371 (Aug. 2014) (ALJ) (renewing motion to enforce a subpoena).[2] And sometimes a complainant has no access to facts about the scope of the administrative investigation because no adequate investigation was conducted. *See, e.g., Deuso v. Shelburne Limestone Corp.*, 41 FMSHRC 232, 242 (Apr. 2019) (ALJ); *Myers v. Freeport-McMoRan Morenci, Inc.*, 34 FMSHRC 1593 (July 2012) (ALJ). In these cases, *Hatfield* has been misapplied to the extent miners have been barred from advancing a case of discrimination solely because they are denied access to evidence delineating the scope of the Secretary's investigation of his or her protected activities, or denied an adequate investigation.

Our holding in *Hatfield* must not operate to prevent a miner complainant from identifying and offering instances of protected activity as evidence in support of a private action. *Hatfield* only precludes a miner from broadening his complaint to request relief for an *adverse action* that

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[1] (… continued)
Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). However, this is not surprising, given miners may only file a private action under section 105(c)(3) if and when the Secretary declines to pursue the complainant's case.

[2] MSHA should ensure its policies for responding to requests for information from section 105(c)(3) complainants do not thwart their ability to advance a claim on matters investigated by MSHA.

was neither pled in the initial administrative complaint or investigated by the Secretary after receipt of such complaint.

In the instant case, the only protected activity explicitly referenced in the administrative complaint filed in the wake of Thomas' suspension is his interaction with MSHA inspector Johnson at the dock. However, Thomas alleges in his section 105(c)(3) private action that his reports to his supervisor of inadequate training and excessive work hours are additional protected activities that also motivated, at least in part, his suspension and subsequent termination. These pleaded protected activities concern the adverse action raised in Thomas' administrative complaint. Importantly, Thomas did not seek additional or separate relief.

It is significant that the protected activities not referenced in Thomas' initial complaint but alleged in his private action are claimed to have motivated the same adverse action explicitly referenced in his initial complaint. The adverse action element of a discrimination case is a particularly helpful lens for understanding appropriate application of our *Hatfield* decision. A miner can be expected to be especially familiar with the facts establishing the adverse action prong of a discrimination case. He or she will be able to easily identify and explain in lay terms a termination, suspension, reassignment, threat, etc. These facts describing the adverse action are those a lay miner is most likely to identify as salient and necessary for inclusion in the initial filing explaining why he or she "believes that he has been discharged, interfered with, or otherwise discriminated against." 30 U.S.C. § 815(c)(2). By contrast, miners are comparatively less likely to specifically reference in their initial complaint other allegations critical to the evidentiary burden of establishing a discrimination case, such as protected activity and unlawful motivation, because their importance is only apparent to those familiar with the legal requirements of our *Pasula-Robinette* framework.[3] These are the types of facts an effective administrative investigation and evaluation is reasonably expected to uncover.[4]

Permitting a miner to plead other discrete instances of protected activity alleged to have motivated a properly pled and investigated adverse action does not interfere with or diminish the

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[3] *Sec'y on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817-18 (Apr. 1981).

[4] This point is echoed in both the majority and dissenting opinions accompanying our decision in *Hopkins County Coal, LLC*, 38 FMSHRC 1317 (June 2016), where the majority stated in footnote 11 of their opinion that "MSHA's initial interview with the miner can provide the investigator with much needed clarity regarding the allegations, and can possibly lead to the discovery of other violative conduct the miner did not know to allege or had trouble articulating in his charging complaint." The dissenters agreed, observing at footnote 2 of their opinion that "Miners may initially fail to assert in precise legal terms the elements of a discrimination claim in their written complaint. When, as here, a miner's complaint is facially invalid, MSHA is entitled to ask questions and investigate whether any facts asserted by the miner at that point might support a discrimination claim--that is, can the miner allege the elements of protected activity and adverse action because of such activity." *Id*. at 1339 n.2.

Secretary's ability to ensure every administrative complaint receives a full investigation. An investigator helping determine whether Thomas' administrative complaint makes out a case for relief would have had a reasonable opportunity to investigate whether Thomas had engaged in other protected activity – in addition to the interaction with the inspector - that could have possibly motivated his suspension and termination. Though the Secretary's evaluation of Thomas' administrative complaint determined there was not sufficient evidence to establish a violation, a reasonably diligent investigation would have thoroughly examined Thomas' participation in protected activity.

To resolve this case, we considered whether Thomas' putatively protected complaints about inadequate training and excessive work hours motivated in any way the same adverse action referenced in his administrative complaint - his suspension and ultimate termination.[5] Along with the majority, we find no proof that they did.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

[5] We do not address here whether these additional activities are the type that are protected under *Pasula-Robinette*.

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N
WASHINGTON, D.C. 20004

January 6, 2020

MARSHALL JUSTICE, Complainant, v. ROCKWELL MINING, LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEVA 2018-48-D PINE-CD-2016-07 Mine: Gateway Eagle Mine Mine ID 46-06618

DECISION

Appearances: Samuel B. Petsonk, Esq., Petsonk PLLC, Beckley, WV; for Marshall Justice, Complainant.

Jonathan R. Ellis, Esq., and Joseph U. Leonoro, Esq., Steptoe & Johnson PLLC, Charleston, WV; for Rockwell Mining, LLC, Respondent.

Before: Judge Paez

This long-pending discrimination proceeding is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3). Complainant Marshall Justice ("Complainant" or "Justice") filed his discrimination complaint with the Commission against Respondent Rockwell Mining, LLC ("Respondent" or "Rockwell") after the Mine Safety and Health Administration ("MSHA") investigated Justice's claims and the Secretary of Labor ("Secretary") declined to take action under section 105(c)(2) of the Mine Act.

This case examines four discrete incidents at an underground coal mine that the Complainant alleges constitute a claim of discrimination and three claims of interference under section 105(c) of the Mine Act. To prevail, the Complainant must prove his discrimination and interference claims by a preponderance of the evidence. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981). As the Commission observed, "[p]reponderance of the evidence" requires demonstrating that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

Having considered the testimony from Justice himself and Rockwell's five witnesses, as well as the pleadings, exhibits, post-hearing briefs, and reply briefs, I conclude that the Complainant has failed to prevail in his three interference claims. Additionally, although I determine the Complainant established a prima facie case in his discrimination claim, I conclude that Rockwell provided sufficient evidence to affirmatively defend itself, and thus the Complainant's discrimination claim also fails.

I. STATEMENT OF THE CASE

On July 20, 2016, Marshall Justice filed a discrimination complaint with MSHA using the agency's Form 2000-123 and naming Rockwell as the violator. (Compl., Ex. A.)[1] On September 14, 2017, MSHA notified Justice that the agency had investigated Justice's discrimination complaint and determined Rockwell had violated section 105(c) of the Mine Act. (Compl., Ex. C.) Thereafter, on October 3, 2017, the Secretary in Docket No. WEVA 2018-10-D filed a complaint with the Commission under section 105(c)(2) regarding Rockwell's specific failure to provide mine ventilation maps to Justice due to his status as a miner's representative. However, the Secretary in his section 105(c)(2) complaint did not pursue Justice's claims regarding an allegedly unsafe diesel scoop nor any other claims by Justice. (*See id*. at 1–5.)

On October 30, 2017, Justice filed his own complaint of discrimination with the Commission under section 105(c)(3) of the Mine Act, regarding the claims rejected by the Secretary. Justice attached to his section 105(c)(3) complaint copies of his MSHA Form 2000-123, his supplemental statement to MSHA with his timeline dated August 10, 2016, and MSHA's September 14, 2017, determination letter. (Compl., Exs. A, B, C.)

On December 4, 2017, then-Chief Administrative Law Judge Robert J. Lesnick assigned me this matter. On December 6, 2017, Rockwell filed a Motion to Dismiss, which I granted, in part, on January 31, 2018, with regard to the claim about interference with Justice's right as a miners' representative to obtain copies of ventilation maps, which I found duplicative of the section 105(c)(2) claim contained, and later disposed of, in Docket No. WEVA 2018-10-D.[2] The other claims survived Rockwell's motion. Thereafter, Rockwell filed its answer on February 13, 2018, per my request. On February 9, 2018, the parties filed a joint motion requesting that I set a hearing date in September, which I granted, setting the hearing for September 11–13, 2018. Thereafter, on August 13, 2018, I granted the parties' joint motion to continue the September 11–13, 2018 hearing, and set the hearing for January 23–25, 2019. Yet again, on December 21, 2018, the parties filed a Joint Request to Continue Hearing Date, whereby I set the hearing for May 14–15, 2019, in Charleston, West Virginia.

Prior to the hearing, on April 19, 2019, Rockwell filed a Motion for Summary Decision against which Justice filed his Opposition on April 26, 2019. Rockwell filed a Motion for Leave to File Reply on May 3, 2019, which I granted. I denied Rockwell's Motion for Summary Decision on May 8, 2019, because genuine issues of material fact remained. A full-day, extended hearing took place on May 14, 2019, in Charleston, West Virginia. Justice himself served as the only witness in the Complainant's case. For its case, Rockwell called mine superintendent

[1] In this decision the following abbreviations are used: Complaint ("Compl."); Transcript ("Tr. #"); Complainant Exhibit ("Ex. C–#"); Respondent Exhibit ("Ex. R–#"); Respondent's Motion for Summary Decision ("Resp't Mot. Summ. Dec."); Complainant's Post-Hearing Brief ("Compl't Br."); Respondent's Post-Hearing Brief ("Resp't Br."); Complainant's Reply Brief ("Compl't Reply"); and Respondent's Reply Brief ("Resp't Reply").

[2] The Secretary of Labor and Rockwell settled Docket No. WEVA 2018-10-D prior to hearing per my Decision Approving Settlement dated April 18, 2018.

Kermit "Rex" Osborne; evening shift foreman Harry Frank Javins; maintenance foreman William Luke Stepp; outby foreman and fireboss Rondal Gillispie; and regional human resource and labor relations manager Colin Milam. The parties filed their initial post-hearing briefs on July 10, 2019. On July 19, 2019, Rockwell filed a bankruptcy petition titled "Notice of Suggestion on Pendency of Bankruptcy for Blackhawk Mining LLC, et al. and Automatic Stay of Proceedings." On July 25, 2019, I issued my Order Staying Proceedings due to Respondent's Bankruptcy Filing.[3] On November 13, 2019, I lifted the Stay of Proceedings and ordered the parties to submit their pending reply briefs, which I received on December 2, 2019.

II. ISSUES

Complainant's pleadings were initially unclear regarding the scope of the claims Justice would pursue at hearing. On May 13, 2019, the eve of hearing, counsel for Rockwell e-mailed my law clerk, stating that the parties had agreed to limit the scope of the hearing to four issues. At hearing, counsel for Rockwell recited these issues and counsel for Justice agreed that these were the issues to be adjudicated. (Tr. 9:3–25.) Therefore, the four issues before the court are:

(1) Whether Rockwell interfered with Justice's right to make safety complaints about the use of a caged scoop for long-distance haulage by continuing to assign him to the caged scoop and discontinuing the use of the uncaged scoop Justice preferred;

(2) Whether Rockwell discriminated against Justice for making safety complaints by not selecting him to work during the "miners' vacation" of the first week of July 2016;

(3) Whether, on July 18, 2016, Rockwell interfered with Justice's attempt to make a complaint about a tire to an MSHA inspector; and

(4) Whether, on July 19, 2016, Rockwell interfered with Justice's right, as a miners' representative, to travel with an MSHA inspector on section 103(f) "walkarounds."

For the reasons set forth below, I dismiss Justice's complaint of discrimination and interference in its entirety.

III. FINDINGS OF FACT

Gateway Eagle Mine is a two-section coal mine located in Boone County, West Virginia. (Tr. 19:6–16, 220:15–17.) It is a union mine with a collective bargaining agreement ("CBA") between Rockwell and the United Mine Workers of America ("UMWA"). (Ex. R–2.) In 2012, Marshall Justice began a job as a coal miner at Farley Eagle Mine, operated by Patriot Coal Corporation's subsidiary Gateway Eagle Coal Company, LLC. (Resp't Mot. Summ. Decision, Ex. A.) He then worked for the same operator, Patriot Coal, at Gateway Eagle Mine from January 1, 2014, to October 25, 2015. (Resp't Mot. Summ. Decision, Ex. B.) He worked at the same mine for a subsidiary of Blackhawk Mining LLC while the mine was operated by Rockwell

[3] Under section 362(a) of the Bankruptcy Code, the filing of the petition with the Bankruptcy Court gives rise to an automatic stay, applicable to all entities, of the commencement or continuation of any judicial, administrative, or other action or proceeding against the debtors. Justice, and not the Secretary, brought this case under section 105(c)(3) of the Mine Act. Accordingly, I stayed these proceedings, as the parties had not yet submitted their reply briefs before the filing of the bankruptcy petition.

from October 26, 2015 through December 2015. (Resp't Mot. Summ. Decision, Ex. C.) Justice's last position at Gateway Eagle Mine was as a supply scoop operator from February 22, 2016, until his resignation on November 3, 2016. (Resp't Mot. Summ. Decision, Ex. RR.) During his employment at Gateway Eagle Mine, possibly in 2015 when Patriot owned the mine,[4] Justice filed internal complaints about one incident that took place on the road to work and about another incident that took place in the mine's changing room. (Tr. 113:8–114:7, 168:2–169:21, 250:22–251:8, 337:9–338:24.) Beginning on February 19, 2016, during training, Justice began to keep a journal where he would record events during his shifts at the Gateway Eagle Mine, as well as some personal thoughts interspersed with religious affirmations. (Exs. R–1, C–1.)

The main incidents surrounding the four claims in this proceeding took place during June and July of 2016.

A. Justice's Safety Complaint About the Caged Scoops

As a supply scoop operator or "supply man," Justice hauled supplies to the two coal-producing mine sections, sometimes using diesel scoops. (Tr. 20:2–8, 37:12–38:14.) Rockwell had three diesel scoops: #873, #874, and #882 (although #882 only came into service at the mine in July 2016 after #873 was taken out of service). (Tr. 87:20–88:4, 271:18–20, 276:6–24.) An approved safety cage enclosed scoop #874 and scoop #882 to protect its operators from a manufacturer-installed winch. (Tr. 26:6–7, 183:9–14.) Rockwell ordered miners, including Justice, to haul supplies between mine sections using the caged scoops. (Tr. 183:18–20.) Indeed, on Justice's first day on February 22, 2016, he operated the #874 caged scoop, and the next day hauled supplies to both section #1 and #2. (Ex. R–1.) Scoop #873 had no safety cage or winch, and Justice typically, though not exclusively, used scoop #873. (Tr. 25:1–10, 26:6–7, 276:6–21.) Justice preferred to use the #873 diesel scoop not only because of the visibility but because of the design of the equipment. As Justice explained, the #873 scoop was better designed for supply haulage due to an additional lever allowing the operator to raise the scoop like a forklift rather than the #874 scoop which required more maneuvering to raise the supplies to the appropriate height. (Tr. 68:6–70:2.)

On June 21, 2016, Rockwell assigned a contractor to operate uncaged scoop #873 to clear the intake and lifeline entries of rock material. (Tr. 42:8–21, 45:4–7, 179:2–25; Ex. C–1 at 139.) Justice had to use caged scoop #874 and complained to Rockwell that the cage on his scoop reduced his visibility and that, as a result, the cage posed a danger to the scoop operator and to others during long-distance haulage. (Tr. 44:8–45:15.) Justice made a "step-one" grievance with Gillispie, his direct supervisor, about the reassignment to the contractor of the scoop "that I run." (Tr. 42:12–21.) Justice complained that he should be allowed to use the #873 scoop because it

[4] Despite requests for clarification at hearing, the witnesses had only a vague recollection of when these incidents, which are not at issue in this decision, took place. (Tr. 250:22–251:8.) Regional human resource and labor relations manager Colin Milam investigated the changing room incident when Patriot Coal Corporation operated the mine. (Tr. 337:9–13.) This would place both the changing room and road incidents no later than October 2015 (Resp't Mot. Summ. Decision, Ex. B), at least seven to eight months, if not more, before the events at issue in this decision.

allowed an unobstructed view, unlike the #874 scoop which had a manufacturer-installed safety cage that Justice said obstructed his view. (Ex. C–1 at 139–140; Tr. 42:12–45:1.) Gillispie disagreed, so Justice then spoke to superintendent Osborne, who explained that the contractor's use of the #873 scoop was temporary due to a specific job of clearing the intake and lifeline entries of material, which took the contractor about two or three shifts to complete; so Justice used #874. (Tr. 45:2–15, 189:24–191:5, 193:6–10.) Justice believed his assignment to the caged scoop would last a short time so that uncaged scoop #873 would be returned "right back to me." (Tr. 45:2–15.) Indeed, the next day, June 22, Justice operated the #873 uncaged scoop, as well as on June 23 and 24. (Ex. C–1 at 140–42; Tr. 48:9–49:12.) On Monday, June 27, Justice operated the #874 caged scoop but returned to using the #873 uncaged scoop the following day on June 28. (Ex. C–1 at 143–44; Tr. 49:13–51:6.) Then, on June 29, 2016, Rockwell assigned Justice to operate the #874 caged scoop, whereby Justice learned that the #873 uncaged scoop was taken "out of service." (Ex. C–1 at 144; Tr. 64:11–65:21.)

On June 29, 2016, the date Justice learned that Rockwell was taking his preferred uncaged scoop out of commission (Tr. 64:15–65:4; Ex. C–1 at 144), Osborne poked Justice in the ribs and observed Justice loading supplies. (Tr. 66:2–9, 66:25–67:5.) In his journal, Justice characterized the poke in the ribs as a "Friendly Gest" (meaning friendly gesture). (Ex. C–1 at 145.) However, Justice also interpreted this interaction as a message that management could do whatever they liked, and Justice could not stop them. (Tr. 67:6–12.) On the following day, June 30, 2016, Gillispie told Justice that he did not like him—a statement Justice believed to be in reference to his complaint about being assigned to operate the caged scoops. (Tr. 71:9–72:4; Ex. C–1 at 145.) Following an unrelated safety complaint about air reversal on July 1, Justice had a conversation with Javins during which Justice felt Javins was telling him not to make safety complaints. (Tr. 74:14–77:2, 264:7–265:12; Ex. C–1 at 146.) Justice then went on vacation and returned on July 11, 2016. (Ex. C–1 at 146.)

Rockwell obtained the "new" #882 caged diesel scoop when Justice returned to work on July 11, 2016, and put it into service the next day on July 12. (Ex. C–1 at 148; Tr. 87:20–88:7.) Rather than repairing uncaged scoop #873, Rockwell retired #873 on July 13 by moving it into a weed patch to cannibalize it for parts, citing financial considerations. (Ex. C–1 at 149, C–5 at 3, C–8 at 3; Tr. 193:12–194:15.) When Justice realized the uncaged #873 scoop was being swapped out for the #882 caged scoop whereby he would have to operate a caged scoop at all times, Justice told management he would agree to operate the caged scoops over long distances only "at a protest," meaning under protest, which Justice contended was "the same as a refusal." (Tr. 148:16–149:10; Ex. C–1 at 153.) On July 18 and into August, the #874 scoop began to have problems, so Rockwell paid for repairs to the caged scoops. (Tr. 85:19–86:7, 117:8–118:12, 228:25–231:19; Ex. C–1 at 155.) Sometime after August 8, Rockwell took the white #874 scoop off the property for repairs and returned it to service on August 17. (Ex. C–1 at 179–90.)

Justice sent a complaint to MSHA, which investigated and declined to issue a citation about the scoop's cage. (Tr. 148:16–149:20.) Neither MSHA nor the West Virginia Office of Miners' Health, Safety, and Training ever cited the caged scoops for safety violations. (Tr. 287:24–288:8.) No miner other than Justice presented a safety complaint about the caged scoops. (Tr. 288:9–11.) Prior to June 21, 2016, Justice worked on more than a dozen occasions with the

#874 caged scoop over long distances, and on none of these occasions did Justice actually refuse to operate the scoop. (Tr. 130:19–131:11, 133:3–142:25; Exs. C–1, R–1.)

B. Justice Not Selected to Work During the "Miners' Vacation"

During the first full week of July 2016, known as the "miners' vacation," all miners at Gateway Eagle Mine took paid leave, except certain miners who would work and take their vacation at another time. This was an annual occurrence. (Tr. 336:4–337:5.) Given the kind of work the mine needed that week (Tr. 199:10–20), General Manager Joe Evans decided how many miners to use. (Tr. 200:2–13.) The miners who wanted to work during that week wrote their names on a sign-up sheet. (Ex. C–3.) Under the CBA, Rockwell then ranked volunteers by seniority and specialty, e.g., electrician certification. (Tr. 52:1–12.) In 2016, more miners volunteered to work during vacation than the mine required. (Tr. 52:21–12.) Compared to other years, the mine needed a smaller crew to do maintenance as Rockwell did not intend to mine coal. (Ex. C–5 at 5; Tr. 199:2–20.)

Justice, who lacks an electrician's certification, volunteered, and Rockwell did not select him, filling all necessary non-salary slots either with miners more senior to Justice or with certified electricians. (Ex. C–5 at 4–5; Tr. 52:2–22.) Justice grieved his non-selection with the union, as he had canceled his vacation plans in anticipation of working during the "miners' vacation" week. (Ex. R–2; Ex. C–1 at 144; Tr. 109:18–25, 333:6–12.) The UMWA eventually withdrew Justice's grievance on August 5, 2016, after the union and management determined Rockwell had not violated the CBA in assigning vacation work. (Tr. 333:1–335:13; Ex. R–2.) Because Justice did not work during the "miners' vacation," he was on paid leave along with those miners not scheduled to work that week, resulting in him not having flexible vacation days to use at another time of his choosing later that year. (Tr. 153:17–155:9.)

C. Justice's Safety Complaint About a Damaged Tire

On July 18, 2016, Justice spoke with MSHA Inspector Shawn Tishanel and brought to his attention a damaged tire on a piece of mobile equipment. (Ex. C–1 at 153–54.) Justice explained that for several days a "big chunk" was loose on the tire and would sling mud and material into his face as it rotated, requiring him to wear safety glasses. (Tr. 86:12–22.) Inspector Tishanel examined the tire but did not issue a citation because the wear on the tire fell below the regulatory threshold. (Tr. 83:21–85:1; Ex. C–1 at 154.) After Justice told Tishanel about the tire damage, outby foreman and fireboss Gillispie approached Justice and told him to haul a load of supplies to the producing section. (Tr. 84:8–13, 346:12–13; Ex. C–1 at 154.) Gillispie, before ordering Justice to haul supplies, asked him whether he wished to travel with Tishanel on the rest of the "walkaround"; Justice declined. (Tr. 311:3–6.) Justice denies Gillispie invited him. (Tr. 347:16–22.)

D. Justice Not Traveling with the MSHA Inspector on July 19, 2016

Miners' representatives may travel with MSHA inspectors on their inspections or "walkarounds," but, as a matter of law, the operator needs to compensate only one miners' representative during the "walkaround." The CBA between Rockwell and the UMWA designates the union-appointed miners' representative to receive compensation while traveling with the MSHA inspector. (Tr. 165:16–166:20, 202:18–204:22.) Other miners' representatives who choose to travel with the inspector do so without pay. Although Justice sought to be elected as a miners' representative by the union, the UMWA membership did not elect him to the position. (Tr. 165:16–166:14.) Yet two or more miners appointed Justice as a non-union miners' representative, and he accordingly could choose to travel with the inspector.[5] (Tr. 165:16–166:20.)

On July 19, 2016, Justice entered his supervisor's office to report his completion of a work task but also intending to indicate his availability to travel with MSHA Inspector Tishanel, who Justice observed in the mine office. (Ex. C–1 at 156–58.) While Justice sat in the office, management asked the union-appointed miners' representative, Moses Meade, to come to the surface and travel with Tishanel. (Tr. 91:8–92:19; Ex. C–1 at 157–58.) Rockwell customarily summoned the union-appointed miners' representative to travel with compensation. (Tr. 273:1–16; Exs. C–5 at 2–3, C–6 at 2–3.) Justice did not voice his request to travel with Tishanel. (Tr. 92:11–14.) Instead, he looked at superintendent Osborne hoping to communicate his wish to travel. (Tr. 92:15–17; Ex. C–1 at 157–58.) Outby foreman and fireboss Gillispie was in the office and ordered Justice to haul oil, and Justice complied. (Tr. 92:11–14; Ex. C–1 at 157.)

E. Justice Files a Section 105(c) Complaint with MSHA

The day after Justice visited his supervisor's office hoping to travel, on July 20, 2016, Justice filed a discrimination complaint with MSHA against Rockwell. (Compl., Ex. A.) On or around August 18, 2016,[6] Justice attended a post-inspection conference with Inspector Tishanel and Eugene Cook, a third-shift foreman. (Tr. 315:14–21; Ex. C–1 at 193–96.) Cook told Justice he was not welcome in the meeting, but Gillispie took Cook aside and told him that Justice, as a duly appointed miners' representative, had a right to attend. (Tr. 315:25–316:5; Ex. C–1 at 194–95.) Justice sat through the rest of the meeting without incident. (Ex. C–1 at 195.)

Upon receiving Justice's discrimination complaint, MSHA thereafter conducted an investigation with interviews of Rockwell employees, including maintenance foreman William Luke Stepp, superintendent Rex Osborne, and evening shift foreman Frank Javins. (Exs. C–5, C–6, C–7, C–8.) MSHA later determined it would prosecute Justice's complaint of not receiving ventilation maps from Rockwell as required, given his designation as a miner's representative.

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[5] Almost a year earlier on August 20, 2015, MSHA cited Rockwell for failing to list Justice as a miners' representative on its bulletin board (Ex. C–2; Tr. 205:15–21), even though Rockwell had listed him on previous occasions. (Tr. 205:22–206:14.) Following the citation, Rockwell reposted Justice's information on the mine bulletin board. (Ex. C–2.)

[6] Gillispie testified about this incident based on an entry from Justice's journal dated August 18, 2016. (Tr. 315:9–13.)

However, MSHA declined to take up Justice's other discrimination and interference claims involving operation of the caged scoop, his non-selection for work during the "miner's vacation" week, his damaged tire complaint to an MSHA inspector, or the events surrounding the MSHA inspection on July 19, 2016. MSHA completed its investigation and finally issued its determination letter on September 14, 2017.

IV. PRINCIPLES OF LAW

A. Initiating Section 105(c) Complaints

The Mine Act provides that, upon receipt of a complaint for discrimination or interference, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . ." 30 U.S.C. § 815(c)(2). Under section 105(c)(2), "[t]he complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing . . . ." *Id.*

Section 105(c)(3) of the Mine Act provides that if the Secretary determines no discriminatory violation occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). The written discrimination complaint filed with MSHA must contain specific allegations that MSHA has investigated and that the Secretary's has considered in a determination. *See Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991). The scope of the Secretary's *investigation*, rather than the initiating complaint, governs the permissible ambit of the complaint filed later with the Commission. *See Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997).

B. Establishing a Prima Facie Discrimination Case

Under section 105(c), mine operators cannot discriminate against miners for engaging in activity protected by the Mine Act. 30 U.S.C. § 815(c)(1). Under Commission precedent, complainants must establish a prima facie case for discrimination by demonstrating that the miner was: "(1) engaging in protected activity, and (2) subject to an adverse employment action that was at least partially motivated by his protected activity." *Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 318 (6th Cir. 2013) (citing *Pendley v. FMSHRC*, 601 F.3d 417, 423 (6th Cir. 2010)).

Section 105(c)(1) of the Mine Act states, in relevant part, that "[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by [the Mine Act]." 30 U.S.C. § 815(c)(1).

Under the traditional *Pasula-Robinette* framework, a complainant establishes a prima facie case of section 105(c) discrimination if the preponderance of the evidence proves that (1)

the complainant engaged in a protected activity, (2) there was adverse action, and (3) the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2799. The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that protected activity motived the adverse action in no part. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n. 20 (Apr. 1981). If the mine operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that the miner's unprotected activities also motivated the operator and it would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328–29; *Pasula*, 2 FMSHRC at 2799–800.

Under a discrimination claim, a miner has the right under section 105(c) of the Mine Act to refuse work if the miner has a good faith, reasonable belief in a hazardous condition. *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 177 (Feb. 2000). Furthermore, under a discrimination claim, the adverse action may be a constructive discharge, in which the operator has no conscious retaliatory motive but instead fails to reasonably remedy intolerable conditions, leading to the resignation of the miner who reported the conditions. *See id.* at 176 (citing *Simpson v. FMSHRC*, 842 F.2d 453, 461–63 (D.C. Cir. 1988)).

C. Establishing a Prima Facie Interference Case: *Franks* Test and *Pepin* Test

The Commission has not settled on the legal test for assessing claims of interference but has articulated two tests commonly referred to as the *Franks* test and *Pepin* test. *See Sec'y of Labor on behalf of Greathouse v. Monongalia Cty. Coal Co.*, 40 FMSHRC 679, 680–81 (June 2018). Several Commission Judges have applied the Secretary's two-prong (*Franks*) test, which establishes an interference claim when:

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Id. at 686 (Comm'rs Cohen & Jordan, separate op.) (quoting *UMWA on behalf of Franks and Hoy v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Chairman Jordan & Comm'r Nakamura, separate op.)). Commissioners Althen and Young would additionally require proof (*Pepin* test) that the person's action was motivated at least in part by the miner's protected activity. *Id*. at 711 (Acting Chairman Althen & Comm'r Young, separate op.) Some Commission Judges have come to refer to these tests as *Franks* (the Secretary's two-part test) and *Pepin* (requiring proof of operator motivation also). *See Sec'y of Labor on behalf of Pepin v. Empire Iron Mining P'ship*, 38 FMSHRC 1435, 1453–54 (June 2016) (ALJ) (articulating a test in which the Complainant has the burden to establish that the Respondent's actions were motivated by animus to the exercise of protected rights).

The Commission's line of section 105(c) interference cases demonstrates that successful claims concern tangible actions and clear communications by the operator and not vague implications requiring subtle inferences. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478–79 (Aug. 1982) (determining that the operator's coercive interrogation of a miner over the exercise of protected rights was interference because it could chill the exercise of rights); *Sec'y of Labor on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 10–12 (Jan. 2005) (determining that threats to a miner are more likely to be interference if they are coercive, isolating, and pertaining to a criminal investigation).

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

I now turn to the Complainant's individual claims. First, I will analyze the discrimination claim about Justice not working during the "miners' vacation" week. Second, I will examine the three interference claims. Of these, I will first analyze the interference claim about the caged scoop, then the interference claim about the damaged tire, and finally the interference claim about Justice not traveling with the inspector.

A. Whether Rockwell Engaged in Discrimination Under Section 105(c)

1. Protected Activity

Justice alleges that he engaged in protected activity through his safety complaints to MSHA inspectors as well as his "operation under protest" of caged scoops for long-distance haulage. (Compl't Br. 9.) Justice reported the alleged hazard of the cage on the scoop to MSHA, which investigated the use of the caged scoop for long-distance haulage and declined to issue a citation: the MSHA Inspector "didn't see no problem with it," Justice said. (Tr. 170:24–171:23.) Justice continued to inform Rockwell that he felt the caged scoop was dangerous because it obstructed his view, and that he operated the scoop only under protest. (Tr. 148:16–149:20.) Despite these actions by Justice, Rockwell counters that Justice did not engage in protected activity because Justice lacked a good-faith belief that the caged scoop was hazardous; Rockwell argues that Justice alleged a hazard as reprisal for Rockwell taking him off of uncaged diesel scoop #873, the scoop he preferred. (Resp't Br. 13–18.)

Under the Mine Act, a complaint about mine safety, made by the miner to the operator, is protected activity. 30 U.S.C. § 815(c)(1) ("[A] complaint under or related to this [Mine Act]," filed by a miner, his representative, or a job applicant is expressly protected under Section 105(c)); *see also, e.g.*, *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997) (holding that complainant's conversation with the mine landowner's representative, who was investigating conditions at the mine, was "protected, as it included complaints about unsafe equipment at the mine").

Justice unquestionably made safety complaints about the caged scoops. Indeed, both Rondal Gillispie and Rex Osborne listened to Justice's complaints about lack of visibility in the caged scoops and offered the advice of turning off his headlamp, which would reduce the glare, demonstrating Rockwell was aware of Justice's safety complaint at the time. (Tr. 217:13–19.)

Justice also expressed concerns that stacked supplies on the caged scoop impaired his vision, so Gillispie "had the supplies reloaded in such a manner as to not obstruct Justice's visibility." (Resp't Br. 19–20.) Though Justice told management that he considered the caged scoops unsafe, Justice never actually refused to operate those scoops. (Tr. 148:16–149:20.) The lack of refusal is, however, immaterial to this element. Justice raised safety issues with his employer and with MSHA. Consequently, I conclude that Justice has shown he engaged in protected activity. I turn now to the adverse action element.

2. Adverse Action

Justice argues that Rockwell took an adverse action against him by "prohibiting him from working through vacation and thus from earning additional bonus wages that he would have received for working during that period." (Compl't Br. 9.) Justice was frustrated that Rockwell "allowed others to work through vacation who had [fewer] qualifications than [him]." (*Id*.) Further, Justice pointed to the fact that miners who had never even signed the sheet were invited to work during vacation. (Tr. 58:4–7.) Finally, Justice considered it unfair that Rockwell waited until the "very last minute" to announce who would work during vacation. (Tr. 52:18–22.) Rockwell, however, noted that "[a]lthough nobody had ever guaranteed him or anyone else that signing the sheet would result in being selected to work over vacation, Justice . . . canceled his vacation plans." (Resp't Br. 22.)

Common forms of adverse action include discharge, suspension, and demotion. *See Pendley*, 34 FMSHRC at 1930. But the Mine Act protects miners against a broad range of adverse actions. *See id.* (noting that "section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against 'not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference . . . . '") (quoting *Moses*, 4 FMSHRC at 1478 (quoting S. Rep. 95-19 at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978))). Furthermore, an adverse action may be an omission on the part of the operator. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 (Aug. 1984) (determining that an adverse action is any "act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.")

To determine whether adverse action occurred, the Commission has adopted the test articulated by the United States Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). *See Pendley*, 34 FMSHRC at 1931–32. In that Title VII retaliation case, the United States Supreme Court held that the term "discriminate against" included employer actions against an employee that would be "materially adverse to a reasonable employee." *Burlington*, 548 U.S. at 57. "[T]he employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id*. Furthermore, the Court stated that analysis should look at actions from the perspective of a reasonable employee and that analysis should look at the particular circumstances of the case. *Id*. at 68–69. "[A]n act that would be immaterial in some situations is material in others." *Id*. at 69 (citations omitted). In adopting this test, the Commission recognized that "retaliatory action does not only affect the targeted miner, but other miners on whom it could have a chilling effect

regarding the reporting of safety hazards." *Pendley*, 34 FMSHRC at 1932. Nevertheless, an adverse action under *Burlington* cannot be simply "those petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington*, 548 U.S. at 68.

The standard for determining adverse action is objective but also depends on the particular circumstances of the case. Another miner, in a different situation, might have taken his non-selection on the chin and not have been reasonably dissuaded from filing a charge of discrimination. Yet it remains that the effect of Justice's non-selection was that he had to take his vacation during the "miners' vacation" week and could not use those vacation days at a time of his choosing later in the year. Indeed, Justice had canceled his vacation plans with his daughter, so he could work that week in July and plan a vacation with her later in the year. (Tr. 109:18–25, 153:24–154:4.) Because senior miners were granted priority during the decision-making process (Tr. 200:2–21), I determine that miners considered their selection for work during vacation to be desirable. When I consider a reasonable miner who made safety complaints to the operator shortly before learning of his non-selection for a desirable assignment (e.g., that would have allowed him more flexible vacation-day options later in the year), I determine that this miner could reasonably be dissuaded from raising safety complaints in the future. The non-selection of Justice for work during the "miners' vacation" week was therefore materially adverse and could chill a reasonable miner from making safety complaints, even though this non-selection is much less severe than discipline, lost wages, or termination. Weighing the evidence and circumstances, I conclude that Justice's non-selection for work during the "miners' vacation" week was an adverse action.

3. Motivation/Causal Connection

I now turn to the most crucial element in a prima facie discrimination case, the motivational nexus between the protected activity and adverse action. The Commission looks to four factors to determine whether a causal connection links the protected activity to the adverse action: "(1) the mine operator's knowledge of the protected activity; (2) the mine operator's hostility or 'animus' toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner." *Cumberland River Coal Co.*, 712 F.3d at 318; *see also Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–12 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I will examine these factors one by one.

a. Knowledge of Protected Activity

In its post-hearing briefs, Rockwell does not specifically deny knowledge of Justice's complaints about the safety of using a caged scoop for long-distance haulage. On June 21, 2016, the date Rockwell assigned uncaged diesel scoop #873 to the contractor, Justice initiated a step-one grievance under the CBA: "I step oned [Gillispie] over this," Justice wrote in his journal. (Ex. C–1 at 139; Tr. 42:8–43:18.) Gillispie was aware of Justice's complaint about using the caged scoop because Gillispie responded to Justice's concerns about the safety of the scoop by advising him to extinguish his cap light to reduce glare. (Tr. 44:16–45:1, 309:22–310:7.) Moreover, Justice then complained to Osborne about the #874 caged diesel scoop, and Osborne also gave Justice the same guidance as Gillispie regarding the cap light. (Tr. 188:22–189:17,

189:24–190:7, 190:21–191:8, 198:9–21; Ex. C–5 at 3–4.) Justice did not testify specifically that Rockwell was aware of the complaint he made to MSHA about the cage, but the inspector investigated the situation at the mine and declined to issue a citation. (Tr. 170:24–171:23.)

I therefore determine that Rockwell had knowledge of Justice's protected activities, given Gillispie and Osborne's discussions with Justice regarding his safety complaints about obstructed visibility in operating the #874 caged diesel scoop.

b. Animus Toward the Protected Activity

Operator animus ranges from minor actions, such as less desirable work schedules, all the way to the severe or criminal (physical assault). "The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Chacon, supra*, 3 FMSHRC at 2511. For this element, I will examine several incidents and remarks related by Justice at hearing.

The court heard much testimony at hearing about incidents outside of the June and July 2016 events at issue in this case. Among them were incidents that, depending on whom I credit, were either workplace bullying of Justice or just goofing off, part of workplace camaraderie. As observed at the hearing and stated in testimony, Javins is animated and known for clowning around with his colleagues. According to Javins, "[i]t's the camaraderie between the men and the playing and the things that you do. You build a bond and stuff with people." (Tr. 248:16–21.) In contrast, Justice was comparatively reserved and known for carrying around a diary where he would record incidents at the mine, interspersed with religious reflections. (Exs. C–1, R–1.) I observed Justice at hearing to be quiet, deliberate, and soft-spoken.

The first alleged incident happened to Justice once in his car. (Tr. 168:17.) According to Justice, Javins tailgated him and then drew alongside his vehicle and then he would let off and get back behind. (Tr. 114:1–7.) Javins drove up behind to "stomp gas" making it look like he would ram Justice's car and then lunge sideways. (Tr. 168:2–24.) From his car, Justice observed Javins "laughing and just acting crazy." (Tr. 168:20–21.) According to Javins, the general manager and HR manager interviewed him about "a shopping list of things" including an allegation he had attempted to "run [Justice] over . . ." (Tr. 249: 11–19.) At hearing, Javins acknowledged the incident, pointing out he drove a small Cutlass while Justice drove a "good size" Cadillac. (Tr. 249:20–25.) But Javins denied the allegation he tried to run over Justice: "I certainly got enough sense about me [that] I'm not going to try to run over somebody on a highway." (Tr. 249:25–250:2.)

On another occasion, Javins came through the changing room back door where he encountered a group of miners, including Justice. Javins admitted that he hit Justice with two fingers in the Adam's apple: "[N]othing ill at all was intended by that, you know," Javins testified, "It certainly wasn't anything that would have been hurtful." (Tr. 248:19–21.) Justice observed the scene as the miners being lined up on both sides; Javins walked through "like a big bull and looked everybody over." (Tr. 169:6–10.) According to Justice, Javins mock-lunged at him "like he's wanting to scare me plum out of my skin," but "that day I didn't jump because I was used to him doing that." (Tr. 169:11–14.) And then Javins made contact with Justice's throat

with his two fingers. (Tr. 168:25–169:21.) Following this "karate chop" incident, Justice filed an internal complaint with the company. (Tr. 169:19–21.) Regional human resource and labor relations manager Milam investigated the incident for then-operator Patriot Coal and concluded that the encounter had not been malicious and that Javins was "just playing" with Justice. (Tr. 337:9–338:24.) After a superior informed Justice that Javins could lose his job, Justice rescinded his complaint, "[pleading] mercy for him." (Tr. 169:22–170:15.) Rockwell counseled Javins that placing one's hands on another employee was "under no circumstances appropriate," and Javins agreed it would not happen again. (Tr. 338:17–24.)

The automobile and karate-chop incidents took place months before the events underlying these claims when Patriot operated the mine, which was from January 2014 through October 2015. (Tr. 249:8–10, 250:22–251:8; Resp't Mot. Summ. Decision, Ex. B.) Importantly, these incidents are not contemporaneous with the June and July 2016 events at issue in this case. Still more importantly, none of these incidents, even if I were to credit fully Justice's version of them, are probative to the claim that Rockwell's decision not to select Justice was motivated by animus toward Justice's complaints about the diesel caged scoops. Justice did not even assert that his exercise of protected rights prompted these two incidents. Based on the evidence and my observations at hearing, I find it more plausible that these incidents were akin to a personality conflict. Accordingly, they do not help establish that Rockwell's actions, at issue in this case, were motivated by animus toward protected activity.

To contextualize the incidents above, I also note a significant entry in Justice's journal. On August 5, 2016, Justice recorded that, when management offered complimentary cake and coffee shortly before testing him for drugs, Justice believed that the company might have laced the food with drugs so he would fail his drug test. (Ex. C–1 at 177; Tr. 155:12–158:9.) Milam was present at the meeting where coffee and cake had been provided, and he denied at hearing that Rockwell attempted to drug Justice. (Tr. 335:9–336:3.) This indicates to me that Justice was highly suspicious of any action taken by Rockwell, and accordingly I find Justice's uncorroborated testimony about Rockwell's actions less credible than I otherwise would.

I will also consider several contemporaneous events described at hearing. On June 29, 2016, the date that Justice learned that his preferred #873 uncaged scoop would be taken out of commission (Tr. 64:15–65:5), Osborne poked Justice in the ribs in a friendly way while he observed Justice loading supplies onto #874 scoop. Justice interpreted this interaction as a message that management could do whatever it liked, and Justice could not stop them. (Tr. 66:10–18, 66:25–67:18.) Next, Justice recorded in his journal that on June 30, 2016, Gillispie told Justice at the start of the shift that "he did not like [him.]" (Tr. 71:9–72:4.) I have only Justice's word that Gillispie made this remark. More importantly for this analysis, Justice presents no reliable evidence, only his personal interpretation, that this remark meant that Gillispie did not like him because of his protected activity. The other conflicts detailed above suggest that "I don't like you" could have referred to several other issues. Justice simply did not introduce sufficient evidence to convince me that this exchange referred to the exercise of protected rights.

On July 1, 2016, Justice used a walkie-talkie that could be heard throughout the mine to report that the flow of air in the section he was working had reversed; when he received no

response, Justice listed several things aloud that could be wrong on the section that might cause the air to temporarily reverse. (Ex. C–1 at 146; Tr. 74:14–76:17.) Due to his observance of the Sabbath on Friday at sundown, Justice had to leave early. (Tr. 74:14–23.) As he left the mine, Justice informed Frank Javins of the air reversal issue. (Tr. 76:18–23.) According to Justice, Javins told him, "[I]f you'll just leave us alone, we'll leave you alone." (Justice's words). (Tr. 76:21–23.) Justice took this to mean that he should not make safety complaints. (Tr. 76:21–77:2.) Javins, however, remembers neither receiving this complaint nor giving this response. (Tr. 264:7–265:12.) Given the particular circumstances, "leave us alone" is another ambiguous phrase. Justice was leaving for a religious observance and shortly before had broadcast to the entire mine his theories about the air reversal. It remains unclear whether Javins's annoyance flowed from Justice's safety complaints, or perhaps from his early departure from the mine, or perhaps from how Justice used his walkie-talkie. I determine that Justice has not introduced sufficient evidence about this incident to establish that Javins was telling Justice not to make safety complaints.

Next, Justice recorded in his journal that on July 11, 2016, management held a meeting with the crew, at which Osborne and MSHA Inspector Mark Muncy spoke. (Ex. C–1 at 146–47; Tr. 77:3–78:16, 79:8–18.) Muncy warned the miners about safety hazards related to air flow and dust accumulation. (Tr. 78:8–12.) Justice relates that Osborne said unless miners remained cognizant of safety hazards, they could become unemployed. (Tr. 78:18–79:7.) I do not find this incident probative to questions of animus, given that, according to Justice's own account, both Osborne and MSHA Inspector Muncy were exhorting the miners to pay *more* attention to safety. Justice nevertheless testified that the safety talk was "directed to me." (Tr. 77:13–19.)

Next, in the July 29, 2019, entry in his journal, Justice says that Javins "blew up" at him about the issue of using the scoop for hauling supplies and accused Justice of "just trying to cause trouble . . . ." (Ex. C–1 at 168–69; Tr. 271:13–272:8.) But Javins testified that he did not remember the incident and "I certainly don't remember blowing up on anyone." (Tr. 272:10–18.) Once again, I have only Justice's word, this time contradicted by the person who is supposed to have made this remark. The quotation imputed to Javins is, like the one above imputed to Gillispie, too brief and lacking in context to serve as evidence that Justice's supervisors were motivated by animus specifically toward his safety complaints about the diesel scoop's cage. These incidents as related do not help Justice meet his burden.

More apposite to this element is MSHA's investigation on August 30, 2016, during which an MSHA employee interviewed William Luke Stepp about possible interference with Justice's right to travel as a miners' representative. (Tr. 295:5–19.) This MSHA employee drafted a memorandum, written in Stepp's own voice, and included a passage stating that neither Rockwell nor the union liked Justice to travel with an inspector because he habitually drew the inspector's attention to violations that Justice had not previously reported to Rockwell, which hurt Rockwell's reputation. (*Id.*; Ex. C–8.) Before signing, however, Stepp crossed out these sentences and initialed next to them to indicate that he wished them stricken from his statement. (Tr. 295:19–21.) On the one hand, an investigator reducing an interview to a written statement could easily misconstrue words or make an error, and this statement was quickly disavowed by Stepp. On the other hand, Stepp's revised statement notes his belief that when "Justice travels with inspectors, he points out potential hazards that he has previously observed but which he did

not inform anyone of," and that the union is "frustrated" with Justice observing potential hazards and not reporting them because it gives the appearance of not doing their job." (Ex. C–8 at 3.) At hearing, Stepp tried to distance himself from the statement (Tr. 297:16–298:13), but agreed that the company and union did not like it if unreported hazards were cited by MSHA. (Tr. 299:14–300:2.)

Bearing in mind especially Justice's belief that management intended to poison him with coffee and cake, I find generally that Justice's interpretations of his interactions with management skew toward the negative, and I therefore accord his uncorroborated testimony less weight than I otherwise would. But Stepp's statement is specific and in my opinion unlikely to be groundless and, accordingly, serves to corroborate the impression that Justice attempts to make in detailing his interactions with Rockwell. I believe that Rockwell had a negative attitude about Justice's various safety-related efforts near the time when they did not select him to work during vacation. Considering all the evidence produced at hearing as a whole, I determine that Rockwell's management exhibited some level of hostility or animus toward Justice due to his protected activities.

c. Timing

The Commission does not apply "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." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Nevertheless, coincidence in time between the protected activity and the adverse action may alone be sufficient to establish discriminatory intent. *See Pendley*, 601 F.3d at 427 (citing *Garcia v, Inc.*, 24 FMSHRC at 354. Here, Rockwell assigned the contractor to uncaged scoop #873, the one Justice preferred, on June 21, 2016. (Tr. 42:8–21, 44:8–45:15.) Justice initiated with Gillispie his step-one grievance under the CBA on that same date, and also discussed it with Osborne. (Ex. C–1 at 139; Tr. 45:2–15, 189:24–191:5.) On June 28, 2016, Justice recorded in his journal that he "step oned [Osborne] on not allowing me to work vacation." (Ex. C–1 at 144.) I infer, then, that Justice learned of his non-selection no later than June 28, 2016. The "miners' vacation" at issue took place during the first week of July 2016. (Tr. 336:4–337:5.) The safety complaints and grievance were contemporary with Rockwell not selecting Justice to work during vacation. Consequently, I determine that a coincidence in time existed between Justice's protected activity and the adverse action taken against him.

d. Disparate Treatment of the Miner

For the disparate treatment factor, "it is incumbent on the complainant to introduce evidence showing that another employee guilty of the same or more serious offenses escaped the disciplinary fate suffered by the complainant." *Driessen*, 20 FMSHRC at 331 n.14 (citing *Chacon*, 3 FMSHRC at 2512). Justice admitted that those miners who worked during vacation were either senior to him or had an electrician's certification, which Justice lacked. (Tr. 58:8–15.) From Justice's perspective, however, Rockwell's alteration of its customary "miners' vacation" work-selection procedure amounted to disparate treatment. (Tr. 51:14–53:12.) Specifically, Justice testified that Rockwell "customarily posted a specific number of employees who could sign up through vacation." (Compl't Br. 9.) Deviations from the norm such as these

led Justice to suspect that Rockwell was retaliating against him: ". . . I know in my heart that they stopped me from working all because of my protest over this scoop situation . . ." (Tr. 53:8–10.) Yet Justice had never before worked during a "miners' vacation" week. (Tr. 52:13–14.)

Justice argues that "just a few days following [his] complaints to management about the caged scoop, management decided not to post a specific number of positions and rather elected to cut off vacation workslots at the point on the sign-up list that would cause [him] to be excluded. . . . " (Compl't Br. 9–10.) Rockwell, however, explains that it declined to post the number of miners needed during the miners' vacation because they felt that this would have the "effect of discouraging enough people from signing up if they thought that they might not get picked." (Resp't Br. 22.) Rockwell further notes the mine was not "running coal over the 2016 miner's vacation, so it needed fewer people." (*Id*.)

Rockwell treated Justice differently than other miners who signed up to work over the miners' vacation. But Justice fails to meet his burden by introducing evidence that another miner similarly situated—who had made safety complaints, lacked seniority, or lacked an electrician's certification—was granted permission to work during the miners' vacation. Therefore, I determine that the evidence presented does not establish that Justice suffered disparate treatment.

e. Weighing the Motivation Factors

Considering the above four factors on causal connection, I determine that Justice has proved by a preponderance of the evidence that Rockwell's adverse action against him was motivated in part by his protected activity. Rockwell knew about his safety complaints regarding the caged scoop when they began on June 21, 2016 (Tr. 128:23–129:20, 309:22–310:7), and did not select Justice to work during the vacation, which was the first week of July 2016. (Tr. 336:4–337:5.) When I examine this close sequence of events alongside Stepp's signed statement and testimony (Ex. C–8; Tr. 295:5–19), I determine that Justice has met the timing, animus, and knowledge factors, and I thereby conclude that Justice has established a causal connection between his safety complaints and Rockwell's non-selection of him to work during vacation.

4. Evaluating the Prima Facie Case

Justice alleges that management's decision not to post the specific number of positions was motivated by his safety complaints about the caged diesel scoop and was intended to allow management to "cut off the vacation workslots at the point on the sign-up list that would cause [him] to be excluded." (Compl't Br. 10.) Further, Justice alleges "[t]he discriminatory motive is apparent from [] Osborne's open animus toward [] Justice's good-faith concerns regarding the caged scoop, and by the proximity in time of the protected activity . . ." (*Id*.)

In contrast, Rockwell argues that it chose those miners to work during the miners' vacation week because of business necessity and CBA requirements. Specifically, "pursuant to the CBA, selection of who was to work was a matter of simply sorting the volunteers by specialty . . . and seniority." (Compl't Br. 23.) Simply put, Justice lacked an electrician's license, a specialty needed that week, plus he lacked the level of seniority that would have required his selection over other miners willing to work during the miners' vacation.

Justice engaged in protected activity by making safety complaints to MSHA and management about the obstructed view of the #874 caged scoop. He also suffered an adverse action in his non-selection for work during the "miners' vacation" week. Finally, Rockwell's knowledge of Justice's safety complaints, the very close timing, and the animus, especially when corroborated by Stepp's statement and testimony, allow Justice to establish the motivational nexus element and, therefore, to establish a prima facie case for discrimination. Thus, I determine that Justice's protected activity motivated Rockwell, in part, to take an adverse action against him. However, before turning to Rockwell's affirmative defense, I address the special difficulties presented by the issue of damages in this case.

5. Recoverable Damages

Justice requests, as relief under the discrimination claim, that Rockwell "pay [him] five days of pay to compensate him for the extra wages that he was unable to earn when Respondent declined to allow [Justice] to work through vacation."[7] (Compl't Br. 10.) If Justice establishes discrimination under section 105(c), the Commission may "[grant] such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate." 30 U.S.C. § 815(c)(3).

The Commission has recognized that discrimination encompasses intangible as well as tangible employment actions. *See McNary v. Alcoa World Alumina, LLC*, 39 FMSHRC 433, 439 (Mar. 2017). Furthermore, Commission Judges can fashion discrimination remedies suitable to the facts of each case. *Sec'y of Labor on behalf of Rieke v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257 (July 1997) ("The Commission enjoys broad remedial power in fashioning relief for victims of discrimination."); *see also Sec'y of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1306–07 (Dec. 1998) (determining that Commission Judges may remedy section 105(c) violations by ordering the posting of notices and expunging references to discipline from employee records). Nevertheless, in fashioning a remedy, the aim of the Commission Judge centers on "[restoring] discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Sec'y of Labor on behalf of Dunmire* v. *Northern Coal Co.*, 4 FMSHRC 126, 143 (Feb. 1982).

At Gateway Eagle Mine, miners who did not work during the miners' vacation would have to take paid vacation during that week. In not selecting Justice to work that week, Rockwell prevented him from taking his vacation days at another time of his choosing. (Tr. 154:5–155:7.) Given that Justice no longer works for Rockwell and does not seek reinstatement, making Justice whole in this respect would be difficult and the proposed five days of pay might be a reasonable fashioning of a remedy. (*See* Ex. C–4.) But given Rockwell's successful affirmative defense (*see* discussion *infra* Section V.A.6), the issue of appropriate relief is moot.

[7] Justice submitted pay stubs dated July 8, 2016 and July 22, 2016, which I have considered. (Ex. C–4.)

6. Affirmative Defense

A mine operator "can establish an affirmative defense under the *Pasula-Robinette* framework by showing that 'while it took adverse action against the miner because of the miner's protected activity, it would have taken the action even if the miner had not engaged in protected activity.'" *Cumberland River Coal Co.*, 712 F.3d at 319 (quoting *Pendley*, 601 F.3d at 423–24). "[T]he 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." *Pendley*, 601 F.3d at 425 (citing *Chacon*, 3 FMSHRC at 2516). Nevertheless, the Commission Judge should not accept a defense that rests on mere pretext: a justification may be "so weak, so implausible, and so out of line with normal practice" that it should be found to be "mere pretext." *Chacon*, 3 FMSRHC at 2516. The inquiry is not whether the Commission Judge believes that the justification supported the adverse action but is based on what the evidence shows that "the operator actually believed at the time." *Pendley*, 601 F.3d at 426. The Commission Judge should not "impose [his or her] own business judgement as to an operator's actions." *See id*. at 425.

At hearing, Rockwell laid out its defense by describing the procedure by which it decided which miners would work during vacation, not including Justice. Given the kind of work the mine needed that week, Osborne proposed the number of miners needed and General Manager Joe Evans decided how many miners to take, trying "to be as lean as he possibly could." (Tr. 199:2–200:13.) Under the CBA, Rockwell then ranked volunteers by seniority and specialty, e.g., electrician certification. (Tr. 52:4–53:8.) Justice, who lacks an electrician's certification, volunteered to work that week, and Rockwell did not select him, filling all necessary slots either with miners more senior to Justice or with certified electricians, who were needed to conduct MSHA-mandated weekly permissibility checks on equipment. (Ex. C–5 at 4–5; Tr. 211:15–214:17.)

In 2016, more miners volunteered to work during vacation than the mine required. (Tr. 211:15–214:17.) Compared to other years, the mine needed a smaller crew because it was not running coal. (Tr. 199:13–20.) Indeed, from December 2015 to February 2016, the mine had been idle because of a slow coal market. (Tr. 147:18–21, 195:15–19.) According to Superintendent Osborne, during the June and July 2016 period at issue in this case, "money was hard to come by" and the mine was "pinching pennies just to survive . . . . [i]t was tough in that day." (Tr. 195:10–14.) Moreover, Osborne characterized the proposed cost of repairing the uncaged scoop—$50,000—as "devastating to us" and that carrying out the repair would have required significant cost-cutting in another part of the mine. (Tr. 195:24–196:6.) At hearing, Justice did not rebut this testimony demonstrating that the mine was in tight financial straits. I therefore determine that trimming costs was a significant motive for Rockwell, not only with respect to the "miners' vacation," but in every area of the mining operation at that time.

Justice grieved his non-selection with the union, having already canceled his vacation plans in anticipation of working during the "miners' vacation" week. (Ex. R–2; Tr. 109:18–25, 333:6–12.) But the UMWA eventually withdrew Justice's grievance on August 5, 2016, after the union and management determined Rockwell had not violated the CBA in assigning vacation work. (Ex. R–2; Tr. 333:1–335:13.) At hearing, Justice spoke of possible arbitration but did not

rebut this testimony establishing that Rockwell properly followed the CBA in selecting miners to work during vacation. (Tr. 152:8–22, 344:6–349:16.) Based on this unrebutted testimony as well as the evidence as a whole, I determine that Rockwell properly followed the procedures under the CBA when choosing miners to work during the vacation.

From these determinations, I conclude that Rockwell's procedures could not have been mere pretext. To deprive itself of an additional miner, like Justice, whom Rockwell needed that week, would have been shooting itself in the foot. Neither seniority nor electrician certification are subjective categories of the kind that allow plausibly deniable retaliation. At hearing, Justice did not rebut his lack of seniority or lack of an electrician's credential. He did not disprove or cast doubt on whether Osborne or General Manager Evans properly determined that the tasks that week required a certain number of miners to work during vacation. He did not rebut the assertion that Gateway Eagle Mine had to cut costs due to a poor coal market. He did not rebut Rockwell's testimony that the CBA procedures were properly applied, especially in light of the UMWA's withdrawal of the step-three grievance. Upon weighing this evidence together, I determine that Rockwell's procedure for selecting which miners would work justified its non-selection of Justice for work during the "miners' vacation" week.

I therefore conclude that Rockwell has established by a preponderance of the evidence that it would not have selected Justice to work during the "miners' vacation" week for an unprotected activity alone. Consequently, I dismiss Complainant's discrimination claim.

B. Whether Rockwell Interfered with Protected Rights Under Section 105(c)

1. Assigning Justice to Use the Caged Scoop for Long-Distance Haulage

Justice's interference claim alleges that the caged scoop was unsafe yet Rockwell continued to task him with using it to haul supplies over long distances, despite his complaints. (Compl't Br. 7.) Justice argues that Osborne "continued to express derision for the concern at hearing" about the allegedly hazardous cage and that this attitude helps establish interference. (Compl't Reply 2.) At hearing, although not in the post-hearing briefs, Justice emphasized that Rockwell's decision to retire and not repair his preferred, uncaged #873 scoop amounted to a message that he should not make safety complaints. (Tr. 72:22–73:24.) Justice also emphasized that he operated the caged scoop only "under protest," because he feared retaliation should he disobey his supervisors. (Compl't Reply 1–2.)

Rockwell argues that Justice made his safety complaint in bad faith because he had operated the caged scoop many times over several months. (Resp't Br. 13–15.) Rockwell then makes several additional points. No governmental agency, including MSHA, had cited the factory-installed cage for safety violations, and neither any miner besides Justice nor the union had complained about the cage. (*Id*. at 16–18.) Furthermore, Justice never refused to operate the caged scoop. (*Id*. at 16.) He was not "chilled" because he continued to make safety complaints. (*Id*. at 21.) Justice has no right to say which scoop Rockwell assigns him to use. (*Id*. at 20.) Finally, the decision to retire the uncaged scoop was a purely financial one. (Resp't Reply 4.)

a. Tendency to Interfere with Protected Rights

An interference claim first requires the Complainant to establish that the operator's action tended to interfere with the exercise of protected rights. (*See* discussion *supra* Section IV.C.) Considering the evidence presented, I find it difficult to discern which right Rockwell allegedly chilled. First, Justice complained to management on June 21, 2016, about being assigned the caged scoop for long-distance haulage because he thought it unsafe due to the obstructed view. (Tr. 128:23–129:20.) But at hearing Justice acknowledged that, according to his own journal, he had used the caged scoop to haul items to mine sections several times before June 21, 2016, without incident or complaint. (Tr. 130:19–131:11, 133:3–142:25; Ex. R–1.) Rockwell listened to Justice's complaint and acknowledged the caged scoop's limited visibility but disagreed with Justice's assessment of the safety cage's dangers, as Justice did not work in close proximity to other miners. (Ex. C–5, at 4.) Rockwell continued to assign him to use it for long-distance haulage. (Tr. 309:22–310:7.) Second, Justice reported the alleged hazard of limited visibility to MSHA, which investigated the use of the caged scoop for long-distance haulage and declined to issue a citation—the MSHA Inspector "didn't see no problem with it," Justice said. (Tr. 170:24–171:23.) Yet on July 18, 2019, Justice continued to inform Rockwell that he felt the scoop was dangerous and that he operated the scoop only under protest. (Tr. 148:16–149:20; Ex. C–1 at 153.)

If Justice's argument is that Rockwell chilled his right to say which scoop Rockwell should assign to him, then the argument fails because there is no such right. Rather, a miner has a protected right to make safety complaints to the mine operator or to MSHA. Here, Rockwell did not chill Justice from making safety complaints about the caged scoop because he continued to make them by notifying management that he was operating the caged scoop "under protest." (Tr. 148:16–149:10.) But neither would Rockwell have chilled a reasonable miner by assigning him to the caged scoop or disagreeing with his complaints. Threats, coercion, and isolated interrogation are hallmarks of section 105(c) interference, but none are present here. *See, e.g.*, *Gray*, 27 FMSHRC at 10–12 (determining that threats to a miner are more likely to be interference if they are coercive, isolating, and pertaining to a criminal investigation). Rockwell was simply assigning Justice work tasks and disagreeing with some of his safety complaints, regarding the caged scoop. Rockwell did not disagree with all of his complaints. Justice was concerned an obstructed view would force him to back up the caged scoop exposing him to diesel dust and the higher rates of cancer for those exposed to it. (Tr. 159:1–22.) Justice acknowledged that Gillispie had heard his complaint and taken measures to fix the conditions. (Tr. 160:2–11; Ex. C–1 at 189.) For example, Justice described the August 16, 2016, incident in which supplies were stacked so high on the scoop that his vision was impaired. Gillispie corrected it, which convinces me that Rockwell was not averse to addressing safety complaints as such. (Tr. 158:10–160:11.) Likewise, Javins's statement to MSHA recalls that Justice had a conversation with Gillispie about ventilation problems, whereby Javins instructed Gillispie to check into it and he found an open mandoor that he closed, which fixed the problem. (Ex. C–5, at 4.)

Justice seeks to convince me that Rockwell, by disagreeing with his safety complaints about the caged scoop, would chill safety complaints. But because Rockwell addressed other safety complaints unrelated to the cage, I conclude that Rockwell's continued and reasonable

disagreement with Justice on one issue could not have chilled the right to make safety complaints in general. My determinations that MSHA investigated and found no hazard with the cage (Tr. 170:24–171:23), and the fact that Justice continued to make safety complaints, including some where Rockwell agreed with him, are also significant to my conclusion.

Next, a miner has a right to refuse work if he expresses a good faith, reasonable concern about safety that is not adequately quelled by the operator.[8] But Justice admits that he never refused to operate the caged scoop. He continued to inform his supervisors that he considered the caged scoop unsafe. It appears Justice would like me to believe that Rockwell continuing to assign him to the caged scoop would be chilling a reasonable miner from refusing to operate the caged scoop. I determine that it is more plausible that Rockwell needed Justice to operate the scoop as part of its mining operation. At any mine, operators repeatedly assign the same miner to the same task; it is entirely implausible that a mining operator thereby "chills" all work refusal rights with respect to that task. No reasonable miner would infer such a conclusion. I am not convinced that assigning a task to a miner chills that miner from refusing to perform that task if or when he reasonably deems it dangerous. I conclude that repeated assignments to the caged scoop did not tend to interfere with the right to refuse dangerous tasks.

Justice, in his post-hearing briefs, does not center this interference claim on the fact that Rockwell assigned his preferred scoop to a contractor and then later retired it, cannibalizing it for parts. But I infer from Justice's testimony at hearing that he considers these incidents important to his claim about the scoop, and so I examine the incidents briefly. Justice stated that he understood that Osborne had promised him that he would get "my scoop back" after the contractor had finished using it temporarily. (Tr. 179:8–10, 179:24–25.) Yet Justice acknowledges that Rockwell assigned the uncaged scoop to the contractor to assuage safety concerns in the area where the contractor was working. (Tr. 179:8–24.) Justice then testified that Rockwell removed the #873 uncaged scoop from service but that Gillispie had not given him a reason for its removal, as though one was required. (Tr. 72:15–21.) Justice considered it insulting when Rockwell decided to have him be the miner who would put his favorite scoop into the weed patch, retiring it. (Tr. 72:22–73:24.) While Rockwell repaired the caged scoop #874, it did not expend the money and effort to repair the uncaged scoop that Justice preferred and which he deemed safe. (Tr. 117:8–118:12.) Justice is thus asking me to be convinced that Rockwell would deprive itself of a useful machine for the sole reason of discouraging Justice from complaining about the caged scoop. Rockwell has provided evidence that it would have cost roughly $50,000 to repair the uncaged scoop. (Tr. 194:2–7.) In the earlier statement, Osborne estimated $40,000. (Tr. 219:15–220:7.) Either figure is considerable. I find it implausible that Rockwell would engage in a subtle and potentially very expensive conspiracy to punish a single miner for his

[8] Throughout this case, Justice has discussed "work refusal" as part of an interference claim. However, as articulated in *Dolan v. F&E Erection Co.*, the Commission analyzes a work refusal claim under a discrimination theory and requires a showing that the miner expressed a good faith, reasonable concern about safety, and that the operator did not quell these reasonable fears before the miner refused to perform the assigned task. 22 FMSHRC at 177. If the operator takes an adverse action against a miner who reasonably refuses work, a court can grant appropriate relief. Here, it is undisputed that Justice never refused to operate the caged scoop. Thus, Complainant and his counsel failed to articulate a "work refusal" claim under *Dolan*.

disagreements with his supervisors. Osborne testified that during June and July 2016, the mine was "pinching pennies," and he characterized the potential spending of $50,000 dollars as "devastating." (Tr. 195:10–14, 195:24–196:6.) Justice did not rebut these financial arguments at hearing.

Despite Justice's belief that Rockwell conspired not to repair the #873 scoop, he acknowledged that equipment "in the mining industry . . . [had] breakdowns weekly in a drilling operation and you replace parts." (Tr. 118:9–11.) Thus, removing the #874 scoop for repairs in mid-August would not be an unusual occurrence. (Ex. C–1 at 179–90.) Justice did not introduce convincing evidence to rebut Rockwell's business decision to repair the #874 scoop and not the #873 scoop. Instead, he second-guesses Rockwell's decision nearly a month after the fact.

I determine that Rockwell made a business decision not to repair the #873 uncaged scoop, given the cost. Because I determine that retiring the #873 scoop was a business decision, I conclude that Justice has failed to establish that retiring the scoop would tend to interfere with the exercise of protected rights.

b. "Legitimate and Substantial" Reason Element Under *Franks*

On this element, Justice can prevail only if Rockwell fails to justify the action with a legitimate and substantial reason outweighing the harm to protected rights. (*See* discussion *supra* Section IV.C.) Rockwell offered sufficient evidence to establish a legitimate and substantial reason for retiring the uncaged scoop and retaining the caged one: namely, the cost to fix it and the fact that it had no reason to believe that the caged scoop presented a danger to its operator. Osborne testified that the uncaged scoop had trouble passing emissions tests and that the front and rear brakes had problems. (Tr. 193:12–194:1.) The cost, Osborne estimated, was roughly $40,000 or $50,000 dollars. (Tr. 194:2–7, 219:15–220:7.) The retiring of the uncaged scoop and the diversion of funds to repair the caged one was an action narrowly tailored to the business goals of Rockwell. On the other side of the scale, the harm to protected rights is very slight, for the reasons articulated above: Justice continued to make safety complaints and no reasonable miner would have been discouraged from doing so. I determine that Rockwell's business decision, made in hard economic times, outweighs the "chill" imposed on Justice's right to make safety complaints. Accordingly, I conclude that Rockwell has met its burden on the "legitimate and substantial" element by justifying its action based on a logical business decision.

c. Motivation Element Under *Pepin*

Commissioners Althen and Young would require the Complainant to establish as well that protected activity motivated the operator's action. (*See* discussion *supra* Section IV.C.) But Justice has not provided enough credible evidence to meet this burden. While the evidence below suggests mistrust and personal dislike between Justice and some supervisors, it does not establish that Rockwell made its decisions about the scoops because of animus toward a miner's protected right to make safety complaints.

In fact, as discussed above, Rockwell corrected complaints unrelated to the safety cage. (Tr. 159:1–22, 160:2–11, Tr. 158–59.) Only the most circumstantial evidence could indicate that

Rockwell meant to discourage Justice from making safety complaints by its decision to take the uncaged scoop out of service and assign Justice to caged scoops for long-distance haulage. The same evidence could reasonably be interpreted, as I do, that whatever animus Rockwell might have displayed was irritation at Justice for requesting that the company make various modifications to the caged scoop that MSHA and management deemed unnecessary. Given the evidence presented as a whole, I determine that the most plausible motive to impute to Rockwell for repeatedly assigning Justice to the caged scoop and retiring the #873 uncaged scoop is business necessity. (*See* discussion *supra* Section V.B.1.a.)

As detailed in the discussion of animus in the discrimination claim *supra*, there were several incidents not directly related to the scoop, which I will consider. Although they took place months before Justice's complaints about the caged scoop (Tr. 250:22–251:8), I examine operator motivation in light of the incident on the road (Tr. 113:8–114:7) and the "karate-chop" incident (Tr. 168:25–169:21). I consider as well contemporaneous incidents such as Osborne's poking Justice in the ribs in a "friendly way" on June 29, 2016 (Tr. 66:10–13, 66:25–67:18), and Gillispie telling Justice that he did not like him on June 30, 2016. (Tr. 71:9–72:4.) I also consider an incident that Justice related at hearing, involving Justice and Javins, of which Javins has no recollection: on July 1, 2016, Justice made a safety complaint (about air reversal, unrelated to either the scoop or the tire) to Javins, and Javins told Justice (in Justice's words at hearing) "if you'll just leave us alone, we'll leave you alone." (Tr. 74:14–77:2, 264:7–265:12.) On August 5, 2016, Justice recorded that, when management offered complimentary cake and coffee shortly before testing him for drugs, Justice believed that the company might have laced them with drugs so he would fail his drug test. (Tr. 155:12–158:3.) The fact that Justice believed Rockwell intended to poison him leads me to give less credit to his interpretations of these other events. Because Justice himself was the sole witness for the Complainant, I only have his word, and furthermore the contemporaneous incidents concern mostly attitudes and tone of voice rather than tangible, material actions. "I don't like you" and "leave us alone" may or may not have referred to safety complaints. These are short, ambiguous phrases lacking corroboration, and inferring that they refer to safety complaints requires me to credit Justice's interpretation of them. Given his suspicions of being poisoned, I cannot do this. Justice does not offer sufficient convincing evidence to establish that Rockwell's actions in this claim— decommissioning the uncaged scoop and assigning him to the caged scoop—were motivated by its hostility to the exercise of protected rights. In the discrimination analysis above, I found the Stepp statement (about Rockwell and the union not liking Justice to travel with the inspector (Tr. 295:5–21)) probative to the animus element in the prima facie case. In this interference claim, however, Rockwell has presented sufficient evidence that its decommissioning of the uncaged scoop and its assignment of Justice to the caged scoop were not motivated by animus toward his complaints about the scoop. I determine that neither Rockwell's declining to carry out an expensive repair to an uncaged scoop nor Rockwell's repeated assignment of Justice to operate a caged diesel scoop, deemed safe by MSHA and other miners, indicate a motivation to curb protected rights.

In post-hearing briefs, instead of emphasizing the remarks at Gateway Eagle Mine, Justice appears to hang his hat on an exchange during hearing in which Osborne compared the removal of a factory-installed safety cage from a scoop to the removal of an air conditioning system from a car. (Compl't Br. 6–8; Tr. 219:1–14.) From this, Justice asks me to infer hostility to the protected right to make safety complaints. I find more plausible the idea that this exchange

shows Rockwell considered Justice's proposed modification to be impractical and unsafe. My determination is buttressed by the fact MSHA approved the manufacturer's installation of the safety cage on the scoop and it had never been cited for a safety violation. Here, the operator's reasonable disagreement with a miner's safety complaint does not establish the motivation element under *Pepin*. I conclude that Justice does not establish the motivation element.

d. Conclusion

I conclude that, under both the *Franks* and *Pepin* tests, Justice did not establish a prima facie case in his claim of interference involving the caged diesel scoops.

2. Interrupting Justice While He Discussed an Allegedly Damaged Tire with an MSHA Inspector

Justice argues that Rockwell interfered with protected rights when Gillispie interrupted him as he attempted to make a safety complaint about a tire to MSHA Inspector Tishanel. (Compl't Br. 8.) In ordering him back to work, Justice argues, that Gillispie prevented him from making his complaint and also from exercising his "walkaround" rights as a miners' representative. (*Id*.)

Rockwell argues that Gillispie giving Justice a work order did not prevent Justice from making his complaint to Inspector Tishanel and such an action would not "chill" a reasonable miner and did not chill Justice, who successfully made the complaint. (Resp. Br. 4–5.) Furthermore, Gillispie's action was legitimate because assigning tasks to employees is a necessary part of any organization. (*Id*. at 5.) Finally, Rockwell states that Justice cannot show Gillispie was motivated by animus toward Justice's right to make safety complaints or to accompany the inspector if he so chose. (*Id*.)

a. Tendency to Interfere with Protected Rights

An interference claim first requires the Complainant to establish that the operator's action tended to interfere with the exercise of protected rights. (*See* discussion *supra* Section IV.C.) Justice testified that Gillispie interrupted Justice's conversation with Inspector Tishanel about the tire complaint by telling him to hurry up and haul a load to the section. (Tr. 83:21–84:11.) Justice testified that he told Gillispie that as a miner's representative he had a right to have Tishanel examine Justice's safety concern about the tire. (Tr. 84:14–18.) Gillispie, for his part, did not recall Justice invoking his rights as a miners' representative at that time. (Tr. 322:19–25.) Gillispie testified that he understood that the conversation with Tishanel was over when he tasked Justice with hauling a load and that he probably would not have issued this work order if, say, Tishanel had beckoned him over to discuss the issue. (Tr. 325:17–22.) In contrast, Justice recollects that Inspector Tishanel had to interrupt Gillispie when he gave Justice the order, and that Tishanel had told Gillispie that he needed to wait while he examined the tire. (Tr. 346:11–19.) But during the same line of questioning, Justice does not dispute he had already alerted Tishanel to the tire damage before Gillispie told Justice to go haul a load. (Tr. 346:12–13.) Furthermore, Gillispie's testimony is that before giving his work order to Justice, he asked whether Justice wished to travel with Inspector Tishanel on his walkaround, and Justice declined.

(Tr. 311:3–6.) Although Justice denies this (Tr. 347:16–22), I credit Gillispie's testimony and find that, after voicing his safety concern to Inspector Tishanel, Justice chose not to accompany him on the rest of the "walkaround" because it comports with Justice's other testimony that he would decline to travel with the inspector unless he received compensation. (Tr. 103:16–17.) *See* discussion *inra* Section V.B.3.a.

The test for this element requires analyzing the totality of the circumstances. Most importantly, Justice made his safety complaint to the inspector. Even if Gillispie interrupted the conversation, the character of the interruption is key to the analysis: it was abrupt, brief, and it did not prevent Justice from reporting the alleged hazard, which did not result in a violation. This is in contrast to a deliberate, explicit statement to stop talking to an inspector. My determination that Gillispie suggested Justice could travel with Tishanel also removes the impression from a reasonable miner that Rockwell discouraged the reporting of safety violations. I determine from the totality of the circumstances that no "chilling" of protected rights took place during this encounter. I therefore conclude that Justice failed to establish the first element.

b. Legitimate and Substantial Reason Element Under *Franks*

On this element, Justice can prevail only if Rockwell fails to justify the action with a legitimate and substantial reason outweighing the harm to protected rights. (*See* discussion *supra* Section IV.C.) That Gillispie interrupted Justice or that, alternatively, he told Justice to perform a task after ascertaining that he was finished speaking with the inspector, is an action that has a legitimate and substantial justification: namely, that supervisors must assign tasks to their subordinates. Even if this interruption tended to interfere with the right to speak to an MSHA inspector—and I conclude that it did not—the action in question, a single command to go perform a task, is narrowly tailored to a legitimate and substantial reason. On the other side of the scale, the harm to the right to communicate safety complaints to MSHA inspectors is negligible because Justice successfully conveyed his concern to Tishanel. Rockwell has met its burden in this element, and Justice's claim accordingly fails under *Franks*.

c. Motivation Element Under *Pepin*

Commissioners Althen and Young would require the Complainant to establish as well that protected activity motivated the operator's action. (*See* discussion *supra* Section IV.C.) Justice does not establish this element. Even if I credit Justice's testimony that Inspector Tishanel had to tell Gillispie to pause in his orders while Tishanel examined the tire (Tr. 346:11–19), this does not meet Justice's burden. Such behavior could suggest one of two things: hostility toward protected rights or else Gillispie's sense of the urgency of the task he was assigning. When I combine this ambiguity with the fact that Gillispie said nothing else to indicate his hostility to safety complaints and furthermore suggested to Justice that he could travel with Inspector Tishanel, I determine that the balance tips in favor of Rockwell, and I conclude that Justice does not establish this element. (Tr. 311:3–6.)

d. Conclusion

I conclude that, under both the *Franks* and *Pepin* tests, Justice did not establish a prima facie case in his claim of interference involving his complaint to an inspector about the tire.

3. Justice Not Traveling with MSHA Inspector Tishanel on July 19, 2016

Justice argues that, on July 19, 2019, Rockwell interfered with protected rights because management did not allow him to travel with MSHA Inspector Tishanel on the "walkaround." (Compl't Br. 8.) Although Justice was in the office with the inspector, management summoned another miner, Moses Meade, who was underground, and Justice did not accompany the inspector. (*Id*. at 8–9.)

Rockwell argues that no one ever told Justice he could not accompany Tishanel, and that Justice never asked to accompany Tishanel. (Resp't Br. 6–7.) Furthermore, Rockwell argues that Justice was not interested so much in traveling with the inspector as he was in being the miners' representative who received payment for traveling with Tishanel. (*Id*. at 7.) Rockwell argues, not only does the Mine Act not require the operator to compensate more than one miners' representative during the "walkaround," but the CBA requires that the union-designated representative (Meade) be the one to receive payment. (*Id*.)

a. Tendency to Interfere with Protected Rights

An interference claim first requires the Complainant to establish that the operator's action tended to interfere with the exercise of protected rights. (*See* discussion *supra* Section IV.C.) Justice stated at hearing that he was unable to voice his desire to travel with Inspector Tishanel on his walkaround on July 19, 2016, because Gillispie told him to go haul oil before he could ask whether he could accompany Tishanel. (Tr. 90:2–11.) Justice entered the office to inform his supervisor that he had removed trash from the trailer and it was ready to be loaded. (Tr. 90:2–6.) Justice also knew that Inspector Tishanel was on the premises, and he "was hoping to get to travel." (Tr. 90:6–7.) Management asked for the miners' representative appointed by the union, Moses Meade, to come to the surface to accompany Tishanel. (Tr. 91:8–13.) Justice states that supervisors had told him before that, if he traveled with the inspector, he would not be compensated for his time. (Tr. 91:17–20; Ex. C–6 at 2–3.) Justice stated that he felt he had a deal with management in which they would allow the paid representative to be the union-appointed miners' representative Moses Meade, and that Justice, the non-union miners' representative, would take turns with Meade when it came time for a miners' representative to travel with the inspector. Justice stated that Rockwell did not conform to this arrangement. (Tr. 91:25–92:5.) On July 19, 2019, Justice testified that the union representative Meade was "miles away on a working section, and I was right there front and center." (Tr. 92:5–9.) Justice intended to offer his services as the "walkaround" miners' representative, but, as soon as he walked into the office, "Rondal [Gillispie] was already in the frame of mind that he was going to . . . slap a bunch of orders on me before I could even hardly say a word." (Tr. 92:11–14.) Justice testified that he then "looked at Rex [Osborne] to kind of let him and the inspector know, you know, I'm kind of wanting to travel here." (Tr. 92:15–17.)

Javins testified that supervisors had always instructed him to send the miners' representative appointed by the union to travel with the MSHA inspector, and he was not aware of ever having told Justice that he could not travel with the inspectors. (Tr. 273:1–16.) Furthermore, he does not recall Justice asking him whether he could travel with Inspector Tishanel, although Javins testified that he would have no problem if he did. (Tr. 247:10–12, 19–21.) But Javins's understanding was that Justice did not want to travel unless he could be the miners' representative who was compensated. (Tr. 246:22–247:4.)

The union did not elect Justice as its miners' representative. But Justice continually requested that management "try to make it fair" by "rotating us out or whatever," meaning that Justice and the union representative would alternate "walkaround" duties. (Tr. 103:13–17.) The sticking point for Justice, however, was not the "walkaround" itself but the payment given to the miners' representative: "I was expressing to [Osborne] I'd like to be able to travel and travel with pay." (Tr. 103:16–17.)

Putting aside the fact that only one miners' representative has a right to be compensated for his time during "walkarounds," *see* 30 U.S.C. § 813(f) ("[O]nly one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection"), the more salient fact, by Justice's own admission, is that he did not actually ask anyone if he could accompany the inspector. The fact that none of Rockwell's agents invited him to travel after he cast a significant glance toward Osborne and Tishanel is not the kind of overt coercion, threat, isolated interrogation, or heated argument that can give rise to an interference claim. In short, with respect to the first element of the interference test, I conclude that Rockwell violated no right because Rockwell is not obliged to make Justice's request to travel for him. That Justice did not actually ask to accompany the inspector is clear. (Tr. 92:1–19.) Furthermore, the Mine Act does not guarantee "walkaround" payment to every miners' representative, only to one. Justice may have understood, rightly or wrongly, that he had an arrangement with Rockwell that would allow him to be paid sometimes during a "walkaround," but the evidence of record as a whole does not establish such an arrangement and does not serve as the basis for an interference claim.

b. Legitimate and Substantial Reason Element Under *Franks*

On this element, Justice can prevail only if Rockwell fails to justify the action with a legitimate and substantial reason outweighing the harm to protected rights. (*See* discussion *supra* Section IV.C.) Gillispie had a legitimate and substantial reason for ordering Justice to go haul oil: transporting supplies was Justice's job. On the other side of the scale, the harm to protected rights is negligible. Indeed, Justice did not even ask to travel with the MSHA inspector. I determine that, without Justice speaking up, Rockwell had no way of knowing that Justice wanted to accompany the MSHA inspector. I therefore conclude that Rockwell's not asking Justice to travel was justified by a legitimate and substantial reason.

c. Motivation Element Under *Pepin*

I have determined that Rockwell did not engage in activity tending to interfere with protected rights when it called the union-designated miners' representative to accompany the

inspector and did not ask Justice. Justice has therefore not established a prima facie case for interference. Nevertheless, I will examine the motivation element in the *Pepin* test. Commissioners Althen and Young would require the Complainant to establish additionally that protected activity motivated the operator's action. (*See* discussion *supra* Section IV.C.)

Luke Stepp had made statements to MSHA on August 30, 2016, and the initial draft by the MSHA employee, memorializing the conversation, included a passage to the effect that Rockwell and the union did not like Justice to accompany the inspector because Justice would point out violations to the inspector that had not been previously reported to the mine, hurting Rockwell's reputation. (Tr. 295:5–19.) However, Stepp then crossed out these sentences on his statement and initialed them to indicate he wanted them stricken. (Tr. 295:19–23.) Stepp stated that he had not written the initial statement and did not believe it accurately reflected his views. (Tr. 296:1–22.) Stepp testified at hearing that he did not think the statement was accurate and that it was a misunderstanding on the part of MSHA, which he corrected in writing. (Tr. 295:10–296:4, 297:12–298:13.)

In another incident, a third-shift foreman named Eugene Cook was in a post-inspection conference with Inspector Tishanel, and Justice attended the meeting as well. (Tr. 315:16–21.) Gillispie recalls that Cook told Justice that he did not want him in the meeting, but Gillispie took Cook aside and told him that Justice had a right to attend. (Tr. 315:1–316:5.)

Rockwell had been cited previously in 2015 for failing to list Justice as a miners' representative on the mine's bulletin board. (Tr. 205:15–21.) Osborne testified that he did not know why the name was not displayed and that it could have fallen or been pulled down, given that it had been displayed before. (Tr. 205:22–206:14.)

Taken together, these incidents convince me that Rockwell at least harbored reservations about Justice as a miners' representative. But this element of the *Pepin* test does not require proof of a general animus, but rather demonstration that Rockwell took the action in question *because* of protected activity. Here, Rockwell simply refrained from inviting Justice to travel (without pay) with the inspector. It was not obligated to invite him. (Ex. C–6 at 2–3.) Justice did not ask to travel on that date. Rockwell's sole positive action was when Gillispie told Justice to go haul oil. Given that Justice had entered the office to inform his supervisor that he had completed a task (Tr. 90:2–6), giving Justice another order does not seem to be an extraordinary action indicating a particular state of mind. If Justice had responded to Gillispie's order by asking to travel with the inspector instead, Gillispie's reaction could perhaps have shed light on Rockwell's motivations. But because Justice never made such a request or raised the issue, I determine the evidence is lacking that the motive underlying Gillispie's order was hostility to protected rights. I conclude that Justice did not establish this element by a preponderance of the evidence.

d. Conclusion

I conclude that, under both the *Franks* and *Pepin* tests, Justice did not establish a prima facie case in this claim for interference involving his walkaround rights as a miners' representative.

VI. ORDER

The evidence presented in this case does not establish that Rockwell Mining either discriminated against Complainant Marshall Justice or interfered with his rights under section 105(c) of the Mine Act. Accordingly, Justice's complaint is hereby **DISMISSED**.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 21, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. SE 2019-0116 A.C. No. 01-01401-485027 Docket No. SE 2019-0143 A.C. No. 01-01401-487207 Docket No. SE 2019-0169 A.C. No. 01-01401-491187
v.	
WARRIOR MET COAL MINING, LLC, Respondent	Mine: No. 7 Mine

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge McCarthy

This case is before the undersigned upon Petitions for the Assessment of Civil Penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The CLR and the Solicitors have filed motions to approve settlement proposing a reduction in the penalties from $41,657.00 to $25,535.00. The CLR and the Solicitor in Docket No. SE 2019-0143 state that Citation Nos. 9132879, 8314141, and 9133552 have been vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *E.g.*, *RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). Citation Nos. 8535986, 9132861, 9133539, 8535988, 8535989, 8535991, 9133540, 9133541, 9133543, 9133544, 9133545, 9133546, 8314484,

8314485, 8314483, 9133270, 9133271, 9133272, 8314489, 8536072, 9133550, 9133701, 9133703, and 8369985 remain unchanged, but the settlement motions indicate that, given the number of citations involved in this settlement and the non-monetary aspects of the settlement, the parties have agreed to an across-the-board reduction of 20% for these Citations. The CLR and Solicitors also request that

> Citation Nos. 9133536, 9133538, and 8536070 be modified to reduce the levels of negligence from moderate to low;
>
> Citation Nos. 9136933, 9133548, 8531885, and 9133702 be modified to reduce the levels of negligence from high to moderate;
>
> Citation Nos. 8531887, 8538990, 9133547, 8536000, 8536075, and 8536078 be modified to reduce the likelihoods of injury or illness from reasonably likely to unlikely and to remove the designations of significant and substantial;
>
> Citation No. 9133555 be modified to reduce the number of persons affected from three to two; and
>
> Citation No. 9133708 be modified to reduce the number of persons affected from two to one.

The Solicitors contend that the Secretary has the "unreviewable discretion to withdraw" a designation of significant and substantial. Settlement Mot. at 4 (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996)). However, the Solicitors present an overbroad reading of *Mechanicsville*. In *Mechanicsville*, the Commission addressed whether a Commission administrative law judge could *sua sponte* designate a violation as significant and substantial when the Secretary had not designated a violation as significant and substantial. The Commission ruled that there is "no material difference between the Secretary's discretion . . . on the one hand to vacate a citation and his discretion on the other hand not to issue a citation in the first instance or not to designate a citation as [significant and substantial]." *Mechanicsville*, 18 FMSHRC at 879. The Commission iterated that the designation of a violation as significant and substantial "in the first instance" is a prosecutorial decision akin to the decision to vacate a citation. *Id.* at 880.

However, *Mechanicsville* does *not* address situations—such as here—where the Secretary has *already* exercised his discretion to designate a violation as significant and substantial and now the parties come before a Commission judge to approve a settlement. This situation fits squarely within the plain language of section 110(k) of the Mine Act. Section 110(k) states that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." The matter before the undersigned involves the parties' request for "the approval of the Commission" to "compromise[], mitigate[], or settle[]" a violation already designated as significant and substantial. That's a far cry from supplanting the Secretary's discretion through an authorized representative to designate a violation as significant and substantial in the first instance. Accordingly, the undersigned rejects the Solicitors' contention that the Secretary has the unreviewable discretion after contest to remove a designation of significant and substantial.

The Solicitors also argue that "[t]he Secretary's use of [the 30 C.F.R. § 100.3] regular assessment tables in settlement is a *prima facie* indication that the penalty reduction is fair, reasonable, and adequate under the facts, and protects the public interest" and that "[i]t is appropriate to defer to the judgment of the parties' in arriving at a modified penalty based on the § 100.3 tables." Settlement Mot. at 6. However, the Commission is not bound by 30 C.F.R. § 100.3, and it is the purview of the Commission—not the Secretary or regulations issued by the Secretary—to determine whether a settlement is appropriate under the criteria set forth in section 110(i) of the Act. *Sellersburg Stone Co.*, *v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties. . . . [W]e find no basis upon which to conclude that these MSHA [penalty] regulations also govern the Commission."); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101 (Dec. 2014) ("The Secretary's regulations at 30 C.F.R. Part 100 apply only to the Secretary's penalty proposals, while the Commission exercises independent 'authority to assess all civil penalties provided [under the Act]' by applying the six criteria set forth in section 110(i)." (quoting 30 U.S.C. § 820(i))).

In order to overcome its burden the Secretary must present evidence to a judge—exercising his or her independent authority—to satisfy the six criteria set forth in section 110(i). Simply pointing to its own regulations does not overcome this burden. Therefore, the undersigned rejects the Solicitor's contention that the application of § 100.3 establishes a *prima facie* case for a reasonable settlement or that the undersigned should defer to the parties on this matter.

Consequently, the undersigned evaluated the settlement agreement absent the arguments rejected above.

The undersigned considered the representations and documentation submitted in this case, and the undersigned concludes that the proffered settlement is fair, reasonable, appropriate under the facts, and protects the public interest under *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016), and is appropriate under the criteria set forth in § 110(i) of the Act. The settlement amounts are as follows:

Docket No. SE 2019-0143

Citation No.	Assessment	Settlement
9133272	$142.00	$114.00
8314141	$1,242.00	$0.00
8314489	$142.00	$114.00
8536070	$708.00	$320.00
8536072	$344.00	$275.00
8536000	$832.00	$168.00
9133550	$708.00	$566.00
8531885	$1,577.00	$474.00
8536075	$319.00	$122.00
9133701	$142.00	$114.00
9133702	$4,836.00	$2,173.00
8536078	$344.00	$122.00
9133703	$832.00	$666.00
9133552	$270.00	$0.00
8369985	$230.00	$184.00
	$12,668.00	$5,412.00

Docket No. SE 2019-0116

Citation No.	Assessment	Settlement
8535986	$168.00	$134.00
9132861	$214.00	$171.00
9133536	$768.00	$383.00
9133538	$902.00	$450.00
9133539	$293.00	$234.00
8535988	$768.00	$614.00
8535989	$768.00	$614.00
8535990	$768.00	$383.00
8535991	$768.00	$614.00
9133540	$1,146.00	$917.00
9133541	$1,146.00	$917.00
9133543	$2,993.00	$2,322.00
9133544	$2,353.00	$1,882.00
8133545	$2,353.00	$1,882.00
9133546	$2,353.00	$1,882.00
9133548	$2,353.00	$787.00
9133547	$708.00	$135.00
8314484	$142.00	$114.00
8314485	$142.00	$114.00
8314483	$142.00	$114.00
9133270	$142.00	$114.00
9133271	$270.00	$216.00
	$21,660.00	$14,993.00

Docket No. SE 2019-0169

Citation No.	Assessment	Settlement
9132879	$121.00	$0.00
8531887	$1,057.00	$214.00
9133555	$977.00	$832.00
9136295	$708.00	$708.00
9136933	$2,353.00	$1,323.00
9136081	$1,345.00	$1,345.00
9133708	$768.00	$708.00
	$7,329.00	$5,130.00

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation Nos. 9133536, 9133538, and 8536070 be **MODIFIED** to reduce the levels of negligence from moderate to low.

It is **ORDERED** that Citation Nos. 9136933, 9133548, 8531885, and 9133702 be **MODIFIED** to reduce the levels of negligence from high to moderate.

It is **ORDERED** that Citation Nos. 8531887, 8538990, 9133547, 8536000, 8536075, and 8536078 be **MODIFIED** to reduce the likelihoods of injury or illness from reasonably likely to unlikely and to remove the designations of significant and substantial.

It is **ORDERED** that Citation No. 9133555 be **MODIFIED** to reduce the number of persons affected from three to two.

It is **ORDERED** that Citation No. 9133708 be **MODIFIED** to reduce the number of persons affected from two to one.

It is further **ORDERED** that the operator pay a total penalty of $25,535.00 within thirty days of this order.[1]

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

[1] Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 23, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. SUPERIOR SILICA SANDS LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2019-0133 A.C. No. 41-01126-482167 Docket No. CENT 2019-0171 A.C. No. 41-01126-484042 Mine: Superior Silica Sands San Antonio Plant

DECISION AND ORDER

Appearances: Lindsay A. Wofford and Phillip Marquez, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;

Joseph A. Fisher, III and Benjamin Rhem, Jackson Walker LLP, Houston, Texas and Austin, Texas, for Respondent.

Before: Judge Miller

These cases are before me upon petitions 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"). These cases involve one citation and two orders issued pursuant to Section 104(d)(1), with a total proposed penalty of $49,195.00. The parties presented testimony and evidence regarding the citations at a hearing held in San Antonio, TX commencing on November 6, 2019.

The Superior Silica Sands San Antonio Plant is an open pit, surface sand mine located in Bexar County, Texas. The parties have stipulated that Superior Silica 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. Tr. 6–7; Sec'y Amend. Prehearing Submissions at para. 4.a–g.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The citation and two orders at issue in this proceeding involve railcars on the south section of the company owned rail spur at the Superior Silica Sands San Antonio Plant. On June 23, 2018, a fatal accident occurred at the mine when Rodney Fernandez, a 46-year-old electrician, was struck by two uncoupled railcars after attempting to set the manual handbrake. Fernandez had no previous mining experience and had been employed at Superior for about ten weeks. The accident occurred when Fernandez climbed on a set of moving railcars after they began to roll down the track while he was helping Plant Manager Chad Thomsen uncouple and move railcars from the south spur to the north spur. The parties agree that most of the facts in this case are not in dispute. There is, however, a dispute regarding the time on the day of the accident and what occurred between Thomsen and Fernandez leading up to the accident. At hearing, the parties agreed that the diagram taken from the MSHA accident investigation report and labeled as Joint Exhibit 1, would be used to facilitate testimony regarding the railcars and the rail spurs. The diagram labels the cars from one to six on the south spur, with a track mobile, also referred to as a Rail King, at the front of Railcar #1. The north spur shows a car labeled "spare". The cars are shown in the photographs in Secretary's Exhibit 2.

The problem with the railcars began on March 2, 2018, when railcar TILX 338713 (Railcar #4 on Joint Exhibit 1), was involved in an accident in the area of the south spur of the Superior rail line. The car derailed, and as a result, the brakes and underside of the car suffered significant damage. The mine hired a contractor to set the car back on the rail, and subsequently moved it into place on the south spur between Railcars #3 and #5, both of which had functioning brakes. The three cars were coupled together and signs were placed on Railcar #4 that read "DO NOT FILL." Sec'y Ex. 2, 9. The railcars are leased and at the time of the accident in June, no repairs had been made to Railcar #4.

Superior operated an old plant and a new plant. The mined product was moved by railcar at times from the old plant and onto a portable conveyor, which in turn was used to load material onto trucks. At times, material is loaded first onto the rail cars. The railcars operate on the rail spur, as seen on the second page of Secretary's Exhibit 2, to a load out area to be filled with sand and are then returned to the south spur until the sand is needed. When sand is needed, the portable conveyor is moved to the railcar to empty it by opening the bottom of the car, and loading material onto a conveyor that moves the sand from the railcar to a truck for transport out of the mine. There is conflicting evidence about the use of Railcar #4 from the time the brakes were damaged in March until the accident in June. The car was not filled and the mine asserts that the car had not been moved at all, but several witnesses indicated that the string of cars was moved on a weekly basis in order to take on sand for storage. Nonetheless, Railcar #4 remained in the string of cars and coupled to Railcars #3 and #5 on the rail spur from March until the accident in June.

Emilio Gonzales works as a team leader, primarily in the dryer, and sometimes loaded the railcars by opening a valve at the end of the silo's load out arm shown in Exhibit 2. Once loaded with sand, the railcars were moved back to the spur to wait unloading onto the trucks for transport out of the mine. Gonzales did not move the railcars and, in his view, that was done only by the veteran employees who knew the procedure and had moved them in the past.

After the derailment of Railcar #4 in March, but before the accident in June 2018, the mine provided railcar training to some of the miners at the old plant. Adian Amador-Doss attended the training for the full twenty hours over several days. Amador worked as a field mechanic and plant operator at Superior. Amador had been asked at one time to help move the railcars, but he refused, not only because he did not know how, but also because he believed it was not a good idea without the proper training. In May 2018, railcar training was given to Amador and five others, and included class time with videos and a number of handouts. Sec'y Ex. 21. The videos explained how the railcars operated and the hazards associated with working around them. After time in the classroom, the miners spent time around the railcars with demonstrations and hands-on training. Amador explained that at least three miners must be present when a train moves, each with a radio for communication. The training emphasized that trains can fail, and, in the case of a runaway train, miners were told "to let it go." Fernandez did not attend the railcar training.

On Saturday, June 23, 2018, Fernandez reported to work just before seven a.m. He spoke with Amador and Gonzales, and spent time with his immediate supervisor, Taft. Fernandez was the main electrician on site, but also performed general repairs. After discussing the tasks for the day, Taft and Fernandez went to the control room to inspect items that needed repair. Around 8:30 or 9:00 a.m., Taft was called away to look at a conveyor at the old plant, and he told Fernandez to stay at the control room to see if he could find the problem there.

Gonzales, who was working at the dryer that Saturday, greeted Fernandez when he arrived and then went back to work. Just before 9:00 a.m., Gonzales left the control room to change filters and saw Fernandez standing by the railcars. He did not see Thomsen. Gonzales changed the filters, collected a sample of sand, and walked back towards the new plant. As he was on the control room stairs, he looked out and saw Fernandez on the back of moving Railcar #6. At hearing, Gonzales said that one moment he said hello to Fernandez and the next thing he knew, Fernandez was on the moving rail cars. He explained that "Rodney was on the moving train, cranking on the manual brake as it was moving." He also described that Railcars #5 and #6, which were coupled to each other, began "rolling pretty good," and Gonzales could not believe that Fernandez would try to stop them. Fernandez was cranking on the wheel to set the brake as the train was headed for the spur where it would derail. Gonzales saw Fernandez attempt to jump off, and ran toward the cars while calling on the radio for help. Taft heard the radio call, called 911, and shut down the plant. A call went into the paramedics at 9:26 a.m. Sec'y Ex. 15.

According to the evidence gathered by the MSHA inspectors, Fernandez had been in the control room until close to 9:00 a.m. He then left, walked out to the railcar area, and spoke with Thomsen, the plant manager. Thomsen's plan was to first move a spare car coupled to the Rail King from the south spur to the north spur. Next, he planned to move the damaged Railcar #4, from its position with the five other cars on the south spur to the north spur, where it would be coupled with the spare car. Thomsen next planned to move the remaining five cars and offload the sand from Railcars #1 and #2 onto the conveyor. Tr.269. Although Thomsen was working earlier with a partner, he was alone at the railcars when he agreed that Fernandez could help. A few witnesses explained that Fernandez may have left the control room and arrived at the railcars as early as 8:40 a.m. to start the tasks with Thomsen, but the inspector concluded that he left around 9:00. Although not all witnesses agreed, there is evidence to show that Fernandez may

have been with Thomsen for up to 45 minutes, or as little as 25 minutes prior to the fatal accident.

Fernandez had no prior mining experience and had worked as an electrician at the mine for ten weeks. He had never worked with or around railcars, so he had to be task trained prior to completing the work with Thomsen. Thomsen explained that Fernandez was intelligent and caught on quickly. Shortly after Fernandez arrived, Thomsen started up the Rail King, the engine that would pull the cars from the south spur to the north spur. The Rail King had the spare car connected and Thomsen described the process to Fernandez, and then moved the Rail King with the spare car coupled down the south track. Fernandez was responsible for throwing the switch to change the tracks once the cars were in position. Thomsen backed the Rail King onto the north spur and the spare car was uncoupled. Then, the process was reversed, with Fernandez on the ground, changing the tracks as necessary. Next, the Rail King was backed onto the south spur and coupled with Railcar #1 to begin the process of moving Railcar #4 out of the line of cars. The plan was to uncouple Railcar #4 from Railcar #5, and move Railcars #1–4 down the south spur. Then, switch tracks and deliver Railcar #4 to the north spur to couple it with the spare car, and return with Railcars #1–3 to the south spur to couple with Railcar #5. Fernandez was tasked with uncoupling Railcar #4 from #5 to initiate the process.

The mine's maintenance supervisor, Taft, explained the process for moving the railcars as contemplated by Thomsen. Tr. 99–109. The process typically involves two people: an engineer and a ground person. The two miners communicate either by radio or by hand signals. The miners first complete a walk around or a visual check of each of the cars, set the air brakes from inside the Rail King, set the manual or mechanical brake on each car if not already set, and then ascertain that all cars are coupled or uncoupled, based upon what must be moved. It is the duty of the engineer to set the air brakes from inside the Rail King, and the ground person is tasked with setting the manual or park brake on each car by climbing onto an affixed ladder and turning the wheel until it can no longer move. *See* Sec'y Ex. 2, 22.

The process contemplated by Thomsen should have followed the scheme described by Taft, and, after completing a walk around inspection of the cars, setting each mechanical brake, starting at the back of Railcar #6, moving forward, before any cars were uncoupled or moved. The air brakes should have also been set and then Railcar #4 could have been uncoupled from Railcar #5 so that only Railcars #1–4 were moved with the Rail King. According to the testimony, coupling and uncoupling of cars does not take much time. Setting the manual brake is a longer task, as the miner on the ground must climb a ladder onto the back of each car and turn the wheel until it stops.

Following the move of the spare car, Fernandez and Thomsen began the process of moving the damaged Railcar #4 to the north spur.[1] In addition to learning the operation of the switch, Fernandez had to learn how to complete a walk around inspection of the cars, couple and uncouple the cars, set the mechanical brake, and communicate with Thomsen. Thomsen, who had task trained miners in the past, explained that he had confidence in Fernandez after working with him for several weeks because Fernandez was intelligent and caught on quickly. At the time the two were coupling the Rail King to Railcar #1, Thomsen explained the tasks and demonstrated how to climb on the back of the car to set the brake. There is some dispute in the testimony at this point. Thomsen agrees that he did not observe Fernandez set a brake after he demonstrated the action, but he remembers that he did tell Fernandez to set the brakes. Inspector Barrick recalls his conversation with Thomsen differently; twice he was told that Thomsen did not tell Fernandez to set the brakes, but instead assumed Fernandez knew it should be done. Thomsen believed that the brakes on Railcars #5 and #6 were set, but could not explain why the cars began to roll away once uncoupled from Railcar #4. There is no disagreement that the manual brakes on both railcars #5 and #6 were not set when Thomsen began to move the first four cars forward.

Thomsen had a conversation with Fernandez about the process of moving the cars, then walked up the spur to the Rail King and climbed in, leaving Fernandez to uncouple Railcar #5 from Railcar #4. The Rail King was approximately 250 feet away from where Fernandez was uncoupling Railcar #5. Once Fernandez had uncoupled Railcar #5 from Railcar #4, he signaled to Thomsen to begin pulling the four railcars. As Thomsen began to pull the railcars, he looked out of the side window and saw Railcars #5 and #6, which were coupled to each other, rolling down the spur. Thomsen could not see Fernandez, so he stopped the train, ran down the track, and found Railcar #6 derailed and Fernandez lying between the tracks.

As a result of the accident, one citation and two orders were issued to Superior Silica on December 6, 2018. Citation No. 8660296 was issued for failure to properly task train a miner. Order Nos. 8660297 and 8660298 were issued for failure to effectively secure parked Railcars #5 and #6 by blocks or brakes, and for failure to maintain the braking system on Railcar #4 in functional condition, respectively.

A. CENT 2019-0171

Citation No. 8860296

Ten minutes after the accident occurred, MSHA was notified and Inspectors Lance Miller and David Tijerina, along with Lead Investigator Brett Barrick, were dispatched to the mine. As

[1] At hearing, Thomsen explained that he and Fernandez moved the spare car to the north spur that same day prior to the accident. Thomsen indicated that during this process, Fernandez operated the rail switch. Barrick explained that he was not told during the investigation that Thomsen and Fernandez had successfully moved the spare car prior to the accident nor was that fact included in the statement Thomsen gave to the 110(c) investigator several months after the accident. *See* Resp't Ex. G.

a result of the investigation into the accident, Inspector Barrick issued Citation No. 8860296 to the mine.

The citation states that:

> An accident occurred on this mine site on 6/23/18, at approximately 9:20 am, when a miner was fatally injured while assisting in relocating a rail car. The miner uncoupled the last two rail cars and they began to roll away. The miner then ran to the moving cars and attempted to set the manual handbrake. The miner fell from the moving cars and was run over. The miner had not received adequate task training nor did he have any prior experience in this task. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others. Management engaged in aggravated conduct constituting more than ordinary negligence in that it failed to instruct or ensure that the miner set the manual handbrakes or block the two cars from movement. This is an unwarrantable failure to comply with a mandatory standard.

The citation was designated as S&S and an unwarrantable failure, and the Secretary proposed a penalty of $18,846.00 for this violation. The Secretary alleges that the operator violated 30 C.F.R. § 46.7(a), new task training, which requires that:

> You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task …This training must be provided before the miner performs the new task.

30 C.F.R. § 46.7(a). The Secretary argues that Fernandez, who had never worked around railcars and had been at the mine only 10 weeks, needed further and more extensive task training; more than the 25-40 minutes provided by the plant manager, Chad Thomsen.

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152-53 (Nov. 1989).

Based upon information learned during the course of the investigation, MSHA Inspector Barrick determined that Fernandez had not received adequate task training. Prior to doing any work or moving any of the cars, Thomsen was required to task train Fernandez in all aspects of the job at hand that day. He was also required to—but did not— discuss safety hazards with Fernandez and specifically did not instruct him on the procedure in the event of a runaway railcar.

Barrick credibly testified that the mine had experienced a derailment several months prior to this accident and then held a training session in May, which lasted several days. Unfortunately Fernandez did not attend that training. *See* Sec'y Ex. 21 at 2. Thus, Fernandez's only exposure to railcars was the training received just prior to the accident, from Thomsen. Thomsen explained to Barrick that he only demonstrated to Fernandez how to set the manual brake and to couple and uncouple the cars. In Barrick's opinion, that limited training does not meet MSHA requirements. The training did not include any documents, manuals, or other handouts, supervised demonstration of skills, or, crucially, an explanation of hazards associated with the task. Even if Fernandez had the ability to learn quickly, Barrick found it unreasonable to believe that the short amount of time was enough to adequately train Fernandez.

MSHA provides information to mine operators regarding its standards, including task training, which is published and mailed to each mine. MSHA's guidelines suggest that task training is an extensive process that should include providing handouts to miners, maintaining a task list in a training plan, using operator's manuals to determine specific hazards related to the equipment used in the task, and reviewing safety procedures. Sec'y Ex. 28. The guidelines further provide that task training should be completed in a non-production setting, which allows a competent trainer the time to discuss a skill, demonstrate it, and then observe the miner safely complete the task. Sec'y Ex. 28. Inspector Barrick explained that the training for a ground man, working around rail cars, must involve more than uncoupling the cars. The task training should include how to communicate or use hand signals, how to check and set the brakes, the hazards associated with moving rail cars, the red zone area between the cars, the ability to warn persons about moving cars, and how to safely mount cars. Miners must also be trained in safe practices and instructed not to mount a car when it is moving, and never attempt to stop or jump on a runaway rail car.

Superior Silica argues that a competent person, Plant Manager Chad Thomsen, trained Fernandez how to set the manual handbrake and how to uncouple railcars. The mine also argues that given Fernandez's intelligence and prior work performance, the short duration of task training by Thomsen was all that was needed. The mine argues that Thomsen observed Fernandez successfully assist in moving one railcar prior to the accident by operating the switch as Thomsen moved the spare car with the Rail King. Thomsen believed that because Fernandez observed and asked questions prior to moving the spare car, he understood the process. Thomsen agrees that as they began the process, they did not conduct a walkaround inspection of the cars, and did not connect the air brake to Railcar #4, stating, "I had noticed that the steps were bent in. I mean, the braking mechanisms were bent…it was a bad car." Tr. 278. Thomsen did not set the hand brakes on any of the cars prior to uncoupling the cars, nor is it certain that he told Fernandez to set the hand brakes. Resp't Ex. G. Thomsen testified that he did not recall setting or checking the brakes himself, and he did not recall instructing, supervising, or verifying that Fernandez set the brakes, stating, "I guess I assumed he did" because "he looked like he was – I mean, he was more than capable of doing it." Tr. 279; Tr. 283. Thomsen also testified that he did not instruct Fernandez about the hazards of moving a railcar and specifically how to react to runaway cars. Thomsen was approximately 200 feet away from Fernandez with the Rail King's engine running while Fernandez performed many of these tasks for the first time. Thomsen did not observe Fernandez do the tasks he was assigned, and he could not adequately supervise him from such a distance.

Superior Silica called Carl Bradley, as an expert in rail operations, to testify about the training required to demonstrate proper techniques for setting hand brakes and decoupling railcars. While somewhat familiar with MSHA regulations based on his review for this case, Bradley is most familiar with the Federal Railroad Administration regulations. *See* 49 C.F.R. Ch. II. Bradley's expert opinion, based upon visits to the mine location, examination of the railcars, and review of statements made by employees, is that the mine was not negligent in providing task training to Fernandez on the day of the accident. Resp't Ex. B. After listening to testimony at hearing, Bradley believed that Thomsen instructed Fernandez to set the hand brakes, but Bradley could not say why that was not done by either Thomsen or Fernandez. Bradley described the brake wheel in Exhibit L-21, located on the B end of Railcar #5 and agreed that the brake was not set as evidenced by the slack chain. *See* Resp Ex. L-1, L-2.

Bradley believed Thomsen was a qualified trainer and that adequate training could have been completed in 30 minutes. Bradley compared task training to railroad training, and he opined that Fernandez received basic brakeman training. Bradley insists that task training in this instance was straightforward because he saw the task as limited to "uncoupling and setting the brakes on a car," which he considered to be "a very simple task to grasp and understand." Tr. 319. Bradley assumes as part of his opinion that Fernandez and Thomsen communicated effectively, that Thomsen was not required to impart adequate information, and that Fernandez's intelligence was sufficient to compensate for any lack of instruction provided. Bradley did not believe that training on moving equipment was required. The only hazard Bradley considered was slipping on the ladder as Fernandez climbed up to set the brake, but he believed Fernandez, as an experienced electrician, likely had experience climbing ladders. Bradley's observations and opinions do not change my view that Fernandez was not adequately task trained. Bradley's testimony regarding the rail industry is inconsistent with MSHA's requirements and practices for task training. Bradley acknowledged when new rail workers were shown how to set a brake, he took the time to have each of them demonstrate that they could competently complete the task. Finally, Bradley did not address an important part of working with railcars, a part not explained to Fernandez: never attempt to catch or stop a runaway train but instead "let it go." Tr. 42-43; 114; 152-153.

Fernandez had never worked on a railcar, and he had only been at the mine for a short time. These factors indicate that the task training needed to be much longer and in greater detail than for an experienced miner who had worked around railcars. Superior asserts that there is no requirement in the regulations that a certain amount of time be spent on task training and that the trainer can take into account the skills of the miner. Inspector Barrick agreed that the MSHA regulations do not specify an amount of time for task training, and the training can be done through supervised practice under a competent trainer. The complexity of the task may be considered along with the experience and ability of the miner being trained. Nonetheless, these are just a few of the many considerations that go into complete task training. Notably missing from the training and from Bradley's testimony are the important requirements of task training that relate to safety considerations when working around railcars, including safety considerations when setting a brake, coupling and uncoupling cars, throwing switches, using hand signals, and understanding correct safety procedures in an emergency. When asked, Bradley responded that railroad companies no longer train miners how to board moving equipment "because there was [sic] so many injuries." Tr. 359. Although Thomsen and Barrick differ on whether Thomsen told

Fernandez to set the brakes on Railcars #5 and #6 prior to moving the cars, it is not disputed that Fernandez failed to do so. The fact that Fernandez did not set the brake, and Thomsen also failed to do so, indicates that the task training was inadequate. In this instance, either Thomsen did not remind Fernandez to set the two brakes, or Fernandez who is described as an intelligent and thoughtful worker, disregarded Thomsen's direction. It was the responsibility of Thomsen, to observe Fernandez and ascertain that he not only knew how to do a task, but when and where to do it.

The Secretary's regulations require that a miner who is assigned to a new task for which he has no previous work experience be provided with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task. 30 C.F.R. § 46.7(a). Moreover, this training must be provided before the miner performs the new task. *Dacotah Cement*, 26 FMSHRC 461, 466 (Jun. 2004) ("Subsection (d) clearly requires that a miner be trained in recognizing hazards *specific* to the assigned task *before* performing the task.") (emphasis original); *see* 30 C.F.R. § 46.7(d). Although the Commission has indicated that a short period of time may suffice for task training, it must include health and safety information in addition to supervised practice or operation. *See White Oak Mining & Construct. Co.*, 20 FMSHRC 1130 (Oct. 1998). Even if I find that everything Superior Silica suggests is true, there is no dispute that supervised practice or operation was not provided and that Fernandez was given no training in the safe work procedures of that task. I find therefore that the mine did not task train Fernandez as required and uphold the violation as issued.

i. Significant and Substantial

The Secretary further alleges that the violation was 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)(l). 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, 2037-38 (Aug. 2016). The Commission has explained that "hazard" refers to the prospective danger the cited safety standard is intended to prevent. *Id.* at 2038. For example, Newtown involved a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed. *Id.* The Commission determined that the hazard was 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 found that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

I have found a violation as discussed above, and I find that the hazard that this standard is meant to prevent is that of an untrained person engaging in a task without understanding the proper procedure and safety hazards associated with the task. As Congress noted in the Mine Act, an untrained miner is a hazard to himself and others. 30 U.S.C § 814(g). Here, given the circumstances and conditions at the time, the hazard was likely to occur, in that a miner who had not been adequately trained, was forced to deal with an unsafe condition and did not know how to do that. The failure to adequately train was likely to lead to an accident that would in turn result in serious injuries or a fatality. Clearly, the violation here led to a fatal injury.

The Commission has previously agreed with an ALJ regarding the significant and substantial nature of failing to task train a miner. In *Twentymile Coal Co.*, a miner fell from a ladder while attempting to unclog a vertical rock chute. 26 FMSHRC 666 (Aug. 2004), *aff'd in part and remanded in part by Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005). The Commission unanimously agreed that the operator failed to provide task training and that the violation was S&S, finding that the operator had assigned a group of miners to a job without any training "to guard against hazards inherent to the task," such as slipping and falling around the ladder and platforms and spillage of rocks outside of the chute. The Commission also rejected the mine's argument that the background and experience of miners must be reviewed in order to make an S&S determination once a violation has been established. 26 FMSHRC at 681.

In this case, Fernandez was inexperienced and received very little training in the new task he was performing. As a result, the hand brakes were not set on Railcars #5 and #6, and as they were uncoupled from Railcar #4, they began to roll down the track. In addition to not understanding he must set the brakes on those two cars, Fernandez was not told that he should not jump onto a moving railcar in an attempt to set the brakes after it was in motion. Applying the S&S criteria to the circumstances here, I find that the violation is significant and substantial.

ii. Negligence

The Secretary alleges that the violation was the result of high negligence. 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. *Newtown*, 38 FMSHRC at 2047; *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987) ("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."); *see also* 30 U.S.C. § 801(e). 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*, 38 FMSHRC at 2047; *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). While the Secretary's Part 100 regulations evaluate negligence based on the presence of mitigating factors, Commission judges are not limited to that analysis. *Brody*, 37 FMSHRC at 1702-03. Rather, Commission judges consider "the totality of the circumstances holistically" and may find high negligence in spite of mitigating circumstances. *Id.* at 1702.

Superior Silica argues that a competent person, Chad Thomsen, observed Fernandez successfully move one railcar prior to attempting to move Railcar#4 to the other track. Therefore, the mine argues some training was provided and so the negligence was not high. The Secretary alleges that because Thomsen did not take the time required to adequately train Fernandez, and made assumptions about his abilities, the violation was the result of high negligence. I agree. Thomsen knew that Fernandez had no experience or prior training on rail work and as Inspector Barrick explained Thomsen should have either refused the help offered by Fernandez or taken the time necessary to include all aspects of the training needed by Fernandez to do the job safely. Thomsen was a manager with experience who should understand the risks of failing to adequately train miners. In particular, Thomsen should have understood the risks of an untrained miner uncoupling and moving large and heavy railcars on a grade.

In *Ky. Fuel Corp.*, the Commission approved a judge's decision that similarly concluded that high negligence was appropriate due largely to the operator's failure to provide adequate training and materials that resulted in an improper wheel blocking violation. 40 FMSHRC 28 (Feb. 2018). In this case, the supervisor made little to no effort to task train the miner. The Secretary believes the task training was inadequate for three reasons: (1) the mine failed to ensure that Fernandez set the manual handbrakes or blocked the two cars prior to Thomsen attempting to decouple the cars; (2) Thomsen should have either set the manual handbrakes on or blocked the two railcars himself, or directly observed Fernandez set the manual handbrakes on or block Railcars #5 and #6; and (3) the mine should have instructed the miner that in the event of a runaway train, the miner should allow the railcars to proceed to derailment. In failing to do any of these three items, Thomsen was highly negligent.

iii. Unwarrantable failure

Citation No. 8860296 was designated as an 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.

A number of the factors outlined in *IO Coal,* are a basis for the unwarrantable finding in this case, particularly that the violation was obvious, posed a high degree of danger and the operator knew of the violation. First, there is no testimony regarding how long the mine has failed to adequately task train its miners, and there is also nothing to demonstrate that the mine had been placed on notice that greater training efforts were necessary. However, the record reflects that the violation was extensive in terms of the total failure to task train prior to attempting to move the railcars. 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) (emphasis added). To safely work in this sort of situation, a miner must have a breadth of understanding about the very large equipment and the safety hazards associated with it. Yet, the mine failed to train Fernandez on the important safety factors related to the task, and therefore the violation was extensive in those terms.

Thomsen and Fernandez were working on enormous pieces of machinery. The railcars at issue are nearly 50 feet long and 15 feet high. The railcars weigh approximately 53,000 pounds when empty and are estimated to contain 200,000 pounds of sand when full, on a track that has a grade of 2-3%. Resp Ex. F at 4, Tr. 173-177 217, 281. Work on this equipment posed a considerable risk to miners, regardless of their level of training or experience. The degree of danger was exacerbated by the fact that Thomsen left Fernandez alone to perform a task that he clearly did not have enough experience or training to do. Moreover, the fact that Thomsen did not include any explanation regarding the safety hazards associated with the tasks, including what to do in the event of a runaway train, made this already dangerous activity all the more hazardous. Fernandez's death resulted from a reckless disregard for his safety when working under conditions that posed an extremely high degree of danger. I find these to be aggravating

circumstances that support a finding of unwarrantable failure to comply with a mandatory standard.

Knowledge is also a factor in determining that the violation is an unwarrantable failure. Thomsen was the plant manager, a supervisor with experience who had conducted task training in the past. Thomsen knew, or at best, should have known, that given the lack of experience in both mining and in the use of railcars, the training he gave Fernandez was inadequate. Despite the fact that Fernandez had performed well during his short time at the mine, Thomsen should not have assumed that Fernandez knew what to do safely. The need for explicit and careful training was obvious, and the operator was aware of that fact.

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. In this case, Thomsen provided inadequate instruction before leaving Fernandez to work on his own and no abatement efforts were made. Given that the task was inherently dangerous, that the lack of task training was obvious, and that Thomsen should have known that more training was needed, yet failed to do so, I find the Secretary has demonstrated that the violation occurred as the result of the operator's unwarrantable failure to comply with a mandatory health or safety standard.

Order No. 8860297

On December 6, 2018, Inspector Barrick issued a second citation as a result of the accident. The citation states:

> An accident occurred on this mine site on 6/23/18, at approximately 9:20 am, when a miner was fatally injured while assisting in relocating rail cars. The miner uncoupled the last two rail cars and they began to roll away. The miner ran to the moving cars and attempted to set the manual handbrake. The miner fell from the moving cars and was run over. The two loaded cars at the end of the train were not effectively secured by either of the raking systems. Management engaged in aggravated conduct constituting more than ordinary negligence in that it did not ensure or instruct the miner to set the manual handbrakes or block the two cars from movement prior to uncoupling. This is an unwarrantable failure to comply with a mandatory standard.

The inspector designated the order as S&S and as an unwarrantable failure, and the Secretary proposed a penalty of $20,940.00. The Mine Act and its standards "are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners." *Pittsburg & Midway Coal Mining Co.*, 8 FMSHRC 4, 6 (1986). The mandatory standard at issue here, 30 C.F.R. § 56.14217, securing parked rail cars, is part of the safety standards for equipment and is intended to ensure miner's safety when working around equipment such as railcars. The standard requires that "[p]arked railcars shall be blocked securely unless held effectively by brakes," which is meant to "provide [p]rotection for miners against unintended movement of railcars." 30 C.F.R. § 56.14217; 53 Fed. Reg. 32,496 (Aug. 25, 1988).

The Section 104(d)(1) order alleges that the two cars at the end of the train were not effectively secured by either of the braking systems. The Secretary argues that the mine failed to set the manual handbrakes or block the two cars prior to attempting to decouple and then move the cars. Since the miner had never performed this task, the supervisor should have either set the handbrakes or directly observed the miner set the handbrakes. And if there was any indication that the brakes would not hold, the Supervisor should have blocked the cars from movement. When the miner uncoupled Railcar #5 from #4, and Thomsen pulled Railcars #1-4 away, Railcars #5 and #6 began rolling down the track in the opposite direction and therefore were not secured against movement.

This citation was issued because Railcars #5 and #6 did not have the mechanical brakes set or blocked prior to uncoupling and moving the front cars. *See* Jt. Ex. 1. There is no dispute that the brakes were not set, as Fernandez tried to jump on Car #6 as it was moving and was observed turning the wheel to set the brakes. When the cars came to a stop, and Railcar #6 derailed, the brake was set on that car, but was not set on Railcar #5. Inspector Barrick testified that if the brakes had been set and were functioning, that might have stopped the train. The mechanical brakes on both cars were required to be set, and if they were not, or did not hold, they were required to be blocked from movement.

Superior Silica argues that the two railcars were effectively secured because they had remained in the same position since March 2018 and until June 23, 2018, the date of the accident. I disagree, the mandatory standard requires that the mechanical brakes be set and therefore, relying on the brakes of attached equipment does not satisfy the requirements of the standard. Thomsen and Fernandez failed to set the brakes on Railcars #5 and #6 or block the cars from movement. As neither action was taken, I find that there is a violation of the mandatory standard.

i. Significant and Substantial

The Secretary alleges that the violation occurred and was fatal and marked the citation as significant and substantial. The standard is designed to protect against unintended movement of the rail cars. In the circumstances found here, uncoupling the cars resulted in an unintended movement, which in turn resulted in the hazard the standard is designed to avoid. The unintended movement of these two railcars resulted in two, very heavy, 50 foot long cars moving down the track without warning, and resulted in an injury to a miner. The additional hazard that the standard is intended to prevent is that of a miner trying to set the brake once the cars started to move, in order to avoid a derailment. Both conditions and hazards would result in an injury to a miner and the injury would be serious or fatal.

Superior argues that the railcars had been in the same location for months, and therefore it was unlikely that they would move. However, the cars had been coupled to others while on the tracks and it was the uncoupling that most likely caused the unintended movement. The Secretary argues that even if coupled, the brakes are required to be set, if the cars are not blocked from movement and the failure to do so creates a hazard that likely will lead to a serious injury. I agree and find that the violation was significant and substantial.

ii. Negligence

The Secretary alleges that the violation was the result of high negligence. Superior Silica argues that the railcars were effectively secured because they had remained in the same position from March 2018 up until the accident on June 23, 2018. The mine also argues that the miner was specifically instructed to set the manual handbrakes on the two cars to prevent movement prior to uncoupling.

The Secretary argues that the mine failed to ensure that Fernandez had set the manual handbrakes or block the two railcars before either of the men attempted to decouple the cars and before Thomsen began to move the four front cars forward. Thomsen, as the supervisor and trainer, knew that the brakes should be set prior to any movement, or even while just idle on the tracks. He should have ascertained that all of the brakes were set and would hold the two end rail cars before attempting to move the front cars. Given Thomsen's position, the Secretary contends that Thomsen should have set the manual handbrakes or blocked the railcars himself, or that he should have directly observed Fernandez perform the task. Thomsen did neither. Thomsen was the plant manager and the supervisor; he should have ascertained that the brakes were set or blocked and therefore his actions constituted more than ordinary negligence, and I find that high negligence is appropriate.

iii. Unwarrantable failure

The inspector issued the violation as an unwarrantable failure to comply with a mandatory standard. The Secretary argues that management engaged in aggravated conduct constituting more than ordinary negligence because working in and around railcars poses a high degree of danger, the supervisor made no effort to see that the brakes were set or that the cars blocked from movement prior to uncoupling, and the supervisor was aware of the dangers posed by railcars that were not held in place.

Superior Silica argues that there was no willful intent to avoid setting the brakes and that Thomsen specifically instructed Fernandez to set the manual handbrakes prior to uncoupling Railcars #5 and #6. The testimony is disputed in this regard. Barrick asserts that Thomsen did not instruct Fernandez to set the brake, nor did Thomsen in his statement to Barrick believe that the brakes had already been set. Thomsen, on the other hand, asserts that he believed the brakes had been previously set, but later asserts that he told Fernandez to set the brakes.

Nevertheless, as the plant manager and supervisor, it was Thomsen's responsibility to ensure the brakes were set prior to moving the cars. This was crucial. The brakes were not set at the time the cars were uncoupled, resulting in a critically high degree of danger and resulting in the death of Fernandez. Moreover, as long as the cars were parked, the mechanical brake should have been set, and the violation therefore was obvious and known to the mine, yet nothing was done to abate the condition prior to the date of the accident. Since the railcars were not used frequently, the brakes likely had not been set for some time. Therefore, the length of time the condition existed contributes to the finding of unwarrantability. Although the Secretary argues that the mine was put on notice by the derailment some months earlier, I cannot agree that the earlier derailment would alert the mine to the type of violation cited here. I also do not rely on how extensive the violation was in making a determination about unwarrantable failure.

However, I find the other factors compelling and as a result find the violation was the result of an unwarrantable failure to comply with a mandatory health or safety standard.

B. CENT 2019-0133

Order No. 8860298

The final order issued by Inspector Barrick on December 6, 2018 cited a railcar, designated as Railcar #4 on Joint Exhibit 1, for not having functional brakes. The citation alleges:

> The mine operator failed to maintain the braking system on rail car TILX 338713. The rail car was located on the South section of the mines rail spur coupled to 6 other cars situated in the 4 position. The rail cars brake linkage had been sheared off on March 2, 2018 when it was released down the spur and derailing it onto its side. The car was recovered and placed back onto the spur without repairing the braking system. Chad Thomsen, Plant Manager engaged in aggravated conduct constituting more than ordinary negligence in that he failed to ensure that the braking system on the TILX 338713 was maintained. This is an unwarrantable failure to comply with a mandatory standard.

The citation is designated as S&S and unwarrantable and the Secretary has proposed a penalty of $9,409.00.[2] The standard cited at 30 C.F.R. § 56.14102, titled, "Brakes for rail equipment," states that "[b]raking systems on railroad cars and locomotives shall be maintained in functional condition." The standard is analogous in language to a standard dealing with back up alarms, which are also required to be maintained in functional condition. In *Wake Stone Corp.*, 36 FMSHRC 825, 827 (Apr. 2014), the Commission reviewed the standard for back up alarms and decided that the plain meaning of § 56.14132(a) requires that back up alarms and horns *always* be maintained in functional condition. Evidence showed that the service horns were defective at the time of inspection and the equipment had not been removed from service. *Id.* Therefore, the horns were not being "maintained in functional condition" as required by the regulation. *Id.* Applying a similar interpretation to the regulation at issue here, the plain language of 30 C.F.R. § 56.14102 requires that braking systems on railroad cars must always be maintained in functional condition and, if not, the car must be removed from service.

The Section 104(d)(1) order alleges that the mine operator failed to maintain the braking system on Railcar #4. The Secretary argues that the car's brakes were severely damaged in the March 2018 derailment, that the mine was aware the brakes were damaged, and the mine did nothing to repair them. *See* Sec'y Ex. 2, 25; *see also* Sec'y Ex. 16, 8–15. Instead of repairing the brakes, the mine put Railcar #4 in a string of railcars that the mine used in normal operations. The Secretary argues that while the mine placed a "DO NOT FILL" sign on Railcar #4, that action is not sufficient to comply with the clear terms of the standard. As Barrick explained, if

[2] Order No. 8860298 was originally issued as a Section 104(d)(2) order. At hearing, the Secretary represented that the order had been modified to a Section 104(d)(1) order.

the mine was not going to repair the brakes, the car should have been completely removed from service. The "DO NOT FILL" sign did not effectively remove the car from service. Tr. 226. Even though Rail Car #4 was coupled to Railcars #5 and #3, it could not hold in place on its own and remained defective.

Superior Silica takes the position that the mine should not have been cited for the damaged brakes. Instead, the facts and circumstances surrounding the violation should be considered, including that the mine contacted the owner of Railcar #4 to discuss repairs, coupled the car to other cars to prevent use, did not load it with sand, and did not move the car for nearly three months. The law, however, does not support the mine's position. Once the brakes were discovered to be non-functional and inoperative, and the car remained in a location where it could be used, the mine was in violation of the standard. Railcar #4 was coupled to a line of other cars, which were on the south spur and available for use at the mine. *See Wake Stone*, 36 FMSHRC at 828 (citing *Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843, 845 (Apr. 1981) (if defective equipment affecting safety is located in a normal work area and is fully capable of being operated, that constitutes use)). Following its March 2018 derailment, Railcar #4 should not have been placed in the string of cars but instead isolated in a separate area where it could not be used, as Thomsen was attempting on the day of the accident. Thus, Railcar #4 was not out of service as the mine alleges and I find that the Secretary has proven the violation.

The mine has also suggested that MSHA failed to cite the correct mandatory standard in Order No. 8860298. Superior Silica asserts that the mine should have been cited for a violation of 30 C.F.R. § 56.14100, which requires in part, that self-propelled mobile equipment with hazardous defects be tagged and removed from service. The mine's argument fails to consider the Commission's case law that requires the standard that is the most specific to be cited over a more general standard. As the Commission has consistently explained, when two regulations apply to the same condition, the more specific regulation is the appropriate standard to cite. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994 (June 1997). Here, the standard cited by the inspector, 30 C.F.R. § 56.14102, deals specifically with braking systems on railroad cars and is clearly titled "Brakes for rail equipment." In a dispute over which standard should apply, it is clear that 30 C.F.R. § 56.14102 is more appropriate than the general regulation found at 30 C.F.R. § 56.14100.

i. Significant and Substantial

The citation was marked S&S and the Secretary alleges the violation was highly likely to result in a permanently disabling injury. The Secretary asserts that although the defective brakes did not contribute to the June 23 accident, it was likely that the condition of the brakes would result in an accident. Superior Silica disagrees. The operator argues that the injury was not highly likely to occur because the mine did not use Railcar #4, and instead placed a sign on each side of the car instructing miners not to fill it.

Barrick believed that the condition of Railcar #4 was bad enough that any movement would cause it to derail. He explained that any number of things could go wrong moving Railcar #4 given its severe damage. Tr. 228–29. The car had been sitting on the tracks for months and even though it was connected to Railcars #3 and #5, the brakes were not set on Railcar #5,

thereby rendering the connection less effective. The failure to isolate Railcar #4 from the functional railcars and remove it from the south spur resulted in a hazard. Railcar #4 was in a position and location where it was available for use and could be moved up and down the tracks, even if not filled.

I have found a violation of the mandatory standard and I find further that the standard is designed to prohibit railcars from use when the brakes are not functioning. Using a railcar with bad brakes would likely result in an accident, including derailment or unexpected movement, which in turn would result in a serious injury. In this case, Railcar #4 was coupled within a line of cars and between two that had functioning brakes. However, the evidence shows that Railcar #5, at a minimum, did not have its air or mechanical brakes set at the time of the accident. It is not known if the mechanical brakes were set on Railcar #3, or if they were set at any time during the several months that Railcar #4 was on the south spur and coupled with it.

Given that Railcar #4 had no functioning brakes, was coupled between cars in which at least one did not have the brakes set, and was available for use, a hazard existed. Miners using the car and anyone working or traveling in the area would be subject to the hazard of derailment or unintended movement of a very large, 50 foot long, railcar. If left on its own, Railcar #4 would not be controlled and would likely derail. A railcar without functioning brakes, and most importantly the resulting runaway car, would result in injuries to anyone working in or around the car, and those injuries would be serious and likely fatal. Therefore the violation is S&S.

ii. Negligence

The Secretary alleges that the violation was the result of high negligence. The Secretary argues that placing signs that say "DO NOT FILL" on a railcar with defective brakes is not sufficient to comply with the standard. The operator does not contest that the brakes were damaged, but argues that it took steps to make exposed miners aware of the hazard. The mine put signs on Railcar #4 to indicate that it should not be used, coupled the railcar to other cars with functioning brakes, and did not fill it with sand.

As a reasonably prudent mine operator, Superior Silica should have known its failure to repair the brakes was a violation of a mandatory standard and that the violation posed a significant danger to the miners. The mine's placement of signs on Railcar #4 warning miners not to fill the car was an ineffective effort to comply with the standard. In *Newtown Energy*, 38 FMSHRC 2033 (Aug. 2016), the Commission overturned a judge's finding that the use of a defective lock on a cathead should be considered as an element of mitigation for negligence purposes. "Negligence is not diminished by a miner's clearly ineffective effort to comply with the safety standard." *Id.* at 2048 n.21. Here, mine management was aware the brakes on the car were defective and, given its discussion with the railcar's owner, knew it would be some time before repairs were made. Therefore, Railcar #4 should have been removed from service immediately by disconnecting it from other cars and disabling its ability to be moved. The car should have been moved to the north spur immediately following the March 2018 derailment and blocked against any movement. The mine's failure to do so was the result of high negligence.

iii. Unwarrantable failure

The order was issued as an unwarrantable failure to comply with a mandatory standard. The Secretary argues a number of factors support a finding of unwarrantable failure, including that the operator knew the brakes were damaged on Railcar #4, yet coupled it to an active string of railcars and left it in its defective condition for several months. Since the car lacked functional brakes, the Secretary asserts that the violation was extensive, obvious, and involved a high degree of danger. The Secretary argues further that because the car derailed and was damaged, the mine was on notice that greater efforts were necessary to correct the condition. Coupling Railcar #4 with other cars available for use shows that the mine understood the seriousness of the condition.

Superior Silica argues that the violation does not amount to unwarrantable failure because the mine did not ignore Railcar #4's damaged brakes. The mine contends it could not repair the damaged brakes due to an ownership dispute. Instead, Superior Silica took reasonable steps to limit potential harm, including not filling the railcar, trying to isolate the railcar, and providing warning signs. The mine also states that the railcars were used infrequently. Although I agree that the violation was the result of high negligence, I cannot find sufficient evidence to support a finding of unwarrantable failure.

IO Coal requires Commission Judges to consider a number of factors in addressing an unwarrantable failure designation. First, is length of time that the violation has existed. Following the March 2018 derailment, Railcar #4 was placed in the string of active railcars and remained between Railcars #3 and #5 until the June 23 accident. According to the mine, Railcar #4 was not used and the string of cars was moved infrequently during that time. As the Commission explained in *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010), 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." Here, the inspector believed that Railcar #4 was in the string of active railcars for the several months following its derailment and the mine has not presented any evidence to refute that suggestion but instead suggests that the car was not moved during that time period. Thomsen explained that he was in the process of removing Railcar #4 so that he could empty material from the railcars, but there is no evidence to suggest when the other railcars had been filled. Therefore, the violation did exist for the several months Railcar #4 remained on the active track, but it may not have been used. So while the violation existed for several months, it cannot be said to be extensive. Railcar #4 was on the track with two cars coupled behind it and three in front, each 50 feet in length. I credit Barrick's testimony that the entire railcar and the attached railcars were affected by the damaged brakes but I cannot say that the condition was extensive, given that one car in the string was damaged and was coupled with other cars that were not damaged.

Next, I must consider whether the operator has been placed on notice that greater efforts were necessary for compliance. In this case, the Secretary did not present evidence that the mine had been told to correct the condition of the brakes or that it had been previously cited for similar violations. Therefore, I do not agree that the mine was on notice that greater efforts were required for compliance. I also cannot rely on the lack of abatement efforts to support a finding of unwarrantable failure. 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. Here, the mine did not believe the condition continued to exist because they had moved the car to a location that they believed would prohibit its use.

The Secretary argues that the condition posed a high degree of danger because Railcar #4 lacked functional brakes to hold itself in place and could have derailed following any movement. Tr. 228. Thomsen explained that coupling Railcar #4 in the string of railcars on the south spur was a safe place to keep it since the car was between two cars with operative brakes and the railcars did not move for some length of time. However, the evidence shows that the brakes were not set on Railcar #5 and the string of railcars was available for use, increasing the degree of danger posed by Railcar #4. Although there was a high degree of danger associated with a railcar that had no functioning brakes, it is not sufficient, based upon the facts here, to alone support a finding of unwarrantable failure.

In this case, the condition was obvious to the miners and mine management. Taft, the maintenance manager at the time, testified that he could see Railcar #4 was damaged because the springs were out, the brake shoes were off, the axle was not sitting down on the pin, and there was body damage to the car. Tr. 117–18. In addition, Secretary's Exhibit 16 contains various photographs showing the brakes sheared off of Railcar #4. Sec'y Ex. 16, 9–10, 12, 15. While the condition of the car was obvious, the violation—that is, leaving the damaged car on the tracks without repair— was not as obvious to the mine, since they believed they had abated the violation by placing Railcar #4 in a location that would not require the brakes to be used. The same can be said for the knowledge of the violation. Here, both Taft and Thomsen, supervisors at the mine, explained that they were aware of the defective condition of the railcar. Tr. 116, 258. Thomsen testified that he knew the brakes were not functional because "[t]he levers were bent up on it . . . [the] brake mechanism was bent." Tr. 260–61. While the mine should have known of the existence of the violation, the fact that they believed they had remedied the condition is a factor in determining the knowledge.

Even though the mine was negligent in not repairing or removing the car from service as required by the standard, there is not sufficient evidence in the record to conclude that the violation was the result of an unwarrantable failure to comply.

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). Commission Judges are not bound by the Secretary's penalty regulations. *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).

The Secretary has proposed a penalty of $18,846.00 for the violation cited in Citation No. 8860296, which alleges a failure to provide new task training to Fernandez. I have considered and applied the six penalty criteria found in Section 110(i) of the Act. The history of assessed violations has been admitted into evidence and shows 20 violations by this operator in the 15-month period prior to the issuance of the citation, two of which involve a similar standard. Sec'y Ex. 24. I have addressed negligence and gravity in the discussion above and have found that the violation was S&S, and the result of high negligence and an unwarrantable failure to comply. The mine is medium-sized and the parties agree that the citation was abated in good faith. The mine has raised no defense of ability to pay, but the mine has filed for bankruptcy. Therefore, I find that the proposed penalty of $18,846.00 is appropriate.

Next, the Secretary has proposed a penalty of $20,940.00 for the violation cited in Order No. 8860297, which alleges that Railcars #5 and #6 were not effectively secured by either of their braking systems. In assessing a penalty, I have considered and applied the statutory penalty criteria. According to the history of assessed violations, there are no similar violations for this standard in the preceding 15-month period. Sec'y Ex. 24. Negligence and gravity are addressed above, with findings of high negligence, unwarrantable failure, and S&S. I have considered the operator's good faith abatement, size, and ability to pay, and I find that the penalty of $20,940.00 is appropriate.

Finally, the Secretary has proposed a penalty of $9,409.00 for the violation cited in Order No. 8860298, which alleges that Railcar #4 did not have functional brakes. In determining a penalty, I have considered and applied the six statutory penalty criteria. The history of assessed violations shows no similar violations for this standard in the preceding 15-month period. Sec'y Ex. 24. Negligence and gravity have been addressed in the discussion above, and I have found that the violation was S&S and the result of high negligence. The designation of unwarrantable failure has been removed. The mine's history, size, ability to pay, and good faith abatement have been considered. Based on these findings, I assess a penalty of $5,000.00.

Citation No.	Originally Proposed Penalty	Penalty Assessed
Docket No. CENT 2019-0171		
8860296	$18,846.00	$18,846.00
8860297	$20,940.00	$20,940.00
Docket No. CENT 2019-0133		
8860298	$9,409.00	$5,000.00
TOTAL	**$49,195.00**	**$44,786.00**

III. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $44,786.00 within 30 days of the date of this decision.

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 30, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL CO., LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2018-244 A.C. No. 36-07416-467981 Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Matthew R. Epstein, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor

James P. McHugh, Esq., Hardy Pence, Charleston, West Virginia, for the Respondent

Before: Judge Lewis

I. STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). A hearing was held concerning Citation Nos. 9076658 and 9079183 in Pittsburgh, Pennsylvania wherein the parties presented testimony and documentary evidence.[1]

FINDINGS OF FACT AND CONCLUSION OF LAW

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his

[1] This Court issued a Partial Decision Approving Settlement on June 10, 2019, that disposed of Citation Nos. 9079153, 9079154, 9079155, 9079157, 9079159, 9079160, 9079163, 9079166, 9079165, 9079171, 9079173, 9079177, 9079176, 9077366, 9079184, 9077226, and 9078990.

demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's 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) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

II. JOINT STIPULATIONS

The parties' joint stipulations are as follows:

1. Respondent is an operator as defined in Section 3(d) of the Mine Act at the mine where the citations were issued.
2. Enlow Fork Mine is a mine as defined in Section 3(h) of the Mine Act.
3. The operations of Respondent at Enlow Fork Mine are subject to the jurisdiction of the Mine Act.
4. The proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Mine Act Sections 105 and 113.
5. Enlow Fork Mine is owned by Respondent.
6. Payment of the proposed penalties will not affect the Respondent's ability to remain in business.
7. The individual whose name appears in Block 22 of each citation in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
8. The citations were properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time and place stated in each citation, as required by the Act.
9. Exhibit A to the above-captioned docket contains authentic copies of the citation sat issue.
10. Respondent stipulates to the authenticity and admissibility of the R-17 certified mine history form (GX-8).

Tr. 102-103; SB 1-2.[2]

[2] References to the transcript of the hearing in this matter are designated "Tr." followed by the page number. References to joint exhibits are designated as "J" followed by the number. References to the Secretary of Labor's exhibits are designated as "GX." References to Respondent's exhibits are designated "RX." References to the Secretary's Post-Hearing Brief are designated "SB" followed by the number. References to the Secretary's Reply Brief are designated "SRB" followed by the number. References to the Respondent's Post-Hearing Brief are designated "RB" followed by the number. References to Respondent's Reply Brief are designated "RRB" followed by the number.

III. SUMMARY OF TESTIMONY

On May 24, 2018, MSHA Inspector Bernard Caffrey was sent to the Enlow Fork Mine for a quarterly E01 inspection.[3] Tr. 17-18. Inspector Caffrey was also instructed to find several gas wells and see if they had the pillar protection permit for the plan submitted. Tr. 17-18. The gas wells were plotted on 75.1200 mine maps that had been submitted to MSHA since 2015. Tr. 113. Caffrey asked to see the pillar protection plan, but found that the mine did not have one. Tr. 18. Therefore, he issued Citation No. 9076658 for violating 30 C.F.R. § 75.1700.[4] Tr. 17-18. The Condition or Practice section of the citation stated:

> The operator failed to take reasonable measures to locate all oil and gas wells penetrating the coal bed or any underground portion of the mine in that the operator did not submit for a gas well pillar protection permit to establish adequate barriers around the total of 11 CNX Gas NV-34 Marchellus [sic] gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter without prior approval from all agencies. The CNX Gas NV-34 wells have been drilled within 100 feet of the previously mined E-19 Longwall panel of the E Longwall district without an approved gas well pillar protection permit.
>
> In order to terminate this citation, the operator will submit for approval a gas well pillar protection permit for the CNX Gas NV-34 Marchellus [sic] wells for the now sealed E Longwall district to prove that the barrier is sufficient in size.

GX-1.

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[3] At the time of hearing, Bernard Caffrey had been an MSHA inspector for six years. Tr. 15. Prior to working for MSHA, Caffrey worked at several mines performing various types of work, including ventilation work, running a scoop, running a continuous miner, running a rib bolter, and others. Tr. 15-16. He had black cap papers as well as machine runner's papers. Tr. 16-17.

[4] The regulation states:

> Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier.

30 C.F.R. § 75.1700.

After Caffrey was shown the number of wells to make sure that they matched his records, he discussed with Consol personnel the distances to determine whether they were within a 150-foot radius required by law. Tr. 19. Caffrey asked for proof that the plan was submitted, but such proof could not be provided. Tr. 20. Caffrey wrote in his notes that the area was mined in 2009, it was sealed in 2014, and the well was drilled in 2013. Tr. 19. The area at issue was a bleeder district when the wells were drilled. Tr. 23. He testified that it was not an active area when the citation was issued, but it was traveled by a certified examiner. Tr. 23, 28.

Caffrey discussed the matter with his supervisor, Tom Bochna, and then notified Steve Apperson at Consol that he was issuing a citation. Tr. 20. Caffrey explained that he had to discuss whether to issue a citation with his supervisor and district manager because the situation was not one he had dealt with before. Tr. 20. To his knowledge, MSHA had not previously issued a 75.1700 citation for Marcellus wells prior to the one that Caffrey issued.[5] Tr. 25-26. MSHA did not issue any 75.1700 citations for these NV-34 wells between January 2015 and May 2018.[6] Tr. 34. Caffrey did not know the reasons why no citations were issued, but testified that it may have been overlooked. Tr. 34. Inspector Caffrey testified that even though the regulation requires conformity with state law, he did not consider state law before he issued the citation. Tr. 27. Caffrey explained, "Honestly, we don't typically go into state laws, because it's state law, and we are federal law. And I cited it as a federal law." Tr. 27.

Caffrey testified that he designated the citation as "no likelihood" because, at the time that the citation was issued, the area was sealed.[7] Tr. 21. He designated it as "moderate" negligence because he believed that the company knew about these wells. Tr. 21-22. Caffrey based this belief on the fact that company representatives worked with the gas companies to plot the areas, and because Consol had the wells on their maps. Tr. 22.

Caffrey gave Consol one week to terminate the violation. Tr. 22. The citation stated that in order to terminate, "the operator will submit for approval a gas well pillar protection permit for the CNX Gas NV-34 Marchellus [sic] wells for the now sealed E Longwall district to prove that the barrier is sufficient in size."[8] Tr. 41. The operator submitted a short letter with an

[5] Caffrey was not able to determine if Enlow Fork had previous 75.1700 citations at the time he wrote the citation. Tr. 25.

[6] The transcript improperly called the NV-34 well "NC134 wells." Tr. 34.

[7] The bleeder district adjacent to NV-34 wells was sealed on June 28, 2014. Tr. 139.

[8] The operator had not previously submitted a gas well pillar protection permit application to establish adequate barriers around the total of the 11 CNX Gas NV-34 Marcellus gas wells. Tr. 31-32. Caffrey testified that 30 C.F.R. 75.1700 requires such that barriers shall be no less than 300 feet in diameter without prior approval. Tr. 31-32. In the letter attached to the initial drilling plan submitted to MSHA in 2013 for NV-34, it stated that the gas company would maintain a 50-foot barrier of coal between the hole and the mine rib. Tr. 134-135.

attached map/form in order to terminate the citation. Tr. 41-42; GX-5, p. 3-4. The letter stated in full:

> Enlow Fork Mine is respectfully submitting, for your approval, a safety barrier zone for the NV-34 wells. Mining in the respected area had been completed in 2009 and these wells were drilled after mining in 2013. This submittal is in response to citation #9076658 issued by your department on May 24, 2018. Please find the attached drawing pertaining to this request.

GX-5, p. 3. Attached to the letter was a drawing and form that the operator had submitted to the state of Pennsylvania. Tr. 59. The attached drawing shows the wells, along with a 40,000 square foot Support Area. *Id.*

After the operator filed a plan with the district manager, MSHA Inspector Bryan Yates issued the termination for Citation No. 9076658.[9] Tr. 58; GX-1, p. 2. On July 17, 2018, MSHA sent Consol a short letter stating, "Your plan dated May 30, 2018, and additional information received on July 11, 2018, to protect the Enlow Fork Mine, I.D. 36 07416, from the hazards of the NV-34 Wells, located in the E19 sealed area of the mine, is approved." GX-5, p. 1.

There was general agreement among the witnesses that if the operator wants to get within 150 feet of the wells in the future, it would still need to file paperwork with MSHA and the state of Pennsylvania. Tr. 43, 137. This is because the operator only needs to notify MSHA if, when it is mining, it comes within the 300-foot diameter surrounding the well. Tr. 51-52, 138.

On May 30, 2018, Inspector Yates issued Citation No. 9079183 at the Enlow Fork Mine because the operator's plan only listed six wells, but their 75.1200 map listed nine wells.[10] Tr. 60; GX-2. The Condition or Practice section in the citation stated:

> The operator failed to file a revised plan for the 3 additional wells that were drilled at the NV-60 well cite[sic] located between the E-23 tailgate and the E-23 headgate. the plan that the operator filed for the NV-60 only requested to drill 6 wells. The plan submitted indicated that the holes would measure 80 feet from the rib line. The addition of the 3 wells lessened this distance to 59 feet. The operator did not ensure that an adequate barrier would remain around these new wells. The operator failed to file for an approved gas well pillar protection permit with all agencies.

[9] Bryan Yates was a MSHA inspector since May 2014. Tr. 55-57. Prior to that, Yates worked as a section foreman, a MET instructor, and a CPR instructor. Tr. 55-56. Yates received CMI training, as well as accident investigator training. Tr. 55. As an MSHA inspector, Yates performs quarterly inspections and reviews plans to ensure that the mines are following plans as required. Tr. 57.

[10] Yates had not been in the bleeder before the day that he issued the citation. Tr. 81.

> Standard 75.1700 was cited 1 time in two years at mine 3607416 (1 to the operator, 0 to a contractor).

GX-2.

Yates testified that the plan approved on September 24, 2013, for the NV-60 Marcellus wells was only approved for six wells in the area.[11] Tr. 61; GX-3, p. 3. These additional wells were drilled on the same surface pad as the six existing wells. Tr. 83. Casey Saunders, the manager for coal and gas coordination for Consol Energy, testified that Consol was not required to submit the drilling plan, but only did so for the NV-60 wells as a courtesy.[12] Tr. 125. He explained that he met with Pennsylvania officials in 2013 to discuss the novel issue of gas wells being drilled behind mining. Tr. 121-122. Consol had gas wells drilled behind mining in West Virginia, but had not done so in Pennsylvania, so Saunders sought guidance from the state concerning the requirements. Tr. 122. The Pennsylvania Department of Environmental Protections officials told Saunders that if the gas wells were being drilled behind mining, and it met with the requirements of the 1957 study guidelines, then no drilling plan was required. Tr. 123. He explained, "At the time, like I said before, this was pretty new. When I say this, drilling behind mining was a new concept at the time in Pennsylvania. And it's better to be safe. And we decided to submit a drilling plan to get everybody on board." Tr. 125.

When the new wells were drilled, it reduced the barrier to approximately 59 feet. Tr. 63. The plan submitted for the six wells stated that the operator would keep an 80-foot barrier in order to ensure a minimum 50-foot barrier of coal between the hold and mine rib. Tr. 82-83; GX-3. Yates indicated that the holes were measured 80 feet from the rib line, measured from the barrier block. Tr. 81-82; GX-2. When the engineer gave Yates the distance reading, it was 59 feet from the wells to the rib line. Tr. 84. The approval letter from MSHA stated that the plan was approved and that "The MSHA field office shall be notified at least 48 hours prior to drilling within 30 feet of the coal seam. This approval is for drilling at the stated site only. Additional sites will require separate approvals."[13] GX-3.

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[11] These unconventional wells involve horizontal drilling. Tr. 66.

[12] Casey Saunders worked as the manager of coal and gas coordination for Consol Energy since 2017. Tr. 106. Prior to that position, Saunders was a senior project engineer working with gas operators on coordinating surface activities. Tr. 107. Saunders graduated from Virginia Tech in 2009 with a BS in mining and mineral engineering. Tr. 107. Saunders has previously worked for Peabody Energy. Tr. 107. Saunders was responsible for coordinating gas wells since 2012. Tr. 108. Saunders has assistant underground foreman papers in West Virginia, as well as a Pennsylvania engineering license. Tr. 109. Saunders is a member of the PA DEP oil and gas management technical advisory board. Tr. 109.

[13] Based on this Court's reading of the plan and approval in evidence at GX-3, the term "site" refers to the "solid barrier of coal left between the Enlow Fork's E-23 Tailgate and the E-22 Headgate sections," which shared a common well pad on the surface. GX-3, p. 1-3.

After investigating, Yates concluded that there were no additional pillar permits for these three additional wells.[14] Tr. 61. Yates did not find any other documents, revisions, or changes that showed approval to drill the three additional wells. Tr. 61-62. Yates did not cite the operator for failing to locate the wells, but rather for not filing the plan. Tr. 81. Yates testified that they received a directive from the District to raise awareness and pay more attention to the maps. Tr. 77. He understood that to mean that they "should pay attention to mining around gas wells and make sure maps are correct." Tr. 77. Yates testified that he does not know much about state mining laws. Tr. 90.

Yates testified that he believed the areas were drilled in 2014 and had been used only for bleeder examinations in order to check the fans, water, and ventilation. Tr. 70. In the bleeder district, at the third entry which is closest to the wells, the operator was required to have supplemental support through the entire entry. Tr. 79. They would have to do this by either cans or cribs. Tr. 79. The operator must maintain the integrity of the bleeder entryway using cans until the bleeder district is sealed. Tr. 79. The cans keep the area from being crushed by the pressure. Tr. 79. Once the cans are installed, there is no way to get mining equipment into the area. Tr. 80, 94-96. Electricity is not allowed in the bleeder section. Tr. 80. Yates testified that there would be no future mining in the third entry. Tr. 80.

Yates marked the citation as "no likelihood" because the wells had already been drilled so he treated the matter as a paperwork violation for the plan not being revised for the three additional wells. Tr. 62. Yates marked the citation as "moderate" negligence because the operator showed that they knew about the wells by including them on the maps, but never revised their plan. Tr. 62-63. Yates did not consult with any state laws before writing the citation. Tr. 87. Yates testified that he has no expertise in geology, and indicated that that was why it was important to submit plans that experts could analyze and determine if adequate. Tr. 88. Yates terminated Citation No. 9076658 on May 30, 2018, after the operator submitted a plan. Tr. 67-68.

Casey Saunders testified that state law does not require an operator to apply for a pillar protection permit when wells are drilled behind the coal. Tr. 112. Saunders took issue with the citation's assertion that the operator failed to take reasonable measures to locate the wells because, he explained, they were placed on the mine map in 2015. Tr. 113. Saunders testified that the operator submitted the ventilation maps to MSHA on an annual basis. Tr. 113. Saunders did not believe that the law applied to the instant situation. Tr. 114. He described the process of getting a Pennsylvania coal pillar permit, but explained that the state application was not relevant to the instant situation. Tr. 114-115. The relevant portions of Pennsylvania law are in regard to wells that are drilled out in an area that mining is approaching. Tr. 117.

The Pennsylvania Department of Environmental Protection (DEP) uses the 1957 pillar study as the standard for determining if a gas well being approached has an active pillar. Tr. 118;

[14] The three additional wells were on the same pad as the six approved wells. Tr. 83. Yates testified that there were no survey points for the three additional wells, so he did not know if the holes were closer than 50 feet. Tr. 83.

RX-H. Saunders testified that according to the 1957 study, only a 100-foot pillar would be required for the wells at issue. Tr. 120-121.

Saunders described how in 2013 he approached the state agency about developing a drilling plan for wells drilled behind mining. Tr. 122-123. It was not required under state law, but Saunders felt that it could help to coordinate the complex relationship between coal and gas.[15] Tr. 122-123. The Pennsylvania authorities determined that if the pillar met the 1957 study guidelines, then no drilling plan was required. Tr. 123.

Saunders testified that the state of Pennsylvania would not have required a drilling plan for the wells at issue in Citation Nos. 9076658 and 9079183. Tr. 124-125. Though a drilling plan was not required for wells NV-34 and NV-60, Saunders testified that he provided one for NV-60 because, "it is better to be safe." Tr. 125. At the time, Saunders also sent the information to MSHA and said that the Respondent did not receive a lot of comments back. Tr. 126. He described the process as akin to a "rubber stamp." Tr. 126. Saunders testified that MSHA representatives were present for some of the meeting with the Pennsylvania DEP, but could not remember if they were present in the meetings where Pennsylvania representatives said that a drilling plan was not required. Tr. 125-126.

Saunders testified that he believed that Section 75.1700 only applied when wells were drilled in areas in front of where mining was occurring. Tr. 129. He did not believe that wells NV-34 and NV-60 fell under the law. Tr. 129. Saunders was not aware of any Program Policy Manual or other information from MSHA that stated MSHA would apply Section 75.1700 to mine out areas. Tr. 129-130. According to the Program Policy Manual, a petition for modification is required to mine through a well.[16] Tr. 37; GX-F.

Saunders based his belief that Section 75.1700 only applies to future mining areas on the idea that a pillar would be constructed by remaining coal. Tr. 130. Saunders further testified that the cans would serve as a physical barrier that prevented them from accessing the area. Tr. 131.

Robert Robinson was the director of engineering for three mines, and he testified on behalf of Respondent.[17] Tr. 149. In this capacity, he was responsible for certifying Enlow's maps, as well as the Harvey and Bailey mines if needed. Tr. 149. Robinson testified that in his experience, a pillar protection permit was only required when the mine was going to advance within 150 feet of a well. Tr. 151. He described the procedure as submitting a pillar plan based on the 1957 study to the state of Pennsylvania first. Tr. 151. Then, once the state approved it, the plan was sent to MSHA for approval. Tr. 151.

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[15] Saunders described the submission of the 2013 plan as a "courtesy." Tr. 137.

[16] The July 2010 PPM does not mention wells drilled behind mining operations. Tr. 89.

[17] Robinson has a BS in mining engineering from Penn State. Tr. 149. He has worked in the mining industry since 1976, and has been employed by Consol since 1998. Tr. 149-150. He is a licensed professional engineer and a licensed professional land surveyor, and has general mine foreman's papers for Pennsylvania. Tr. 150.

Robinson understood Section 75.1700 as requiring only that the operator file a permit pillar application with the state if they want to get within the 150-foot radius of the well. Tr. 157. Then, after the state approved, the operator would have to submit the plan for MSHA approval. Tr. 157. He did not interpret this regulation to require pillar permits behind the mining. Tr. 158.

A. CONTENTION OF THE PARTIES

The Secretary argues that the Respondent clearly violated 30 C.F.R. § 75.1700 by not getting approval from the Secretary prior to the drilling of the NV-34 and NV-60 wells. The Secretary further argues that the wells were drilled in active workings and that whether the wells were in front or behind the mining is irrelevant. The Respondent did not maintain barriers as regularly defined, and the Secretary's lack of previous citations does not estopp the Secretary from enforcing the law. Though the Secretary argues that the standard is clear, it uses *Chevron* and *Auer* to argue that should the Court find it ambiguous its interpretation is a reasonable one entitled to deference. Accordingly, the Secretary argues that the citations should be upheld.

The Respondent argues that no plans or permits were required under state law or MSHA regulations for the NV-34 and NV-60 wells because the wells were drilled in inactive areas where mining had been completed. Furthermore, if barriers were required, the cans served as an effective barrier greater than the required 150 feet. The operator argues that the regulation is clear and unambiguous in not requiring a permit or plan in this sort of case, and if MSHA is starting to interpret the regulation to require such plans it must provide fair notice to operators. Accordingly, the Respondent argues that the citations should be vacated.

B. BURDEN OF PROOF AND STANDARD OF PROOF

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by the preponderance of the evidence. *Jim Walter Resources, Inc.,* 28 FMSHRC 983, 992 (Dec. 2006). *RAG Cumberland Resources, Corp.,* 22 FMSHRC 1066, 1070 (Sept. 2000). *Jim Walter Res., Inc.,* 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.,* 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probably than its nonexistence.'" *RAG Cumberland Resources Corp.,* 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California,* 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California.* 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: "[T]here is a distinction between civil and

criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates." *Lilienthal's Tobacco v. United States,* 97 U.S. 237, 266 (1877).

While the Secretary must prove the elements of a citation by a preponderance of the evidence, this Court's factual determinations must be supported by substantial evidence.[18]

C. ANALYSIS

Both citations in this case center on the proper interpretation of 30 C.F.R. § 75.1700. The regulation, entitled "Oil and Gas Wells," states:

> Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier.

30 C.F.R. § 75.1700.

Both the Secretary and Respondent argue that the regulation is clear and unambiguous, with divergent positions on what the regulation clearly says. SB at 13-15; SRB at 1-3; RB at 13-16. Under longstanding precedent, when "'the meaning of [a regulation] is in doubt,' the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019) (citing *Bowles v. Seminole Rock & Sand*, 325 U.S. 410, 414 (1945)). "Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a

[18] When reviewing the finding of fact by a lower court, the Commission will decline to disturb the determination if is supported by substantial evidence. *Wolf Run Mining Co.,* 32 FMSHRC 1669, 1687 (Dec. 2010), *U.S. Steel Mining Co.,* 8 FMSHRC 314, 319 (Mar. 1986). This test of factual sufficiency has been a part of Commission jurisprudence since its inception, required by the plain text of the Mine Act itself. 30 U.S.C. § 823(d)(s)(A)(ii)(I). Substantial evidence has been described by the Commission as "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety and Health Rev. Commn.,* 499 U.S. 144, 149–51 (1991) (citations omitted).

However, the Supreme Court has recently warned that "*Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it." Kisor, 139 S. Ct. at 2414. The Court warned that a regulation must be "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Id.* "Deference is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible interpretation requires a taxing inquiry." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 706 (1991) (Scalia Dissenting). "To make that effort, a court must 'carefully consider[ ]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. *Ibid*. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." *Kisor,* 139 S. Ct. at 2415.

In the instant case, both parties are correct that the Section 75.1700 is clear and unambiguous, which means that there is no need to move to step two of the analysis and the Secretary is not entitled to deference. The regulation has two primary requirements:

1) The operator must take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine.
2) When located, the operator shall establish and maintain barriers around the wells in accordance with state laws and regulations. These barriers must be at least 300 feet in diameter (or 150 feet in radius), unless the Secretary authorizes a lesser barrier.[19]

Each of these will be considered in turn for each citation. However, before addressing the requirements of the standard, this Court must first address a primary point of disagreement between the parties.

The Respondent argues that Section 75.1700 does not apply to the wells identified in Citation Nos. 9076658 and 9079183 because the wells were drilled adjacent to inactive bleeder areas in the mine. RB at 6. It points to the text of the regulation, which "refers to locating wells that are 'penetrating' coalbeds and then establishing and maintaining a 'barrier.'" RRB at 7. It argues that this interpretation is both in line with the legislative history of the Act, as well as its purposes. In *Peabody Coal Co*., the ALJ cited the Senate Report, which stated "numerous inundations of gas into coal mines have been caused by cutting into or approaching too near gas wells…All possible precautions should be exercised to safeguard against penetrating oil and gas wells." 1 FMSHRC 473, 482 (1979) (ALJ). The Respondent argues that the legislative purpose here was to prevent mining from getting too close to gas wells, which would not be a problem if the gas wells are drilled behind the mining. RB at 6. Furthermore, requiring an operator to install a coal barrier in a mined-out area would lead to the absurd result "because an operator cannot re-install coal." RB at 6.

[19] The Secretary may also require a greater barrier where warranted due to geological conditions or other factors, however this is not at issue in this case.

By contrast, the Secretary argues that with regards to Section 75.1700, "the location of mining is not relevant." SB at 10. The text of the regulation makes no mention of the location of the well, the Secretary asserts, and Part 75 defines "active workings" as "any place in a coal mine where miners are normally required to work or travel." SB at 10. It argues that bleeders must be examined, and therefore they are "active workings." SB at 11. Citing the 1979 ALJ decision in *Peabody Coal Co.*, the Secretary states that "Peabody Coal made the same argument 40 years ago and it was rejected then." SB at 10.

The Respondent's reading of the regulation is too narrow and not supported by the clear language of the text. Contrary to what the Respondent asserts, 75.1700 does not only refer to "oil and gas wells penetrating coalbeds," but rather continues, "or any underground area of a coal mine." 30 C.F.R. § 75.1700. Though the Respondent makes a reasonable argument concerning the decreased level of danger when gas wells are drilled behind mining, the text of the regulation leaves little room to exclude such areas. Accordingly, I find that the NV-34 and NV-60 wells are covered by Section 75.1700.

1) Did the operator take reasonable measures to locate gas wells?

Citation No. 9076658 stated in relevant part that the "operator failed to take reasonable measures to locate all oil and gas wells penetrating the coal bed or any underground portion of the mine in that the operator did not submit for a gas well pillar protection permit to establish adequate barriers around the total of 11 CNX Gas NV-34 Marchellus [sic] gas wells…" GX-1.

Evidence that the operator plotted gas wells on maps submitted to MSHA satisfies this element of the regulation. *See e.g. Dominion Coal Corp. v. MSHA*, 35 FMSHRC 3557, 3592 (Dec. 6, 2013) (ALJ) ("In this case, Respondent had already located the well and had plotted it on its maps from 1994 to 2008. Therefore, it appears that Respondent complied with the first requirement of § 75.1700."). Inspector Caffrey testified that on May 24, 2018, he was sent to the Enlow Fork Mine and instructed to find several gas wells that appeared on the maps that the operator submitted. Tr. 17-18. Caffrey further testified that he asked the operator's agent to show him the wells on their digital map and "they had it on the map, that was fine." Tr. 18. When presented with a map of the area at issue, Inspector Caffrey located the wells in the lower right corner off the E19 panel. Tr. 29-30; RX-L. He testified that the map showed 11 wells at NV-34. Tr. 30. When asked if the operator had located the wells, Caffrey responded, "They had. Correct." Tr. 32. Based on this evidence, I find that the operator took reasonable measures to locate the NV-34 gas wells at issue in Citation No. 9076658.

Inspector Yates testified that he issued Citation No. 9079183 on May 30, 2018, because there was a discrepancy concerning the number of gas wells at NV-60. Specifically Yates stated that the operator listed nine wells on its mine map, but only listed six wells on its drilling plan. Tr. 60. Yates testified, "When I first got to the mine, I found that the operator had listed all nine wells on their mine map, on the 75.1200 map. And the map for the escape way map that is located where the miners congregate." Tr. 60. At hearing, Yates showed where on the operator's map he found the nine NV-60 wells. Tr. 68-70; RX-M. Based on this evidence, I find that the operator took reasonable measures to locate the NV-60 gas wells at issue in Citation No. 9079183.

2) Did the operator establish and maintain barriers in accordance with state laws and regulations that were either 300 feet in diameter or were authorized to be less by MSHA?

With regards to this issue, the Respondent spent much of its time at hearing focusing on the first part concerning the requirement that the barriers be in accordance with state laws and regulations, while the Secretary primarily focused on the second part concerning the required distance. Casey Saunders testified about the process of applying for a pillar permit to the Pennsylvania Department of Environmental Protection. Tr. 115-125. According to Saunders, the state only requires a pillar permit application when an operator is mining in the direction of a gas well and gets within 500 feet of the well. Tr. 117; RX-I. The state then uses the 1957 study to determine if the pillars are appropriate.[20] Tr. 117; RX-H.

Both inspectors readily conceded that they were not familiar with state laws and regulations concerning gas wells. When questioned about state law, Inspector Caffrey replied, "Honestly, we don't typically go into state laws, because it's state law, and we are federal law. And I cited it as a federal law." Tr. 27. He furthermore stated that with regards to the 1957 study, "I have no recollection of [it], because I never read it." Tr. 27. Similarly, Inspector Yates testified, "I just know federal law. I don't know state law." Tr. 66. Neither the inspectors nor this Court is in a position to review state law and determine whether the operator acted in accordance with such. Because there was no evidence submitted to the contrary, this Court assumes that the operator did not violate state laws or regulations concerning gas wells.

Section 75.1700 not only requires the operator to maintain barriers in accordance with state law, but also to establish those barriers at a specific distance, unless MSHA allows a lesser distance. The Secretary argues that the operator did not maintain a 150-foot barrier between the wells and the active workings. Quoting the *Peabody Coal* case, the Secretary states that a barrier "ordinarily would consist of a coal pillar or a rib of coal." SB at 11. The purpose of the barrier is "to limit the risk from gasses that can move through cracks in coal and endanger miners due to the risks of explosion or displacement of oxygen." SB at 11. The Secretary argues that the operator had no such barriers, and no permission for a lesser barrier.

The Respondent argues that it would be impossible for it to construct a coal barrier in the areas at issue, because doing so would require it to physically extract coal around the well. RB at 8. Instead, the Respondent argues that it had "an effective barrier" because the area around the NV-34 wells was sealed at the time of the citation, and the support cans and cribs in the area around the NV-60 wells made the area unreachable by mining equipment. RB at 11. Furthermore, both areas were adjacent to bleeders, and both federal and state law forbid mining in such areas. RB at 10-11; Tr. 131.

The term "barrier" is not defined in the regulations or in the Program Policy Manual submitted into evidence in this case. While the parties agree that normally such barriers refer to a coal barrier, in cases such as the instant one where a mined-out area is at issue, it would be

[20] The Joint Coal and Gas Committee Gas Well Pillar Study was repeatedly referred to as "the 1957 study" throughout the hearing. It was admitted into evidence as RX-H.

absurd to require the operator to somehow reconstruct a coal barrier. In *Peabody Coal Co*., the ALJ examined this issue at length:

> Congress, in requiring the operator to establish and maintain "barriers" around located gas and oil wells, did not indicate the kind of barrier it intended and there is little to suggest the exact purpose of the barrier other than for the brief explanation quoted above.
>
> A "barrier," as defined in Webster's Third International Dictionary (1966), is "a material object or set of objects that separates, keeps apart, demarcates, or serves as a unit or barricade." In the mining industry, the term appears to have a more specific meaning. A Dictionary of Mining, Mineral and Related Terms (Department of the Interior, 1968), defines the term as follows:
>
> > barrier. a.) Blocks of coal left between the workings of different mine owners and within those of a particular mine for safety and the reduction of operational costs. It helps to prevent disasters of inundation by water, of explosions, or fire involving an adjacent mine or another part of a mine and to prevent water running from one mine to another or from one section to another of the same mine. Mason, v. 1, p. 312. See also barrier pillar. b.) A low ridge by wave of action near the shore. Fay.
>
> The same dictionary defines a related term thusly:
>
> > barrier pillar. a.) A solid block or rib of coal, etc., left unworked between two collieries or mines for security against accidents arising from an influx of water. Zern. b.) Any large pillar entirely or relatively unbroken by roadways or airways that is left around a property to protect it against water and squeezes from adjacent property, or to protect the latter property in a similar manner. Zern. c.) Incorrectly used for a similar pillar left to protect a roadway or airway, or a group of roadways or airways, or a panel of rooms from a squeeze. Zern.
>
> Based on these definitions, a "barrier" ordinarily would consist of a coal pillar or a rib of coal and the purpose is not only to keep fluids and gases out of the mine, but also to prevent "squeezes," that is, the squeezing down of the top, at least from adjacent property. As a historical matter, it appears that the use of the coal pillar was originally developed by the petroleum and natural gas industry to prevent subsidence due to mining from rupturing or dislocating a well bore. Quarto Mining Company, Docket No. M 77-48 (Initial Decision, Judge Michels) (December 5, 1977), p. 3.
>
> The term "barrier", as used in the statute, would, I believe, generally define a coal pillar, and its principal purpose, as referred to in the legislative history quoted

> above, would be to safeguard against penetrating oil and gas wells by operators. Nevertheless, there is nothing in the statute or the legislative history limiting the type of barrier to be used or its purpose so long as it relates to protection against hazards from wells. The Act and the regulation require simply that measures are to be taken to locate wells—there being no implication that such must be in existence when the coal is mined—and that appropriate barriers be established and maintained when a well is located…
>
> As indicated, ordinarily the barrier to be established and maintained would be the coal barrier, but when that no longer exists or only partially exists, other kinds of barriers made from other materials may have to be used. It is significant that the Act and the regulation, when referring to "barriers," or to a "barrier," in no place limits these to coal barriers; thus, they can be made of other substances. The use of barriers may be required to protect against subsidence if there is a risk that such a condition would rupture the wells and release gases or liquids. The regulation is clearly broad enough to protect the miners from hazards of such a rupture as well as ruptures from accidental cutting in the mining process.

1 FMSHRC at 482-483.

I find the ALJ's reasoning persuasive and adopt it here. The purpose of the barrier requirement is to prevent mining into a gas well. *See eg. Dominion Coal*, 35 FMSHRC at 3597 ("the event against which the standard, 30 C.F.R §75.1700, is directed is explosion or methane inundation as a result of the intersection of a gas well. The standard seeks to prevent operators from mining into gas wells by requiring that those wells be located and that barriers be established around them.") If MSHA intended for a barrier to be limited to a coal barrier, it would have said so in the regulation. And though a coal barrier may be preferable, cases such as the instant one illustrate that coal barriers are not always possible. Indeed, when asked how an operator could install a coal barrier in an area where mining had already occurred, Inspector Yates responded, "I know of no process yet that can." Tr. 78.

I find the Respondent's argument that the bleeders' proximity to the wells served as a sort of legal barrier, because mining is prohibited near the bleeders, unavailing. Whereas the term "barriers" has a broader meaning than the Secretary suggests, it is clearly a reference to physical barriers.

However, the Respondent also presented evidence and argument concerning barriers around these wells, which though not constructed of coal, served the purpose of excluding mining equipment that could penetrate the wells. With regards to the NV-34 wells, Inspector Caffrey testified that it was mined out and made so that there was no physical way to get mining equipment into the area. Tr. 45-46. Similarly, numerous witnesses testified that the area around the NV-60 wells had numerous floor and roof support cans and cribs that made it impossible to reach the area with mining equipment. Tr. 46, 79-80, 93,131. Inspector Yates' was asked "Well, as far as you know, there is no technology that would allow you to go in and get a barrier pillar between two long wall--" Tr. 80. He answered, "Not yet. Correct." Tr. 80. Insofar as the barriers

contemplated in the regulation are intended to limit the possibility of mining into a gas well, these barriers are effective barriers.

The next issue that must be addressed is the distance of the barriers. Due to the unique circumstances of this case, where it was effectively impossible to install and maintain coal barriers, this Court must determine whether the bleeders acted as a barrier greater than 150 feet for both the NV-60 and NV-34 wells. Inspector Yates testified to this point exactly in the hearing:

> Q: Would you agree that the can line in a bleeder would be an active barrier to keep any mining from progressing up the No. 3 entry of the long wall panel next to the NV-60 mines?
>
> A: I agree that that protection is put in there to keep that airway open.
>
> Q: And that would act as a physical barrier to keep someone from mining that in the area or anywhere in that entry, the No. 3 entry adjacent to the NV-60 wells, correct?
>
> A: Yes. There would be no more mining in that area.
>
> Q: So there is no way to get within 300 feet -- or 150 feet of the NV-60 wells at the time those wells were drilled. Correct?
>
> A: I don't understand.
>
> Q: There is no way to get any mining equipment within 150 feet of the NV-60 wells when those were drilled in 2014. Correct?
>
> A: Correct.
>
> Q: So that would mean those are a physical barrier, those can lines are a physical barrier to mining in that area. Correct?
>
> A: Correct. There would be no mining…

Tr. 92-93. Inspector Yates testified similarly concerning the NV-34 wells. Tr. 94-98.

While there may very well be requirements in other sections of Part 75 that required the mine operator to file a plan or permit application with MSHA, the inspectors cited the Respondent under 30 C.F.R. § 75.1700. According to both Inspector Caffrey and Inspector Yates, an operator would not have to notify MSHA or file for a permit for a well under Section 75.1700, unless it planned to have a barrier with a radius of less than 150 feet. Tr. 51-52, 94. Though there could have been better communication between the operator and MSHA, and though it might have constituted a best practice to more clearly inform MSHA about the gas wells at issue here, the Secretary has not met his burden of proof that the operator violated

75.1700. All the evidence presented in this case indicated that the operator took reasonable measures to locate the gas wells at NV-34 and NV-60, and installed and maintained an effective barrier of at least 150 feet for all wells.

ORDER

The Respondent complied with the requirements of 30 C.F.R. § 75.1700. Accordingly, it is **ORDERED** that Citation Nos. 9076658 and 9079183 are **VACATED**.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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